94, 1930

APPELLANTS CASE

In the Privy Council

No. 60 of 1930.

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF MANITOBA

BETWEEN

WILLIAM YOUNG,
(Plaintiff) Appellant,

AND

CANADIAN NORTHERN RAILWAY COMPANY
(Defendant) Respondent.

Appellant's Case

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1. This is an appeal by the plaintiff from the judgment of the Court of Appeal for Manitoba, dated the 3rd day of February, 1930, pursuant to special leave granted by the said Court. Record, pp. 858-859, pp. 863-865.

2. The Appellant is a machinist and was employed as such by the Respondent in its Ft. Rouge Shops in the City of Winnipeg, in Manitoba, from June 10th, 1920, until June 13th, 1927, when he alleges that he was wrongfully dismissed by the Respondent from its service.

3. The Appellant brought this action against the Respondent for such wrongful dismissal.

4. The Appellant's action was dismissed by the learned trial Judge. An appeal from that judgment was dismissed by the Court of Appeal for Manitoba, and it is from such judgment of the Court of Appeal that the present appeal is taken.

5. The grounds on which the learned trial Judge and the learned Judges of Appeal based their reasons for judgment are summarized as follows by Prendergast, C.J.M., in delivering the judgment of the Court of Appeal granting the Appellant special leave to take this appeal to His Majesty in Council:

Record, p. 861, ll. 3-16.

"The learned trial Judge dismissed the action on the ground that as the plaintiff never was a member of Division No. 4, he is not privy to the agreement and so cannot claim any seniority or other rights under it.

"In this Court, three Judges constituting a majority, held that the agreement was unenforceable even by members of Division No. 4, on the ground of want of mutuality as it imposes no obligation whatsoever upon the men. The two other members of the Court, while agreeing that the appeal be dismissed, did so on the ground that assuming the agreement to be enforceable and available to the plaintiff although he be not a member of Division No. 4, he must adopt it in its entirety and particularly with reference to Rule 35 by virtue of which his grievance was committed to the local committee who refused to carry it further."

6. These judgments strike at the very root and foundation on which the peaceable and harmonious relationship between capital and labor in Canada rests, and they say in effect that the right of collective bargaining, which has received statutory sanction and recognition in Manitoba, means nothing, and that agreements as to hours of labor, rates of pay, seniority rights, working conditions, etc., which are the fruits of such collective bargaining, are mere waste paper and of no legal effect.

7. This action, therefore, involves not merely an ordinary action by a servant against his master for wrongful dismissal,

but requires an examination and consideration of the evolution that has taken place in the relationship and method of dealing between capital and labor and the determination of the legal principles that must be applied in view thereof. For that reason a brief tracing of such development as it affects Canadian railways and their employees may be helpful.

8. Prior to the late war each railway company in Canada negotiated so-called wage agreements or schedules with its own employees. See, for example, Exhibit 5. In such negotiations such employees were at the commencement represented by committees from each craft. This was followed by a consolidation of the various crafts into federations on each separate railroad, and these federations conducted the negotiations on behalf of the employees. These federations on the different railways were later amalgamated into one federation (really a federation of federations) embracing the employees on all railways.

Record, p. 703, ll. 17-22.

9. These agreements, which were usually negotiated annually, were intended to apply, and were in fact applied, to all the employees of such railway company in the particular craft to which they applied and entirely regardless of any question of whether such employees were or were not affiliated with any particular labor organization.

10. During the war a critical situation developed on the railways in the United States of America owing to the abnormal condition of the labor market and due to large numbers of railway employees leaving their work for more remunerative employment, such as work in munition factories, shipbuilding and other industries where very much higher wages prevailed.

11. In the United States this led to the placing of all American railroads under the control of the Federal government under the provisions of an Act known as the Federal Control Act of 1918, which created the office of Director General of United States' Railroads and made him the supreme head of all railroads in the United States.

12. This resulted in the bringing into force of uniform rates of wages, hours of labor and regulations governing conditions of employment generally which applied to all American railways and to railway employees generally without any discrimination of any kind. This was commonly known as the "McAdoo Award" because the Director General of the United States' Railroads at that time, and the man primarily responsible for bringing this about, was Mr. McAdoo, a member of President Wilson's cabinet.

