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M. A. Strand v. Union Pacific Railroad Company : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

M. A. STRAND, dba Strand Electric
Service Company,
Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD COM-
PANY, a corporation,
Defendant and Respondent.

FILEDCase No. 8594
Clerk, Supreme Court, Utah**BRIEF OF RESPONDENT**

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Case No.
8594

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Defendant will agree that plaintiff's statement of facts accurately represents part of what plaintiff's witnesses testified to and part of what plaintiff's exhibits show—with one exception. On pages 6 and 15 of the brief plaintiff's counsel refers to a meeting in Omaha between the plaintiff and Mr. Dickinson of the defendant railroad and states, "At that time the railroad company agreed, in substance, to change the method of compensation in the contract from a unit price to a cost basis." Plaintiff's counsel refers to

page 74 of the record. Plaintiff did not testify to that at all on page 74 of the record, or any other place. The only testimony as to what was agreed upon in Omaha is found on page 68 and it is contained in this one sentence, which begins with line 9: "They agreed at that meeting to telegraph the Walker Bank and advanced some money right away to keep the job going." That obviously does not constitute evidence of an agreement "in substance," or otherwise, to change the method of compensation in the contract from a unit price basis to a cost basis. Plaintiff's evidence is that this alleged agreement to change the payment from a unit price basis to a cost basis was made between the plaintiff and a Mr. Prater, an engineer of the railroad, in Salt Lake City in September 1944.

This is pointed out because the contract (Exhibit 1), Section 9, provided that any agreements concerning extra work were to be made with the "engineer," who was a Mr. Dickinson, and not with a Mr. Prater, or anyone else.

Some significant testimony appearing in the record and alleged to be fact by the plaintiff, is not recited in plaintiff's brief. The plaintiff and his son testified to numerous provisions in an alleged oral agreement which were modifications of the written agreement. According to the plaintiff and his son there was an oral agreement entered into between the plaintiff and Mr. Prater in Salt Lake City sometime in September 1944, six years and three months before the complaint was filed in this case and twelve years before plaintiff brought the matter to trial. By this alleged oral agreement several provisions in the written contract were changed. It is true (but beside the point here) that

there is no evidence whatsoever that this Mr. Prater had any authority whatsoever to make or change any agreement on behalf of the railroad. However, it is claimed by the plaintiff that Mr. Prater agreed:

“(1) That after the job was done, the parties would sit down together and go over the details and make adjustment; then the railroad would pay the insurance and expenses so that the plaintiff would not lose a dime (R. 59). The written contract specified unit prices (Ex. 1, section 2).

“(2) That it would be satisfactory to the railroad if the plaintiff got the job done ‘as fast as possible’ (R. 60). The written contract specified the completion date as July 1, 1944. (Exhibit 1 and R. 75.)

“(3) That all costs and expenses from the beginning to the end of the job would be paid (R. 60). There was no such provision in the written contract.

“(4) That the railroad would pay plaintiff all of his losses on the job (R. 61). There was no such provision in the written contract.

“(5) That the railroad would pay the plaintiff for all depreciation on equipment (R. 61, R. 75). There was no such provision in the written contract.

“(6) That the railroad would pay the capital expenditures incurred by the plaintiff in connection with the job, including the payment for trucks, caterpillars and horses purchased for the job (R. 62, R. 75). There was no such provision in the written contract.

“(7) That it would be all right with the railroad if the plaintiff finished the job by Christmas,” (R. 76). The contract specified July 1, 1944, as the completion date.

On page 79 of the record, beginning at line 21, the court said to plaintiff's counsel:

"You now take the position that the oral agreement was an amendment of the written agreement?"

and plaintiff's counsel answered:

"Yes, that the written agreement was amended by an oral understanding between the parties."

STATEMENT OF POINTS

POINT I.

THE COURT'S FINDINGS OF FACT ARE CONSISTENT WITH, AND SUPPORTED BY THE EVIDENCE.

POINT II.

THE COURT WAS CORRECT IN ITS CONCLUSIONS OF LAW APPLICABLE TO THE FACTS IN THIS CASE.

