3239

197-291

Record No. 4367

In the
Supreme Court of Appeals of Virginia
at Richmond

TOM HENRY LEE

v.

VIRGINIAN RAILWAY COMPANY

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS.

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

H. G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

197VA291

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held

MAR 1955

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

H. G. Turner, Clerk.

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of the record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of said fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 4367

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 12th day of October, 1954.

TOM HENRY LEE, Plaintiff in Error,

against

VIRGINIAN RAILWAY COMPANY, Defendant in Error.

From the Circuit Court of the City of Norfolk.

Upon the petition of Tom Henry Lee a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Norfolk on the 21st day of July, 1954, in a certain notice of motion for judgment then therein depending wherein the said petitioner was plaintiff and Virginian Railway Company was defendant; and it appearing from the certificate of the clerk of the said court that a *supersedeas* bond in the penalty of three hundred dollars, conditioned according to law has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code of Virginia, no additional bond is required.

RECORD

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Filed Aug. 6, 1954.

T. A. W. GRAY, D. C.

ASSIGNMENTS OF ERROR.

1. The Court erred in sustaining the motion for summary judgment, based upon the special plea to the jurisdiction.
2. The Court erred in disregarding the allegations set forth in the reply to the grounds of defense that the contract of employment was a verbal one and the said contract between the defendant and the Brotherhood was only one element fixing certain rights and privileges of the plaintiff incident to the employment and with respect to being discharged.
3. The Court erred in not following the decisions which hold, and in refusing to hold that the plaintiff had a right of election whether he would proceed at common law or proceed before the National Railroad Adjustment Board under the Railway Labor Act.

TOM HENRY LEE
By T. HELM JONES,
Of counsel.

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NOTICE OF MOTION FOR JUDGMENT.

(1) TAKE NOTICE, That the undersigned plaintiff will move the Judge of the Circuit Court of the City of Norfolk, Virginia, at the Court House thereof, for a judgment and an award of execution against you for the sum of Fifteen Thousand ($15,000.00) Dollars, together with Court costs incident to this proceeding, this amount being due by you to plaintiff for the wrongs and grievances hereinafter set forth, to-wit:

(2) That the defendant, Virginian Railway Company is a corporation engaged in the business of transporting passengers and freight for hire, and operating a railroad from Norfolk, in the State of Virginia, to various points in the State of Virginia and West Virginia.

(3) That on or about the month of February, 1945, the plaintiff entered the employ of the defendant as a skilled and experienced fireman, and remained continuously in its employ as such fireman until August, 1952, when his employment was terminated as hereinafter stated. That he was employed and acted in the capacity of a locomotive fireman, and was paid by the said defendant as such, and performed and assumed the duties and responsibilities of such employment until his discharge as hereinafter set forth.

(4) And also for this to-wit; on January 1, 1938, and June 1, 1953, the Brotherhood of Locomotive Fireman and Enginemen, a labor union, acting on behalf and for the benefit of the plaintiff and others, entered into an agreement in
page 5 } writing with the said defendant fixing the terms and conditions of employment of the plaintiff and the rate of pay which the plaintiff would receive, it being expressly agreed and made a part of the agreement hereinbefore referred to that the plaintiff would not be dismissed from the employ of the defendant without just cause. In consideration of these premises of the defendant, plaintiff agreed to perform, and faithfully did perform his duties as a locomotive fireman until August, 1952, on which date the defendant, without just cause and in direct violation of its said agreement and his rights as an employee, wrongfully, maliciously and unlawfully discharged and/or suspended the plaintiff from its employment.

By reason of the premises and the wrongful and unlawful acts of the defendant, plaintiff has sustained damages, and

will therefore ask judgment against you at the place and in the amount hereinabove first written.

Witness my signature, this the 7th day of May, 1954.

TOM HENRY LEE
By T. HELM JONES
Counsel.
LESTER S. PARSONS
Counsel.

* * * * *

Filed in the Clerk's Office the 10th day of May, 1954.

