

1963

# Wilfred Wheatly v. Teamsters Local Union 222 et al : Brief of Respondents

Utah Supreme Court

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

**WILFRED WHEATLY,**  
*Plaintiff and Appellant,*

**vs.**

**TEAMSTERS LOCAL UNION  
222, affiliated with INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN and HELPERS OF AMERICA, and WIL-  
LIAM H. FACKRELL,**  
*Defendants and Respondents.*

**FILED**

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Clerk, Supreme Court, Utah

Case No.  
9908

**BRIEF OF RESPONDENTS**

**Appeal from the Judgment of Third Judicial District Court for  
Salt Lake County, Utah  
Honorable A. H. Ellett**

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**BRIEF OF RESPONDENTS**

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**STATEMENT**

Plaintiff employed as a truck driver by Union Pacific Motor Freight Company was discharged following three warning notices because of several successive violations of company rules. Three weeks later at the instance of the plaintiff the defendant Fackrell, agent of the de-

fendent union, succeeded in persuading the company to rehire the plaintiff to his former employment. Plaintiff refused to accept such offer on the part of the company unless the company paid him for fifteen shifts he had lost while waiting for Fackrell to negotiate a rehiring of plaintiff by the company. The company refused to pay the plaintiff for such waiting time loss; thereupon plaintiff requested the defendant union to process his alleged grievance pursuant to the collective bargaining agreement between the company and the defendant union. Thereafter the four steps were taken pursuant to such contract arbitration machinery and at each step the company refused to pay plaintiff any waiting time compensation.

During the hearing in the Newhouse Hotel pursuant to step four the Board of Arbitration consisting of six members and a secretary heard testimony from both sides of the controversy including plaintiff's personal testimony. Following such hearing the board decided that the company discharged plaintiff for good cause; that is to say, the board sustained the position of the company. Thereafter plaintiff brought the instant action to recover damages from defendants upon the ground that the defendant Fackrell failed to supply sufficient evidence to support the defense of plaintiff made by Fackrell at the Newhouse Hotel hearing and that plaintiff was discriminatorily discharged by the company.

Briefly, the defendants' position is that the company retained its usual right and authority to fire an employee

for good cause, no cause, discriminately or otherwise, insofar as a jurisdiction of the state court and issues here presented are concerned.

Plaintiff alleges in his complaint that his "discharge was without cause and was discriminatory." Plaintiff freely admitted his discharge was for good cause, the sole remaining ground would be discrimination; assuming that to be so, the jurisdiction of the state court would be plainly superseded by that of the National Labor Relations Board.

The term "discrimination" in the area of industrial labor relations has a special, general and well-known meaning. It involves always an intent on the part of the employer to distinguish in the treatment of an employee on the basis of labor union activity or affiliation. When an employer resorts to discrimination among his employees in the conventional industrial economic sense he thereby encourages or discourages membership in a labor organization — a subject matter we are not concerned with here. The plaintiff takes the firm position that he was discriminatorily discharged; hence that the discharge was legal and valid is admitted, unless plaintiff refers to discrimination in the federal statutory area in which even the state court would lack jurisdiction. An employer usually needs no reason to fire an employee. The employer always retains his basic right to fire an employee unless he contracts to do otherwise, and in this matter Union Pacific Freight Company, the employer,

made no such agreement. The fact is, the contrary appears.

Therefore the plaintiff having apparently predicated his recovery exclusively upon the sole ground of discriminatory discharge, there remains no means by which the company could be legally forced against its will to rehire plaintiff or compensate him for waiting time while defendant Fackrell was subsequently negotiating a rehire of plaintiff. Whether the defendants expended much or little skill and diligence in processing plaintiff's alleged grievance pursuant to the contractual arbitration agreement is of no moment and beside the point. Such arbitration procedure activity on the part of the defendant was an endeavor in the nature of a collateral service, a bonus or serendipity exercised because of plaintiff's membership card.