ARGUMENT

BOTH POINTS INVOLVE THE SAME ISSUE AND WILL BE ARGUED TOGETHER.

According to the plaintiff's argument in his brief there is only one issue in this case: Was the court wrong in his finding of fact No. 4, that "plaintiff's action is founded on a contract partly in writing and partly oral?" and in the court's consequent conclusion of law that "Plaintiff's cause of action is barred by the statute of limitations

* * *."

Plaintiff in his brief does not quarrel with the court's conclusions of law Nos. 1 and 2 that

“(1) Actions on contracts which are partly in writing and partly oral are subject to the statute of limitations covering oral contracts.”

“(2) In the State of Utah an action on an oral contract must be commenced within four years of the time the cause of action arises.”

And there is no debate about the fact that plaintiff's cause of action arose on January 7, 1945, and that more than four years elapsed before suit was brought.

The plaintiff admits that when an action is based on a written agreement which has been materially modified by an oral agreement so that the agreement sued on is partly oral and partly written, the entire agreement becomes, in contemplation of the limitations laws, an oral agreement. However, now, in spite of what plaintiff's counsel said at the time of trial, he contends that his action is based on the written contract alone and that [“]the agreement to change the compensation from a unit price to a cost basis was not a modification of the original contract * * *.” such as to render the agreement upon which he sues partly oral and partly written. Plaintiff claims that the change of amount and method of payment and the change of time of the completion of the job made by oral agreement, was not an oral agreement but merely an implementation of Sections 9 and 20 of the written contract, providing for the procedure to be followed in connection with “extra work”, and plaintiff contends that evidence aliunde the written contract can be admitted to reveal the obligation of the railroad under the written

contract without rendering the four-year statute of limitations applicable. Plaintiff's counsel claims that all plaintiff asks for in this lawsuit was provided for in the written contract and that an obligation was imposed upon the railroad in the written contract to pay what the plaintiff seeks to recover in this suit.

The defendant will concede that under some circumstances evidence aliunde a written contract may be introduced to illuminate the details of a written contract without turning the written contract into an oral contract within the contemplation of the limitations laws. The crucial question then is: What evidence may be introduced and for what purpose?

This requires examination of the cases and authorities involving the basic proposition of when a written contract by oral modification is converted into an oral contract in contemplation of the limitations laws.

53 C. J. S., page 1030, Section 68, dealing with "Contracts Partly in Writing," states as follows:

"Actions on contracts which are partly in writing and partly oral are subject to statutes of limitation covering oral contracts, as are actions on written agreements which are so indefinite as to necessitate resort to parol testimony to make them complete.

"For the purpose of distinguishing between oral and written contracts, as those terms are used in the statutes of limitation, a written contract, as defined supra, Section 60, is one which in all its terms is in writing; and a contract partly in writing and partly oral is in legal effect an oral contract, an

action on which is governed, as to the period of limitation, by the statute governing oral contracts generally * * *."

17 C. J. S., page 870, Section 379:

"Where a written contract is modified verbally, the entire contract becomes an oral one."

34 American Jurisprudence, Limitations of Actions, page 76, Section 92:

"Limitation statutes customarily provide a period, frequently less than that for actions upon written contracts, for the commencements of actions upon contracts, obligations, or liabilities not founded upon instruments in writing. As has been noted, such a provision is applicable if the promise arises only upon proof of extrinsic facts, or if the agreement must be proved only by evidence aliunde, or if the liability sought to be enforced is imported into an agreement from some extrinsic source. It seems that it also applies if the agreement is partly oral and partly written."

An annotation found in 129 A. L. R. 604 specifically treats the situation involved in this case. I quote from page 604:

"Cases collected in this annotation concern the effect of the necessity of introducing evidence, oral or written, extrinsic to a written contract, upon the question whether a given action is deemed to be upon a 'written contract' or upon a 'writing for the payment of money or property' within the meaning of a statute of limitations, or is deemed to be within the contemplation of any other statute of limitations * * * This annotation only includes cases in which there was in existence a written contract between the parties to the action."