Teste:

W. R. HANCKEL, Clerk.
VIRGINIA MANNING, D. C.

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Filed May 24, 1954.

T. A. W. GRAY, D. C.

GROUNDS OF DEFENSE.

The defendant, for grounds of defense, says:

1. It is not indebted to the plaintiff in any sum of money.
2. It admits the allegations contained in paragraph numbered 2 of the motion for judgment.
3. It admits that on February 28, 1945, the plaintiff was employed by The Virginian Railway Company as a yard fireman and has continued in the employ of the said Railway Company until the present time. It denies that the plaintiff was ever discharged or suspended.
4. It admits the allegations in regard to the agreements

contained in the first eight lines of paragraph numbered 4. It denies the remaining allegations of paragraph numbered 4.

5. The defendant avers that the plaintiff returned to work as a yard fireman on March 12, 1954, and at the present time is so employed. A reply to this allegation is requested.

6. The defendant avers that when the plaintiff returned to work on March 12, 1954, he asserted all rights under the labor agreements to assignments based upon continuous employment relations from February 28, 1945. A reply to this allegation is requested.

PLEA.

The said defendant says that this Court ought not to have or take any further cognizance of the action aforepage 8 } said, because the plaintiff has been, and is at the present time working as a yard fireman for the defedant. That under the Railway Labor Act (45 USCA Sec. 153 (i) the plaintiff's sole remedy, if any, is to file a petition or claim with the National Railroad Adjustment Board, and said plaintiff has not exhausted his administrative remedies, and this Court is without jurisdiction to decide this case. And this the defendant is willing to verify. Wherefore, it prays judgment if this Court will take cognizance of the said action.

THE VIRGINIAN RAILWAY COMPANY,
By LEIGH D. WILLIAMS
Attorney.

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Filed June 2, 1954.

T. A. W. GRAY, D. C.

REPLY TO GROUNDS OF DEFENSE.

1. The plaintiff has alleged the defendant is indebted to him and the defendant has denied that.

2. The defendant has admitted the allegations of paragraph 2 of the notice of motion for judgment.

3. The plaintiff says it is true that he entered the employment of the Virginian Railway Company on February 28, 1945, and continued in such employment up to on or about the middle of August, 1952, at which time it became necessary for him to discontinue work temporarily to be treated for malaria. That he returned to work and reported for duty on or about October 1, 1952, but he was told that he would not be allowed to return to work because he was suffering from high blood pressure, presumably on information furnished by the defendant's physician, Dr. Southgate Leigh, Jr., whereupon the plaintiff proceeded to have other physicians examine him to determine whether in fact he had such high blood pressure and was thereby disabled from duty, and it was determined that he was not in fact suffering from high blood pressure and was not disabled from his regular duties. Thereupon he immediately reported for duty and so advised the company officials, but they continued to refuse to permit him to do his work, and this refusal continued to exist up until March 12, 1954, although at various and sundry times between October 1, 1952, and March 12, 1954, he continued
page 10 } to request that he be allowed to resume his duties and furnished additional evidence that he was not physically disabled, from various and sundry doctors. The defendant chose up until March 12, 1954, to ignore the fact that the plaintiff was not suffering from high blood pressure or any other physical disability which would disable him from discharging his duties as a fireman. Thus the defendant wrongfully and unlawfully suspended the plaintiff from working at his job as fireman and wrongfully and unlawfully deprived him of the gains and earnings which he would and should have made in that position until, to-wit, March 12, 1954, that being the first time the defendant had recognized and acknowledged that he was capable of performing his work and permitted him to return to the same duty as fireman as that which he had previously performed, and the defendant, of its own motion, at that time returned him to his job with full seniority rights which he possessed and from which he had been previously wrongfully and unlawfully suspended.