13. In Canada the labor situation was still more critical because of the very much larger proportionate number of men engaged in military service and the consequent greater scarcity of labor, which was resulting in an even greater drifting of railway employees into other more remunerative occupations.

14. The Canadian Government, in order to meet this and other emergencies connected with the railways, therefore, set up an organization known as the Canadian Railway War Board, which, for the time being, represented the railways of Canada collectively in their negotiations with railway employees so as to bring about uniform terms and conditions of employment on all railways in Canada.

Record, p. 446, ll. 17-20.

15. At this time the federation of federations of railway employees referred to in the eighth paragraph hereof had come into existence and took charge of the negotiatioins on behalf of the employees. See Exhibits 59 and 60.

16. The first of the so-called wage agreements or schedules so negotiated is Wage Agreement No. 1 (Exhibit 4), which, in substance, was merely the adoption of the "McAdoo Award" and making it applicable to the Canadian railways. There cannot be the shadow of a doubt that, just as the "McAdoo Award" was intended to apply to all railways in the United States and to all railway employees in that country without any exception or discrimination of any kind and without any regard to labor union affiliation or lack of such affiliation, it was similarly intended by all parties concerned that the Canadian counterpart of the "McAdoo Award," Wage Agreement No. 1, should apply to all Canadian railways and all Canadian railway employees without exception or discrimination, and that it was so applied in practice.

17. The Railway Employees' Department of the American Federation of Labor, with headquarters in the United States, has four territorial divisions. Three of them are in the United States and one is in Canada. The territorial divisions in the United States are known as Divisions Nos. 1, 2 and 3, respectively. Division No. 4 comprises the whole of Canada. The 1918 constitution of the Railway Employees' Department of the American Federation of Labor was filed as Exhibit 32; the 1922 constitution was filed as Exhibit 31, and the 1926 constitution was filed as Exhibit 24.

18. Division No. 4, Railway Employees' Department, as a matter of fact did not become affiliated with the American Fed-

eration of Labor until after the negotiation of Wage Agreement No. 1, although so described therein.

19. Wage Agreement No. 1 (Exhibit 4) is dated September 2nd, 1918, but was made retroactive so as to apply from May 1st, 1918, for employees in the Locomotive and Car Departments covered by expired agreements or who had not an existing agreement, and to apply not later than August 1st, 1918, for employees on roads where agreements had not yet expired. (See clause 2 thereof). Thus it will be seen that Wage Agreement No. 1 was to apply to all railway employees on all railways, bringing in employees that never had contracts or schedules and railroads that had not established a system of collective bargaining, and went so far as to give the benefits of wage increases provided for in said Wage Agreement No. 1 to all employees who had left or had been discharged from any railway subsequent to May 1st, 1918. Record, p. 912, ll. 25-29.

20. This was later followed by Wage Agreement No. 4 (Exhibit 25), which was also negotiated on behalf of the railways by the Canadian Railway War Board, is dated November 12th, 1919, and came into force December 1st, 1919. (See Rule 185 thereof). It was this Wage Agreement No. 4 (Exhibit 25) which was in force in the Respondent's shops on June 10th, 1920, when the Appellant entered the service of the Respondent.

21. After the conclusion of the war the Canadian Railway War Board as such went out of existence. The benefits both to the railway companies and to the men in carrying on their negotiations with one another collectively had, however, been so clearly demonstrated through the experience gained in war time that neither side wished to revert to the system of negotiations that had obtained prior to the creation of the Canadian Railway War Board. The Canadian Railway War Board was, therefore, continued in substance through the formation by the railway companies of a voluntary association known as the Railway Association of Canada, and this Association has represented the Canadian railway companies in all subsequent negotiations with Canadian railway employees, and the employees have similarly carried on their negotiations collectively instead of negotiating either individually or as employees of an individual railway company with such company. Record, p. 455, ll. 30-35.

22. The first of the so-called wage agreements or schedules so negotiated with the Railway Association of Canada is Supplement "A" to Wage Agreement No. 4. This was filed as Exhibit 26 and is dated August 24th, 1920.