Page 613:

“A majority of the cases upon the point support the rule that an action upon a contract is subject to a limitations statute applicable to oral contracts, rather than to one applicable to written contracts, where evidence extrinsic to a written agreement must be used to show the obligation itself, as distinguished from detail of the obligation that is sought to be enforced.”

The case of *Lugland vs. W. T. Tomlin*, 287 S. W. 2d 188, decided in Texas in 1956, is very closely analogous to the facts in this case. A contractor brought action against a home owner to recover the amount allegedly due the contractor under the contract for the construction of the home. The original plans and specifications were contained in a written agreement, but they were changed to such an extent that a new plan had to be drawn but the specifications were not rewritten. Oral agreements for changes in the specifications were relied on. The court held that the contract had become an oral contract and any claim arising under it was governed by the two-year statute of limitation rather than the four-year statute applicable to written contracts. This case is convincingly analogous because the written contract contained a provision with regard to alterations, changes or extra work, and it provided that any alterations or changes from the plans and specifications were to be paid for by the owner at the times that the materials were furnished by the contractor. It was argued in that case just as plaintiff is arguing here, that the oral alterations and changes were merely implementations of the alteration and change provision in the written contract and

did not change the contract sued upon from a written contract to an oral contract. The court was not impressed by that argument.

The court said :

“Here the original plans and specifications were changed to such an extent that a new plan had to be drawn but the specifications were not rewritten. Oral agreements for changes in the specifications were relied on. Under such circumstances the contract becomes an oral one and any claim arising under such a contract is governed by the two-year statute of limitations.”

On the question of the claim that the oral amendments were merely implementations of the written contract, the court said this:

“Appellee contends that the following stipulation contained in the written contract, to wit: ‘Any alterations or changes from plans or specifications to be paid for by owners at times materials furnished by contract,’ was sufficient to show that the parties contemplated alterations and changes at the time the original contract was executed, and is sufficient to take this case out of the general rule. We cannot agree.”

It is impossible to find a case more closely analogous to the one at bar than this Texas case.

In the case of *Homire vs. Stratton & T. Company*, 164 S. W. 67, (Kentucky, 1914), the original contract sued upon provided that plaintiff should receive \$50 a month as his compensation under the contract if defendant decided at the end of six months or sooner to discontinue the agree-

ment; but if defendant decided after six months to continue the agreement, the plaintiff's salary should be \$100 a month, which should apply from the beginning of the contract.

A subsequent oral agreement extended the six months' trial period and thus created an issue as to how much the plaintiff should be paid.

It was held that the oral modification rendered the entire agreement an oral agreement in contemplation of the limitation-of-actions law.

The court said:

"Periods of limitation are graduated mainly with reference to the nature and quality of the evidence by which the contract sued upon must be established. The limitation in this state, for instance, upon contracts in writing is fifteen years, while upon oral contracts is but five years. In the one case there is a permanent memorial of the terms of the agreement, while in the other, the terms of the agreement are rendered subject to the uncertainties of human testimony and to the frail and perishing nature of parol proof. The modification of a contract in writing by parol agreement of the parties which goes to a material part thereof, therefore, should operate to reduce it to the status of a contract by parol, in determining the applicability of statutes of limitation, for, when so modified, its entire purport, terms, and construction are rendered subject to establishment by parol proof in the same measure as those of a contract entirely by parol. And, in addition, it is more reasonable that the parol part, being the more recent expression of the intention of the parties, should draw to its nature the written

stipulations of the written contract than that the written contract should draw to it the new parol stipulations. Therefore, when by subsequent parol agreement of the parties a written contract has been modified in its material parts, the whole contract is thereby reduced to the status of a parol agreement, in determining the applicability of statutes of limitations.

“So, whether the extension of time was a mere modification by parol of the terms of the original written contract, or whether it created a new contract, discharging the original contract, the five-year statute of limitation applies.”