4. In order to clarify paragraph 4, plaintiff says his contract of employment was a verbal one and that the agreement referred to between the Brotherhood and the company was merely an element to be considered in connection therewith and did not constitute the entire contract. The contract of employment was a separate and distinct agreement from the

agreement between the Brotherhood and the defendant, itself. The said agreement between the Brotherhood and the defendant insofar as this case is concerned, bears upon his rights wherein it says that he will not be suspended from the service of the company without just cause.

5. The plaintiff says it is true that he was permitted to return to his work as a yard fireman on March 12, 1954, after having been suspended from such work and having been refused the opportunity to return to work for the period of time hereinabove set forth, and it is also true that he is at the present time so employed, having been reinstated after his suspension.

page 11 } 6. The plaintiff says that when he returned to work on March 12, 1954 after having been suspended from his duties in violation of Article 30 of the agreement between the Brotherhood and the defendant, the defendant voluntarily told him that he would be reinstated with full seniority rights, and there was no question about any other agreement based upon continuous employment since February 28, 1945. Under date of March 10, 1954, Mr. G. M. Purnell, Assistant to the President of the defendant, advised the attorney for the plaintiff that they had been informed *with* Mr. Lee was physically qualified to resume service and to arrange to make him subject to whatever seniority he had. On March 11, 1954, Mr. J. P. Strickland, Superintendant of the defendant, stated that it would be satisfactory for him to resume service as fireman at Sewells Point.

MOTION TO STRIKE THAT PART OF THE DEFENDANT'S PLEADING MARKED "PLEA."

It is alleged as a fact that the plaintiff was unlawfully and wrongfully and in violation of the agreement between the Brotherhood of Locomotive Fireman and Enginemen, deprived of the right to work and was actually suspended from duty during the period of time set forth in the notice of motion for judgment, and the plaintiff has a right to elect to bring his action in this court and is not required to file a claim with the National Railroad Adjustment Board.

TOM HENRY LEE
By T. HELM JONES,
Of counsel.

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Filed June 10, 1954.

T. A. W. GRAY, D. C.

MOTION FOR SUMMARY JUDGMENT.

The defendant, The Virginian Railway Company, a corporation, moves the Court for a summary judgment in its favor pursuant to Rule 3:20 of the Rules of the Supreme Court of Appeals of Virginia.

THE VIRGINIAN RAILWAY COMPANY, a Corporation,
By LEIGH D. WILLIAMS
Attorney.

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Filed 6-14-54.

W. R. HANCKEL, Clerk.

REPLY TO MOTION FOR SUMMARY JUDGMENT.

(1) Now comes plaintiff and says the Motion for Summary Judgment is insufficient in law as it does not set out the grounds for sufficient facts as a basis for such motion.

(2) Plaintiff demands a Bill of Particulars setting forth the facts and the grounds upon which it intends to rely to sustain such motion for a summary judgment.

(3) Based on the above, plaintiff prays that the Motion for Summary Judgment be denied and dismissed.

TOM HENRY LEE
By T. HELM JONES,
Attorney
L. S. PARSONS
Attorney.

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ORDER.

This action came on this day to be heard upon the plea and on the motion for summary judgment heretofore filed and defendant's Exhibit No. 1, and was argued by counsel.

And the Court having heard the argument of counsel and having maturely considered of its judgment, doth sustain the said plea and the motion for summary judgment, and doth dismiss the said action. It is therefore ADJUDGED AND ORDERED that the plaintiff recover nothing of the said defendant, and the said defendant recover and have judgment against the said plaintiff for its costs about its defense herein expended, to which action of the Court the plaintiff duly excepted.

The plaintiff having indicated his intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the action of the Court herein, upon motion of the plaintiff for the suspension of the operation of this judgment for a period of ninety (90) days, it is hereby ORDERED that the execution of the Court's order or judgment be suspended for a period of ninety (90) days upon the plaintiff, or someone on his behalf, entering into a bond, with surety, before the Clerk of this Court within twenty-one (21) days from this in the penalty of Three Hundred Dollars ($300.00).

Enter.

C. H. J., Judge.

July 21, 1954.

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A Copy—Teste:

H. G. TURNER, Clerk.

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