1971

Ewell & Son, Inc. v. Salt Lake City Corporation, The Denver And Rio Grande Western Railroad Company, And Union Pacific Railroad Company : Reply Brief of Appellant, Union Pacific Railroad Company

IN THE SUPREME COURT OF THE STATE OF UTAH

EWELL & SON, INC., a corporation,
Plaintiff-Respondent,

vs.

SALT LAKE CITY CORPORATION, a corporation,
Defendant-Respondent,

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,
Defendant-Appellant,

UNION PACIFIC RAILROAD COMPANY, a corporation,
Defendant-Appellant.

Case No. 12168

REPLY BRIEF OF APPELLANT, UNION PACIFIC RAILROAD COMPANY

Appeal by Union Pacific Railroad Company, Defendant [illegible] from a Judgment on Jury Verdict and Amended Judgment entered by the District Court of Salt Lake County, Utah, the Honorable Marcellus K. Snow, Judge Presiding, in Favor of Ewell & Son, Inc., a corporation, Plaintiff-Respondent.

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Case No. 12166

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

Although the brief of respondent, Ewell & Son, Inc., filed in this case raises no new legal issues, appellant Union Pacific Railroad Company deems it necessary to file this reply brief in order to reply to certain assertions of fact made by respondent and in order to

prevent misunderstanding of Union Pacific's position which might otherwise arise from misstatement of that position in respondent's brief, as well as to correct misquotations of Union Pacific's brief made in respondent's brief.

I. REPLY TO RESPONDENT'S PRELIMINARY STATEMENT

At page 3 in respondent's brief it argues that the testifying witnesses "presently or formerly employed by the city . . . would have no interest except to see justice done between the parties." This statement is, of course, manifestly absurd. Salt Lake City was and is a defendant in this case. Plaintiff's complaint (R. 1-8) and plaintiff's amended complaint (R. 37-47) reflect plaintiff's consistent position up until the second day of the trial that plaintiff was entitled to judgment against Salt Lake City in the alternative if plaintiff was not given judgment against defendant railroads. From the time of filing the complaint on February 15, 1966, until the second day of trial on May 13, 1970, a period encompassing nearly ~~over~~ four and one-half years, plaintiff maintained this position, and on the second day of the trial it receded therefrom (R. 324-326). Clearly during this period Salt Lake City's position as a defendant seeking to place the burden of this lawsuit on the defendant railroads was established and solidified. As a matter of fact, Mr. Crellin clearly stated that the position of the city was not that of an uninterested party. He candidly

admitted to the trial court that "We want to be of any assistance that we can be in seeing that justice is occasioned here *for the plaintiff* in this matter." (Emphasis added.) (R. 668) Salt Lake City officials throughout the entire course of this proceeding were not interested in seeing "justice done between the parties" but were seeking only to vindicate a position which had been taken by Commissioner Catmull, the City Engineer's office and plaintiff, prior to any meeting between plaintiff, the city and defendant railroads.

II. REPLY TO STATEMENT OF FACTS

Respondent's statement of fact contains many conclusions drawn by respondent from evidence which was in and of itself a conclusion and was erroneously admitted into evidence over the objection of defendant railroads. For example, on page 7, in speaking of the first meeting on October 21, 1965, respondent states, "At the end of the meeting it was agreed that the contractor would be contacted for the purpose of making an agreement between the railroads and the contractor. (R. 897)" The basis of this statement is a conclusion drawn by Mr. Holmgren, that "it was understood by all that they (the railroads) were to contact the contractor." (R. 896) Said conclusion was admitted over defendant's objection even though Mr. Holmgren stated, "I can't say who said what." Union Pacific could cite many other similar instances of conclusions made in the statement of facts in respondent's brief, for it is replete with similar narra-

tions of respondent's conclusions concerning statements that were in themselves conclusions which were admitted into evidence over Union Pacific's strenuous objections. However, Union Pacific will allow the court to draw its own conclusions concerning the facts of this lawsuit from the record on appeal.

III. REPLY TO RESPONDENT'S POINT I

In the last paragraph on page 14 and ending on the top of page 15 of its brief, respondent states that the Public Service Commission would have no interest in the activity involved in this action because no hazard to, or interference with, rail or highway traffic was presented thereby. This statement is simply not true. Any crossing of railroad tracks with any type of permanent or temporary installation presents hazards, particularly during the construction period, regardless of whether such crossing is above, beneath, or at the same level with, the tracks. And any dispute as to the duty to be imposed by law in respect to bearing the cost of alleviating such hazards is within the exclusive jurisdiction of the Public Service Commission. That is why the trial court erred in giving Instruction No. 33, which not only overstated the requirement of the franchise ordinances in evidence in this case, but also stated that a duty was imposed by law on defendant railroads in this action when such duty had not been imposed by the Public Service Commission in accordance with its exclusive jurisdiction to settle disputes in respect to such duty.

