94. 1930

No. 60 of 1930

In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

BETWEEN

WILLIAM YOUNG

(Plaintiff) Appellant,

AND

THE CANADIAN NORTHERN RAILWAY COMPANY

(Defendant) Respondent.

CASE FOR THE RESPONDENT
THE CANADIAN NORTHERN RAILWAY COMPANY

RESPONDENTS CASE.

1.—This is an appeal from a judgment of the Court of Appeal for Manitoba, dated the 3rd of February, 1930, unanimously affirming a judgment of the Court of King's Bench for Manitoba, dated the 10th of July, 1929, which dismissed the action. RECORD —

2.—The Appellant in his statement of claim alleged that on the 10th of June, 1920, the Respondent employed him as a machinist under the provisions of a document known as wage agreement No. 4, made between The Canadian Railway War Board and Division No. 4, Railway Employees' Department, that such document was part of the contract of hiring, and that on the 13th of June, 1927, he was dismissed contrary to the provision therein, that in case of a reduction in the number of employees, seniority of service should govern. He asked for a reinstatement and for damages of $50,120.00. pp. IX to XVI p. IX p. IX p. XI

3.—The Respondent in its statement of defence denied the material allegation of the claim, and set up that the said document was not, as between the parties to it, a contract; that it was not made for or on behalf of the Appellant, and was not, ratified by him, and did not apply to his employment; that its terms were not implied in the verbal contract of hiring; that subject to such denials, if any portion thereof were so implied, it was all implied, and that in such case there had been no breach of its provisions, and that the Appellant was limited to the remedies provided therein, and that he had not complied therewith; that the said Division No. 4 was an illegal organization, and could pp. XVI to XXVII p. XVI p. XXIV pp. XX and XXI pp. XXIII and XXIV p. XXVI p. XXV

RECORD

p. XXV not contract, and that the misconduct and inefficiency of the Appellant justified his dismissal, and that the Appellant was a nominal party, and that the action was wrongfully and illegally brought and maintained by others, who
p. XXVI were to share in any damages recovered. The Respondent further pleaded the absence of any writing, The Statute of Frauds, and the Masters' and Servants' Act of Manitoba.

4. The trial took place before Honourable Mr. Justice Dysart in May and June, 1928, and further evidence was taken in November, 1928.

pp. 98-100
pp. 136 and 142
pp. 144-146, 169-170, 664
p. 169
p. 292, ll. 1 and 2
p. 1006
p. 170, l. 6-8
p. 664, ll. 20-29
p. 665, ll. 2-7
p. 299, ll. 5-6

5.—The evidence shows that the Appellant, on the 9th of June, 1920, a few days after his arrival in Winnipeg from England, sought employment at the Fort Rouge repair shops of the Respondent, and was thereupon verbally engaged as a machinist to commence work the following morning at the going rate of wage. Nothing was said by him or the Respondent's representative as to the period of employment, or the method of its termination. The Appellant signed a printed form of application, but no written agreement of hiring was then or at any time thereafter signed by the parties to the action.

p. 147, l. 6-7
pp. 182-183
pp. 147-8
pp. 302-3
pp. 314-315
p. 1014
pp. 176-7
p. 170, ll. 12-19
p. 180
p. 412, ll. 20-29
p. 213, ll. 11-18

6.—The Appellant, except for periods when he was employed for only three or four days a week, and for other temporary absences on account of shortage of work, or of his inability, served as a machinist in these shops from the 10th of June, 1920, until the 13th of June, 1927, when his services were dispensed with by written notice dated the 9th of June, 1927, and delivered to him on the same date. During this time changes in the shops affecting the Appellant in respect of hours of labour and wages were made by the Respondent without any agreement with him. He was paid semi-monthly for the hours he worked, at the current hourly wage.

p. 475
p. 444

7.—In 1919 there was in existence a voluntary body known as The Canadian Railway War Board, composed of several Railway Companies of Canada, including the Respondent, for considering matters common to the operation of the Railways. Some time subsequent to 1919 this body became known as The Railway Association of Canada.

p. 322, ll. 20-23
p. 323, ll. 3-7
pp. 343-4
pp. 410-11
pp. 414-5
pp. 822-3
pp. 301-2
p. 79
p. 113, ll. 8-19

8.—In 1918 a labour organization known as Division No. 4, Railway Employees' Department, American Federation of Labor, was formed. It was composed of such members of the International Association of Machinists and of other international labor associations affiliated with the American Federation of Labor, a large organization in Canada and the United States, as were employed on Canadian railways. It was the fourth division of the Railway Department or branch of this body, the first three divisions being organizations of employees on railways in the United States. A large percentage of the machinists employed by the Respondent were in 1918 members of this Division No. 4, or of affiliated labor organizations, but membership therein was not necessary to secure or to retain such employment, and throughout all the material times machinists, and others, belonging to this labor or-

ganization and to other labor organizations, or to no organization at all were employed by the Respondent. RECORD

