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Bill of Complaint.

(Filed June 27, 1933.)

IN CHANCERY OF NEW JERSEY.

TO HIS HONOR, LUTHER A. CAMPBELL,
CHANCELLOR OF THE STATE OF NEW JERSEY.

The complainants, Anthony Unkovich, Dejo 10
Vigoc, Harvey Masten, Charles Zmirich, Frank
Marotta, Edward O'Meara, Joseph Carcich, John
Kucich, Wm. Anderson, Paul McKennie, and Peter
Korlich, all residents of the County of Hudson and
State of New Jersey, respectfully show that:

1. That the New York Central Railroad Com-
pany is a foreign corporation authorized to do busi-
ness in the State of New Jersey. One of its 20
branches of business is conducted under the Marine
Service Department which is engaged in the plying
of vessels and crafts, such as tugs, floats, lighters,
etc., in and about the vicinage known as New York
Harbor.

2. The complainants herein were engaged by the
said New York Central Railroad Company and en-
tered in its employ in the Marine Service Depart-
ment on the respective dates herein set forth: 30

<i>Name</i>	<i>Month-Day-Year</i>	<i>Transfer Dates</i>
Anthony Unkovich	3—15—1902	6—10—1918
Dejo Vigoc	9— 9—1913	10—26—1922
Harvey Masten	7—23—1920	8—23—1926
Charles Zmirich	8—26—1920	6— 2—1925
Frank Marotta	6— 7—1920	8—19—1925
Edward O'Meara	6—21—1920	9—29—1923
Joseph Carcich	10—27—1921	11—17—1926

Bill of Complaint.

John Kucich	9— 9—1921	8— 5—1925
Wm. Anderson	10—31—1922	11—29—1926
Paul McKennie	1— 3—1926	5—13—1927
Peter Korlich	6— 2—1923	6—18—1925

10 3. At the respective entry dates of service of these complainants, they were placed in what is known as the tugs and floats division of the Marine Service Department and served in the requisite capacities until such time as they were transferred by the company into what is known as the Lighterage Division and each made lighter captains. The date of such transfer for convenience is listed opposite the entry service dates in Paragraph marked "2" in this Bill of Complaint.

20 4. From time immemorial, in all fields of human endeavor, through custom and usage, seniority in service age, determined the priority of employment and benefits, all things else being equal, amongst the several co-employees; and this seniority in particular has been universally recognized by railroad companies and particularly by this New York Central Railroad Company. Furthermore, after a series of negotiations between the representatives of this New York Central Railroad Company and
30 a group known as the Marine Workers' Affiliation, an agreement was accepted by both parties on or about March 7th, 1919, as to rates of pay, etc., and as to seniority which was as follows:

"In filling a vacancy, qualifications being equal, seniority will prevail."

This agreement besides lending affirmation to the invariable custom of seniority age recognized be-

Bill of Complaint.

tween this New York Central Railroad Company and its employees, giving said employees a vested right to same as such, conferred a contractual right in said employees, to vested interests in seniority privileges.

5. During the time of employment of several of these complainants, there was organized an unincorporated association of more than seven people, and which still is such, known as the "Lighter Captains Union of the Port of New York and Vicinity", and designated as Local 996, International Longshoremens' Association. 10

6. After the formation of this Union, all of these complainants joined as members thereof at different times, and have been and still are members thereof in good standing. 20

7. The said Union adopted a set of by-laws regulating its internal affairs, and provided therein to be guided by accepted rules of parliamentary procedure as laid down in the standard "Cushing's Manual", as to all questions and rules for governance not expressly provided for by their by-laws.

8. During the several years that these complainants were members of this Union, their vested property rights of seniority were never questioned by the Union or the Railroad, but were in fact recognized by the Union or the Railroad, but were in fact recognized by a certain dispute which arose in the year of April, 1931, when some of these complainants were laid off for a few days from employment and their seniority rights attempted to be encroached upon, but after consideration, were rein- 30
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Bill of Complaint.

stated by the Railroad in their employment and to their seniority rights.

10 9. These complainants were steadily and continually employed by the New York Central Railroad Company from the entry of their service until during the month of January, 1933, when they were laid off.

20 10. Such action by the New York Central Railroad Company these complainants strenuously questioned, and objected to their layings off on the ground that they were being discriminated against in favor of other employees contrary to their seniority ratings of priority of employment. Whereupon, they were informed that their Union on behalf of its business agent, one, Howard Forbes, determined their service ages to date from the date of their entry into the lighter division to which they were transferred as above recited from the tugs and floats division and that they were not to be credited with their prior service in the other division; and that they were acting according to the dictates of this Union.

30 11. Whereupon, these complainants further investigated and found that the said Howard Forbes had circulated a petition, not at a regular meeting, amongst the members as to whether or not these complainants should carry their seniority from the date of entry of service with the Railroad, and that a majority of the members had apparently voted against the seniority rights of these complainants. Whereupon, the said Howard Forbes submitted said petition to the Railroad Company and these
40 complainants were accordingly laid off.

Bill of Complaint.

12. These complainants contend that such action by the Union was illegal, arbitrary and abortive, and contrary to the by-laws and rules of parliamentary procedure; and could in no event, even if such action were legal, be binding and effective as against the vested property rights of these complainants. These complainants also contend that the New York Central Railroad Company acted wrongfully in laying off these complainants by recognizing the wrongful action of the Union or for whatever other reason they so acted. 10

13. As a result of such action these complainants have been and will in the future be greatly damaged, and their vested property rights destroyed.

14. These complainants have made repeated requests of the Lighter Captains' Union for a hearing and determination of their rights either in the nature of an appeal or otherwise, but the said Lighter Captains' Union have failed and refused to grant them such hearing. 20

These complainants are without remedy in the Courts of law, and, therefore, pray:

1. That the New York Central Railroad Company and the Lighter Captains' Union of the Port of New York and vicinity, Local 996, International Longshoremens' Association, through their officers and members, who are the defendants to this suit, be compelled to answer this Bill of Complaint and each statement therein made. 30

2. That the said petition circulated and signed by the members of the Lighter Captains' Union or 40

Bill of Complaint.

any other petition of resolution adopted by the said Lighter Captains' Union which deprived these complainants from their seniority rights of employment based on the original date of service entry in the employment of the New York Central Railroad Company, be rescinded and held of no effect; and
10 that the said Lighter Captains' Union or any of its officers or members acting in an official capacity for the said Union, be restrained in the future from in any manner or form interfering, encroaching or impairing the seniority rights of these complainants of employment with the New York Central Railroad Company in the Lighterage division based on the dates of entry of service with the said Railroad Company.

20 3. That the said New York Central Railroad Company be enjoined from recognizing any petition, resolution or other instrument from the Lighter Captains' Union, Local 996, that affects the seniority rights of these complainants other than that based on their service age dating from the day of entry of employment with the said New York Central Railroad Company.

30 4. That the said New York Central Railroad Company recognize the seniority rights of employment of these complainants according to its custom which bases such right on service age.

5. That the Lighter Captains' Union, Local 996, be compelled to account and pay to these complainants any and all money losses that they sustained by reason of the wrongful action of these defendants in depriving them of their employment.

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Bill of Complaint.

6. That these complainants have such other and further relief as to the court may seem just and meet in the premises.

7. That a writ of subpoena may issue commanding said defendants to answer this Bill of Complaint and abide by such decree as this court may make in the premises. 10

PESIN & PESIN,
Solicitors for and of Counsel
with Complainants.

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**Answer of Defendant, New York
Central Railroad Company.**

(Filed July 19, 1933)

IN CHANCERY OF NEW JERSEY.

97/244

10	Between <div style="text-align: center; margin: 10px 0;"> ANTHONY UNKOVICH, <i>et al.</i>, Complainants, and NEW YORK CENTRAL RAILROAD COMPANY, <i>et al.</i>, Defendants. </div>	}	On Bill, &c.
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Defendant, New York Central Railroad Company, a corporation of the State of New York, authorized to do business in the State of New Jersey, in answer to the bill of complaint herein says:

1. It admits the allegations of Paragraph 1.
2. It admits the allegations of Paragraph 2.
- 30 3. It admits the allegations of Paragraph 3.

4. As to the allegations of Paragraph 4, it denies that there was any custom or usage of seniority in service age in determining the priority of employment and benefits, all things else being equal, among the employees of the Marine Service Department of defendant prior to the year 1931. That during the year 1931 a proposal was made to defendant by representatives of its employees engaged

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*Answer of Defendant, New York Central
Railroad Company.*

as lighter captains to establish seniority rights among the employees engaged in that service; that there was a difference of opinion among such employees as to whether their seniority ratings should be computed from the original date of employment in the marine service division, or from the date of entry into service as lighter captains; that defendant agreed to establish seniority rights and resolve the question of the time from which such rights should be computed in accordance with the wish of the majority of its employees engaged as such lighter captains; that a substantial majority of the said lighter captains manifested a desire that said priority should date only from the beginning of their service as such lighter captains and filed with defendant a petition to that effect; that thereupon defendant established seniority rights among the employees engaged as lighter captains and computed the seniority of the various employees so engaged from the date of commencement of service as such lighter captains. Defendant further pleading to the allegations of Paragraph 4 admits that on October 14, 1919, an agreement relative to rates of pay, &c. was adopted by the Railroad Port and Terminal Workers and the Harbor Boatmen's Union which provided that "in filling a vacancy qualifications being equal, seniority will prevail"; but says that the beforequoted clause has no application to the matters set forth in the bill of complaint, conferred no contractual right on the various employees in connection with the matters set forth in the bill of complaint and did not recognize any seniority rights of such employees in regard to the matters set forth in the bill of complaint. Further pleading to the allegations of Paragraph 4, this

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*Answer of Defendant, New York Central
Railroad Company.*

defendant denies that complainants or any of its employees ever had or now have a vested property right in any seniority rights or benefits.

5. It admits the allegations of Paragraph 5.

10 6. It neither admits nor denies the allegations of Paragraph 6, not having knowledge or information thereof sufficient to form a belief.

7. It neither admits nor denies the allegations of Paragraph 7, not having knowledge or information thereof sufficient to form a belief.

20 8. As to the allegations of Paragraph 8, defendant denies that complainants had vested property rights of seniority or that such alleged vested rights of seniority were ever recognized by it.

9. It admits the allegations of Paragraph 9, except that it denies that said service was continuous in the case of all complainants.

30 10. It admits that complainants objected to being laid off. It neither admits nor denies the other allegations of Paragraph 10, not having knowledge or information thereof sufficient to form a belief.

40 11. It neither admits nor denies the allegations of Paragraph 11, not having knowledge or information thereof sufficient to form a belief, except that it says that the duly accredited representatives of the Lighter Captains' Union Local No. 996 advised this defendant that a majority of the members of said Local desired that their seniority rights as employees of the defendant be computed from the date

*Answer of Defendant, New York Central
Railroad Company.*

of entry into service as lighter captains and that this defendant was obliged to recognize and did recognize said Lighter Captains' Union Local No. 996 as representing all of its lighter captains.

12. It denies the allegations of Paragraph 12.

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13. It denies the allegations of Paragraph 13.

14. It neither admits nor denies the allegations of Paragraph 14, not having knowledge or information thereof sufficient to form a belief.

WHEREFORE this defendant prays that said bill of complaint be dismissed as to it.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for Defendant,
New York Central Railroad Company.

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Answer.

(Filed Nov. 20, 1933)

IN CHANCERY OF NEW JERSEY.

10	<p>Between</p> <p style="text-align: center;">ANTHONY UNKOVICH, <i>et als.</i>, Complainants,</p> <p style="text-align: center;">and</p> <p style="text-align: center;">NEW YORK CENTRAL RAILROAD COMPANY, <i>et als.</i>, Defendants.</p>	}	On Bill, &c.
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20 The answer of the defendant, LIGHTER CAPTAINS' UNION OF THE PORT OF NEW YORK AND VICINITY, LOCAL No. 996, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, with its principal office located at No. 164 Eleventh Avenue, New York City, N. Y.

This defendant answering the bill of complaint, says:

1. It has no knowledge or information, sufficient to form a belief as to the allegations of Paragraph 1.
- 30 2. It has no knowledge or information, sufficient to form a belief as to the allegations of Paragraph 2.
3. It has no knowledge or information, sufficient to form a belief as to the allegations of Paragraph 3.
4. It denies the allegations of Paragraph 4 of the bill of complaint.

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Answer.

5. It denies the allegations of Paragraph 5 of the bill of complaint, except as hereinafter admitted.

The defendant is a voluntary unincorporated association, consisting of more than seven members, and owes its existence to and operates under a Charter or License, issued on July 29th, 1918, under the authority of the laws and usages of the International Long Shoremen's Association.

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6. It denies the allegations of Paragraph 6 of the bill of complaint, except that it admits that "Complainants joined as members thereof at different times."

7. It denies the allegations of Paragraph 7 of the bill of complaint, except as hereinafter stated.

The defendant further answering says that Section 4 of its RULES OF ORDER, provides—

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"Section 4. All questions of a parliamentary nature not provided for in these rules shall be decided by Cushing's Manual."

8. It denies the allegations of Paragraph 8 of the bill of complaint.

9. It has no knowledge or information, sufficient to form a belief as to the allegations of Paragraph 9.

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10. It denies the allegations of Paragraph 10 of the bill of complaint.

11. It denies the allegations of Paragraph 11 of the bill of complaint.

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Answer.

12. It denies the allegations of Paragraph 12 of the bill of complaint.

13. It denies the allegations of Paragraph 13 of the bill of complaint.

10 14. It denies the allegations of Paragraph 14 of the bill of complaint.

FIRST SEPARATE DEFENSE.

20 1. The defendant is a voluntary, unincorporated association, consisting of more than seven members, and owes its existence to and operates under a Charter or License, issued on July 29th, 1918, under the authority of the laws and usages of the International Long Shoremen's Association.

2. The said defendant and its members as well as all other subordinate local unions throughout the United States Chartered by the International Long Shoremen's Association are governed by a Written Constitution as amended at the last Convention held at New York, New York July 13-18, 1931.

30 3. Under and in accordance with said Constitution it became the duty of the complainants herein, before resorting to a Court for redress of the alleged grievances, to exhaust the remedies available to them within the organization.

4. Complainants have the following remedies within the organization, to redress their alleged grievances, viz:

Answer.

(a) They could have appealed or brought the matter to the attention of the New York District Council, and from thence

(b) To the International Executive Council consisting of a President, fourteen Vice Presidents and Secretary-treasurer; all final executive powers of the association when not in session, shall be vested in the Executive Council or the majority thereof,— and the judicial powers when not in session are vested in the President and the Executive Council, or the majority thereof; and from thence 10

(c) To the next International Convention following the decision of the Executive Council.