23. As a matter of fact Wage Agreement No. 4 is the last complete wage agreement or schedule negotiated between the Canadian railways and their employees. All subsequent agreements or schedules are in the nature of supplements to Wage Agreement No. 4 or supplements to Wage Agreement No. 6 (Exhibit 3), which is not a new "wage agreement" but merely a consolidation of Wage Agreement No. 4 and supplement "A," "B" and "C" thereto. See Record, p. 986.

24. In the City of Winnipeg, in Manitoba, there was a feeling of great unrest in labor circles following the termination of the war. The government of the day attempted to meet the situation by the passage of "The Industrial Conditions Act," being chapter 43 of the Statutes of Manitoba, 1919, which came into force on March 29th, 1919, and provided for the creation of "The Joint Council of Industry." This, however, did not meet the situation, and a disastrous general strike in the City of Winnipeg followed in May, 1919, the main issue involved being the right of the men engaged in the metal and building trades to negotiate or bargain collectively with their employers—a right which had been enjoyed for many years by railway employees.

25. As a direct result of this general strike the Manitoba Legislature at its next session passed legislation giving statutory recognition and sanction to the right of collective bargaining. This was done by way of amendment to "The Industrial Conditions Act." This amendment is contained in chapter 57 of the Statutes of Manitoba, 1920, and came into force on March 27th, 1920. It reads as follows:

"22. The right of employers and employees to organize for any lawful purpose is hereby recognized.

"23. Employers and employees shall have the right to bargain with one another individually, or collectively, through their organizations or representatives, provided that in case of any dispute between employers and any such organization of employees or its representatives as to the method or manner or the terms and conditions of such bargaining such dispute shall be submitted to the Joint Council of Industry, and dealt with by it in the manner prescribed by this Act."

26. In construing this statutory provision and applying it to the case at bar it is necessary to bear in mind the statutory rule of construction to be applied thereto that is laid down by the

Manitoba Legislature in section 13 of "The Manitoba Interpretation Act," being chapter 105 of the Revised Statutes of Manitoba, 1913, which reads as follows:

"13. The preamble of every Act shall be deemed a part thereof, intended to assist in explaining the purport and object of the Act; and every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit."

27. The Appellant is an Englishman and learned his trade as a machinist in England. He came to Canada direct from England in June, 1920, and located in Winnipeg. Record, p. 169, ll. 9-10.

28. In England the Appellant was a member of the Amalgamated Society of Engineers and was familiar with the labor union movement in that country. Record, p. 666, ll. 1-9.

29. After arriving in Winnipeg the Appellant claims that he set about familiarizing himself with the conditions that existed in the Respondent's shops and claims that he borrowed from a friend a copy of Wage Agreement No. 4 and read it and became familiar with its contents before he applied to the Respondent for employment. Record, pp. 146-147.

30. The learned trial Judge expresses some doubt as to whether the Appellant had in fact seen Wage Agreement No. 4 at the time he entered the Respondent's employ, but it is respectfully submitted that the Appellant's statement on this point should be accepted, for the Appellant swore to the truth of it in very positive terms, not only at the trial but also on his examination for discovery, and his statement to that effect on his examination for discovery was put in by the Respondent as part of its case and it is submitted that the Respondent is bound by it. Moreover, this evidence is uncontradicted. Record, p. 824, ll. 18-29. Record, pp. 146-147, 168-169, 667-668.

31. On June 9th, 1920, while Wage Agreement No. 4 was in force, the Appellant applied in person to the foreman of the Respondent's Ft. Rouge Shops for employment as a machinist. He was supplied by the foreman with a printed form of applica- Record, p. 824, ll. 4-11.

tion, which he filled in and signed. He presented his credentials, which proved satisfactory, and was told to report for work the following morning, which he did. In answer to his direct question, he was informed that he would receive "the going rate" of wages. The Appellant's written application for employment was filed at the trial as Exhibit 9, and this shows that he was hired as a permanent employee and placed under the schedule.

Record, pp. 141-148.

32. The Appellant went to work on the morning of June 10th, 1920, and remained in the Respondent's employ until June 13th, 1927, when his services were dispensed with pursuant to notice (Exhibit 7) dated and served on him on June 9th, 1927. During all this time he worked, as already pointed out, under the provisions of Wage Agreement No. 4 and the supplements thereto.