IV. REPLY TO RESPONDENT'S POINT II

The last paragraph of respondent's Point II, found on page 20 of respondent's brief, misstates Union Pacific's contention, which contention respondent labels "careless and unfounded." Union Pacific's contention in this case as expressed to the trial court and in its original brief to this court is that every public bidder to a city project within the scope of the competitive bidding statute is entitled to have detailed in writing all of the material facts which might affect his bid in order that each such bidder may stand on equal footing in preparing and submitting a bid on a public project. Union Pacific's only reference to "collusive" in its brief was in designating one of the legislative purposes behind the competitive bidding statute. As a matter of fact, Union Pacific's counsel stated to the trial court in the course of his motion for a directed verdict that he was not making an accusation that favoritism was intended by the city in this case but that to allow recovery in this case would create the opportunity for such favoritism to be exercised. (R. 689) The statute was indeed intended to prevent the very type of activities admittedly conducted in this case between Salt Lake City representatives and one or two, but not all, of the potential bidders on this public project.

V. REPLY TO RESPONDENT'S POINT III

None of the conduct of Union Pacific at the job site which is contended by respondent to be a waiver of the

right to disclaim formation of a contract with plaintiff (p. 22 of respondent's brief) was in any way inconsistent with the assumption by Union Pacific that plaintiff was performing on its contract with the city to install a complete sewer. Defendant railroads by being present at the job site were only performing their duty to the general public to protect their right of way and railroad tracks from unreasonable and unlawful interference. This conduct was certainly no more than is required of Union Pacific, who is a public utility engaged in a public service with a public duty to protect its employees and the persons it serves. Such public duty is at least as great as, if not greater than, Salt Lake City's public duty to provide sewer service to its inhabitants. Under the facts and circumstances of this case Union Pacific was as a matter of law clearly justified in assuming that plaintiff was only doing its job pursuant to the contract it had with Salt Lake City, and none of Union Pacific's conduct at the job site in cooperating with respondent should be held against it.

VI. REPLY TO RESPONDENT'S POINT IV

On page 26 of respondent's brief, in the last line of the first paragraph, respondent "blandly" misquotes Union Pacific's brief by omitting the word "actual" from between the words "of" and "authority," and in the argument that follows, respondent clearly fails to distinguish between Union Pacific's contention in respect to actual authority and the contentions of all parties in respect to apparent authority. There is simply not a scintilla of

evidence in this record that any representative of Union Pacific who was in contact with plaintiff before, during or after construction had any actual authority to bind Union Pacific to a contract as distinguished from apparent authority to so bind Union Pacific. All of the argument in respondent's brief is devoted to the question of apparent authority, and the court was clearly in error in failing to give defendant Union Pacific's Requested Instruction 4 (R. 177) and in giving Instruction 28 (R. 125) in place thereof.

VII. REPLY TO RESPONDENT'S POINT VI

Respondent claims that the ample consideration for its alleged contract with defendant railroads was that plaintiff "guaranteed" not to interrupt railroad service at each track for a period exceeding ten hours. This ten-hour special time requirement appears to be somewhat of an afterthought because even prior to the time when plaintiff had any knowledge or idea that a time limitation might be requested, it asked for and received a promise from Commissioner Catmull that defendant railroads would pay any extra expense caused by the presence of their tracks, and plaintiff received this promise prior to bidding on the contract. (R. 870, 876, 877) The ten-hour time limitation was purely and simply a standard which was determined by all parties to be reasonable dispatch in fulfillment of plaintiff's duty under Paragraph 20 of its contract with Salt Lake City and under Paragraphs 1(d) and 1(e) of the detailed specifications attached thereto.

On page 32 of respondent's brief, in the last sentence of Point VI, the question is asked why Ewell was asked to give his open-cut price, if the railroads had no responsibility to pay respondent. This question is easily answered and was answered by Mr. Oatman (R. 742-743) when he stated as follows:

> "Q. Now, did you have some reason for asking him what he was being paid by the City for laying this pipe in there?
>
> "A. Well, absolutely. The contract with the City covered the trenching of the ground, the excavation and the material existing removal of same by trucks and the replacement of excavation. There was some bedding involved under the pipe backfill, road base and so forth. So, it appeared to me in my own thoughts that if we were going to eliminate or the excavation possibly and the backfill for whatever we decided, if we decided to jack under any track, there should be some reimbursement from someone to the railroad company or railroad companies if they elected to jack or tunnel a piece of pipe under the railroad track, there should be a decrease in whatever amount we'd have to pay for whoever this contractor might be to jack or tunnel a piece of pipe."