4. Complainants have not exhausted the foregoing remedies available to them within the organization. 20

SAUL NEMSER,
Solicitor of Defendants.

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Replication.

(Filed Nov. 22, 1933)

IN CHANCERY OF NEW JERSEY.

10	Between ANTHONY UNKOVICH, <i>et als.</i> , Complainants, and NEW YORK CENTRAL RAILROAD COM- PANY and LIGHTER CAPTAINS' UNION OF THE PORT OF NEW YORK AND VICINITY, LOCAL 996, INTER- NATIONAL LONGSHOREMEN'S ASSO- CIATION, Defendants.	}	On Bill, &c.
20			

Complainants join issue on the Answer of the defendants herein.

PESIN AND PESIN,
Solicitors of Complainants.

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Opinion.

(Filed March 15, 1934)

(Not to be printed in any report)

IN CHANCERY OF NEW JERSEY.

Between

ANTHONY UNKOVICH, *et al.*,
Complainants,

and

NEW YORK CENTRAL RAILROAD COM-
PANY and LIGHTER CAPTAINS'
UNION OF THE PORT OF NEW YORK
AND VICINITY, LOCAL 996, INTER-
NATIONAL LONGSHOREMEN'S ASSO-
CIATION,

Defendants.

On Bill, &c.

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Messrs. PESIN AND PESIN, for the Complainant.

Messrs. WALL, HAIGHT, CAREY & HARTPENCE,
for the Defendant, New York Central
Railroad Company.Mr. SAUL NEMSER, for the Defendant, Local
996.

30

MEMORANDUM.

EGAN, V. C.

The complainants, eleven in number, are em-
ployed in the Marine Department of the defendant,
the New York Central Railroad Company. That

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Opinion.

department of the railroad service appears to consist of two several crafts—(1) the tug, or float craft; and (2) the lighter, or barge, craft. These complainants at various times, in the year 1915, in the years 1920, 1921, 1922 and 1926, entered the Railroad Company's Marine Service in the tug, or float, craft. Subsequently, in, or about, the year 10 1926, they were transferred from the tug, or float, craft to the lighter, or barge, craft. They remained in this latter service until sometime in April, 1931, when nine of them were withdrawn, or suspended therefrom. They, thereupon, complained about their suspension to Howard C. Forbes, a delegate, or representative, of the defendant, the Lighter Captains' Local 996 of the International Longshoremen's Association, of which Union they were mem- 20 bers; and Forbes, without direction from the said Union, as he stated, and independently of it, conferred with Leroy Relyea, an official, or representative, of the Railroad Company, about the question of the complainants' suspension from service. The day following this conference, the suspended complainants were reinstated, or returned, to active service—they had been absent therefrom four days.

They then continued in service until January 13, 1933, when they were again suspended or "laid-off". 30 At the same time, other employees, longer in the lighter craft service, but with less years in service in the Marine Department, were not disturbed and were kept on the active list in the lighter, or barge, craft. Complainants insist they should have been retained and preferred over the others who, though they concede them to be their seniors in the lighter, or barge, craft, are their juniors in years of entire service in the Marine Department. They maintain 40 that their total years of combined tow and lighter

Opinion.

craft service endowed them with these "senior rights". This conclusion the defendants ignored and complainants now urge they should be compelled to respect it because of (1) custom; (2) the "Stone Award"; and (3) agreement. These conclusions, the defendants say, are without warrant of fact or of law. They say that the tow, or float, craft never carried seniority rights; and that rights of seniority did not attach to complainants until after they became associated with the lighter, or barge, craft—only then and there. 10

Senior comprehends "one older in office, or whose entrance upon an office was anterior to that of another." *State v. Hueston*, 44 Ohio St. 6, 4 N. E. 471.

Where in this case does an instance of (1) custom appear to have been successfully invoked to support seniority rights of complainants, or any other employees of the Railroad Company? It is not in the testimony. The record does not disclose that such custom existed while any of the complainants were in the tow craft. Complainants produced witnesses Relyea and Forbes who testified a tow boat captain could at any time, at will, dismiss an employee from service in the tow craft. Masten (a complainant) testified (page 57 of testimony): Q. "And you had been in service in the tug division since 1920, and I suppose that there were men in the towing division who came into service after you did. That's between 1920 and 1926, is that right?" A. "I suppose there was." Q. "And those men continued to work on their tugs when your tug was laid up, is that right?" A. "Yes." Q. "Did you seek to displace any of those junior men?" A. "There was no such thing as bumping men. The captains could hire their own men at that time." 20 30 40

Opinion.

Mr. Pesin. "What?"

The Witness. "The captains could hire their own deckhands at that time."

The Court. "When was that?"

The Witness. "In 1926."

Mr. Pesin. "That was on the tugs and floats?"

10

The Witness. "Yes."

Mr. Pesin. "That's all."

20

Certainly testimony of this character by complainants' witnesses does not tend to support the contention of complainants—the effect is quite the reverse. A custom or usage, before its benefits can be invoked, must be proved to exist; it "must be established, known, certain, uniform, reasonable and not contrary to law." *Steward and Matter v. Scudder*, 24 N. J. L. 96; *Barton v. McKelway*, 22 N. J. L. 165; *Greenleaf*, Vol. 2, par. 251. The testimony shows no custom or usage whatever.

30

The fact that when nine of these complainants were withdrawn, or suspended, from service in April, 1931, and after a conference between Relyea, an official of the Railroad Company, and Forbes, a representative of the defendant Union (who denied he conferred in his capacity of Union delegate), were reinstated, carries no probative force of the existence or the recognition of seniority rights. I cannot find as a fact the Railroad Company, in substance or otherwise, declared "you have rights of seniority which we recognize, and because of these rights, we reinstate you." The evidence permits no such inference; it does not disclose the reason for the dismissal, nor does it state why the men returned to service; it simply shows that the Railroad Company restored them to ac-

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Opinion.

tive employment. Why it did so, is not apparent to me and, therefore, I can draw no conclusion.

Relyea, the Railroad official with whom Forbes, the complainant's representative, conferred, and Forbes, both testified, on behalf of complainants, as to the incident of the dismissal and reinstatement neither of them stated that the men were returned to work because of the recognition of seniority rights by either the Union or the Railroad Company. In fact, Forbes, testifying for complainants, said they had no seniority rights "for tow boat men" under the (2) "Stone Award" (p. 4 of testimony). The contention of the complainants that the April, 1931, dismissal, followed by reinstatement, was an acknowledgement of seniority rights, and the observance of a custom to hold employees who were senior in point of service, is without weight; the sole act of reinstatement in itself does not establish usage or custom. Our courts say that "usage cannot be proved by isolated instances, but must be so certain, uniform and notorious that it must be presumed to have been understood by the parties as entering into and constituting a part of the contract." *Steward and Matter v. Scudder*, supra.

Complainants say that (2) the "Stone Award" favored and created seniority rights for complainants. This frequently discussed "Stone Award", carries the date of March 7, 1919; it regulated the pay and working conditions of employees in the Marine Service of Railroads under the jurisdiction of the United States, or Federal, Railroad Administration, in New York Harbor; the Chairman of the Railroad Administration was A. J. Stone. It, among other things, provided: "This schedule becomes effective as of March 1st, 1919, and provided

Opinion.

Federal control continues, will remain in full force for one year and thereafter until thirty days notice is given by either party of a desire to change. No change will be made until approved by the proper officer, and the duly authorized committee representing the employees shall have been heard.

10 "In filling a vacancy, qualifications being equal, seniority will prevail."

Under its terms it was to exist for a period of one year, or until March 1, 1920—provided Federal control continued. The Federal government has long since relinquished its control and returned the Railroads to private ownership. The "Stone Award" presents a rule for filling vacancies. I have no warrant or power to read into it, or into the contract of employment of these complainants with the Railroad Company, any terms or conditions not calculated or comprehended by the parties, which does not properly belong there. I may interpret, but I cannot add. There is no evidence in the case which shows that the "Stone Award" rule continued longer than the announced period of its existence of one year, or that it has had any binding force, or effect, since then, or that it has from then on, at any time, been observed or considered in questions of increasing or decreasing the number of workmen. The record in this case forces the opinion that the "Stone Award" confers no seniority rights upon the complainants.

30 If the complainants are entitled to seniority by (3) agreement, then it extends from the date of a definite agreement to that effect with the Railroad Company.

I fail to find any evidence of a clear understanding of terms between the complainants and the defendant Railroad Company until after the confer-

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Opinion.

ence had between the representatives of the Union and the Railroad Company in September, 1931, which was later communicated to the defendant Union by letter dated October 5, 1931, which reads as follows:

“Referring to our conference of Sept. 23rd about the practice of deckhands and floatmen transferring to our barges as captains. Effective October 1, 1931; we will not permit any other employees of the Marine Dept. to accept positions as barge captains except as junior or new men; (Signed) Lloyd, General Superintendent.” 10

I believe this communication from the Railroad Company unquestionably referred to subsequent employees. It said nothing whatever about employees who were then in the barge service. Subsequent conferences between the Railroad Company and the Union official definitely established the seniority rights of those in the lighter service, and January 1, 1933, appears to be about the time when the first official seniority list was agreed upon between the defendant Railroad Company and the defendant Union. I can recall no other date. 20

The instant case is a close approach to *Aulich v. Craighmyle*, 59 S. W. Rep. (2d Series) 560, (Court of Appeals of Kentucky). Part of the decision fits in with the facts herein, the reasoning therein may be applied here, and it may be worth quoting: 30

“*Craighmyle's* cause of action is based on his claim to seniority as against both the Order of Railroad Telegraphers and the Railroad Company by virtue of his continuous employment since 1905, and the custom of the Railroad 40

Opinion.

Company and its employees, during this period of time, to recognize and observe the right of the employees to seniority.

10 “The courts have for a long time used the term ‘custom’ as co-ordinate with ‘usage’ and we will so regard it in our consideration of this case. *Thomas v. Charles*, 119 S. W. 752; *Brumfield v. Consolidated Coach Corporation*, 240 Ky. 1; *Franklyn Sugar Refining Company v. Cane Milling, etc. Co.*, 122 Atl. 231. To establish a custom it is not enough to prove the act is frequently done, it must be both alleged and proven to be *certain, general, uniform* and *recognized*. Where it is so alleged and proven, it is a fair presumption that the parties on entering into their engagement do it with refer-
20 ence to the custom, and agree that their rights and responsibilities shall be determined by it.

 “A practice to arise to the dignity of a cus-
tom so as to enter into and form a part of a contract must possess those elements of cer-
tainty, generality, fixedness and uniformity, as
are recognized by the law as essential to con-
stitute a custom. A *loose, variable custom* or
discretionary practice does not arise to the
30 dignity of a custom so as to control the rights of the parties to a contract. If the usage leaves some material element to the right of exercising an option, or discretion, of one of the parties, it does not constitute a custom. (Citing cases).

* * * * * * *

40 “In the stipulation of facts in this case it is agreed, ‘that there was no binding agreement as to seniority of the employees of the telegraphic department prior to 1919, but that such

Opinion.

right was merely recognized, the railroad company reserving for its discretion, the final decision as to whether it would or would not apply this usage.' This language leaves no doubt in the disinterested mind that the railroad company was under no obligation to recognize or observe the rights of seniority of its employees, unless it chose in the exercise of its discretion to do so. * * * We are convinced in the present case that there was no such custom existent and recognized by either the company or its employees, between 1905 and July, 1921, sufficient to support the presumption that the right of seniority was a part of Craigmyle's contract of employment. The converse is established, i. e., his seniority was to be determined and fixed in the discretion of the Railroad Company at the time the right thereto was asserted by him. When he returned to the Cincinnati Terminal Division in 1921, his right to seniority, or service age, was optional, or discretionary, with the railroad company and was not enforceable against it as a part of his contract of employment.

* * * * *

"The members of the railroad telegraphers' union possessed the absolute right to formulate and adopt such constitution and by-laws as they deemed proper to accomplish the purpose of the organization. Being a voluntary association its constitution and by-laws become a part of the obligations entered into by a member when he joins. In a controversy between a member and the association, the remedies provided by its constitution and by-laws were the remedies within the organization, and as a gen-

Opinion.

eral rule they must be exhausted before an appeal by a member to the courts. *Emma v. Loggia Fasci Italici*, 145 A. 630, 7 N. J. Law, 439, 38 A. 693, 64 Am. St. Rep. 596. The general applicable rules in such cases were formulated and stated in *Roxbury Lodge v. Hocking*, supra; *Walsche v. Sherlock*, 110 N. J. Eq. 223, 159 A. 661. It is not within the province of the court to inquire into and determine the expediency, practicability, or wisdom of the constitution and by-laws of the Order of Railroad Telegraphers, nor to relieve its members of the operation or enforcement thereof, so long as they do not violate, trespass upon, or destroy the property or contractual right of its members, or transgress the bounds of reason, or contravene public policy or the laws of the land. In connecting himself with the organization *Craigmyle* subjected himself fully and completely to the power of its administration, within the legal limits of the power of the organization. On becoming a member thereof his right of seniority was controlled thereafter by its by-laws which were at that time in force, or thereafter adopted. *Fish v. Huddell*, 60 App. D. C. 263, 51 F. (2d) 319; *Yazoo & M. V. R. R. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669; *Malky v. Carroll*, 272 Mass. 524, 172 N. E. 790; *State ex rel. Smith v. Kanawha County Court*, 78 W. Va. 168, 88 S. E. 662, 20 A. L. R. 1930. His right to seniority before becoming a member of the organization was subject to the right of adoption, or discretion, of the railroad company to recognize it or not. His right thereto prior to his return to the Cincinnati Terminal was in no sense a vested, contract-

Opinion.

ural, or property right, justifying the court, either then or now, in interfering to preserve it. *Schaup v. Grand International Brotherhood of Locomotive Engineers et al.*, 223 Ala. 202, 135 So. 327; *Porterfield v. American Surety Co.*, supra; *McConville v. Milk Wagon Drivers Union*, 106 Cal. App. 696, 289 P. 852, 853; *Clark v. Morgan*, 271 Mass. 164, 171 N. E. 278; *Chambers v. Davis*, 128 Miss. 613, 22 A. L. R. 114.” 10

Finding the complainants' contention of (1) custom, (2) the "Stone Award", and (3) agreement, without support in the evidence, and that finding being dispositive, it is unnecessary to discuss the other allegations of the complainants' treatment, or consideration of their claims, by the defendant Union. 20

Considering the entire situation, I shall advise a decree dismissing the bill of complaint.

Dated: March 14, 1934.

30

40

Final Decree.
(Filed Apr. 2, 1934)

IN CHANCERY OF NEW JERSEY.