Record, p. 829, ll. 7-11.

33. The Respondent kept a seniority list showing the order of seniority of all machinists employed in its Ft. Rouge Shops, and on this list the names of all machinists working in the Respondent's Ft. Rouge Shops were entered and no distinction was drawn between those who were members of Division No. 4 and those who were not members. It should be noted that the seniority rights granted under Wage Agreement No. 4 are not affected or modified in any way by the supplements thereto or by any subsequent agreement.

34. The said seniority list was filed at the trial as Exhibit 21, and such list contains the Appellant's name and shows that at the time of the Appellant's dismissal there were in the Respondent's Ft. Rouge Shops forty-one men junior to the Appellant. The Appellant's number on such list is 192. In the subsequent numbering there is a slight error in that the numbers 198 and 199 are used twice (but for two different individuals the second time), so that the last number on the list should be 233 and not 231.

Record, p. 829, ll. 1-11.

35. It is proved conclusively, and is not denied, that when the Appellant was dismissed, men junior to him were retained in the service of the Respondent and that his seniority rights (if any) were thereby violated. On this point the finding of fact of the learned trial Judge is as follows:

Record, p. 828, l. 35 to p. 829, l. 11.

"Rule 27 had already been applied to the defendant's shops generally. At least two stages had been followed in making 'a reduction in expenses.' We find that when the plaintiff was laid off all men generally had been reduced to 40 hours' service per week. In the next step which should have been followed for fur-

ther reduction there was a deviation, a discrimination against the plaintiff. Instead of first suspending the men who were junior to him, the defendant retained those juniors and suspended the plaintiff. In all about 30 men were thus retained to all of whom the plaintiff was senior in service. In the subsequent 'restoration of forces,' several apprentices were promoted into machinist jobs, all of whom were far below the plaintiff in the scale of seniority. Inasmuch as the defendant kept only one seniority list, on which the names of all employees, members and non-members of Division No. 4, were posted, as at the date they respectively entered the service, it is quite clear that Rules 27 and 31 were violated by the plaintiff's suspension."

36. The learned trial Judge further finds: "His suspension is, for the purposes of this trial at least, considered by both litigants as tantamount to dismissal." In the Court of Appeal the same attitude was taken. Fullerton, J.A., says the plaintiff "continued in the employ of the defendant until June 13, 1927, **when he was dismissed.**" Trueman, J.A., says: **"At the time the plaintiff was dismissed,** with eight or ten others, there were 30 men at least junior to him, who were retained and thereafter continued at work." Record, p. 824, ll. 1-3. Record, p. 841, ll. 11-12. Record, p. 848, ll. 3-5.

37. It is also undisputed that in Appellant's dismissal Rule 37 was violated, and that the investigation which by that Rule is made a condition precedent to the right to dismiss an employee for cause, was not held. Under Wage Agreement No. 4 there is no right to dismiss except for cause and after investigation, and there was here neither cause nor investigation.

38. As to Wage Agreement No. 4 the learned trial Judge finds: "The agreement was intended by the defendant to apply to, and to govern while it remained in force, all defendants' employees in the departments mentioned. The plaintiff was therefore within its purview." He further finds: "There is no doubt that the defendant, on its part, intended that these working Rules should apply to **all** men in the departments affected. Letters and statements from high officials clearly show that. Moreover, the Rules have as a matter of fact, been applied to all the craftsmen, at least in a general way." Record, p. 831, ll. 19-22. Record, p. 827, ll. 18-23.

39. In considering the legal significance of the various wage agreements or schedules referred to in the evidence, and in particular Wage Agreement No. 4, and whether they do or do not apply to the Appellant so that he can claim the benefit thereof,

it is necessary to approach that question bearing the following considerations in mind:

(a) During the whole of the period here in question the Respondent company has maintained what is commonly known as an "open shop," that is to say, membership in any particular labor organization has never been required as a condition of getting or retaining employment. The Respondent has at all times had in its employ men who were members of Division No. 4 of the American Federation of Labor, men who were members of the One Big Union and other labor unions having no connection with the American Federation of Labor, and men who belonged to no labor organization whatever.