In the case of *L. Cannaday vs. Martin*, 98 S. W. 2d 1009 (Texas, 1936), the defendant agreed in writing to erect a building for plaintiff. The writing contained no details as to the size or nature of the building, but plaintiff alleges an oral agreement had established the size and nature of the building to be constructed. The plaintiff claimed that the oral agreement was supposed to have been included in the written memorandum but was left out by mistake. The plaintiff sought reformation of the written instrument to include the parol provisions of the agreement.

The defendant failed to construct the building, and the plaintiff sued for damages.

The two-year statute of limitations on oral agreements had run prior to the commencement of this suit.

The court cited numerous cases holding that an agreement partly written and partly oral is an oral agreement and then said on page 1013:

“It being admitted that the agreement sued on was partly written and partly oral, and undisputed

that more than 3½ years elapsed from * * * the date of the breach on which appellees recovered until * * * the date on which their suit was first filed, limitations was complete and the cause of action for damages was barred before the suit was instituted.”

There are numerous cases standing for the general proposition that when a written contract is modified by an oral agreement so that the agreement when sued upon is partly oral and partly written, the entire contract becomes an oral contract. However, inasmuch as this general principle of law is admitted by the plaintiff, I see no need to go on burdening the court with the citation of a lot of cases. The pertinent question here is whether or not the particular facts in this case are such as to enable the plaintiff to introduce evidence aliunde the contract without so altering the contract as to make it an oral agreement subject to the four-year statute of limitations.

Let us examine cases where parol testimony has been admitted to illuminate or implement the obligation under a written contract and in which the courts have decided such parol did not convert the written contract into an oral one. All these cases follow a definite pattern, and the defendant submits that none of them are applicable to the facts in this case. The crucial factual issue in the case at bar is when may parol testimony aliunde a contract be introduced to determine what should be paid under a written contract? All the courts follow the unvarying principle that the written contract must have set up an *objective standard* for payment, which then can and must be observed and followed in the parol testimony.

Let us examine the plaintiff's own cases cited in his brief.

The case of *Lewis vs. Taylor*, 204 S. W. 383, was decided in 1918 and dealt with an oral change in price of wheat sold under a written contract. If this 1918 Texas case had any merit to support plaintiff's theory, it has been completely discredited and vitiated by the 1956 Texas case of *Lugland vs. Tomlin*, cited above, which case deals with the exact type fact situation involved in the case at bar.

The case of *Fabian, et al. vs. Lammers*, 84 P. 432, is not in point. In that case a group of adjoining land owners agreed in writing to build respective sections of a levee to protect all of them against flood. Part of the written agreement read "that the levee to be built by each of the parties hereto shall be of the same size, height, width, character and in accordance with the said decision of the aforesaid George A. Atherton, civil engineer * * *."

The defendant failed to build his levee, and the plaintiff, one of the parties to the contract, built it for him and sued him for the amount it cost him. Defendant claimed that the agreement was partly in writing and partly oral and therefore the longer statute of limitations was applicable. The court correctly decided that the claim was based on a contract in writing and held for the plaintiff. This case is not applicable to the case at bar because in this *Fabian* case there was *no modification of the written agreement* ^{by} ~~by~~ *a subsequent oral agreement*. The written contract established an objective standard to be followed in determining the specifications of the levees, to wit: a certain engineer would make that decision. That objective stan-

dard was followed. The engineer did determine the specifications and the levee was built in accordance therewith.

In the case at bar if the written contract between the Union Pacific Railroad Company and Strand had said: "The amount of compensation to be paid Strand will be determined by Mr. Prater, an engineer," then this *Fabian* case would be in point and Prater's decision could be introduced in evidence to show the railroad's obligation and it would not convert the written contract into an oral one, but the UPRR Co.—Strand contract did not say that. On the contrary, it provided its own specific objective standard by which payment was to be computed, that is, by unit prices specifically set forth in Section 2 of the contract. A subsequent oral agreement completely ignored that objective standard set up in the written agreement and substituted an entirely different basis of compensation.