10	Between ANTHONY UNKOVICH, <i>et al.</i> , Complainants, and NEW YORK CENTRAL RAILROAD COM- PANY and LIGHTER CAPTAINS' UNION OF THE PORT OF NEW YORK AND VICINITY, 996, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, Defendants.	} On Bill, &c.
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20 This cause coming on to be heard in the presence of Pesin and Pesin, Solicitors for the complainants, and of Wall, Haight, Carey & Hartpence, Solicitors for defendant, New York Central Railroad Company, and Saul Nemser, Solicitor for defendant, Lighter Captains' Union of the Port of New York and Vicinity 996, International Longshoremen's Association;

30 And the court having examined the pleadings, and taken proofs orally and in open court, and having heard and considered the arguments of counsel, and being satisfied that complainants had no seniority rights of employment based on their respective original dates of entry into the employ of defendant, New York Central Railroad Company, either by custom or usage, by virtue of the so-called "Stone Award", or by agreement, and

40 that consequently the bill of complaint herein should be dismissed,

Final Decree.

It is thereupon, on this 2nd day of April, 1934, on motion of Wall, Haight, Carey & Hartpence, Solicitors for defendant, New York Central Railroad Company, and of Saul Nemser, Esquire, Solicitor for defendant, Lighter Captain's Union of the Port of New York and Vicinity 996, International Longshoremen's Association, ORDERED, ADJUDGED and DECREED that the bill of complaint be and it is hereby dismissed. 10

And it is further Ordered, Adjudged and Decreed that complainants pay to the defendant, New York Central Railroad Company, the costs of this suit to be taxed, including a counsel fee of \$, which is hereby allowed to said defendant, and that complainants likewise pay to the defendant, Lighter Captains' Union of the Port of New York and Vicinity 996, International Longshoremen's Association, the costs of this suit to be taxed, including a counsel fee of \$, which is hereby allowed to said defendant within 15 days after service upon complainants' solicitors of a true but uncertified copy of this decree, and of said taxed costs; and that in default of such payment, execution issue therefor, according to the practice of this court, against the goods and chattels, lands, tenements and hereditaments of complainants. 20 30

Respectfully advised,
 CHAS M. EGAN,
 V. C.

Notice of Appeal.

(Filed Apr. 18, 1934)

IN CHANCERY OF NEW JERSEY.

Between

ANTHONY UNKOVICH, *et als.*,
Complainants,

10

and

NEW YORK CENTRAL RAILROAD COM-
PANY and LIGHTER CAPTAINS'
UNION OF THE PORT OF NEW YORK
AND VICINITY, LOCAL 996, INTER-
NATIONAL LONGSHOREMEN'S ASSO-
CIATION,

Defendants.

20

On Bill, &c.

The complainants hereby appeal from the entire final decree made in this Court in the above entitled cause on the 2nd day of April, 1934 by the Chancellor on the advice of Vice-Chancellor Egan, to the Court of Errors and Appeals in the last resort in all causes.

Dated: April 13th, 1934.

30

PESIN & PESIN,
Solicitors for Complainants.MEYER PESIN,
Of Counsel.

40

Notice of Appeal.

Due service of a copy of the within Notice of Appeal is hereby acknowledged this day of April, 1934.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for Defendant,
N. Y. Central.

10

SAUL NEMSER,
Solicitor for Defendant,
Lighter Captains' Union, etc.

I conceive there is good cause for appeal in the above-entitled cause.

MEYER PESIN,
Of Counsel with Complainants.

20

30

40

Petition of Appeal.

(Filed Apr. 18, 1934)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

10

ANTHONY UNKOVICH, *et als.*,
Complainants-Appellants,

and

NEW YORK CENTRAL RAILROAD COM-
PANY and LIGHTER CAPTAINS'
UNION OF THE PORT OF NEW YORK
AND VICINITY, LOCAL 996, INTER-
NATIONAL LONGSHOREMEN'S ASSO-
CIATION,

20

Defendants-Respondents.

On Appeal
From the
Court of
Chancery.TO THE HONORABLE THE COURT OF ERRORS AND
APPEALS IN THE LAST RESORT IN ALL CAUSES:The petition of the complainants, the appellants
in the above-entitled cause, respectfully shows
that:

- 30 1. Petitioners find themselves aggrieved by an
entire final decree made in the Court of Chancery
by his Honor Luther A. Campbell, Chancellor of
the State of New Jersey upon the advice of Vice-
Chancellor Egan, dated April 2nd, 1934, in the
above entitled cause, in this respect, to wit, that
the said decree adjudges that the bill of complaint
herein be dismissed because the complainants had
no seniority rights of employment based on their
respective original dates of entry into the employ
40 of defendant, New York Central Railroad Com-

Petition of Appeal.

pany, either by custom or usage, by virtue of the so-called "Stone Award", or by agreement.

And petitioners appeal from such decree upon the ground that the same is erroneous in that complainants did have seniority rights of employment by custom, by virtue of agreements, and usage, and that the dismissals of complainants as alleged in the bill of complaint were unlawful on the part of both defendants herein, since they were done contrary to the aforesaid, and contrary to the statute and laws in existence at the time of their dismissals and deprivation of their seniority rights which were property rights. 10

Petitioners therefore pray that the said decree of the Chancellor may be, for the reasons aforesaid and for the reasons more specifically to be set forth and argued upon the appeal, set aside and for nothing holden, and that the petitioners may have such other relief in the premises as to this Court shall seem proper. 20

PESIN & PESIN,
Solicitors for Complainants-Appellants.

MEYER PESIN,
Of Counsel.

30

40

Case.

IN CHANCERY OF NEW JERSEY.

97-244

10	Between ANTHONY UNKOVICH, <i>et als.</i> , Complainants, and NEW YORK CENTRAL RAILROAD COMPANY, <i>et als.</i> , Defendants.	}	On Bill, &c.
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February 14, 1934.

20 Transcript of stenographic record of final hearing before His Honor, CHARLES M. EGAN, Vice Chancellor, at the Chancery Chambers, Jersey City, New Jersey, in the presence of Meyer Pesin, of Pesin & Pesin, for complainants, Edward J. O'Mara, of Wall, Haight, Carey & Hartpence for defendant New York Central Railroad Company, and Joseph Moritz appearing for Saul Nemser, for

30 New York and Vicinity, Local 996, International Longshoremens' Association.

LOUIS F. BEACHNER,
 Official Stenographer in Chancery,
 No. 1 Exchange Place, Jersey City.

H. C. Forbes. Called by Complainant. Direct.

CASE FOR THE COMPLAINANT.

HOWARD C. FORBES, being sworn:

DIRECT EXAMINATION BY MR. PESIN:

Q. Mr. Forbes, you are an officer of Local 996,
one of the defendants in this matter? A. I am. 10

Q. What officer are you? A. Business agent.

Q. And your duties as business agent consist of
what? A. My duties as business agent is that of a
servant of the men carrying out their orders in re-
gards to keeping agreements, working conditions,
rules and working conditions, and collecting dues
on the water front.

Q. And how long have you been such officer? A.
Since 1930. 20

Q. Now, do you recall a dispute that took place
in 1931, in April 1931, where nine of these eleven
men who sit here laid off? A. I do.

Q. And why were they laid off, do you know? A.
I don't know why they were laid off. That is, at
the time I didn't know.

Q. And when did you find out why they were
laid off? A. The men came to me after being down
to Mr. Clark, and in fact they blamed me for lay-
ing them off at that time. Being innocent of lay- 30
ing them off why naturally I told them I hadn't
had anything to do with it.

Q. Yes. A. To prove my innocence I says "I
will tell you what I will do, I will make an ap-
pointment with Mr. Relyea, the assistant superin-
tendent, and we will find out who laid you off".

Q. Yes. A. So they went down to Mr. Relyea's
office with me and I stated to Mr. Relyear—

40

H. C. Forbes. Called by Complainant. Direct.

Q. Who is Mr. Relyea? A. Mr. Relyea is assistant superintendent of the New York Terminal District of the New York Central Railroad.

Q. Do you know about what date that was? A. I can't give you the date.

Q. Was it in April 1931? A. It was when the men were laid off—the day after.

10 Q. That was about the latter part of April, 1931? A. I believe it was.

Q. All right. A. I stated to Mr. Relyea when I entered the office I was there as a neutral party in the case, only I stated the men blamed me for doing something and I just made the appointment for them. Mr. Relyea said that he understood my position. So the men took the matter up with Mr. Relyea and Mr. Relyea said that he would make a
20 decision later. I told Mr. Relyea if my organization had given me authority in the matter I would have to be in line with whoever laid them off. I would have to be in the same position.

Q. And you went to Mr. Relyea at the behest of the men. A. Yes.

Q. In view of their solicitation you made the appointment you claim now for no other purpose. In other words, they told you they thought they were laid off because they claimed seniority, isn't that
30 so? A. Yes, I suppose so.

Q. And you of course heard their statements and you went to Mr. Relyea on their behalf, did you not? A. No, sir, I did not. I only made the appointment. They blamed me.

Q. You knew then why the men were recalcitrant because of the lay off and why they objected to being laid off. A. Yes, I knew why they objected.

Q. And did you tell Mr. Relyea about it? A.
40 I told Mr. Relyea that if my organization had given

H. C. Forbes. Called by Complainant. Direct.

me authority in the matter that I would have to stand with whoever laid them off because I believed ther was an agreement under the Stone award for the lighter captains—not for towboat men, but for lighter captains.

Q. And you thought that the men should be reinstated. A. No, I did not.

Q. You didn't tell him that? A. No.

10

Q. Didn't you tell these men you would go down and straighten this thing out with Mr. Relyea? A. No, sir, absolutely not.

Q. You are sure of that? A. Positive.

Q. And you did call Mr. Relyea's attention there was this so-called Stone award. A. I did.

Q. How long after this conversation with Mr. Relyea did you hear from him? A. I guess it was the second meeting afterwards. I think there was a letter—a communication came.

20

Q. About how many days? Can you tell us how many days? A. In fact I didn't hear from him right away. I can't tell when I did hear from him. All I know is the men were put back.

Q. You do know the men were put back? A. Yes, I do know the men were put back.

Q. Do you know how many days later? It was around four days wasn't it, to refresh your recollection? A. Yes, I think so.

30

Q. And the men were put back. A. Yes.

Q. And that was after you had had this conversation with Mr. Relyea and spoke to him about it. After this conversation the men were put back. A. Yes. When I spoke to him?

Q. It was after that conversation wasn't it, Mr. Forbes? A. That the men were put back?

Q. Yes. A. Yes, sir.

40

H. C. Forbes. Called by Complainant. Direct.

Q. Now, before I go a little further with you Mr. Forbes, how many members are in Local 996?

A. All told?

Q. Yes. A. At what time?

Q. Let us say in November, 1932. A. In November, 1932 around— In the New York Central?

10 Q. In the entire local. A. Around 450 in good standing membership.

Q. You mean by good standing those who were paid up in their dues. A. We reduced from fifteen hundred during the depression. Eleven hundred were laid off of work from fifteen hundred.

BY THE COURT:

20 Q. You had approximately 450 men in November, 1932. A. Yes.

Q. Prior to that how many men did you have? A. Fifteen hundred.

Q. The difference prior to November 1932 were dismissed as members. A. Yes, sir, laid off. They were members but they were laid off of work.

BY MR. PESIN:

30 Q. And what railroads does this local take in? A. Eight railroad in the Port of New York.

Q. Can you mention them? A. New York Central, Lackawanna, Lehigh Valley, New Haven, Jersey Central, Erie, Pennsylvania and B. & O.

BY THE COURT:

Q. What is the full title of your organization? A. Lighter Captains' Local 996 of the International Longshore's Association.

40

H. C. Forbes. Called by Complainant. Direct.

BY MR. PESIN :

Q. Now, when you held meetings all the members of the local were entitled to be present, isn't that so? A. Yes, sir.

Q. Including all the railroads? A. Yes, sir.

Q. Now, how many divisions are there in the marine department if you know, Mr. Forbes? A. How many divisions? 10

Q. Yes.

Mr. O'Mara: New York Central?

Mr. Pesin: Yes.

A. Well, I guess the towing division, the lighterage division and the marine repair shop division. That's the three divisions I know of. 20

Q. Of course that would only be two divisions, the repair shop operating as part of those divisions. A. I am not sure. I think it would be a different division. I am not sure.

Q. Now, let us get that straight on the record. What do you call a tug and float? A. A tug is a self propelled boat that works under its own power.

Q. A tug boat. A. Yes. A float is a continuation of the rails if the boat carries trains. 30

Q. Freight trains? A. Yes.

Q. And is a man always stationed on that float? A. Not always stationed on it, no, sir.

Q. Has the man who is on the float any connection with the tug? A. Yes, at the time the floatman is on the tug. He is a deckhand practically.

Q. You mean at this time. It wasn't so previously? A. Previous to that he used to be located at a certain station and take care of some 40

H. C. Forbes. Called by Complainant. Direct.

ten to fifteen floats—a tow, while they were laying in a bunch, and be responsible for them while it was in transit between points.

Q. He is called a floatman, isn't he? A. Yes.

Q. What is a barge? A. A barge is a non-self propelled lighter used to carry freight to a steamship or other points in the ports.

10 Q. And is it commonly also called a house boat?

A. Some of them are called house boats. Others are called stick lighters, derrick lighters and gas hoise lighters and covered barge.

Q. They are all under the classification of lighters. A. Yes.

Q. The word lighter is the same as barge, isn't that it? A. Yes, sir.

20 Q. Now, did you get any letter from the railroad with reference to this dispute that occurred in 1931? A. I did.

Q. Will you let me have it please? A. My counsel has it.

Q. Is this the letter you received from the railroad? A. Yes, sir.

Mr. Pesin: I would like to offer the letter in evidence.

Mr. O'Mara: No objection.

30 Mr. Pesin: I think it has Exhibit "C" on it. I offer it with the exception of those marks.

Mr. Moritz: There are some marks on the letter which has just been offered in evidence. If I may explain—

The Court: No, never mind.

(Letter marked Exhibit C 1 in evidence.)

BY MR. PESIN:

40 Q. Now, this letter Mr. Forbes is dated October 5, 1931, is addressed to the Lighter Captains'

H. C. Forbes. Called by Complainant. Direct.

Union, 217 Court Street, Brooklyn, N. Y. "Dear Sir: Referring to our conference of September 23rd about the practice of deckhands and floatmen transferring to our barges as captains: Effective October 1, 1931, we will not permit any other employees of the Marine Department to accept positions as barge captains except as junior, or new men". You got this letter? A. Yes, sir. 10

The Court: By whom is that signed?

Mr. Pesin: A. E. Lloyd, General Superintendent of the New York Terminal District.