(b) The so-called wage agreements or schedules that are here in question are without exception the result of collective, as distinguished from individual, bargaining.

(c) These agreements are made for the job and not for any particular individual, that is to say, they fix the terms on which any particular job is to be filled without reference to who the individual filling the job for the time being may be, and these conditions automatically attach to the individual employee, both present and future, who holds the job unless he expressly contracts himself out of them.

(d). In practice these wage agreements have always been treated by all concerned as applying to all the employees of the Respondent regardless of whether they were or were not members of Division No. 4, and they have been applied by the Respondent to all its employees without distinction or discrimination.

Record, pp. 300, 301, 316, 411, 688, 703.

(e) On the admissions of the Respondent's own high officials there has been no case of individual bargaining as to terms of employment, etc., between the Respondent and its employees for at least twenty years prior to the Appellant's dismissal, and it is not suggested that in a single instance during that period has anyone been hired by the Respondent on terms varying in any particular from the terms laid down in these wage agreements.

(f) The right to collective bargaining has received statutory recognition and sanction in Manitoba.

(g) Whatever may be the precise legal nature of these wage agreements or schedules, they fix the conditions in that particular industry for the time being, and these conditions once fixed can-

not—at least so far as Dominion railways are concerned—be changed by either party as regards "conditions of employment with respect to wages or hours" without first giving a thirty days' notice and then waiting until the matter has been passed upon by a board of conciliation under the Lemieux Act (The Industrial Disputes Investigation Act, R.S.C. 1927, ch. 112, sec. 58.) This Act has by the Manitoba Legislature been made applicable "to every industrial dispute of the nature therein defined which is within or subject to the exclusive legislative jurisdiction of this Province." See Statutes of Manitoba, 1926, ch. 21. If either the employer or the employee changes these conditions without first complying with the Lemieux Act, he commits a criminal offence; The Industrial Disputes Investigation Act, R.S.C. 1927, ch. 112, secs. 59, 60 and 61; Rex v. McGuire, 16 Ont. L.R. 522. It is, therefore, self-evident that both the Manitoba Legislature and the Dominion Parliament intend wage agreements negotiated through collective bargaining to have, and treat them as having, some legal validity.

Record, p. 449, ll. 32-33.

40. When the Appellant was discharged by the Respondent he took the precaution of first seeking redress under Rules 35 and 36 in case they should be held to apply. On this point the learned trial Judge made the following finding of fact:

"After receiving notice of suspension, the plaintiff tried to get redress under Rules 35 and 36 . . . .

Record, p. 880, ll. 7-8 and 18-33.

"The plaintiff applied to the shop foreman to ascertain the ground of his suspension in violation of seniority rights, and was by him referred to the shop committee. He went to the shop committee repeatedly but could get no satisfaction; he applied to several of the proper officials of the defendant but in some instances he was referred back to the shop committee and in others was unable to get a hearing. **He did, I think, all that he could do under these Rules to get redress along the lines therein contemplated,** but the local committees, consisting exclusively of members of Division No. 4, displayed neither patience nor impartiality in their attitude towards him. Under these rules, therefore, the plaintiff found himself helpless to get redress, and because of this helplessness, coupled with the fact that **he did all that he could do,** the defence based upon this failure to get the shop committees to take up his grievance, has little to commend it."

41. The Respondent takes the position in this action that the so-called wage agreements have no legal force or significance whatever, either **qua** wage agreements or as either expressly or

impliedly forming part of the individual employee's contract of hiring, and that, in any event, the Appellant is not an "employee subject to this agreement" within the contemplation of Rules 35 and 36. That being so, the Appellant respectfully submits that the Respondent, having repudiated the said agreement **in toto,** cannot invoke the provisions of Rules 35 and 36 of Wage Agreement No. 4 or any other of its provisions in this action.

42. The Appellant further respectfully submits that, if the said Rules 35 and 36 apply, then the remedy therein provided is not exclusive and their effect is not to oust the jurisdiction of the Courts, but is at most that of a permissive arbitration clause, and that the Respondent by failing to apply to the Court to stay proceedings in his action before it delivered its defence has waived and lost the benefit of the said Rules. See in this connection the decision of Mathers, C.J.K.B., in the case of **Brand v. National Assurance Co.,** (1918) 3 W.W.R. 858, which deals exhaustively with the English and Canadian authorities, as well as the Manitoba statutory provisions, bearing on this point.