The case of *W. T. Rawleigh Company vs. Graham*, 103 P. 2d 1076, is not in point. Here the written agreement provided that the plaintiff would furnish defendant with products "at current wholesale prices." The defendant claimed the contract was partly in writing and partly oral and that therefore the action was barred by the statute of limitations. The court properly admitted evidence aliunde the written contract to show what the "current wholesale prices" were and held the action was based upon a contract in writing. The words which plaintiff's counsel quotes from the case in his brief clearly distinguish it from the case at bar:

"The written contract relied upon by the respondent is complete *and furnished an objective*

standard (emphasis mine) for the ascertainment of any amount due thereunder from (the principal debtor) to respondent.”

In the *Rawleigh* case the “objective standard” set forth in the written contract was followed. In the case at bar there was an objective standard set up, that is, unit prices; and Strand could have introduced evidence showing the number of poles he put in earth, in rock, the number of feet of wire strung, the number of H fixtures placed and so on, in order to prove what he was owed if he contended that he had not been paid the unit prices in accordance with the contract. In so doing he would not have converted the written contract into an oral one. But that is not what he attempted to do. He completely ignored the objective standard provided for in the agreement and he substituted a cost standard allegedly arrived at subsequently and orally.

Plaintiff’s case *Lyon, et al. vs. Moise’s Executor*, 183 S. W. 2d 493, is clearly distinguishable from the information the plaintiff himself has given us in the brief. The court said:

“If the written contract contains a definite promise to pay *but does not name the amount* (emphasis mine), the fact that the amount must be ascertained by evidence aliunde does not bring the contract into the category of one partly in writing and partly oral.”

That is true but the reverse is also true. If the contract *does* name the amount to be paid as the UPRR—Strand contract did, then evidence aliunde the written contract cannot be introduced without rendering the contract oral, when the evidence introduced is based on a method of computa-

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tion entirely different from, and in no way contemplated or authorized by the written contract.

If there had been no provision for amount of payment whatsoever in the UP—Strand contract, then this *Lyon* case would be in point, but since there was a precise payment schedule set forth in section 2 of the written contract, the *Lyon* case has no applicability.

There are additional facts in the *Lyon* case which are not pointed out by the plaintiff's counsel but which are significant. It clearly follows "the objective standard" rule laid down in all these types of cases on which the plaintiff attempts to rely. There was an objective standard to compute the amount of payment set forth in the written contract in the *Lyon* case. The court referred to the *Rawleigh* case cited by the plaintiff in his brief and at page 496 the court said:

"But the court held (in the *Rawleigh* case) that the writing contained a promise to pay and 'furnishes an objective standard for the ascertainment of any amount due thereunder,' and applied the limitation controlling written contracts. The same may be said of the writing executed by Moise—the objective standard contained therein is 'I furthermore agree * * * to reimburse you for usual commissions and any advances made by you for my account.' "

In ascertaining the amount due under the contract, *Lyon*, the plaintiff, used the objective standard provided for in the written agreement.

In the case of *Brown vs. Irving*, 269 S. W. 686, the same objective-standard situation exists. In exchange for

surrender of stock by the plaintiff, the defendant agreed to pay the plaintiff "a sum in cash equal to the difference between \$12,500 and the cost of reorganization of said company and in sale of \$90,000 par value of the preferred stock of the company." The reorganization of the company was effected, the preferred stock sold, and the plaintiff sued for the difference between the \$12,500 and the cost of the reorganization and introduced extrinsic evidence to prove the amount of the difference. Here the plaintiff followed religiously the objective standard for computing the amount due contained in the written agreement. There was no subsequent oral agreement modifying the method of computing the amount of payment due. Consequently, this case has no application to the one at bar.

Streeper, et al. vs. Victor Sewing Machine Company, 112 U. S. 676, is exactly the same situation as the other cases cited by the plaintiff. The written contract itself set forth the method used in computing what the sewing machine consignee was supposed to pay plaintiff sewing machine company, and that method was followed by the company when it sued to recover what the consignee owed it. The language of the court sets this forth clearly on page 686:

"The objection made is that although the agreement states the shares to which the plaintiff and the consignees are to be respectively entitled, it fixes no price on the machines. The answer to this is that the agreement states that the retail prices for which the machines consigned are sold, as reported by the consignees, are the prices on which the commissions of the consignees are to be calculated; and that the agreement fixes the prices of parts of the

machines at 40 per cent discount from list prices, and the prices of attachments at the lowest whole-sale rates. By the agreement when the fixed commissions are deducted from the retail prices of sales, the rest belongs to the plaintiff; and Exhibit A shows the retail price of each machine sold as reported by the consignees and how much they retained beyond what they were entitled to retain as commissions, and Exhibit B shows the price of each attachment sold to the consignees."