Q. So at that time, October 5, 1931, you understood that the railroad was going to date seniority of the men who transferred into the lighterage division only from the date of their transfer. A. Yes. 20

Mr. O'Mara: I object.

The Court: I will sustain the objection.

BY MR. PESIN:

Q. Now, did you have any other letter from them with reference to this question? A. With reference to that question? 30

Q. Yes. A. Not at that particular time.

Q. Well, at anytime. A. Do you want all the letters from the New York Central?

Q. With reference to this particular dispute. A. Certainly. I would be only too glad.

Q. Now, did you get any letter from the New York Central Railroad with reference to the laying off of these complainants on January 13, 1933? A. Not in reference to the laying off of these complainants, I don't think. 40

H. C. Forbes. Called by Complainant. Direct.

Q. Now, in 1932 you circulated a petition amongst the members of the lighters' division of the New York Central, did you not? A. I circulated a ballot.

Q. A ballot? A. Yes. It had yes and no on both sides of it.

10 Q. When was that? A. I think around December, 1932.

Q. In November? A. December, 1932, I believe.

Q. And have you a copy of that ballot? A. Yes, sir, it is right in your possession.

Q. And is this the ballot which you circulated? A. Yes, sir, it is.

Mr. Pesin: I would like to offer this in evidence.

20 Mr. O'Mara: No objection.

Mr. Moritz: No objection.

(Ballot marked Exhibit C 2 in evidence.)

BY MR. PESIN:

Q. Now, was there a letter with this ballot, or was there a letter sent along with it? A. No, sir, not that I know of. Oh, yes, there was.

30 Q. Do you remember Mr. Forbes what the nature of that letter was?

Mr. O'Mara: I object. The letter speaks for itself.

The Court: Yes, the letter speaks for itself.

BY MR. PESIN:

40 Q. Now, you did not call a meeting Mr. Forbes, did you, with reference to this ballot, as you call it?

H. C. Forbes. Called by Complainant. Direct.

Mr. O'Mara: I object to counsel leading the witness.

The Court: It is leading. Do you press that?

Mr. O'Mara: I do, sir.

The Court: Then I will sustain the objection.

BY MR. PESIN:

10

Q. You did call a meeting with reference to this ballot, Mr. Forbes? A. Did I call a meeting with reference to this ballot?

Q. Yes. A. You mean after—

Q. No, before. A. It would have to go to the Board of Mediation if they didn't agree.

The Court: You are asked whether you called a meeting. Did you or did you not?

20

The Witness: No, sir.

BY MR. PESIN:

Q. Was there any meeting held with reference to this ballot or petition? A. You mean before the ballot was taken?

Q. Yes. A. No.

Q. And where did you circulate this ballot? A. In the New York Central amongst the membership of the organization on a pay day.

30

Q. Are there any of these eleven men on this ballot? A. I don't believe any of them signed it. There may be one, I am not sure.

Q. Did you go to these men? A. I did. I think on the back you will find some of them refused to sign it.

Q. Now, what is the grain boat division, Mr. Forbes? A. The grain boat division?

40

H. C. Forbes. Called by Complainant. Direct.

Q. Yes. A. I don't know of any grain boat division.

Q. Well, there are such things as grain boats, are there not? A. Yes, sir.

Q. What is a grain boat? A. A grain boat is a non-self propelled lighter.

10 Q. What does it carry? A. It carries grain and general cargoes the same as another lighter.

Q. And are there captains that operate these boats called grain boatmen? A. No, sir. The captains that operate the floats are floatmen.

Q. These are floats, are they not? A. The grain boats?

Q. Yes. A. They are lighters.

20 Q. Did any men that worked on the grain boats at any time transfer into the lighterage department?

Mr. O'Mara: I object to it on the ground there is no difference between the grain boats and the lighterage department. It is one department.

30 The Court: That is what I understood from the testimony of the witness that the grain boat is a lighterage boat and carries grain and general cargo. I will sustain the objection.

BY MR. PESIN:

Q. You are sure that a grain boatman is not called a grain boat captain—

Mr. O'Mara: It is immaterial.

The Court: How is it material, Mr. Pesin?

40 Mr. Pesin: Why, he testified there is another division. I am trying to find out what it em-

H. C. Forbes. Called by Complainant. Direct.

braces; whether or not by this particular question there is another division.

The Court: Why not ask those who are in control or supervision of them?

Mr. Pesin: I will withdraw the question.

Q. Is there any distinction between a grain boat captain and a lighter captain? 10

Mr. O'Mara: I object to that. It is too broad. The inquiry here is whether the grain boats were in a different class of service from the lighter.

The Court: The witness has already said the grain boats are lighters.

BY THE COURT: 20

Q. What, if any, distinction is there between the captain of a lighter and the captain of a grain boat? A. There is no distinction. You have names for different lighters where you have a gas captain or an engine captain, and on the steam you have a steam lighter captains and you have stick lighter captains and grain boat captains.

BY MR. PESIN: 30

Q. Are the grain boat captains members of your organization? A. No, sir.

Q. They are not members of the lighters captains?

Mr. O'Mara: I object.

The Court: He has answered that.

40

H. C. Forbes. Called by Complainant. Direct.

BY MR. PESIN :

Q. Did you have any meeting with reference to the letter that was sent by the railroad in regard to this April 1931 dispute? A. April 1931?

10 Mr. O'Mara: Is it in evidence the letter was sent?

Mr. Pesin: Yes.

Q. Was there a letter which you got from the railroad with reference to the 1931 dispute? A. No, sir, not that I know of.

20 Mr. O'Mara: He testified he didn't know of that letter. The men came back to work and that's all.

BY MR. PESIN :

Q. Now, Mr. Forbes, other than this petition there was nothing voted on at any meeting that you know of in the local with reference to this particular question, was there? A. Nothing voted on about this question?

Q. Yes. A. Previous to that?

30 Q. After that or previous to that. A. After that they ratified that.

Q. How did they ratify it? A. Do you want the minutes of that meeting?

Q. Yes. A. April 5th, I believe—a resolution.

BY THE COURT :

Q. That is dated when? A. April 5th, 1933.

40 Q. On what page? A. Minutes of Lighter Captain's Local 996 I. L. A.

H. C. Forbes. Called by Complainant. Direct.

BY MR. PESIN :

Q. April, 1933? A. Yes, sir.

Q. When were the men laid off—these complainants, on January 13th? A. Yes, but we only have a meeting every three months. This is the next regular meeting—"Be it hereby resolved that the members of the Lighter Captain's Union Local 996 I. L. A. accept the arrangement arrived at between Mr. Wright of the New York Central R. R. and the Local's representatives whereby it was agreed that the men that transferred from tug boats and floats to barges are to receive seniority rights from the time they went to work on the barges, but would not receive seniority rights on the barges for the time served on tug boats and floats." The resolution was signed by Howard C. Forbes.

Q. That was at a regular meeting? A. Yes, sir.

Q. Of the entire local? A. Yes, sir.

Q. And did any men of other railroads vote on that? A. Yes, sir.

Q. They did? A. Why, certainly.

Q. Was any question brought up with the other railroads about that?

Mr. O'Mara: I object as immaterial.

The Court: How are we interested in what other railroads might have done? It only affects the members of the local at large.

Mr. Pesin: I want to get the true circumstances because I allege there was discrimination.

The Court: I will receive it subject to your objection, Mr. O'Mara.

H. C. Forbes. Called by Complainant. Direct.

BY MR. PESIN:

Q. Was this particular question submitted to the lighter captains of the other railroads? A. Yes, sir. It has been on the floor of our organization for two years and our organization consists of all railroads and they all vote, yes, sir.

10 Q. Were there any other ballots circulated amongst the lighter captains of other railroads? A. No, sir.

Q. This was the only railroad—the New York Central, where this ballot was circulated? A. Yes, sir.

Q. And do you know as a matter of fact that there are men of other branches that are carrying seniority time from other divisions into the lighter captain's division of your local? A. No, sir, not that I know of.

Q. Not that you know of? A. No, sir.

Q. Do you know Sam Frederickson? A. No.

Q. A porter on a ferry boat? A. Sam Frederickson?

Q. Yes. A. I don't know him.

Q. Do you know a Mr. Carpenter—Harry Carpenter, with the Lehigh Valley? A. Carpenter in the Lehigh Valley? I don't know him.

30 Q. So you don't know there are men in these other lighterage divisions of other railroads that are carrying seniority. You don't know that? A. No, sir.

Q. Would you say they are not carrying seniority?

Mr. O'Mara: I object.

The Court: I will sustain the objection.

H. C. Forbes. Called by Complainant. Direct.

BY MR. PESIN :

Q. Now, what did you do with this ballot when you circulated it? A. I beg your pardon?

Q. What did you do with this ballot after you had it all signed? A. That ballot was taken just to clear Mr. Wright's mind. It gave Mr. Wright the opinion it was the consensus of the men. I believe I mailed a letter to Mr. Wright and presented the ballot. 10

Q. And did you tell Mr. Wright he could be governed by these signatures and could dispose of the matter in that way? A. I can't remember just what I said in the letter.

Q. Did you say something to that effect? A. The letter is there.

Q. Is this a copy of the letter which you sent to the railroad? A. Yes, sir. 20

Mr. Pesin: I offer this letter in evidence unless you wish to produce the original, Mr. O'Mara.

Mr. O'Mara. I have no objection on the ground it is a copy if it is clearly understood it is only binding on the other defendant and not on the New York Central Railroad.

Mr. Pesin: Yes. 30

The Court: That will be the ruling.

(Copy of letter marked Exhibit C-3 in evidence.)

BY MR. PESIN :

Q. And this action was taken at the request of Mr. Wright of the railroad, was it not? A. Yes, sir. 40

H. C. Forbes. Called by Complainant. Direct.

Q. And have you got the letter from Mr. Wright in which he requested that? A. That was orally.

Q. And when you presented that to Mr. Wright he accepted it? A. Yes, sir.

Q. And then the men were laid off, is that right? A. Yes, sir.

10 Q. Do you know how long after that was presented to Mr. Wright that the men were laid off?

A. No, I don't. It may have been one or two weeks, I don't know. Maybe three weeks. I am not sure.

Q. And when the men were laid off they objected did they not, Mr. Forbes? A. Yes, sir.

Q. And they told you—

20 Mr. O'Mara: If your Honor please, I have been very patient with counsel leading the witness.

The Court: Yes, it would indicate it was clearly leading. You can ask if anything was said.

BY MR. PESIN:

30 Q. What, if anything, was said? A. There was nothing particularly I can say that was said. All the time they took to vote they always said something. When they took the vote it created hard feelings. I cannot tell you what was said about the particular subject matter.

Q. And did the men ask you for a meeting on this particular question? A. They didn't ask me; they asked the president.

Q. And no special meeting was held so far as you know, or was there? A. There was a regular meeting held.

40 Q. What was the purpose of that regular meeting? What was discussed at that regular meeting

H. C. Forbes. Called by Complainant. Direct.

with reference to this question? A. At a regular meeting the seniority question could come up. It couldn't come up at a special meeting. So naturally at the next regular meeting the question came up again.

Q. Now, Mr. Forbes, is this a copy of the revised by-laws of the Lighter Captains? A. I believe they are. I think this is one of the lighterage books. I am not sure. 10

Mr. Pesin: I offer that in evidence.

Mr. O'Mara: I have no objection.

Mr. Moritz: I have no objection on behalf of Local 996 that the revised by-laws be offered in evidence.

(By-laws marked Exhibit C-4 in evidence.)

BY MR. PESIN: 20

Q. Are you familiar with these by-laws? A. Yes, fairly well.

Q. Is there anything in the by-laws which speaks on the question of the seniority of the men?

Mr. Moritz: I object. They speak for themselves.

The Court: Yes. 30

Mr. Pesin: I would like to ask the witness, without glancing through it, if it contains a provision—

The Court: If counsel objects it is within his right to do it.

Mr. Moritz: I will admit in behalf of the defendant Local 996 there is nothing in the by-laws as to seniority.

Mr. Pesin: All right. I offer, if your Honor please, what is known as the Stone Award. 40

H. C. Forbes. Called by Complainant. Direct.

Mr. O'Mara: It is objected to on the ground the so-called Stone Award has no relevancy to the issue. I don't know whether it should be argued at this time but I want to make it clear to the court I object to the so-called Stone Award going into evidence because it has no relevancy to the issue.

10

The Court: Is that the only objection you have as to its relevancy?

Mr. O'Mara: Yes.

The Court: If that's your only reason I will allow it for what it is worth.

(Marked Exhibit C 5 in evidence.)

Mr. Pesin: I offer the agreement in evidence.

(Agreement marked Exhibit C 6 in evidence.)

20

Q. Isn't there another letter that accompanied this petition, or this ballot?

The Court: Referring to Exhibit what?

Mr. Pesin: C 2.

A. Not that I know of.

30

Mr. Pesin: Mr. O'Mara, have you a letter that accompanied this particular ballot outside of this letter?

Mr. O'Mara: Not that I know of. I will make a search and find out.

BY MR. PESIN:

Q. Now, Mr. Forbes, as far as you know until this particular ballot was circulated how were the men who worked in any other division than the

40

H. C. Forbes. Called by Complainant. Direct.

lighterage division granted their seniority if they transferred into the lighterage division.

Mr. O'Mara: I object on the ground it is assumed the men had seniority rights. There is nothing in the evidence about it.

The Court: What have you to say, Mr. Pesin? 10

Mr. Pesin: I will withdraw that question.

Q. What is seniority, Mr. Forbes? A. Seniority? My understanding it is a man's service in a particular craft by agreement.

Q. What? A. It is a man's length of service in a particular craft by agreement.

Q. Does it entitle him to priority in service dating from the entry of his service? 20

Mr. O'Mara: You mean seniority generally speaking now.

Mr. Pesin: Yes.

A. It entitles him in his particular craft. That's what I understand by seniority.

Q. Prior now to this ballot which was circulated do you know how these men worked their seniority, whether they carried it or not from one division into another division? 30

Mr. O'Mara: I object unless you make it more specific.

BY MR. PESIN:

Q. From the tugs and floats division into the lighterage division. 40

H. C. Forbes. Called by Complainant. Cross.

Mr. O'Mara: I object unless it is shown first the men on the tug boats had seniority.

Mr. Pesin: I am merely asking if he knows how it is operated.

10 The Court: Based upon the assumption that the men in the tug boat division have seniority rights. That must be first decided in order to establish whether it was carried to something else.

Mr. Pesin: I am asking did they operate in any other way.

The Court: There seems to be doubt about it. The proper thing would be to determine whether they had such rights which you suggest.

20 Mr. Pesin: I am content to rest on the ballot which will create the inference why the ballot was circulated.

The Court: All I can consider is the proof.