9.—On the 12th of November, 1919, a document known as wage agreement No. 4 was signed by officers of this Division No. 4, and by officers of the Canadian Railway War Board, containing provisions as to the hours and conditions of labor, wages and other matters affecting machinists and other classes of labor. Evidence that The War Board had authority to enter into such an agreement on behalf of the Respondent is not clear. pp. 444-6 p. 916 p. 446, ll. 9-13 pp. 469-471 p. 474, ll. 21-27 pp. 474-5

10.—The Appellant was never at any time a member of Division No. 4, or of any of its affiliated organizations. Shortly after his employment he joined another labor organization, known as the One Big Union, and for part of the time was an official thereof. This organization was antagonistic to Division No. 4. The Appellant was not, when he was employed, as found by the learned trial judge, aware of the existence of wage agreement No. 4. The Respondent was then applying its provisions to members of Division No. 4 in its service, and as a matter of convenience in the operation of its shops, also generally applied these to all its employees working in the same shops. p. 170, ll. 13-22 p. 170, ll. 23-28 pp. 171-3 p. 177, ll. 11-16 p. 413 p. 824, ll. 39-41 pp. 34-36 p. 38, p. 58 pp. 80-81 pp. 104-5 p. 314, ll. 18-24 p. 317, ll. 12-30 p. 450

11.—The Appellant founded his action upon Rule 27 providing that in a reduction in expenses seniority of employees in each craft covered by the agreement should govern, and that five days' notice would be given, and that lists would be furnished the local committee. The document is printed in the Record, and other material parts are the Preamble, Rules 1, 25, 28, 29, 31, 32, 35, 36, 38, 180, 181, 182, 183, 184, 185 and 188. Rules 183 and 184 were as follows: p. 924 pp. 917 pp. 923-6 pp. 952-3

> "Rule 183.—Should either the Canadian Railway War Board or "the employees comprising Division No. 4, Railway Employees' De- "partment, American Federation of Labor, desire to revise these "rules, a written statement containing the proposed changes shall be "given and conference held within thirty days."
>
> "Rule 184.—For the carrying out of this agreement the Railways "concerned, when acting collectively, will deal only with the duly "authorized officers of Division No. 4, Railway Employees' Depart- "ment, American Federation of Labor. Grievances or the applica- "tion or interpretation of the provisions of this agreement will be "initially handled between the respective railways and Committees "of their employees comprising said Division and as herein pro- "vided."

12.—Supplement A to wage agreement No. 4, dated 24th of August, 1920, but effective 1st May, 1920, and made between the Railway Association of Canada and Division No. 4, Railway Employees' Department, American Federation of Labor, amended the rates of wages, and contained a provision for revision on thirty days' notice. The Appellant entered the service on the 10th of June, 1920, at wages of 72c per hour, but under this retroactive agreement, he was paid from that date at the increased rate of 85c an hour. p. 954 p. 664, l. 10 p. 309, ll. 2-4

RECORD

p. 956

13.—Supplement B to wage agreement No. 4, dated and effective the 22nd of May, 1922, made changes in Rule 27, changing the period of notice from five days to four days. Rule 35 was also amended to read as follows:

p. 964, l. 19

"Rule 35.—Should any employee subject to this agreement "believe he has been unjustly dealt with, or that any of the provisions "of this agreement have been violated (which he is unable to adjust "directly) the case shall be taken to the Foreman, General Foreman, "Shop Superintendent, or Master Mechanic, each in their respective "order, by the local committee or one or more duly authorized mem- "bers thereof, and a decision will be rendered without any unnecessary "delay."

"If stenographic report of investigation is taken the committee "shall be furnished a copy."

"If the result still be unsatisfactory, the General Committee, or "one or more duly authorized members thereof, shall have the right "of appeal, preferably in writing, to the higher officials designated "to handle such matters in their respective order, and conference will "be granted within ten days of application."