This case therefore, like the others, is not in point.

If the U.P.-Strand written contract had said that the railroad would pay all Strand's costs in connection with doing the job, then, of course, under the line of cases submitted by the plaintiff, Strand could introduce his evidence to show what the job cost him, and it would not convert the written contract into an oral contract; but, of course, that is not what the written contract said.

Plaintiff's case *Crook Company vs. U. S.*, 270 U. S. 4, has nothing to do with this case at all. Of course, change articles in contracts are legal and enforceable. Of course, written contracts can be changed by oral amendments and be binding, but the *Crook* case involved no problem of the intervention of the statute of limitations and thus no problem of whether or not the written contract had been converted into an oral contract.

The Utah case of *Hardinge vs. EIMCO Corporation*, 266 P. 2d 294, also has absolutely no bearing on this case. The *Hardinge* case is simply one in which the shipper agreed in writing to pay the freight charges; and when the shipment arrived without the freight charges having been paid,

the consignee paid them and then proceeded to recover the freight charges from the shipper, pursuant to the express provision of the written contract. There is in the *Hardinge* case no subsequent oral agreement whatsoever changing the provisions of the written contract.

Consequently none of plaintiff's cases support the theory upon which he attempts to recover in this case.

Moreover, even if plaintiff's theory were legally tenable, *his facts do not support his theory*. Counsel in his brief argues that all the plaintiff is attempting to do is to recover extra money for extra work and that the September oral agreement was simply a computation of the extra work he had done and the amount over and above the contract price he was to get for that extra work. That this is what the plaintiff was attempting to do is not supported by the testimony in the record at all. The testimony shows that if the plaintiff was trying to get extra money for extra work, that was only a small part of what he was trying to do. In Mr. Strand's letter to Mr. Dickinson of September 1, 1944, (plaintiff's Exhibit 3), in which Mr. Strand is asking for help, he names seven items that have caused him difficulty, and only two of them have anything to do with extra work. He does not ask for payment for extra work under Section 9 of the contract. He says: "Thus we find our reserves for this job used up and beg you to help us get some financial adjustment so we can finish the contract." He asks for help because (1) the railroad delayed shipment of equipment, (2) the union raised its pay scale, (3) his camp cost him more to set up than he had anticipated, (4) a wind storm damaged his camp; and then he

refers to the two items which might be argued were extra work: (1) installing extra cross arms, (2) having to build the line farther away from the track than he anticipated. This, obviously, is not simply a case in which the plaintiff seeks extra money for extra work. He seeks to have the railroad pay him for the entire cost of the job plus "overhead" and a profit without any attempt to segregate what was extra work or what he was entitled to for that extra work.

According to the plaintiff Mr. Prater did not merely orally agree to pay him for extra work but agreed to compensate him for additional cost due to a change in a union agreement, a wind storm, unanticipated expense due to railroad's delay in delivering equipment, expense of depreciation of equipment, cost of capital expenditures such as for trucks, caterpillars and horses, and any and all other expenses and losses which he incurred. *Just what does the extra-work provision in Section 9 of the written contract have to do with those items?!* It has nothing to do with them, and plaintiff cannot claim that an oral agreement to pay all those items is based in any way on Section 9 of the written contract.