BY MR. PESIN:

30 Q. How are the men in the lighter captain's local recognized as regards working conditions—as to priority of service? A. We figure we have seniority in the Light Captain's Union from custom and from agreement.

Q. And that's the way you operate? A. That's the way we try to operate.

Mr. Pesin: That's all.

CROSS EXAMINATION BY MR. O'MARA:

40 Q. Mr. Forbes, you stated before that these complainants were laid off in 1933. You didn't mean

H. C. Forbes. Called by Complainant. Cross.

they were dismissed from service, did you? A. No, sir.

Q. You meant they were taken off full time and put on the extra list. A. Yes, part time.

Q. Now, Mr. Forbes, prior to 1932 do you know whether or not there was any seniority amongst the men on the tug boats? A. Prior to 1932? I never knew of any tug men having any seniority. 10

Q. Isn't it the fact that the captain of a tug boat could hire or fire the deckhands or members of his crew at will without regard to the length of service they had, or anything else? A. Yes, sir.

BY THE COURT:

Q. When you talk of tug boats do you include tows? A. It is the same thing. 20

BY MR. O'MARA:

Q. When I talked about the towing division that includes, does it not, all boats that are self propelled and floats in addition to that? A. Yes, sir.

Q. And is it not also a fact that the engineers of these boats in the towing division could and did hire and fire the firemen at will without regard to their length of service? A. Yes, sir.

Q. And that condition prevailed right down to 1932 when a definite agreement was made, isn't that so? A. Yes. 30

Mr. O'Mara: That's all.

CROSS EXAMINATION BY MR. MORITZ:

Q. Mr. Forbes, after some of these complainants were laid off sometime in April, 1931, did any of these complainants make any complaint to you and request of you that a fair and just revision of the 40

H. C. Forbes. Called by Complainant. Cross.

seniority list be had with the employers of the New
ork Central Railroad? A. Yes, sir.

Q. I show you what purports to be a petition
dated December 28, 1931, and ask you if any of
these complainants in this case by reason of this
petition requested you to have a fair revision of the
seniority list from the employers. A. Yes, sir,
10 five of them.

Mr. Moritz: I ask that be marked for iden-
tification.

(Petition marked D 1 for Identification.)

Q. Can you name the five members in this case
who requested of you on December 28, 1931 a fair
revision of the seniority list? A. I believe Ander-
son, Marotta, Masten, McKenzie. That's five,
20 isn't it?

Q. Do you recognize the signatures of these com-
plainants by looking at that particular exhibit?
A. Yes, sir.

Q. You recognize their signatures. A. Yes, sir.

Q. Will you inform the court from that petition
who are the complainants in this case that request-
ed a revision? A. William Anderson, H. Masten,
Peter Korlich, Paul McKenzie and Frank Marotta.

Q. Mr. Forbes, sometime in 1933 did any of these
complainants, after they were laid off, request Lo-
cal Union 996 for a hearing on the subject matter?
30 A. After they were laid off in 1933, yes.

Q. And do you know of whom they requested that
particular hearing? A. They requested a hearing
from the executive board.

Q. And was a hearing allowed to these men on
this grievance by the executive board? A. Yes.

Q. And were the men notified? A. Notified by
40 registered mail.

H. C. Forbes. Called by Complainant. Cross.

Mr. Moritz: I call upon the complainants to produce at this time the registered letters which were sent to them by the executive board fixing the time and place for a hearing of their grievance.

Mr. Pesin: Don't you think it would be better to have him put on as your own witness later on? 10

Mr. Moritz: Complainants say they requested a hearing and never got it.

Mr. Pesin: Do you refer to this thing?

Mr. Moritz: That's the one.

Q. Mr. Forbes, is this the registered letter which was sent out by the secretary informing these men of the time and place of a hearing before the executive board pertaining to their petition? A. Yes, sir. 20

Mr. Pesin: While it may be proper later on I don't think we ought to confuse the issues by going into this testimony. When I get finished with my case then they should recall him as part of their defense. We didn't say anything in the record as to whether there was a meeting. It was in the opening. There was nothing in the examination about a meeting. 30

The Court: No, I don't recall there was any testimony to that effect. Of course you are limited in your cross examination to the matter brought out on direct. I don't recall anything about a meeting have been demanded.

Mr. Moritz: I will not press the matter any further. No further cross examination.

H. C. Forbes. Called by Complainant. Redirect.

REDIRECT EXAMINATION BY MR. PESIN :

Q. Now, Mr. Forbes, you say that a tug captain can fire a man at will—a man on the tow boat? A. He could, yes, sir.

Q. These men on the floats are they known as floatmen? A. The men on the floats? Yes.

10 Q. And a lighter is also a non-propelled barge, isn't it? A. A lighter is a non-self propelled lighter.

Q. That is also included as a tug. A. A lighter is pulled by a tug.

Q. Just answer my question. A tow boat is pulled by a tug. A. You have things mixed.

Q. As a float. A. Yes, by a tug.

Q. It is the same thing. They are non-propelled.
20 A. Yes.

Q. What I want to know is this, can a captain of a tug boat fire at random a lighter captain? A. No, sir.

Q. There is a difference between a lighter captain and a floatman? A. A big difference.

Q. What is it? A. One is continually in charge of a lighter or a barge. His duties are to check freight, represent the company and sign for all cargoes, watch the property, handle the lines. What-
30 ever he signs for the company, if he makes a mistake, is responsible. Therefore he is a responsible man. A floatman is only a watchman on his float when she is laying at a certain point. They don't keep floatmen on the floats all the time—only at certain times.

Q. Didn't they do it in 1929? A. Didn't they what?

Q. What was the last part of your answer there,
40 they didn't keep what in 1929? A. A floatman

H. C. Forbes. Called by Complainant. Redirect.

doesn't stay on the float all the time. He only stays on the float at certain points.

BY THE COURT:

Q. A lighter captain lives on the lighter. A. He lives practically on it.

Q. They have accommodations for their living quarters. A. Yes. 10

BY MR. PESIN:

Q. Does the lighter captain get higher rate of pay than the floatman? A. No, sir, I think it is about the same. In fact the lighter captain gets less because the floatman only stays in the day and the captain lives on it.

Q. What is the advantage that the lighter captain has, if any, over the floatman? A. I can't say. 20

The Court: That calls for a conclusion.

BY MR. PESIN:

Q. Now, do you remember before this petition or this ballot, as you call it, was adopted by the local that—By the way, when was that ballot adopted by resolution of the local? A. April 5th, I believe. 30

Mr. Moritz: I object to the framing of that particular question. The evidence shows the union ratified the act of the superintendent of the railroad.

The Court: Do you object to the form of the question?

Mr. Moritz: Yes.

40

H. C. Forbes. Called by Complainant. Redirect.

Mr. Pesin: I am asking him the date of the resolution.

The Court: I will allow it as to the date of the resolution.

10 A. The date of the resolution? It was passed April 5, 1933.

BY MR. PESIN:

Q. And wasn't that done Mr. Forbes only to cover yourself because on March 30, 1933 the men had filed charges against you for violation of the by-laws of the local for having transactions with the employer without permission from the local? A. No, sir.

20 Mr. Moritz: I object if the court please. It is not proper redirect.

The Court: It is not only that but it is leading. There is no question it is leading. I will sustain the objection.

BY MR. PESIN:

30 Q. And this resolution as I understood you before—I would like to have that clear, was affirmed by lighter captains of different railroads other than the New York Central, is that right? A. Yes, sir.

Q. And that ballot only affected the men that worked on the New York Central, is that right? A. Yes, sir.

Q. No other ballots were circulated for the other railroads, were there?

40 Mr. Moritz: I object. It is immaterial.
The Court: I will allow that.

H. C. Forbes. Called by Complainant. Recross.

Leroy Relyea. Called by Complainant. Direct.

BY MR. PESIN :

Q. Were there any? A. In regards to other railroads? We had no complaints about that matter from other railroads to draw ballots.

Mr. Pesin: That's all.

10

RE CROSS EXAMINATION BY MR. O'MARA :

Q. The ballot was circulated at the request of Mr. Wright of the New York Central. A. Yes, sir.

RE CROSS EXAMINATION BY MR. MORITZ :

Q. This particular ballot was to indicate the will of the majority of the men of Local Union 996 that were employed by the New York Central Railroad. A. Yes, sir. 20

The Court: Suppose you say the number rather than the majority.

Mr. Moritz: The number I mean. That's all Mr. Forbes.

30

LEROY RELYEA, being sworn :

DIRECT EXAMINATION BY MR. PESIN :

Q. Mr. Relyea, you are an officer of the New York Central Railroad? A. Yes, sir.

Q. And what office do you hold? A. Assistant Superintendent of the New York Terminal District. 40

Leroy Relyea. Called by Camplainant. Direct.

Q. And how long have you held such office Mr. Relyea? A. Since May 1, 1932.

Q. What office did you hold before that? A. How long before.

Q. Well, how long are you with the railroad? A. Since May 16, 1901.

10 Q. And what office did you hold immediately to your assistant superintendent position? A. Assistant Superintendent of the river division at Weehawken.

Q. Now, do you remember, Mr. Relyea, the occurrence of April, 1931, where nine of these particular eleven men who are the complainants were laid off by the railroad? A. I remember the occurrence of the men asking for a conference with me. I could not be specific as to the date, but I
20 did not know the men had been laid off.

Q. When did you first learn they had been laid off? Was it April, 1931, to refresh your recollection? A. I couldn't place the date. My recollection is it may have been later, but it may not have been.

Q. But anyway you were informed with reference to the laying off of these men, were you not? A. A conference was asked for.

30 Q. By whom, Mr. Relyea? A. My recollection is that Mr. Forbes 'phoned me.

Q. What did he say to you at that time? A. I don't remember his exact words, but he asked for a conference explaining that some of the barge captains wanted to talk over some question with me.

Q. It was about the laying off of these nine men, wasn't it? A. I didn't know what it was at that time.

Leroy Relyea. Called by Complainant. Direct.

Q. When did you see Mr. Forbes? A. I made the appointment. I couldn't tell you as to the date or hour now.

Q. How long after the telephone conversation?

A. Some day or two later there was a conference.

Q. And what did Mr. Forbes say to you at this conference you had with him? A. Why, Mr. Forbes when he came in with the barge captains explained to me the barge captains had asked him to accompany them to our office over some question of these men's rights. 10

Q. What rights, Mr. Relyea? A. Why, the seniority, or something along that line. Mr. Forbes explained to me he was not acting in the interests of the organization because he had not been designated by his organization to handle this case, but he did make the claim to me that whatever decision I made was more or less a personal decision and his organization was not interested at that time. 20

Q. And what decision did you make, Mr. Relyea?

A. After conferring with our Assistant Marine Superintendent, who handled matters of this kind, we decided to let the men remain where they were.

Q. And they were re-employed, is that right? A. They were not dismissed, sir. 30

Q. What do you mean, they were taken back into active employment again? A. They were not taken from active employment.

Q. They were laid off, weren't they, Mr. Relyea?

A. Not to my knowledge, no.

Q. You don't know these men were laid off? A. I do not know they were laid off, no, sir.

Q. And it was decided that these men would retain their seniority rights. A. It was decided we 40

Leroy Relyea. Called by Camplainant. Direct.

would make no change as to these lighter men. They were to remain on the same boats they were.

10 Q. And that was the first time so far as you knew that any dispute had arose as to lighter captains, whether they would carry their time in seniority from the tows and floats, is that so? A. That was my first knowledge because I had only been in the marine department about six months before that question was raised.

Q. And of course in your discussions with the other men—the officers of the railroad, you didn't learn of any other decision the railroad had previously made on any other dispute that may have arisen. A. I didn't know about it.

20 Q. There was no precedent to be guided by, was there, Mr. Relyea? A. Not to my knowledge. I knew nothing of any other cases.

Q. And before that time, as you understood it and as the railroad and local understood it, the men that transferred into the lighter department carried their time.

30 Mr. O'Mara: I object to it. It is the most flagrant leading question I have ever heard, and secondly there is nothing in the testimony. He is asking the witness whether the railroad understood and the union understood they carried seniority rights.

The Court: I will sustain the objection. What does he know what the railroad understood and what the local understood? What could he say what the mental operation of the mind of anybody was unless expressed in language? It is clearly improper.

40

Leroy Relyea. Called by Camplainant. Direct.

BY MR. PESIN :

Q. Mr. Relyea, you have been with the railroad since 1901 A. Yes, sir.

Q. What is your understanding of the term seniority?

Mr. O'Mara: Objected to on the ground it is immaterial. 10

The Court: Well, he has already said that these men were in to see him, or the representative was, about seniority rights, and I think that counsel can ascertain if he knows what the term indicates. I think it is proper and I will allow it.

Mr. Moritz: I would like to make the same objection because it calls for his understanding. 20

The Court: It calls for the understanding of what the witness knew when they were discussing seniority. I will allow it. Your objection is noted.

A. My understanding of seniority would be the length of service that an employee was engaged in in his particular craft. 30

BY MR. PESIN :

Q. Did you see this letter, Mr. Relyea? A. Yes, I saw it.

Q. And did you discuss this proposition with Mr. Lloyd, the general superintendent? A. Yes, sir.

Q. And what was the purpose of writing this letter?

40

Leroy Relyea. Called by Camplainant. Direct.

Mr. O'Mara: I object to it if your honor please. The letter speaks for itself.

The Court: Why isn't that so?

Mr. Pesin: If your honor please I think we can find out what the purpose was when that letter was written. He said he conferred with Mr. Lloyd.

10 The Court: Wouldn't it be clearly hearsay what Mr. Lloyd told him? The one that can explain the purpose of some particular act is the one that commits the act.

BY MR. PESIN:

Q. Do you know of any action that the railroad had taken with regards to the seniority rights of these men?

20

Mr. O'Mara: When?

BY MR. PESIN:

Q. On or about October 5, 1931, or at any time after this dispute that I referred to of the nine men in April, 1931? A. I didn't know of any action taken in regard to their seniority.

30 Q. Well, was any action taken with reference to these men as to the time they would carry in the lighterage division? A. Not to my knowledge.

Q. You don't know of any action that the railroad had taken? A. No, sir, I do not.

Q. Do you know now they have taken certain action? A. If you will ask me what you refer to.

40 Q. If I say with reference to the time of service, the service age of these men in the lighterage division of these eleven men, whether any action was

Leroy Relyea. Called by Camplainant. Direct.

taken in that respect? A. I don't recall there was any action taken in October 1931 that directly affected seniority. Now, the action that was taken by myself personally was taken prior to October 1931, but that wasn't the question of deciding any seniority.

Mr. O'Mara: Counsel means at any time, even subsequent to that, isn't that so, Mr. Pesin? 10

Mr. Pesin: Yes.