"All conferences between shop officials and shop committees to "be held by appointment during regular working hours without loss "of time to committeemen."

p. 983

14.—Supplement C to wage agreement No. 4, dated 8th of December, 1922, but effective 1st of December, 1922, further changed the rate of wages.

p. 338
pp. 472-3
pp. 333-4
p. 456, ll. 13-18
p. 686, ll. 28-30

15.—Wage agreement No. 4 and these three Supplements were, for convenience, consolidated in December, 1922, into a document called wage agreement No. 6, but this was not executed by anyone as a new agreement.

p. 991

16.—Supplement A to wage agreement No. 6, dated the 26th of November, 1923, effective 1st of December, 1923, made further amendments to Rule 27, and the rule thereafter remained in that form.

p. 996

17.—Supplement B to wage agreement No. 6 dated 25th of January, 1927, but effective 1st of January, 1927, among other matters, amended Rule 31, and it remained thereafter in such form.

p. 464, ll. 14-24
pp. 176-7
p. 762, ll. 15-21
p. 412, ll. 21-30
p. 413, ll. 10-12
p. 299, ll. 5-6
p. 655

18.—All these changes were made as a result of negotiations between the representatives of Division No. 4 and of the Railway Association of Canada, and without any authority from or notice to the Appellant. The Respondent voluntarily applied some of such changes to the Appellant, without any agreement with or notice to him.

19.—The Appellant also filed in evidence three agreements earlier than wage agreement No. 4, namely,

RECORD

(1) Federated Metal Trades Agreement, dated first of May, 1916. This was the result of negotiations between the respondent and representatives of such of its employees as were members of several international labor unions which co-operated for certain common purposes under the name of the Federated Metal Trades. It was to continue for one year from the 1st of May, 1916, and from year to year unless thirty days' notice in writing was given. It contained rules as to hours, wages, reduction of staff, and the disposition of grievances. p. 866 pp. 790-806 pp. 814-7

(2) An agreement dated the 30th of May, 1917, amending the above agreement by changing the wages and continuing the other provisions for one year. p. 881

(3) Wage agreement No. 1 of the 2nd of September, 1918, between the Canadian Railway War Board and Division No. 4. p. 892

On the 8th of March, 1918, the Federated Metal Trades, by letters from their Chairman to officers of the Respondent opened up these agreements, and announced as a result of the organization of Division No. 4, that body would in future conduct negotiations. The result of the negotiations of 1918 was that these earlier agreements were replaced by wage agreement No. 1 between the Canadian Railway War Board and Division No. 4. It and Supplement A thereto, and all earlier rules and schedules were in turn replaced in December, 1919, by wage agreement No. 4. While these earlier documents show something of the history and development of the organization, it is submitted that they are not material to the issues in this action. There is no evidence that the Appellant, while in the Respondent's service, had any knowledge of them. pp. 888-891 pp. 323-327 p. 74, ll, 19-30 p. 77, ll. 18-24

20.—The Respondent, in 1927, decided to make a reduction in expenses, and the Superintendent of the Shops was instructed by his higher officers to reduce the number of employees. He conferred with representatives of Division No. 4 on the 9th of June, 1927, as, it is submitted, was contemplated by the wage agreement under such a condition and it was mutually agreed between officers of the Respondent and the Committee of Division No. 4 that the Appellant should be notified that his services were no longer required, and such action was taken on the same date. pp. 62-3 pp. 118-120 pp. 134-135

21.—The Appellant, upon receiving such notice, interviewed officials of the Respondent, and by them was referred to the local committee under the agreement. He applied to such committee to take up his complaint, but they did not do so. He then consulted the General Secretary of the One Big Union and was referred by him to the solicitor for the said union. Thereafter this action was commenced. pp. 122-123 pp. 135-136 pp. 149-151 pp. 153-158 p. 222

22.—The learned trial judge found that the Appellant did not learn of agreement No. 4 until after he had entered the Respondent's service; that he scorned the suggestion that Division No. 4 was in any way his representative p. 824, ll. 39-41 p. 825, ll. 24-27

RECORD

p. 826, ll. 23-25 in negotiating any of these agreements; that Division No. 4 in making these
p. 831, ll. 23-39 agreements did not assume to speak for non-members; that the Appellant was not privy to the agreement, and had no right to enforce it; that he could not,
p. 831, ll. 39-41 and did not ratify it; that Division No. 4 did not assume to make agreements for service binding even upon its own members, much less upon members of another or of no organization. He dismissed the action upon these grounds. While holding that there was some evidence of misconduct, he did not consider that a dismissal for cause was justified.

p. 836, ll. 1-5 The learned trial judge further found that the action had been promoted, managed and financed by the One Big Union, and the Appellant was a mere figurehead in the litigation, and that all money advanced by the One Big Union to the Appellant by way of wages or for costs was to be repaid out of
pp. 211-213 any damages recovered. From the time of the termination of the Appellant's
p. 217 service until shortly before the trial, the One Big Union had paid him bi-monthly money equal to the wages he would have received if he had continued
p. 836, ll. 9-12 in his former employment, including increases allowed. This was nominally
p. 1025 a loan but it is suggested that it was really for the use of the Appellant's name and support in the action. The learned trial judge did not find it necessary to consider other defences raised.