Even if plaintiff's extra-work theory were legally tenable, and even if his theory were supported by the testimony and exhibits of his witnesses, still he could not recover here because he did not attempt to acquire payment for extra work in the manner prescribed in the extra-work provisions of the contract. His testimony, if true, is that even Section 9, the extra-work provision of the contract—the very section upon which he now relies—*was changed by*

oral agreement. The plaintiff failed to comply with four conditions precedent to collecting for extra work, which are set forth in Section 9. Section 9 provides that if the extra work is not “similar” to that contracted for, (1) the contractor shall submit information concerning the nature of the same to the engineer *before such work is commenced*, (2) it shall be classified as extra work and paid for at prices to be agreed upon between the *engineer* and the contractor *prior to the commencement of the same*, and (3) in case the contractor does not present a claim in writing to the engineer on account of dissimilarity in the work by reason of such change *within ten days* after such change has been explained, the contractor shall be forever estopped from making any claim therefor.

The four requirements ignored by the plaintiff are (1) The plaintiff did not submit information before commencing the alleged extra work. (2) The plaintiff did not agree with *anyone* as to prices for the extra work prior to the commencement of the same. (3) The plaintiff did not present a claim in writing within ten days after the change was explained to him, or discovered by him. (4) When he did achieve agreement (if that’s what he did), as to prices to be paid for the extra work, the agreement was not made with the “engineer”, who was Mr. Dickinson, as provided in the contract, but the agreement was made with a Mr. Prater who was endowed with no authority whatsoever by the written contract.

Now, if plaintiff claims to be entitled to recover for extra work, he has to take the position that the provisions of Section 9 itself were modified by a subsequent oral agree-

ment. He has to take the position that the railroad, by subsequent oral agreement, waived the above four vital provisions of Section 9 of the written contract. In fact, plaintiff's counsel, in his brief, contends that the defendant did waive those provisions of Section 9 (page 16 of the brief). If there were any such waiver, that waiver constituted an oral modification which changed material provisions of the written contract and therefore renders the entire contract oral in contemplation of the limitations laws.

If the plaintiff were actually just seeking extra pay for extra work, and if Section 9 of the written agreement had said "the contractor may do any extra work he desires to do whenever he desires to do it without any prior consultation with anyone as to its nature or price to be charged for it, and after the work is done he may make a claim for it whenever he gets ready and a railroad engineer by the name of Prater may decide what the contractor is to be paid for it," then the plaintiff would be entitled to submit the extrinsic evidence of the alleged oral agreement between himself and Mr. Prater and it would not convert the written contract into an oral contract. But, of course, that is not what the contract said. The provisions in Section 9 were not just put in the contract to take up space. They were vital, important provisions that the railroad expected to be observed. The procedure outlined there was for the very purpose of attempting to forestall contractors' claims for extra work that frequently arise after a job is done without the contractors ever having first consulted anyone about the nature or the cost of the extra work.

CONCLUSION

In the written contract the railroad did *not* agree to pay for (1) capital expenditures, (2) depreciation on machinery, (3) higher wages caused by union contract increases, (4) increased cost of setting up the camp, (5) loss resulting from a wind storm, (6) the total cost of the entire job, or (7) for extra work unless it was done in accordance with the procedure set forth in Section 9 of the agreement.

Yet plaintiff claims that in the subsequent oral agreement Mr. Prater agreed to pay him for all of those things. Still the plaintiff speciously contends there was no material alteration of the written contract by the oral agreement.

It is very obvious that the alleged oral agreement made substantial and material changes in the written contract—so substantial that, according to the plaintiff, it would increase the defendant's obligation by \$94,000 over and above the payments which defendant's pleadings alleged were made to the plaintiff by the defendant, that is, \$85,929.80, (including \$5,867.80 in extras agreed upon under the provisions of Section 9), in accordance with the unit price arrangements, plus an additional gratuity of \$35,927.40 to get the job finished.

The simple fact is that the plaintiff is asking for \$94,000, plus 12 years' interest, based upon an *oral promise* he claims was made in 1944, and plaintiff did not even plead that any oral promise had been made, or pretend to rely on any oral promise, until eleven years after his alleged cause of action arose! The file shows that no oral agreement was alleged by the plaintiff until the filing of his

amendment to his amended complaint, which was filed after this trial began! This he did after defendant's witnesses may be scattered or dead and many of its files on the matter disposed of.

I cannot conceive a more appropriate case in which to apply the doctrine and principle of the bar provided by the statute of limitations.

Respectfully submitted,

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