43. The Appellant further respectfully submits that it is idle to suggest that his only remedy is under Rules 35 and 36, for three good and sufficient reasons, namely:

(a) The evidence is so clear and overwhelming that he was dismissed without cause and in violation of the provisions of the wage agreement then in force that any finding to the contrary by any of the bodies mentioned in the said Rules 35 and 36 would have been so perverse as to be fraudulent and to constitute a denial of justice and could not be allowed to stand.

(b) The members of the committees whose duty it was to deal with Appellant's grievance under these Rules (if they apply) were so biased and prejudiced as to be disqualified from acting in the matter, and both they and the officials of the Respondent in fact declined to act.

(c) The grievances the investigation of which is contemplated by Rules 35 and 36, are grievances that arise while the employee concerned is still being retained in the service of the railway company (Respondent), and these Rules do not relate to cases of wrongful dismissal, for they are followed by a separate and distinct Rule (Rule 37) dealing specially with cases of dismissal, and the principle that **generalia specialibus non derogant** should be applied, more particularly as the special provision contained in Rule 37 follows the general provisions contained in Rules 35 and 36. The duty of providing the investigation called

for by Rule 37 is cast on the employer (Respondent) and not on the employee (Appellant), and the Respondent, after deliberately discharging the Appellant in clear violation of Rule 37 and without observing the conditions there laid down and made conditions precedent to the right to discharge at all, cannot be heard to say in this action that the Appellant was not wrongfully dismissed and that his cause of action is not complete.

44. In the case of **Caven v. Canadian Pacific Railway Company,** (1925) 3 W.W.R. 32; 95 L.J.P.C. 23, the Judicial Committee had occasion to consider a wage agreement similar to the one now before it. It is respectfully submitted that in that case the Judicial Committee expressly decided that an individual employee could as a matter of contractual right, claim the benefit thereof, for Lord Shaw, in speaking of the agreement then before the Judicial Committee, there says: Record, p. 912, ll. 25-29.

"The first reason given by the appellant is in the following terms:

"(1) Because **the schedule constitutes a binding contract between the respondents and the appellant** . . . .

"In the opinion of their Lordships the first reason is sound."

45. On this appeal the Appellant intends to challenge the correctness of the judgment of the learned trial Judge on the grounds set out in the Appellant's praecipe on appeal to the Court of Appeal, and intends to ask the Judicial Committee to receive in evidence, and to consider on this appeal, all the documents and papers marked at the trial as exhibits for identification and not subsequently allowed to be admitted in evidence and marked as exhibits at the trial, and also to receive in evidence those portions of the de bene esse evidence and evidence on commission and on discovery which was tendered by the Appellant at the trial and excluded. Record, p. 455, ll. 30-35.

46. The Appellant submits that the judgment of the Court of Appeal for Manitoba is wrong and should be reversed, and that judgment should be entered in favor of the Appellant awarding him the relief claimed in his statement of claim, or that there should be a new trial of this action, for the following amongst other

REASONS.

1. Because the Appellant had a legally binding contract of

employment with the Respondent as set out in his statement of claim, and that such contract of employment is not open to objection on the ground of want of mutuality or on any other ground.

2. Because he was wrongfully dismissed by the Respondent in violation of the express and/or implied terms of his employment.

3. Because under the facts and circumstances of this case he is entitled to invoke the aid of the Courts to remedy the injustice he has suffered and is not required to resort to some other non-judicial tribunal and is not in any way bound by the action or non-action of such non-judicial tribunal.

E. J. McMURRAY.
H. A. BERGMAN.

In the Privy Council

No. 60 of 1930.

ON APPEAL

FROM THE COURT OF APPEAL FOR THE PROVINCE OF MANITOBA.

Between

WILLIAM YOUNG,
(Plaintiff) Appellant,

and

CANADIAN NORTHERN RAILWAY COMPANY,
(Defendant) Respondent.

APPELLANT'S CASE

BLAKE & REDDEN,
17 Victoria Street,
London, S. W. 1.