23.—In the Court of Appeal Mr. Justice Fullerton delivered reasons for dismissing the appeal, and with these Chief Justice Prendergast and Mr.
p. 841, ll. 28-36 Justice Dennistoun concurred. They adopt the finding of the learned trial judge that the Appellant knew nothing of wage agreement No. 4 until after he had entered the Respondent's service, held that he had not assented to the
p. 844, ll. 4-7 agreement, or agreed to work under it; that these rules could not be incorporated in the contract, that even if they had been incorporated in a written
pp. 844-845 contract, it would not be enforceable for want of mutuality and that such agree-
p. 845, ll. 23-30 ments are not intended to be enforceable at law. The judgment also sets forth
p. 842, ll. 29-37 the Appellant's contention, his Counsel's admission that the agreement was not a legally binding agreement, and that it did not bind any member of Division No. 4, and his consequent argument that members and non-members had the same rights to invoke the rules.

p. 851, ll. 5-21 24.—Mr. Justice Trueman adopted the view that the agreement applied to the Appellant as part of his contract, and that he had been deprived of seniority
pp. 851-852 rights. He held that the Appellant was bound by the rules, and that as the committee under the rules, his agent, had not prosecuted his case, he had no remedy in law, at least until the steps provided by the agreement were exhausted.

pp. 856, ll. 27-30 25.—Mr. Justice Robson did not consider it necessary to examine the question whether the Appellant had rights equal to members of Division No. 4,
pp. 856-858 but assumed that he had. Further, assuming that the Appellant came under the agreements, he was bound by their terms, and by the action of his representatives thereunder. As they had not taken up his grievance, he had no legal ground for complaint. The learned judge referred to other defences,

RECORD

substantial in character, but did not discuss them. He pointed out the difficulty of finding a contract giving the Appellant seniority rights, and considered that the agreements expressed a plan for protecting the men, and for negotiation between employer and employee, and that the ultimate resort was not to the Courts, but as provided in the agreement. p. 858, ll. 2 and 3 p. 858, ll. 3-18

26.—With reference to wage agreement No. 4 and the various supplementary agreements, and particularly as to the parties thereto, the Respondent admits the contention of the Appellant, based upon Jones v. Hope, 3 T.L.R. 247, and other authorities, that Division No. 4, being a voluntary association, was in law incapable of contracting, either for its members, or for others. This, it is submitted, disposes of the argument made before the learned trial judge that the agreement was a contract made in respect of the particular work or job. p. 842, ll. 29-37

27.—With reference to the Canadian Railway War Board, subsequently known as The Railway Association of Canada, the Respondent invokes the same principle, and submits that it also was unable to contract for the Respondent. No evidence or authority has been shown by which the Respondent could delegate its powers to such a body. There is this difference between the two so-called parties: Division No. 4 was composed of its members with the powers of natural persons; the Railway Association was apparently composed of corporations, incorporated by statute, but with limited powers.

28.—It is further submitted that Division No. 4 was not only a voluntary association, but that it was an illegal association. Its objects and purposes are clearly unreasonably in restraint of trade, as shown by the Constitutions of the chief organization of the Railway Employees' Department, and of the Division operating in Canada, and by the oral evidence of its Vice-President and Secretary. The organization is constituted by various crafts, such as, machinists, blacksmiths, boilermakers, electrical workers and others. The International Association of Machinists, one of these constituent crafts. is likewise, it is submitted, an illegal organization. The terms of its Constitution, including its platform, are evidence of this. Under the common law as laid down in Russell *v.* Amalgamated Society of Carpenters and Joiners, L.R. 1912 A.C. 421, and earlier cases, the Courts will not enforce contracts of an association illegal in these respects. pp. 1044-1069 pp. 1069-1077 pp. 425-427 pp. 693-4 p. 681 pp. 1026-1040

29. It is further submitted that The Trade Unions Act of Canada, Chapter 202 R.S.C. 1927, does not overcome this objection. The Statute was first enacted in Canada in 1872, Chapter 29 of 35 Victoria, and has been continued in the revisions of 1886, 1906 and 1927, without any substantial change. It followed closely the English Act of 1871. The material sections are as follows:—

"1. This Act may be cited as the Trade Unions Act."