## TESTIMONY OF PLAINTIFF

Wilfred Wheatly, the plaintiff, testified that he was fired by the Union Pacific Motor Freight Company on May 27, 1960; (T 9-10) that defendant, Fackrell, found a heavy-duty driver job for Wheatly with Carbon Motor Ways, but Wheatly refused to take the job (T 15-16-17); that he received a notice from Union Pacific Motor Freight Company, his employer, to report back to work on June 14, 1960, that he refused to return to work (T-19); that step 3, pursuant to the arbitration machinery set forth in the collective bargaining agreement be-

tween the defendant union and Union Pacific Motor Freight Ways was held in the Teamsters' Building July 15, 1960 (T 24); that step 4, pursuant to the arbitration procedure, about 26 people present, was held at the Newhouse Hotel September 20, 1960, (T 25); that he testified in his own behalf (T 29); that the Board of Arbitrators sustained the company's discharge of Wheatly (T 30). Wheatly admitted he had received three warning letters from the company before he was fired; (T 35) that two warning letters are sufficient for discharge under the collective bargaining agreement (T 35); that the defendant, Fackrell, was successful in restoring him to his job three weeks after he was discharged (T 36-37); that after defendant Fackrell had gotten him restored to his former job with full rights, he refused to return to the job because the company did not pay him for 15 shifts he had lost while not working (T 38-39); that he was fired formerly from both Pacific Intermountain Express Company and Orange Transportation Company for failure to report to work (T 57), similar reasons for which he was fired from Union Pacific Motor Freight Company (T 63).

## ARGUMENT

### POINT I

ADMITTED FACTS SHOW PLAINTIFF WAS DISCHARGED FOR GOOD CAUSE.

If it is assumed that the plaintiff was discharged by the company for good cause, any alleged damage for loss



of time or discrimination on the part of the company or carelessness on the part of the defendants in failing to persuade the company to reinstate plaintiff to his former status without penalty or loss of time, would become irrelevant and moot.

After the conclusion of plaintiff's testimony, the court dismissed the cause. The facts developed at that time seem neither complex nor prolix. Defendants' position was then that the plaintiff having quite freely admitted that he was discharged by the Union Pacific Motor Freight Company, his employer, for good cause, defeated his action. Plaintiff also admitted that the defendants succeeded in getting his job restored to him after a short lay-off; also, admitted that he refused to take the job back unless he got paid about \$375.00 for loss of time during which plaintiff was off duty while the defendants were engaged in persuading the company to hire him back on the job; also admitted that the Board of Arbitrators that heard the case, including plaintiff's testimony, had found that the company for good cause had discharged the plaintiff. In such situation, defendants' position was that plaintiff was obviously not entitled to \$375.00 or any other amount while waiting for the defendants to persuade the company to put plaintiff back on his job, because and by reason of the manifest facts that the company had good reasons for the discharge.

The precipitate of plaintiff's position is set forth in the following quote from his testimony:

“Q. Now, as a result of your being discharged, you hadn't worked for the company, performed no services whatsoever for a period of fifteen working days. Is that right?

A. Yes.

Q. You had performed no services?

A. No services.

Q. So you had the option to come back to take your job, but you refused to because you wanted the company to pay you for those fifteen days you did not work?

A. Yes, that's right.

Q. Now, you could have gone back to work, and that is all the damage you would have sustained was to be out fifteen days' work. Is that right?

A. That's right.

Q. Now, why didn't you go back to work? Why did you ignore the company's order to come back to work after Fackrell got you back on the job?

A. Because there was discrimination there. I don't feel that I should have taken a greater penalty than somebody else just because he is the blood of Mr. Fackrell.

Q. Are you talking about Fackrell or Norm Fackrell?

A. That's right.

Q. Norm Fackrell was a helper, wasn't he?

A. Yes, After he lost his driver's license, they had to make him a helper.

Q. Wait a minute. Norm Fackrell was helper. You were a driver.

A. He was hired as a driver.

Q. Wait a minute. Norm Fackrell was working as a helper?

A. Yes.

Q. And you were working as a driver?

A. Absolutely.

Q. Your job is much — requires much more promptness and dispatch than helper's does, doesn't it?

A. That's right.

Q. And you had two more warning notices, active warning notices, than Fackrell, Norm Fackrell, didn't you?

A. I don't know just exactly how many warning notices Norm Fackrell got while he was down there. Very few, I imagine.

Q. Well, you were both fired at the same time?

A. Absolutely.

Q. And your chief reason that you didn't come back to work is because they didn't pay you for the fifteen days you didn't work, and you support that and justify your conduct there because Norm Fackrell—

A. It wasn't the pay. It was the principle of the thing.

Q. All right. It wasn't the pay. It was the principle. Now, Norm Fackrell did go back to work, didn't he?

A. Yes, but he wasn't going to.

Q. But he did go, didn't he?

A. He had to or else go to jail.

Q. Norm Fackrell got a wire to come back to work, didn't he?

A. Whether he got a wire or what the communication was I do not know.

Q. Well, you knew of your own knowledge that he did go back to work after you were both fired?

A. Yes, and I know of my own knowledge he was two hours late the first day he went back to work.

Q. Well, Mr. Wheatley, I don't want to prolong this examination unduly. If you will just answer the questions that I ask you, it would save me from cutting in with an objection, please. The fact of the matter is you knew Fackrell went back to work, and he had been docked ten working days, the time he wasn't working. You know that of your own knowledge?