The Witness: Well, definite action was taken about January 1, 1933, or if I might explain, at that time the first official seniority list was finally compiled for the lighter captains organization.

BY MR. PESIN: 20

Q. And that is the way in which the railroad was to accept the seniority rating of these men according to the petition which was handed in to the railroad. A. I don't think I quite understand that question.

Q. That ballot that was handed in to the railroad, that computed the seniority rating of the men, did it not? A. It led up to the final decision in connection with the seniority standing on the lighter captain's roster of these eleven particular barge captains. 30

Q. And do you know what effect that had on these eleven men?

Mr. O'Mara: I object on the ground it is immaterial.

The Court: What is the purpose? 40

Leroy Relyea. Called by Camplainant. Direct.

Mr. Pesin: I want to ask other questions as to whether it affected the seniority rating of these particular men.

The Court: I will allow that.

10 A. It changed it, or it placed rather, these eleven captains on our official lighterage captains seniority roster, giving the date that they entered the service of the barges as lighter captains.

BY MR. PESIN:

Q. Within your knowledge what was the standing of these men with reference to their seniority rating?

20 Mr. O'Mara: When?

Mr. Pesin: Before this period of 1933.

Mr. O'Mara: Objected to. There wasn't any.

Mr. Pesin: I am trying to establish it. How can we establish these things? It is within the knowledge of somebody.

Mr. O'Mara: Ask him if they had any standing.

BY MR. PESIN:

30 Q. Did they have any standing, Mr. Relyea? A. Not to my knowledge.

The Court: Suppose we take a recess until two o'clock.

40

Leroy Relyea. Called by Camplainant. Direct.

AFTERNOON SESSION.

LEROY RELYEA, recalled:

DIRECT EXAMINATION (Continued) BY MR. PESIN:

Q. Mr. Relyea, you are with the railroad now for thirty-three years. A. Just about, yes. 10

Q. And how long have you been in the marine department? A. I have been in the marine department twice. I was assigned to the marine department on March 1, 1931 and remained there until October 1, 1931. I returned to the marine department on May 1, 1933 up to the present time.

Q. And before that time how long had you been in the marine department before the second re-entry? A. I had been several months there. 20

Q. And what particular position did you hold with the railroad prior to the marine department? A. Assistant Superintendent. 20

Q. Of what? A. Assistant Superintendent of the river division at Weehawken.

Q. The railroad division? A. The railroad division.

Q. Did that have to do with the marine department? A. No, sir.

Q. And how long did you hold that position? A. I was appointed Assistant Superintendent of the river division on April 16, 1926. 30

Q. And prior to 1926 what position did you hold? A. Train master.

Q. What did your duties consist of? A. A supervisory position. In other words, you have charge of the train crews, the operation of trains and course of travel—a general supervisory work of an outside nature. 40

Leroy Relyea. Called by Camplainant. Direct.

Q. What do your present duties consist of Mr. Relyea? A. The same thing in the marine department.

Q. Supervisory? A. Supervisory.

Q. Have full charge of the supervision of the marine department? A. I am second in command. I am the assistant supervisor.

10 Q. Now, assuming that a man entered the service of the marine department January 1, 1920, assuming another man entered the service of the marine department on January 1, 1925, and they both continued working uninterruptedly until let us assume the first of January, 1933, and then there was a shortage of work so that one man had to be laid off, who would be the man to be laid off, the one that started in the marine department in 1920 or
20 the one in 1925?

Mr. Moritz: I object to it unless it relates to a particular craft in this particular marine division.

BY MR. PESIN:

Q. Assuming further, let us take the lighterage division.

30 Mr. O'Mara: I object also on the ground the testimony has been there was no seniority in the marine department prior to 1932. The question was in 1933, wasn't it?

Mr. Pesin: Yes.

Mr. O'Mara: Then I withdraw my objection. It was after the agreement with the local.

40 A. In 1933? As applying the question to 1933 it would depend on the date the man was carried on

Leroy Relyea. Called by Camplainant. Direct.

the particular seniority roster covering the craft on which he was working.

BY MR. PESIN:

Q. You can answer that Mr. Relyea. Assuming they both worked in the same division or same department and everything else being equal. A. If they were both in the same craft the man that entered the craft the earlier would be the older, if that answers your question. 10

Q. Yes. And assuming this took place in 1920 or any one of those years from 1920 up until 1933, what would be the status of these men? A. I couldn't answer that only from general knowledge.

Q. That is what I want you to answer. A. I want to add to that general knowledge of the operation of the marine department. 20

Q. That is what I want to know. A. During that particular period it would have depended entirely upon the supervising officer as to where the men would be located.

Q. Assuming they were both located in the same place in the same division and in the same department. A. The supervising officer would decide where this man would work.

Q. And what would be the application. How would the railroad determine it? Would the one junior in service be kept or would the one senior in service be retained? A. The junior man may be kept if in the judgment of the operating officer he thought it was proper to do so. 30

Q. Everything else remaining equal he would do so? A. He may.

Q. Do you know of any instance in which it was done? A. I personally couldn't give you any, no. 40

Leroy Relyea. Called by Camplainant. Direct.

Q. And you know of no instance in which it was done in the lighterage department? A. No, I don't.

Q. Now, Mr. Relyea, what is your understanding of a grain-boat man and a barge captain? A. A lighterage captain and a grain boat captain? They are in the same category as a captain on any other barge.

10 Q. In the same category? A. Yes, as to working conditions, if that is what you mean.

Q. Aren't there two different divisions like a tug or a floatman and a lighter? A. I don't quite understand your definition of division. There is no such thing as division in the marine department.

Q. There isn't? A. No. These men are all employed under the supervision of the marine department.

20 Q. So that in the marine department when they are employed they are all under the supervision of the marine department. A. Certainly.

Q. I see. There is really no distinction or difference at all. A. There is no separation by divisions. It is separate as to crafts. There is no division of responsibility of authority in the marine department.

Q. Is the tug and float captain different from the barge captain? A. Yes.

30 Q. Is the duty of a float captain different from the grainboat captain? A. Yes, sir.

Q. The grainboat captain differs from the lighterage captain. A. No, sir.

Q. And the barge captain. A. No, sir.

Q. Positive of that? A. Yes, sir, positive of it.

40 Q. How many men are employed in the grain craft? We will refer to it as craft because you have designated it as such. A. I don't think there are any today.

Leroy Relyea. Called by Camplainant. Direct.

Q. Are you positive of that Mr. Relyea? A. I don't think there are any grainboat captains. In the last one or two I think we have had some men working.

Q. In 1933 on January first do you know how many grainboat men there were? A. I couldn't answer that question, but I can tell you we were not moving a bushel of grain in 1933, so I don't assume any of them were working. 10

Q. And do you know Mr. Relyea that several of the grainboat men do not belong to Local 996 of the Lighter Captain's Union? A. Oh, yes, I know that.

Q. Do you know why? A. Why, they are represented by some different organization. I am not familiar with their organization. They are represented by the Tidewater. 20

Q. You are certain of that? A. I only know what they tell me. I haven't any personal knowledge of their association.

Mr. Pesin: That's all Mr. Relyea.

Mr. O'Mara: No questions.

Mr. Moritz: No questions.

BY MR. PESIN:

Q. You haven't produced any agreements that relate to these working conditions of seniority. There aren't any other than what have been introduced here. A. I don't know what has been introduced. We have the original working agreements with the different crafts. 30

Mr. Pesin: All right, that's all. I would like to recall Mr. Forbes for one or two questions, your honor.

The Court: All right. 40

Howard C. Forbes. Recalled. Direct.

HOWARD C. FORBES, recalled:

DIRECT EXAMINATION BY MR. PESIN:

Q. Mr. Forbes, how many grainboat men were working in January, 193, do you know? A. I don't believe there was over one.

10 Q. One? A. On the grain boats?

Q. Yes? A. I am not very much familiar with how many boats were working. In fact I don't know there was one or not.

Q. And the grainboat men do not have to belong to Local 996 of the Lighter Captains' Union, do they?

20 Mr. Moritz: I object. It is entirely immaterial to the issues involved in this case.

Mr. Pesin: I think it is important in this respect. We say there are grainboat men in the local that are carrying their time from the time they entered into the grainboat department. Mr. Forbes said the grainboat man is a lighter captain and I want to put the question why the grainboat men are not obliged or compelled to be member if they are considered as lighter captains.

30 Mr. O'Mara: It seems to me that the controlling feature in this dispute is what the railroad recognizes as different captains. Mr. Relyea, who is familiar with these matters, says that the grain boats are in the same classification so far as the railroad is concerned as the barges. What difference does it make to the railroad, who are applying the rules of seniority in their interpretation of all the various classes, whether one man belongs to one union
40 or another.

Howard C. Forbes. Recalled. Direct.

The Court: I can't see what effect that would have if you have to belong to it or do not have to belong to it.

Mr. Pesin: Nine of them did. If your honor will take notice there was discrimination right in their own ranks. There are some men that are members of this local at the present time that are lighter captains and were formerly grainboat men, and they are carrying their seniority time from the time they entered into the grainboat department. Now, their answer is that grainboat men are not considered as lighter captains. 10

The Court: They are members of this organization and carrying their time from another division in this union?

Mr. Pesin: Yes. 20

The Court: I will allow it if that's the objection to the question.

Mr. Moritz: The testimony as produced by the complainants is that the grainboat men and the barge captains are one and the same class. Whether some of them belong to the union or do not is immaterial.

The Court: You can bring that out on cross examination. I will allow the question. Your objection is noted. 30

A. Will I answer the question?

BY MR. PESIN:

Q. Yes. A. In regards to that question no one has to belong to our union in either division of the boats. The railway labor act says there shall be no discrimination between union and non-union men. Now, if we made an agreement for one-fourth of our 40

Howard C. Forbes. Recalled. Cross.

men and the other three-fourths didn't belong to the union they would benefit by it just the same as long as they were all in that particular craft.

Q. There are some grainboat men that are members of your union and some who are not? A. Yes, sir, there is one, I believe.

10 Q. At the present time you mean one? A. Yes.

Q. There had been more before? A. There had been more before.

Q. Now, just one other question Mr. Forbes. In 1931 was there not a motion made at a meeting of the lighter captain's local that this particular question of lighter captains carrying their time on the tugs and floats should be submitted to the board of mediation as provided under the railway act? A. Yes.

20 Q. Was it ever submitted to the board of mediation? A. 1932, wasn't it?

Q. I am asking you. A. I think 1932.

Q. Was it ever carried to the board of mediation? A. We started to take it to the board of mediation in the way it was supposed to go by law.

Q. And you didn't? A. We went as far as the company and they agreed with us to take the dispute away from us.

30 Q. And you started circulating the ballot as you call it in the railroad yards and in the homes of the various members, isn't that right? A. No homes.

Mr. Pesin: That's all.

CROSS EXAMINATION BY MR. O'MARA:

40 Q. Mr. Forbes, in other words, before you can go to the board of mediation as constituted under the

Howard C. Forbes. Recalled. Redirect.

Howard C. Forbes. Recalled. Cross.

railway labor act there must be a dispute between the employer and the employees, isn't that so? A. Yes, sir.

Q. And when the employees as represented by the duly constituted agent, the agent of the organization, agrees with the employer, there is nothing to go to the board of mediation, or is there? A. No. 10

Mr. O'Mara: That's all.

REDIRECT EXAMINATION BY MR. PESIN:

Q. And when there is a dispute you go to the board of mediation? A. If the employer wouldn't go along with the employee, or if the employee wouldn't go along with the employer, then you would have to go further to the board of mediation. 20

Mr. Pesin: That's all.

CROSS EXAMINATION BY MR. MORITZ:

Q. Mr. Forbes, the grainboat division of this particular craft is known as the apprentice division, is it not? A. It was always the custom of a man to break in on a grain boat first.

Q. And when he does break in on a grain boat then he is transferred after having experience to a barge, is he not? A. Yes, sir. 30

Q. And when he transfers to the barge does he thereupon become a member of your union? A. Yes, sir.

Mr. Mortiz: That's all.

Harvey Masten. Called by Complainant. Direct.

HARVEY MASTEN, being sworn :

DIRECT EXAMINATION BY MR. PESIN :

Q. Mr. Masten, when did you enter the employ of the New York Central marine department? A. I came back there in 1920 up to the strike.

10 Q. You entered in 1920? A. Yes.

Q. In what craft? A. On the tug boat.

Q. And did you transfer into any other craft? A. In 1926 I went on a barge.

Q. How long have you continued in the employ of the barge service? A. Up to 1933—the 13th of January.

Q. Now, were you ever laid off before that 1933? A. Only that one time we lost four days work.

20 Q. What one time? Are you referring to April 1, 1931—the dispute? A. Yes.

Q. And how long were you out of work because of it? A. We lost four days at that time.

Q. And what was the reason for your being laid off? A. We were notified we were laid off and we went down to a conference with Mr. Relyea with Mr. Forbes.

Q. What was the purpose of the conference? A. To see whether we held our seniority or not.

30 Q. From where? A. From the tug boat.

Q. And as a result of this conference were you reinstated? A. Mr. Relyea said we would know the following day and we went back on the barge up until 1933.

40 Q. Now, at any other time during your employment in the barge or lighter service were there any men that were laid off that were senior in time to you on the barge craft but junior to you from the time of your entering into the marine department service? A. Why, yes. In 1927 they laid men off.

Harvey Masten. Called by Complainant. Cross.

Q. That were senior in time to you? A. That was longer on the barges than I was.

Q. But were less years to you in the marine service department. A. Right you are.

Mr. Pesin: That's all.

CROSS EXAMINATION BY MR. O'MARA:

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Q. Mr. Masten, how were you transferred from the tugboat to the barge? A. In a peculiar way. I was on tug 23. The captain was going on a vacation and they were going to lay up that tug. I walked on Pier 2 and they told me Captain Riley is on his vacation. They decided to put me on a barge the following Monday morning. This was a Saturday.

20

Q. That's how you were transferred to a barge? A. And to see Captain Riley the following week, which I did.

Q. You started in the tug service in 1920? A. Yes.

Q. And you were transferred to the barges in 1926? A. Yes.

Q. Was your service from 1920 to 1926 continuous? A. Yes, sir. About two months and a half I was home when my mother died, that's all.

30

Q. Weren't you out of service from the 4th of August, 1920, to the 1st of August, 1921? A. No, sir, not that long.

Q. Didn't you resign in August, 1920? A. No, sir, my mother died.

Q. Are you sure about that? A. Positively.

Q. And if you saw the company's records which indicate you did resign and were actually out of service from August 4, 1920, to August 1, 1921,

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Harvey Masten. Called by Complainant. Cross.

would you say those records were wrong? A. No, I would not. As I recollect now it was about two months or two months and a half when I went home when my mother died.