"2. In this Act, unless the context otherwise requires, 'trade "union' means such combination, whether temporary or permanent, "for regulating the relations between workmen and masters, or for

RECORD

"imposing restrictive conditions on the conduct of any trade or "business, as would, but for this Act, have been deemed to be an "unlawful combination by reason of some one or more of its purposes "being in restraint of trade."

"3. This Act shall not affect

"(*a*) any agreement between partners as to their own business;

"(*b*) any agreement between an employer and those employed "by him as to such employment;

"(*c*) any agreement in consideration of the sale of the good-will "of a business, or of instruction in any profession, trade or handi- "craft."

"4. Nothing in this Act shall enable any court to entertain any "legal proceeding instituted with the object of directly enforcing or "recovering damages for the breach of any agreement

"(*a*) between members of a trade union, as such, concerning the "conditions on which any members for the time being of the trade "union shall, or shall not, sell their goods, transact business, employ "or be employed;

"(*b*) for the payment by any person of any subscription or "penalty to a trade union;

"(*c*) for the application of the funds of a trade union,

"(i) to provide benefits to members, or

"(ii) to furnish contributions to any employer or work- "man, not a member of such trade union, in consideration of such "employer or workman acting in conformity with the rules or "resolutions of such trade union, or

"(iii) to discharge any fine imposed upon any person by "sentence of a court of justice;

"(*d*) made between one trade union and another;

"(e) to secure by bond the performance of any of the above- "mentioned agreements.

"2. Nothing in this section shall be deemed to constitute any of "the agreements above mentioned unlawful."

"5. No Act in force in Canada providing for the constitution "and incorporation of charitable, benovelent or provident institutions, "shall apply to trade unions; and this Act shall not apply to any trade "union not registered under this Act."

"29. The purposes of any trade union shall not, by reason "merely that they are in restraint of trade, be deemed to be unlawful, "so as to render any member of such trade union liable to criminal "prosecution for conspiracy or otherwise, or so as to render void or "voidable any agreement or trust."

Upon this statute the Respondent submits:—

RECORD

(1) The definition of "trade union" assumes that the Parliament of Canada has legislative power to enact the measure, and to legislate in respect of the relations between workmen and masters. Such power under the B. N. A. Act is not within the sphere of Dominion legislation, but in that of the Provinces. The statute is largely nugatory, and the interpretation clause difficult or impossible of application in Canada. Trade unions, if unlawful before, or apart from, the statute, are unlawful still.

(2) Section 3(*b*) prevents the Appellant relying upon the statute.

(3) Section 4 (*d*) witholds from the Court any power under the statute to enforce or recover damages for the breach of any agreement between one trade union and another. Division No. 4 and the Railway Association are both trade unions, if section 2 is to be given any meaning. The former is a combination of workmen, the latter of large employers of labor. The documents executed on their behalf regulate the relations between them and if valid impose restrictive conditions on the Railway companies.

(4) Section 5 expressly enacts that the statute shall not apply to any trade union not registered under the Act. The American Federation of Labor Railway Employees' Department, and Division No. 4, were not registered.

(5) Section 29 in so far as it relates to an agreement or trust is *ultra vires* of the Parliament of Canada.

The Respondent thus submits that the statute has no application to the present case, but that if it should be so interpreted as to apply, it is *ultra vires*.

The law applicable to this subject of such unions and agreements is the law of England as of 15th of July, 1870, when Manitoba was admitted into and became part of Canada.

30.—The Respondent, subject to the above submissions, adopts the reasoning of the learned trial judge, leading to the conclusion that there was no privity between the Appellant and the Respondent in so far as the agreements are concerned.

31.—Generally, with respect to these agreements, it is submitted that there was no intention on the part of any concerned that they should be enforced, at least through the Courts. Such intent is a necessary ingredient of a contract. The oral evidence of officials of the Canadian Pacific Railway Company, as well as of the Respondent, familiar with the history and the making of such agreements, supports this view, as does also an examination of the documents themselves. They are not in the form or language of contracts. A committee of Division No. 4, in conjunction with the officials of the Railway, is to apply and interpret the agreements. Grievances are to be handled in the same manner, and domestic tribunals for the hearing of complaints and the awarding decisions, are provided, with jurisdiction not possessed by the ordinary Courts. Mr. Justice Fullerton took this view, and Mr. Justice Robson developed it further.

pp. 48-49
pp. 324-325
pp. 449 and 462
p. 953, ll. 9-15
pp. 925-929

p. 917, ll. 20 and 21
p. 930, l. 27
p. 953, ll. 3-16

32.—Upon the interpretation of the agreements, the use of such phrases as, "all employees coming under the provisions of this schedule," "any employee subject to the agreement," "employees covered by this agreement," the provisions for the prosecution of grievances by Division No. 4, and for revision by notice by Division No. 4, all indicate that they were intended to apply, even as working rules, only to members of that organization, and not to all employees.