A. I know he went back to work.

Q. Yes, and you know you didn't go back to work?

A. Yes.

Q. And you didn't go back to work because Norm went back to work. Is that right?

A. And he received a vacation pay for going back to work.

Q. He what?

A. He received pay for the two weeks he was off.

He didn't get penalized in effect at all. They called it his vacation and paid him.

Q. You mean—

A. He suffered no penalty. He got two weeks off as a guise and then received pay as a vacation, which was a rule of his. Wherever he went, to jail or wherever it was, he took a vacation or leave of absence.

Q. Well, I don't know about that. The contract, of course, provides for vacation, as you well know, and you got paid for all your vacation that you took off too, didn't you?

A. I have asked to work my vacations, but the company wouldn't allow me to work my vacation.

Q. Well, now, wait a minute. You had vacations while you were on that job?

A. Yes, I did, sir.

Q. And you got paid for those vacations?

A. Yes, I did." (T 39-42)

At this time, the defendants were not contending plaintiff's complaint did not state a cause of action as plaintiff implies in his brief or that plaintiff was suing his own agent and mayhap not in an tenable position. The defendants took the position that plaintiff's discharge being admittedly for good cause; plaintiff was therefore barred from the recovery of damages for loss of time, imposition of penalty or otherwise.

Shortly ater the conclusion of plaintiff's testimony, the court ruled as follows:

“THE COURT: no, I don’t have a position on it. I think the contract is clear here that they may— company may discharge or suspend an employee for just cause, but it doesn’t mean they have to, and if they don’t want to on a fellow that’s not quite so litigious and who gets in so many arguments with them, they well might forgive him, and somebody else who would be more litigious and more intractable might cause them not to give him the benefits of this “may” provision.

In fact, I am ready to rule. There isn’t any question but what this fellow was fired for just cause. The fact that Norm — and Norm was fired for just cause too, but they put him back. They put this fellow back, but he wouldn’t take it. His fuss was over \$375, and there is a provision in this contract as to what to do about getting the money. He had his job. This fellow was fired. He ought to have taken his job back and engaged in the fuss over getting his money, and there isn’t any need of letting him run a seven or eight thousand dollar bill up on us when all he had was \$375 involved in the first place.

The defendants may have judgment for no cause of action, and the case is dismissed, and the jury is discharged, and I thank you for your services.

We will recess until ten o’clock tomorrow morning.” (T 68)

It is familiar doctrine that employers have a right to make rules controlling conduct of its employees and to discharge or otherwise discipline employees who violate those rules. For example, the employer can make no smoking rules, rules requiring reports on absences and

accidents and rules prohibiting collections without permission and so on. The employer can even make rules restricting solicitation of union membership on company property. The National Labor Relations Act does not interfere in any way with an employer's usual operation of his business, neither may a labor union. All the Taft-Hartley Act does is to forbid the employer from thwarting his employees' right to engage in or refrain from engaging in union activities. It does not prevent him from discharging or disciplining his workers for cause or for no cause. The Act merely prevents such action if the reason for the discharge is anti-union or pro-union, and a fortiori, the Act emphatically prohibits the National Labor Relations Board from reinstating or awarding back pay to employees who were fired for cause; see Sec. 10(c).

This is not a case where the company breached its collective bargaining contract or violated some state law or fired plaintiff because of his union activities and the defendants at plaintiff's timely request neglected to process plaintiff's grievance pursuant to the bargaining contract, just the opposite appears here. In this area, the authorities are legion, but we find no case authorities and we think none can be found supporting the conceptual pattern of plaintiff, that notwithstanding he was fired because of three or four successive violations of company rules and three or four company warning notices and thereafter the union succeeded in securing his job back which he deliberately refused to accept, then

the plaintiff in such situation may recover damages because he lost his job and was re-hired shortly thereafter at the instance of defendant Fackrell.