10 Q. I show you, Mr. Masten, what purports to be your service record, and I show you an entry on there dated 8/4/20 and the notation "Resigned". The last entry right there in red ink the last entry 8/4/20, that is, the 4th day of August, 1920, and the notation "Resigned". I show you the next notation of that service record which is 8/1/21 "Second Deckhand?" A. There is a mistake somewhere.

20 Q. Now, which is right the company's record of your employment or your recollection of it? A. Well, the captain is here today. I think he can verify I wasn't out a year.

Q. You say that record is wrong? A. I would not say so exactly, but I think there is a mistake somewhere. They make mistakes downtown in those records.

Q. Is the record wrong if it says you resigned? A. I never remember resigning.

Q. And you would remember it if you had resigned, wouldn't you? A. Why, yes. I was only home when my mother died that time.

30 Q. And how long do you say that was? A. Around three months.

Q. I thought you said two months? A. Two months and a half or three months.

Q. Were you ill? A. No, my mother died at that time up in New York State.

40 Q. Now, when that tug upon which you had been employed was laid up because the captain was going on a vacation, that was in 1926, wasn't it? A. Yes, sir.

E. J. O'Meara. Called by Complainant. Direct.

Q. And you had been in service in the tug division since 1920, and I suppose that there were men in the towing division who came into service after you did. That's between 1920 and 1926, is that right? A. I suppose there was.

Q. And those men continued to work on their tugs when your tug was laid up, is that right? A. Yes. 10

Q. Did you seek to displace any of those junior men? A. There was no such thing as bumping men. The captains could hire their own men at that time.

Mr. Pesin: What?

The Witness: The captains could hire their own deckhands at that time.

The Court: When was that? 20

The Witness: In 1926.

Mr. Pesin: That was on the tugs and floats.

The Witness: Yes.

Mr. Pesin: That's all.

Mr. Moritz: No questions on behalf of the Local.

EDWARD J. O'MEARA, being sworn: 30

DIRECT EXAMINATION BY MR. PESIN:

Q. Mr. O'Meara, when did you enter the employ of the marine department of the New York Central?

A. In September, 1920.

Q. And how long did you work in that craft? A. Until 1923, in October.

40

E. J. O'Meara. Called by Complainant. Direct.

Q. Now, before we go further we have heard some remarks about the captains of tugs firing men on the floats. Did they fire any men on the floats?

Mr. O'Mara: I don't think that was the testimony.

10 Mr. Pesin: That came up when the last gentleman was on the stand.

Mr. O'Mara: Mean on the floats?

Mr. Pesin: Yes.

Mr. O'Mara: That was on their own boats—
not floats.

BY MR. PESIN:

Q. They couldn't do it on the floats, could they?

20 A. No, sir.

Q. And you worked where, on the tugs or on the floats? A. I worked on the tugs and then there was a shift to the barges.

Q. How were you classified? A. I was classified as a shifter.

Q. Did you get floatman's pay? A. Yes, sir.

Q. When were you transferred into the lighterage department? A. In 1923—around October.

30 Q. And how long did you continue? A. To 1933—January 13th.

Q. And were the men laid off in the lighterage department while serving in the lighterage craft? A. Not up to 1933. No, I hadn't been.

Q. You weren't one of the nine men that were laid off in 1931? A. No, I was not.

Q. And do you know of any men that were laid off in the lighterage department at anytime from 1923 when you first entered until 1933 when you

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E. J. O'Meara. Called by Complainant. Direct.

were laid off that were senior in time to you in the lighterage department and junior in time to your entering the marine department?

Mr. O'Mara: How can that be?

Mr. Pesin: Senior in the lighterage department but junior to him in the entry of the marine department. 10

A. No, there was none.

BY MR. PESIN:

Q. None that you recall. A. No.

Mr. Pesin: At this time your honor I have a list made out of the time they lost and I can probably introduce them in bulk without calling all the men to prove the time they lost because they were laid off. 20

The Court: I don't know. It is up to counsel.

Mr. O'Mara: There is no money damages claimed against the railroad.

Mr. Moritz: In behalf of Local 996 we object to it. 30

The Court: All right, go ahead and prove it.

Mr. Moritz: I suggest that be left to the close of the case. He has not proved anything yet.

The Court: It is up to counsel if he feels he has proved his case.

Mr. Pesin: May I introduce in evidence \$376.40 for Mr. Masten?

Mr. Moritz: We say it should be proved in the regular way. 40

E. J. O'Meara. Called by Complainant. Cross.

BY MR. PESIN:

Q. Mr. O'Meara, when were you daid off? A. January 13, 1933.

Q. And how many days were you out of work until at the present time? A. Up until—I can't quite recall. I have it on the slip there. It was up until May 15, 1933.

Q. And how much does that amount to? A. 106 days.

Q. How much a day do you earn? A. Four eighty-three.

Q. Four dollars and eighty-three cents? A. Yes.

Q. That was your average rate of pay? A. Yes.

Q. That makes a total of \$511.98. A. It is not the exact amount.

20

Mr. Pesin: That's all.

The Witness: If you wish I can get it.

Mr. Pesin: All right.

Mr. O'Mara: No questions.

CROSS EXAMINATION BY MR. MORITZ:

Q. Mr. O'Meara, you know that the particular craft that you worked for in 1920, that is, the towing division craft, is an entirely separate and distinct craft from that of the lighterage, do you not? A. I do not.

Q. You do not know that they are entirely separate and distinct crafts, is that right? A. Yes, sir.

Q. In other words, you say the towing craft and the lighterage craft is one and the same craft, is that correct? A. Yes, sir.

40

Mr. Moritz: That's all.

P. G. McKenzie. Called by Complainant. Direct.

PAUL G. MCKENZIE, being sworn :

DIRECT EXAMINATION BY MR. PESIN :

Q. When did you enter the marine division of the New York Central, Mr. McKenzie? A. January 3, 1926, sir.

Q. In what craft? A. On the tugboats. 10

Q. When were you transferred into the lighterage division? A. On May 13, 1927, sir.

Q. And at any time during your employment from 1927 until 1933 were there any men in the lighterage department that were senior to you but junior in time of entry into the lighterage department that were laid off in preference to you? A. In 1927 when I shifted from the towboats onto the barges there were senior men to me laid off then. 20

Q. Were you one of those nine men that were laid off in April, 1931? A. Yes, sir, I was laid off at that time with my rights of seniority regardless. With all the seniority rights I had I was laid off regardless at that time.

Q. Were you taken back? A. Yes, sir. I was put back in my proper place, sir.

Q. Where do you mean when you say your proper place? A. Back to January 3, 1926. 30

Mr. O'Mara: I object to that and ask it be stricken out.

The Court: Yes.

BY MR. PESIN :

Q. Did you lose any time? A. Not until this year, sir. I lost some time this year. Prior to that I didn't lose anything. 40

P. G. McKenzie. Called by Complainant. Cross.

Q. You lost no time? A. Up until this year. I lost quite a few days this year.

Q. How many days is that? A. I haven't figured it out, sir.

Q. Do you know how many days it was about?

10

Mr. Moritz: I object.

Mr. Pesin: All right, that's all.

CROSS EXAMINATION BY MR. O'MARA:

Q. How many men were laid off in 1927? A. I should judge about twenty or twenty-five men

Q. What time in 1927? A. The summer of 1927, sir.

Q. You are sure about that? A. Yes.

20

Q. Do you know who they were? A. I know some of them but not all of them.

Q. Who were they? A. I know about half a dozen—August Kerl.

Q. Who else? A. George Ryan and J. Allen.

Q. Who else? A. Mark Greimes.

Q. Who else? A. Well, that's all I can think of offhand. There was quite a few more.

30

Q. Do you know why they were laid off? A. I think the depression. I think there was a tie-up of the boats.

Q. Why was that tie-up of the boats? A. No work for them, I presume.

Q. In 1927? A. Yes, sir.

Q. The summer of 1927? A. Yes, sir.

Q. Don't you know Mr. McKenzie 1927 was one of the busiest years that the railroad ever had? A. No, sir. In 1927 they were tied-up, sir.

40

W. Anderson. Called by Complainant. Direct.

Q. Don't you know in 1927 there wasn't a single lay-off in the marine department? A. I beg to differ with you, sir.

Mr. O'Mara: That's all.

Mr. Moritz: No questions on behalf of the defendant Local 996.

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WILLIAM ANDERSON, being sworn:

DIRECT EXAMINATION BY MR. PESIN:

Q. You entered the service of the marine department in 1922? A. November 29th, I believe, 1922.

Q. What craft did you enter? A. When I came for a job on the New York Central I saw Captain Reilly and he told me to take a tug. In the meanwhile I was waiting for a barge. All the time I was on the tug from 1922 to 1926 and I saw other men pushed ahead of me. I went to Captain Reilly and I told Captain Reilly about these men going ahead of me. He said "Why worry; when your opportunity comes you will get it". I kept on waiting from 1926—

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30

Mr. O'Mara: I don't like to interrupt but I think he was asked the question when he entered the barges.

BY MR. PESIN:

Q. When did you enter the barges? A. In November, 1926, I believe it was.

Q. And you were employed up until January 12, 1933, with the rest of the men? A. Yes.

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W. Anderson. Called by Complainant. Direct.

Q. You were laid off then? A. I was.

Q. And at any time during your service from 1926 to 1933 were any men in the barge or lighterage division senior in time to you in the lighterage division but junior in time of entry to you in the marine department that were laid off?

10 Mr. O'Mara: Now, if your honor please it is very confusing. Senior in the lighterage division and at the same time junior in the marine department.

BY MR. PESIN:

Q. That were junior from the time that you were first employed with the New York Central Railroad? A. I don't understand that so thoroughly, but there were older men laid off on the barges.

20

BY THE COURT:

Q. Older in point of service than you were? A. Older in point of service on the barges that were laid off.

Mr. O'Mara: When was that?

30 The Witness: In 1927. There were twenty barges laid off, and I laid on the south of Pier 4, West Shore in Weehawken.

BY MR. PESIN:

Q. How much time did you lose? . For the past three months I haven't been getting any time at all. I lost about nine months.

40 Q. Nine months? A. About nine months.

W. Anderson. Called by Complainant. Cross.

Q. What is your rate of pay? A. Four eighty-three.

Mr. Pesin: Is that consented to the rate of pay was four eighty-three?

Mr. Moritz: That is consented to.

BY MR. PESIN:

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Q. That would be about 270 days at four eighty-three. That's what you lost when you weren't working? A. Yes.

Mr. Pesin: That's all.

Mr. O'Mara: No questions.

CROSS EXAMINATION BY MR. MORITZ:

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Q. Could you give us an idea Mr. Anderson how you make up the nine months? A. I just stated the average time. I couldn't give the time. I haven't been getting any time in the past three months.

Q. It wasn't nine months continuously? A. Positive. In fact it was more than nine months. I figured nine months.

Q. Have you got any definite records or anything by which you can definitely state the number of days or months which you were unemployed? A. No, I didn't keep that.

30

Q. You haven't any record except from memory as to when your unemployment began, have you? A. No. I believe in January, 1933—

Q. You don't know. You are only guessing? A. That's all. Around that time.

40

W. Anderson. Called by Complainant. Cross.

Q. And you don't know when the nine months ceased, do you? A. No, because I get a day now and then.

Q. And when you were employed steadily were you working seven days a week? A. I am only getting a day now and then.

10 Q. I didn't ask you that. I am asking you when you were employed were you working six or seven days a week? A. At the time I was laid off?

Q. Again I repeat when you were working did you work seven days a week or six days a week? A. Six days a week.

Q. Then you didn't work a total amount of thirty-one days a month? A. I only averaged twenty-six actual working days.

20 Q. And on an average of twenty-six working days— A. The grain boats work thirty-one days.

Q. Answer my question. It was an average of twenty-six working days a month if you worked a whole month? A. That's right.

Mr. Moritz: I ask the court to strike out his testimony on the ground it is conclusion and indefinite.

The Court: I will allow it to stand for what it is worth.

30

BY MR. MORITZ:

Q. Mr. Anderson, what barge were you on in 1927? A. Niandel.

Q. That is not one of the barges that was laid up, as you say. A. No.

Q. Do you know what barges were laid up? A. Yes, George Ryan was one.

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Frank Marotta. Called by Complainant. Direct.

Q. The name of the boat? I couldn't give you the names because they have been changed four or five different times since then.

Mr. Moritz: That's all.

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FRANK MAROTTA, being sworn:

DIRECT EXAMINATION BY MR. PESIN:

Q. When did you enter the employ of the New York Central, and in what craft? A. In 1920, on the 27th of June, on the floats.

Q. And how long did you work? A. Continually to the 15th of August, 1925.

Q. And what happened then? A. I was transferred on the tug. I was transferred by the company to the tug when they put the third man on the tug.

20

Q. The company transferred you? A. Yes, sir.

Q. And how long have you worked on these barges or lighters? A. I worked four days on the tugs and I was transferred to the barges. I was only four days on the tugs.

Q. That was 1925? A. The 19th of August I went on the barge.

30

Q. How long did you work in the lighterage department? A. I worked from the 19th of August, 1925, to January 12, 1933, when I was laid off.

Q. Were you one of the men that was laid off in 1931? A. Oh, yes, I was laid off in 1931 four days when the same questions arose between the men and the New York Central.

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Frank Marotta. Called by Complainant. Direct.

Q. On what? A. On the seniority question. They tried to take it away from us but we were restored by Captain Reilly.

Q. What did they try to take away from you? A. The seniority that I carried from the floats.

10

Mr. O'Mara: I object to it.

The Court: To what?

Mr. O'Mara: The fact he carried his seniority from the floats. It is entirely a conclusion.

The Court: That part will be stricken out. It is a conclusion. That is the duty of the court to decide.

Mr. Pesin: What was the nature of the dispute.

20

Mr. O'Mara: There is no question about that. It was the question of seniority rights in dispute.

Mr. Pesin: All right.

Q. And you were out four days because of this dispute? A. Yes.

Q. And you were back again in service? A. Yes.

30

Q. Now, during the time in 1925 when you were transferred until 1933 when the eleven men were laid off, were there any men that were laid off from the barge service that were senior in time to you on the barge service but junior in time to the entry of your employment with the New York Central? A. Yes, sir.

Q. And you retained your time and continued working? A. Yes, sir.

Q. And how many days were you out of work from the 13th day of January to the present time? A. I worked a hundred and ten days. To be exact about three months, I should think.

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Frank Marotta. Called by Complainant. Direct.

Mr. Moritz: I object. It is based upon a conclusion of the witness. He said "I should think".

The Witness: I worked a hundred and ten days in 1933 and I lost two hundred and four days.