If Union Pacific had decided to bear the additional expense of jacking the pipe under its tracks rather than remove and replace them at its own expense, clearly it should have been entitled to reimbursement by the city for the savings to the city of not being obligated to pay the contractor unit price rates for excavation, backfill, bedding, road base, etc., for that work rendered unnecessary when pipe is installed by the jacking method.

From the railroad's viewpoint there was nothing unreasonable about The Rio Grande's inquiry concerning the contractor's open-cut price to Salt Lake City nor did such inquiry constitute the solicitation of an offer, as implied by respondent's brief.

VIII. REPLY TO RESPONDENT'S POINT VII

Respondent in Point VII again misconstrues appellant Union Pacific's contention, this time in respect to double recovery. Union Pacific's contention on that point is based on the fact that even if a contract as alleged by plaintiff exists whereby Union Pacific is obligated to pay for plaintiff's alleged extra cost at Union Pacific's railroad tracks, any delay caused by the presence of said railroad tracks and cables is included in the price of such contract and to allow plaintiff damages both for the contract price and for delay is allowance of a double recovery. Instead of answering that contention, respondent on pages 34 and 35 of its brief argues that its alleged contract price with the railroads is in addition to rather than in lieu of, the prices provided for in the city's contract with respondent.

IX. REPLY TO RESPONDENT'S POINT X

Union Pacific cannot determine from respondent's brief whether it is contending on page 39 that Union Pacific made some sort of waiver in connection with the requested instruction quoted in the brief. It is, however,

clear from the record that no such waiver was made. Union Pacific, at the beginning of the trial in a motion made to the court for involuntary dismissal (R. 832-836), in a renewal of that motion and in a motion for a directed verdict made at the close of plaintiff's case (R. 684-690), in motions made at the close of all evidence (R. 820-822) and in its motion for judgment notwithstanding the verdict (R. 233-235), all supported by memorandum and argument (for memorandum see R. 84-91, R. 211-230, R. 252-266) consistently maintained the position that plaintiff was not able to and did not prove express contract because plaintiff was bound by the weakest portion of its own testimony. To imply that Union Pacific somehow took an inconsistent position with this position by attempting to formulate an instruction at the court's request relating to the general law of contract is clearly without merit.

Union Pacific also asserts that the trial court in this instance failed in its duty to instruct concerning the law applicable to this lawsuit. Instead of giving one comprehensive set of instructions on the applicable law, it gave what were in effect five sets of instructions—first, the Union Pacific set, then the Rio Grande set, then plaintiffs set and the Salt Lake City set, and, finally, a few standard instructions constituting the court set. Instructions relating to a particular subject were not in any way grouped, and the jury was imply allowed to choose between conflicting sets of instructions rather than being directed to follow a comprehensive set which should have

been drafted by the trial court as part of its fundamental duty, a duty which it failed to discharge in this case.

CONCLUSION

Plaintiff's brief, particularly when it misquotes and misinterprets Union Pacific's contentions and position in this matter, clearly demonstrates the reason why the rule of law has been adopted by this court that an obligation arising from an express oral agreement or from an implied contract will be imposed only with care and in clear cases. When plaintiff's counsel, with a trained legal mind, after having had an opportunity for more than six months to analyze Union Pacific's brief, misconstrues and misstates what was said by Union Pacific therein in writing, is it any wonder that two parties who meet for the first time and engage in oral conversation may (and most assuredly did in this instance) misunderstand each other. An alleged oral contract based solely upon what one party unilaterally "understood" cannot be enforced, and in Union Pacific's opinion such unilateral understanding is the sum-total of all the evidence tending to establish a contract in this lawsuit. All other evidence tending to prove the alleged formation of the plaintiff's claimed contract with the railroads arises through and from this unilateral "understanding" on the part of plaintiff and the city. Like ships that pass in the fog in the night, the minds of the plaintiff and the city, on the one hand, and the minds of defendant railroads on the other hand, passed by each other without ever

colliding; and that the city and the plaintiff "understood" a collision occurred, is simply not evidence thereof when no one can remember the specific words nor the gist of anything said by a specific representative of either of defendant railroads. For the reasons set forth in this reply brief and in Union Pacific opening brief, Union Pacific is entitled to the relief requested in this appeal.

Respectfully submitted,

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