p. 141, ll. 2-5

33.—Division No. 4 does not, under the agreement, assume to promise or agree to supply employees for any period or at all, it does not promise or agree to perform any work either directly or through its members. The rules are in the nature of concessions granted by the Railway Association, and no doubt upon representations made by Division No. 4 in the interests of its members. There is thus no mutuality and no consideration, even if the other elements of a contract were present.

p. 170, ll. 6-8
p. 292, ll. 1-2
p. 299, ll. 5-6
pp. 664-5
p. 963, ll. 15-17

34.—The hiring of the Appellant was verbal, and without any reference to the wage agreement, or to any period of time. He had the right to leave at any time without notice to his employer, was paid by the hour and bi-monthly, and was at times laid off on account of lack of work. The Railway Act of Canada requires that the wages of the employees of the Respondent shall be paid at least semi-monthly: Cap. 170 R.S.C. 1927, Sec. 289. Under such circumstances, it is submitted that notice for a period of days or weeks was not required by law to terminate the relationship, and that in any case the notice of four days was amply sufficient. Rule 27 may be considered in this connection as evidence of what the Railway Association and the members of Division No. 4 regarded as reasonable.

p. 170, ll. 6-8
p. 299, ll. 5-6
pp. 664-5

35.—There is, it is submitted, no written agreement, memorandum or note thereof within the meaning of the 4th section of the Statute of Frauds, and upon the Appellant's claim, the Respondent employed him, not for a year only, but, subject to termination under the wage agreement, for life.

36.—The Manitoba Legislature has also dealt with the subject. The Masters and Servants Act, cap. 124 R.S.M. 1913, contains the following section:

> "2. Every contract of hire for personal service for a period "longer than a year shall be in writing and signed by the party to be "charged therewith, and no voluntary contract of service or indenture "entered into by any parties shall be binding on them or either of "them for a longer term than nine years from the date of such con- "tract."

This, in addition to requiring a written and signed agreement when the period is longer than a year, destroys the binding effect of a written agreement for a longer term than nine years.

37.—The Appellant, it is submitted, was not a party to any of these agreements, but a stranger thereto. They were made not for him nor for his benefit,

177

and in law he could not, and in fact did not, ratify them. Not only so, but he

RECORD

and the labor organization to which he belonged repudiated them, and the authority of Division No. 4 to represent him and his fellow members in the negotiations resulting in the agreements. pp. 587, 590, pp. 591-596 p. 599, ll. 22-26 pp. 975-977 p. 979

38.—It is further submitted that to imply the terms of these various wage agreements in the contract of hiring is unwarranted. During the Appellant's period of service changes, some of considerable importance, were made on five occasions, and upon none of these was he consulted. None of the agreements or supplements was posted up in the shops, distributed among the employees, furnished to the Appellant, or brought to his notice by the Respondent. They were all subject to termination or revision on thirty days' notice from either of the parties thereto. pp. 954, 956, 983, 991, 996 p. 20, ll. 11-28 p. 80, ll. 5-17 p. 953, ll. 4-8 p. 956, ll. 4-5 p. 974, ll. 32-36

Further to imply these agreements is unnecessary. The rights of the parties can and should be decided upon the express verbal contract and the law applicable thereto.

An agreement for hiring upon terms to be agreed upon between the parties themselves or between strangers is not a contract. For the Appellant to work under the rules, or for the Respondent to apply them to him does not justify the presumption that they were part of his contract. The clear evidence is that such was done, not on account of any contract or obligation, but as a matter of policy and of convenience. The Respondent adopts the judgment of Mr. Justice Fullerton upon this subject, and, with respect, submits that the conclusion of Mr. Justice Trueman, based as it is upon the arguments of convenience, is erroneous. pp. 33-35 p. 38 pp. 79-81 pp. 103-4 p. 317 p. 450, ll. 1-9

39.—Assuming now that the agreement is part of the contract, either expressly or by implication, the Appellant is bound by its provisions in respect of its application, its interpretation, the prosecution of complaints, and the disposition of them. Representatives of Division No. 4 under the agreement decided that the seniority rule did not apply to him, and they interpreted the agreement in that manner. Mr. Justice Dysart, in a carefully considered judgment, after a lengthy trial and argument by Counsel, reached substantially the same conclusion, namely, that he was a stranger to the agreement, and could not enforce it. The good faith of such committee was not attacked. The committee charged under the agreement with investigating and prosecuting grievances from one tribunal to another, declined to take up his case. If the agreement governs, such committee represents him, and he is bound by its decision. A further appeal to the parties to the agreement is provided for, and that has not been had. There has been no breach of the agreement by the Respondent. The Respondent submits that the reasoning and conclusions of Mr. Justice Trueman and of Mr. Justice Robson upon this phase of the case are sound, and also relies upon Caven v. Canadian Pacific Railway Co., 95 L.J., P.C., 23. p. 831, ll. 22-26 p. 157 pp. 925-926 pp. 851, 852 pp. 856-857