Plaintiff entirely overlooks the fundamental and basic element here involved that the company had the implicit right to fire plaintiff for cause or for no cause and was under absolutely no obligation to take plaintiff back (which it did at the instance of defendant) under any circumstances appearing in this record. Hence, how plaintiff expected the company to present him a premium instead of a penalty for his own admitted wrong doing, the court below could not understand why defendants were not entitled to a judgment of dismissal and neither do defendants.

## APPELLANT'S CASE AUTHORITIES

Plaintiff cites the case of *Marchitto v. Central Railroad Company of New Jersey*, 88 A2d 851 (1925). This was an action on six counts against the union and the chairman of the Grievance Committee. Among such counts was lost seniority, lost wages and a count stating that it was the duty of the Grievance Committee Chairman to prosecute the claims of union members against the railroad company which said chairman failed to prosecute.

The holding of the court was that the action against the union be dismissed but that the complaint stated a



cause of action against the grievance chairman. Such holding is of no comfort to the instant plaintiff for the reason that plaintiff's complaint is not an issue. The defendant has assumed for the purpose of this appeal that plaintiff's complaint does state a cause of action. Nevertheless, the plaintiff admits he was discharged for good cause, therefore the defendants here take the position that no cause of action against the defendants could exist.

The plaintiff cites the case of *Fetcher v. Colorado & Wyoming Railway Company*, 347 P2d 156 (1959). The court below in this matter dismissed the complaint and the court above reversed. The complaint stated that the plaintiff was discharged without cause and that the Brotherhood, Lodge and the individual defendants were guilty of fraud, breach of duty and collusion with the railroad company to bring about plaintiff's discharge without any cause.

In the instant case the pleadings are not an issue.

Plaintiff: cites the case of *Fray v. Amalgamated Meat Cutters, et al*, 101 NW2d 782 (1960). The complaint in this case alleged that plaintiff was unlawfully discharged. The appellant court held that the plaintiff should have an opportunity to amend his complaint, hence, reversed the court below which had dismissed the complaint on the facts pleaded.

The issues in the three cited cases above mentioned arose on the pleadings -- defendant for the purposes of

the instant appeal are not attacking plaintiff's complaint; hence, the above cited cases are inapplicable.

The case of *Soto v. Lenscraft Optical Corporation*, 180 N.Y.S. 2d 388 (1958) is cited. This case arose out of processing an arbitration, where fraud, collusion and misrepresentation were pleaded respecting such arbitration proceeding; furthermore, the employees were denied their right to individual counsel. Two labor unions, the employer and a group of employees were involved. The arbitration award was predicated principally on the ground that the employees were denied the right to counsel of their own choosing.

Plaintiff in the case at bar never did seek an appeal or rehearing of the arbitration award and never sought counsel other than Fackrell until after the Board of Arbitration has sustained the employer in a decision holding that the discharge of plaintiff by the employer was valid, legal and justified. There was no fraud or collusion between the company and the defendants alleged in Wheatley's complaint; but assuming that such were alleged, such allegations in Wheatley's complaint were not the issue. It is the absolute failure of proof to support the allegations of complaint which is the issue here; to the contrary the proof nullified the allegations of plaintiff's complaint and none other than Wheatley supplied such proof personally.

Wherefore to the single point raised by plaintiff, to wit: "that plaintiff's complaint states a cause of action

against defendants and the trial court erred as a matter of law in dismissing said complaint.”

The defendants respond that the pleadings are not an issue in this case for the reason that the defendants do not presently deny the complaint states a cause of action. But an indispensable requisite to the plaintiff's case is that the proof must disclose an invalid discharge of plaintiff by the company. Thus the issue of vital relative consequence is that the plaintiff's own proof and repeated admissions disclose that plaintiff was discharged for cause and good cause which admissions supply abundant proof that the company was justified in the exercise of its managerial right to discharge plaintiff and as a result of such valid exercise of management prerogative no damage to plaintiff could possibly lie against his employer which is not here sued or the defendants who engaged in an extra gratuity bonus endeavor in negotiating with the company successfully to the end that plaintiff was later rehired for a similar employment to that from which plaintiff was discharged.

Defendants therefore submit that the court below was fully justified in dismissing plaintiff's cause of action and its decision should be sustained.

All of which is respectfully submitted.

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