40.—The Respondent in its defence pleaded misconduct justifying dismissal for cause. The learned trial judge did not regard the charges as serious

RECORD

or sufficient to warrant such a dismissal, but it is submitted with respect, that in this he erred. The misconduct was as follows:

pp. 130-133
p. 540

(1) The Appellant's services were unsatisfactory. He neglected his duties, and was a malingerer.

pp. 538-541

(2) The Appellant's treatment of the apprentice under him was improper.

p. 311, ll. 4-10
pp. 314, ll. 6-8
p. 508

(3) The Respondent proposed to adopt, and did adopt, in its Fort Rouge and Transcona shops the Joint Co-operative Plan. This was popularly known as the "B. & O." plan, as The Baltimore & Ohio Railroad Company

p. 1077

was the first in America to adopt it. Under this, officers of the Company met and consulted with representatives of the shop employees, elected from and by themselves, for the advancement of the industry, the welfare of the em-

pp. 528-533
pp. 546-548
pp. 543-544
pp. 657-658
pp. 674-676

ployees, and the improvement of the public service. The Appellant personally opposed the adoption and operation of this plan, and did so not alone during his own time, and at other places, but while at work and in the Company's shops.

pp. 547-549
pp. 553-554
pp. 600-603
pp. 170-173

(4) The One Big Union also actively and violently opposed this plan. The Appellant, during nearly all the period of his employment, was a member of such Union and was an officer thereof for two years. He was also a member of the Winnipeg Central Labor Council, a body of thirteen, the executive of

pp. 178-179

such Union, and the publisher of its weekly organ, The One Big Union Bulletin. That Union opposed the plan in the following ways:

pp. 547-549
pp. 553-554

(*a*) It conducted meetings of the employees at the entrance to the Respondent's shops, and there condemned the plan. These meetings the Appellant attended.

pp. 178-179
pp. 604-613

(*b*) It printed, published and sold the One Big Union Bulletin, containing editorials and articles condemning in strong and abusive language such plan, and also the President and other officers of the Respondent for putting it in operation in the shops of the Company. This was persistent, and continued

pp. 1082-1092
pp. 1110-1111

for a period of two and a half years. Extracts from four of the seventeen issues of this newspaper filed at the trial appear in the Record, and the Appellant admits that the editorials and articles not printed are of the same tenor, and similar in nature and effect to those printed. For the Appellant to be and continue a member of such executive body, responsible for the publication of such editorials and articles is, it is submitted, incompatible and inconsistent with his position and duties as an employee of the Respondent and the due and faithful discharge thereof, and he should cease to occupy one or other of such positions.

pp. 613-619
pp. 1092-1103

(*c*) The One Big Union also printed, published and distributed about the shops of the Respondent several leaflets attacking the Co-operative Plan in the same manner.

p. 1089

Such opposition by the One Big Union continued down to the trial.

Mr. Justice Dysart thought these offences must have been condoned. In reply, the Respondent submits that condonation was not pleaded, that there is no evidence that the Respondent knew of any of the offences, except

RECORD

the unsatisfactory work and some neglect of duty, that condonation implies knowledge, that the Respondent did not know of the Appellant's ill-treatment of the apprentice or that the Appellant was a member of the One Big Union, or of its executive, and that retention in service is not condonation. It is submitted with respect that the learned trial judge in stating that the Superintendent assigned membership in the One Big Union as a reason for suggesting the Appellant's name as one to be laid off, has made a mistake, and that he overlooked the evidence, which proves not only that no such reason was assigned, but that the Respondent did not know to what, if any, union the Appellant belonged.

p. 113, ll. 8-18
pp. 301-302

Further, new and later offences cancel the condonation of earlier ones, and revive with the consequences flowing therefrom the original and earlier ones.

41.—The action, as found by the learned trial judge, was promoted, managed and financed, by the One Big Union; the Appellant was a mere figure-head, and the One Big Union also maintained the Appellant. It is submitted that maintenance and champerty are unlawful acts, and that, with respect, when such facts and circumstances were brought to the attention of the Courts, the action, and the appeal from the judgment on the trial, should have been stayed or dismissed.

p. 836, ll. 1-5
pp. 212-219
pp. 221-228
pp. 566-580
pp. 1023-1025

The Respondent raised this as a reason why the Court of Appeal should refuse the Appellant leave to appeal to His Majesty in Council, but that Court declined to give effect thereto. In this it was applying its own earlier decision of December, 1928, in Davey v. Tallin, 1929, 1 Western Weekly Reports, 171, holding that maintenance of an action and champerty in respect thereof were not a defence to such action.

p. 862, ll. 10-12

The only Manitoba statute bearing upon the subject is The Law Society Act, cap. 111, R.S.M. 1913. Section 73 thereof provides that an agreement may be made between a member of the Society and his client as to the former's remuneration, including a provision for him sharing in the proceeds of litigation. Such a contract is subject to review by an officer of the Court and to cancellation if found unfair or unreasonable with a right of appeal to the Court of King's Bench, and in some cases to the Court of Appeal. This is an existing legislative recognition that champerty is illegal, and the common law is modified to a limited extent in such cases.

42.—With reference to the Appellant's prayer for reinstatement, it is submitted that the Court does not interfere between master and servant in such manner, and that it does not attempt to enforce contracts of employment by a decree of specific performance. The provision for reinstatement found in the wage agreements is applicable, at most, to members of Division No. 4, and such reinstatement is not by the Court but by the domestic forum consisting of officials of the Railway Company, or of allied organizations. The Appellant, it is submitted, is not entitled to any such remedy in the Court.

p. XV, ll. 30-31

43.—As pointed out by Mr. Justice Fullerton, Canadian law, by The Industrial Disputes Investigation Act, cap. 112 R.S.C. 1927, provides a remedy for a dispute between an employer and employee. In fact, in 1922, the labor

p. 845, l. 26
p. 586, l. 7, to p. 599, l. 33
Exs. 44, 45, 46

RECORD

p. 975, l. 23, to p. 983, l. 32

organization with which the Appellant was associated invoked such statute upon another subject.

44. The Respondent humbly submits that the judgment dismissing the action, affirmed, as it was, by the unanimous judgment of the Court of Appeal, should be again affirmed for the following, among other,

REASONS

1. Because the Appellant is not a party or privy to any of the said agreements or supplements thereto, and cannot enforce the same.

2. Because the said agreements and supplements thereto were not made for the Appellant, and they cannot be and were not ratified by him.

3. Because the parties to the said agreements and supplements are voluntary associations, and one of the said associations is unlawful in its objects and purposes, and the said agreements and supplements are not enforceable at law.

4. Because the said agreements and supplements are without consideration, and are lacking in mutuality.

5. Because the said agreements and supplements were not intended to be enforceable at law.

6. Because the said agreements and supplements did not, either by expressed terms or by implication, form part of the contract of hiring of the Appellant by the Respondent.

7. Because, if the said agreements or supplements, or any of them, did form part of the said contract of hiring, the remedy of the Appellant, if any, is under and pursuant thereto, and not through the Courts.

8. Because if the said agreements or supplements or any of them did form part of the said contract of hiring, the representatives of the Appellant did not make or prosecute any claim thereunder.

9. Because if the said agreements or supplements or any of them did form part of the said contract of hiring, the Respondent has not been guilty of any breach thereof, and the remedy, if any, of the Appellant is not against the Respondent.

10. Because neither the Statute of Frauds nor The Masters and Servants Act of Manitoba has been complied with.

11. Because the Appellant received reasonable and sufficient notice terminating his contract.

12. Because the Appellant was guilty of misconduct justifying his dismissal for cause and without notice.

13. Because the Appellant has been guilty of maintenance, and this action has been promoted and conducted, not by the Appellant, but by the One Big Union.

10 14. Because the Appellant has not suffered any damage.

15. Because the judgments of the Court of King's Bench and of the Court of Appeal are right, and ought to be affirmed.

Respectfully submitted.

D. H. LAIRD
E. F. HAFFNER
G. M. HAIR

Winnipeg, Canada,
June, 1930.

No. 60 of 1930.

In the Privy Council

On Appeal from the Court of Appeal for Manitoba

BETWEEN

WILLIAM YOUNG - *(Plaintiff) Appellant*

AND

THE CANADIAN NORTHERN RAILWAY COMPANY
(Defendant) Respondent.

CASE FOR THE RESPONDENT
THE CANADIAN NORTHERN RAILWAY COMPANY

FRESHFIELDS, LEESE & MUNNS,
New Bank Buildings,
31, Old Jewry,
London, E.C. 2.