BY MR. PESIN:

10

Q. Did you figure that out? A. Yes, I got the time from the office.

Q. You got this from the office? A. Yes.

Q. And it is two hundred and four days? A. Lost, and a hundred and ten I worked.

Mr. Moritz: Then I object. The proper records of the New York Central.

The Court: Why isn't that so? Call upon them to produce it.

20

Mr. Pesin: If they have it.

The Court: Call upon them to produce the records or serve a notice to produce. If counsel doesn't produce it I will force them to produce it.

Mr. O'Mara: I have nothing to do with it.

The Court: I will make them produce it. If not today then the next day. It doesn't look as though we will finish today.

30

Mr. Pesin: All right, that's all.

Mr. O'Mara: No questions.

Mr. Moritz: No questions.

The Court: You will produce those records Mr. O'Mara.

Mr. O'Mara: Yes, your honor.

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Charles Zmirich. Called by Complainant. Direct.

CHARLES ZMIRICH, being sworn :

DIRECT EXAMINATION BY MR. PESIN :

Q. When did you first enter the employ of the
New York Central Railroad, Mr. Zmirich? A.
Well, if you want me to tell, before the strike or
10 after the strike?

The Court: When?

The Witness: I started to work March 15,
1915.

BY MR. PESIN :

Q. And what craft did you enter? A. Floatman.
Q. And how long did you work as floatman? A.
20 I worked as floatman right to 1920.

Q. Then what happened? A. Then the time I
was sick, and at the same time I was sick they went
on a strike in 1920.

Q. And when did you come back to work? A.
When I came back from the strike? The 26th of
August.

Q. 1920? A. 1920.

Q. I see. And you worked then from 1915 until
30 1920 as a floatman with the exception of the time
you lost by reason of the strike in 1920? A. Yes.

Q. How long did that strike last, do you know?
A. About five or six months, I guess.

Q. And after the strike how long did you con-
tinue working as a floatman? A. I was working
as a floatman to June 1, 1925.

Q. And then what happened? A. Well, between
that I was so many times changed from floats and
tugs. When they didn't have no men they put me
40 from the floats to the tugs and when I was through

Charles Zmirich. Called by Complainant. Direct.

on the tugs I was put back on the float again. When they needed shifting barges between the piers then they also put me on the shifting barges, and then on the floats back again. Then on the first of June 1 I asked Captain Reilly if I can go on the barges. He said to me "Yes".

Q. And did you go on the barges? A. Then he said to me "Yes, I can go on the barges". 10

Q. Now, you did go on the barges? A. Yes, the first of June.

Q. The first of June, 1925? A. Yes.

Q. And you continued working until when? A. Until January 12, 1933.

Q. How many days were you out of work from the 13th of January, 1933, up to the present time?

A. The way I figure it in my book in which I was keeping my time— 20

Mr. Moritz: I object that the proper way would be the books or records of the New York Central.

The Court: If he kept the book under his own supervision certainly he can testify to it.

BY MR. PESIN:

Q. All right, you may answer. A. I have in my book every day I was working and every day I lost, and everything. 30

Q. And how many days did you lose? A. I lost a hundred and eighty-seven days.

Mr. Pesin: That's all.

Charles Zmirich. Called by Complainant. Cross.
Joseph Carcich. Called by Complainant. Direct.

CROSS EXAMINATION BY MR. O'MARA:

Q. Mr. Zmirich, you were out of service from November 1, 1922, to November 14, 1923, were you not? A. I was sick.

10 Q. You were out of work a year? A. No, sir, less than a year. I was taken by the board of health.

Q. That was in 1922, wasn't it? A. It was in 1922, yes.

Q. November? A. Yes.

Q. Until when? A. Until October 15th, I think I came back.

Q. 1923? A. Yes.

20 Q. You resigned in 1922? A. No, I never resigned. I was taken sick.

Mr. O'Mara: That's all.

Mr. Moritz: No questions.

JOSEPH CARCICH, being sworn:

DIRECT EXAMINATION BY MR. PESIN:

30 Q. Mr. Carcich, when did you enter the employ of the New York Central Railroad? A. October 27, 1921.

Q. In what craft? A. On the float.

Q. You were a floatman? A. Yes.

Q. And how long did you work as a floatman? A. To November 7, 1926.

40 Q. What happened in 1926? A. In 1926 I go and asked Captain Reilly for a barge.

Joseph Carcich. Called by Complainant. Direct.

Q. Did you get a barge? A. Then I got a barge.

Q. When was that? A. November 7, 1926, I got the barge.

Q. How long did you work on the barge? A. Until January 13, 1933.

Q. Were you one of the nine men that were laid off in 1931? A. I was.

Q. You were one of the men? A. Yes. 10

Q. And how long were you out of work? A. I was out four days.

Q. And were there any men that you knew of that were senior in service to you in the lighterage craft or junior to you since your entry with the New York Central Railroad in the float department—the float craft, that were laid off? A. Seniors? No.

Q. That worked longer than you on the barges or on the lighters? A. That was laid off before me? 20

Q. Yes. A. I was working sixty-three days since January 12, 1933, until February 13, 1934. Sixty-three days working and two hundred and twenty-eight days lost by my book which I carry, including Sundays.

Q. Is this your record which you had prepared? A. Yes.

Q. Will you look at the days there? A. Two hundred and twenty-seven days lost. 30

Q. Look at it. A. Sixty-three working says total. Total of lost days two hundred and seventy-eight.

Q. Is that the amount, two hundred and seventy-eight days that you lost? A. Yes, that is the record or book I have of the time on the job.

Mr. Pesin: That's all.

Mr. O'Mara: No questions.

Mr. Moritz: No questions. 40

John Kucich. Called by Complainant. Direct.

JOHN KUCICH, being sworn :

DIRECT EXAMINATION BY MR. PESIN :

Q. Mr. Kucich, when did you enter the employ of the New York Central Railroad? A. In 1921.

Q. And what craft? A. Floats.

10 Q. You were a floatman? A. Yes, sir.

Q. And how long did you work as a floatman? A. Until 1925—August 25th.

Q. So up to the 25th of August you worked as a floatman? A. Yes.

Q. What happened then? A. Then I asked Captain Reilly for a barge.

Q. Were you transferred? A. On August 25, 1925, I was transferred to a barge.

20 Q. How long did you work on the barges? A. January 13, 1933.

Q. Until January 13, 1933. Were you one of the nine men that were laid off at that time? A. Yes, sir.

Q. And how many days did you lose? A. Four days.

Q. With the exception of these four days did you work steady right through? A. Yes.

30 Q. And how many days did you lose up to January 13, 1933? A. About eight months.

Q. Can you tell us how many days? A. It is right on the paper.

Q. Do you figure twenty-six days in a month? A. Yes.

Q. About eight months? A. Yes, eight months work.

Mr. Pesin: That's all.

Mr. O'Mara: No questions.

40

Mr. Moritz: No questions.

Harvey Masten. Recalled. Direct.

HARRY MASTEN, recalled:

DIRECT EXAMINATION BY MR. PESIN:

Q. How many day were you out, Mr. Masten?

A. I made eighty days all told. I don't know how many days I lost.

Q. Haven't you figured it? A. No, just the days I worked. 10

Q. How many days didn't you work? A. I can't figure it in a minute. I could figure it up if I had a calendar.

Mr. Pesin: Suppose you step down and we will figure it up. That's all if your honor please. One of the men is in the hospital. He lost very little time.

The Court: Do you rest? 20

Mr. Pesin: Yes.

Mr. O'Mara: May we take a recess for a short time, your honor so counsel for the defendants can confer?

The Court: Yes. We will take a recess for ten minutes.

Mr. O'Mara (after returning to the court room): The New York Central Railroad rests, your honor. 30

Mr. Moritz: I call Mr. Forbes on behalf of the defendant Local 996.

H. C. Forbes. Called by Defendant. Direct.

CASE FOR DEFENDANT LIGHTER CAPTAINS' UNION OF
THE PORT OF NEW YORK AND VICINITY, LOCAL
996, INTERNATIONAL LONGSHOREMEN'S ASSOCIA-
TION.

HOWARD C. FORBES, recalled:

10 DIRECT EXAMINATION BY MR. MORITZ:

Q. Mr. Forbes, have you got the minutes before you of Local 996 showing the adoption of a resolution by the Local with reference to the decision handed down by Mr. Wright in 1933? A. I have.

Q. That is the particular resolution which you had reference to when you were called as a witness in behalf of the complainants? A.. Yes.

20 Q. Will you kindly turn to the particular page where that resolution was adopted? A. Do you want me to read it?

Q. Have you turned to the particular page where the resolution was adopted? A. I have.

Mr. Moritz: I offer in evidence on behalf of the defendant minutes of Local 996 dated July 5, 1933, so as to show the adoption of that resolution by the Local.

30 Mr. Pesin: What resolution? With respect to what?

The Witness: No, that's a mistake. It is April 5, 1933.

Mr. Moritz: April 5, 1933. That is the decision of Mr. Wright stating that the lighter captains service began from the date they entered the lighter captains' craft.

40 Mr. Pesin: Of course we have no objection to the entry of that for whatever legal import

H. C. Forbes. Called by Defendant. Direct.

it will have. We don't want to make any concession other than we will admit it.

Mr. Moritz: I offer it in evidence.

The Court: That is the resolution which was read this morning.

Mr. Moritz: Yes, on the complainants' case.

Mr. Pesin: He is putting it in evidence.

(Page 8 of minute book marked Exhibit D-1 in evidence). 10

Mr. Moritz: I likewise offer in evidence D-1 for identification and ask that it be marked in evidence on behalf of the defendant Local 996.

(Letter marked Exhibit D-2 in evidence).

BY MR. MORITZ:

Q. Mr. Forbes, subsequent to the adoption of this resolution of April 5, 1933, by Local 996, did these complainants request of the executive local board a hearing? A. They did. 20

Q. Of their grievance? A. They did.

Q. Was a time and date fixed for a hearing of their grievance by the executive board? A. It was.

Q. Was notice of the particular time and date sent to the complainants involved in this case? A. Yes.

Q. In what manner or form was said notice sent to them? A. In a letter stating the time and place and sent by registered mail. 30

Q. I show you a copy of a letter dated June 6, 1933, and ask you is that the particular letter that was sent to these complainants giving them the opportunity to state their grievance before the executive board. A. Yes, that's the letter—a copy.

H. C. Forbes. Called by Defendant. Direct.

Mr. Moritz: Mr. Pesin this is the letter you gave me this morning and I desire to offer it in behalf of the defendant.

Mr. Pesin: All right.

(Letter marked Exhibit D-3 in evidence).

BY MR. MORITZ:

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Q. Did the executive board convene on June 12, 1933, at 8 P. M. at the Lighter Captains' Union Local 996 at 164 Eleventh Avenue, New York City, as stated in Exhibit D-3? A. They did.

Q. Did any of the complainants appear before the executive board? A. No.

Q. On that particular time to state their grievance? A. No.

20

Q. Did the executive board consider their grievance despite the fact that the complainants did not appear? A. They did.

Q. What was the decision of the executive board at that particular time? A. The decision of the executive board stated that the arrangement with the New York Central in regards to Mr. Wright's decision be upheld and they should stay as theretofore. I have a copy of it here.

30

Q. Mr. Forbes, your local union is affiliated with what International? A. International Longshoremen's Association.

Q. And has that International Longshoremen's Association a constitution and rules of order? A. They have.

Q. And is that constitution and rules of order published in pamphlet form or book form? A. It is.

40

Q. I show you a booklet and ask you if that is the particular booklet which is published by the Inter-

H. C. Forbes. Called by Defendant. Direct.

national Longshoremen's Association? A. That is the book—the rules of order and constitution.

Mr. Moritz: I offer that if Mr. Pesin hasn't any objection.

Mr. Pesin: No.

(Book marked Exhibit D-4 in evidence).

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BY MR. MORITZ:

Q. Mr. Forbes, does the constitution of the International Longshoremen's Association provide for matters of appeal where a member of the local union has been in anywise aggrieved? A. They do.

Q. What are the steps within said organization by which an aggrieved member can go in order to rectify his grievance? A. The first step is to the executive board of the Lighter Captain's Union.

20

Q. That is Local 996? A. To Local 996.

Q. What is the second step? A. The second step is to the District Council of the Longshoremen's Association.

Q. Do you know where their office is located? A. 164 Eleventh Avenue.

Q. Where? A. New York City.

Q. Do you know what that body consists of? A. It consists of approximately one hundred delegates or representatives of all locals in the International Longshoremen's Association in the Port of New York.

30

Q. How often do they meet? A. The first Tuesday of each month.

Q. What is the next step on an appeal that a member can take after taking an appeal to the New York District of the International Longshoremen's Association? A. To the members of the executive

40

H. C. Forbes. Called by Defendant. Cross.

board of the International Longshoremen's Association.

Q. And where does the executive board meet?

A. At 265 West 14th Street, New York City.

Q. And is there any further appeal from the executive council of the International Longshoremen's Association? A. To the International Convention.

Q. Did any of these complainants take any steps as you have just mentioned to rectify their grievance? A. They did not.

Mr. Moritz: That's all.

CROSS EXAMINATION BY MR. PESIN:

Q. This notice of June 6th was sent after I had requested and demanded a hearing by the executive board in behalf of these men, wasn't it? A. It was.

Q. And until that time you didn't extend any hearing to these men, and in fact you denied them a special meeting which they wanted to call, isn't that so? A. We never denied them any meeting.

Q. You did, didn't you? A. We couldn't on account of the by-laws.

Q. And you never wrote that stating that to the men, did you? A. We told them that. O'Meara came to see me and I told him that.

Q. Came to the meeting that was not intended to be a hearing before the executive board on the grievance of these men? A. Yes.

Q. Or was it a regular meeting and a free-for-all.

Mr. Moritz: I object to the free-for-all.

H. C. Forbes. Called by Defendant. Cross.

BY MR. PESIN :

Q. A regular meeting where any of the members could come and air their views and state their opinion? A. We had two rooms and a police officer in attendance to keep order, and in one room the executive board sat in session and in the outer room any one wishing to speak on both sides of the question was to have their say. 10

Q. In other words, you were inviting everybody besides these eleven men, weren't you? A. We were inviting those only in the New York Central who had a grievance.

Q. That is members other than these men. A. These men would have been given the privilege of a hearing—the first hearing, and any other further testimony from any other members which would be affected as much as these men. 20

Q. And you posted this notice down on the bulletin board down on the pier. A. We did.

Mr. Moritz: He did that besides the letter.

BY MR. PESIN :

Q. Did you send a notice to the effect this meeting was being held? A. Yes. 30

Q. And do you remember getting a letter from me on June 9, 1933, a day or two after this notice was sent to the men? A. Yes.

Q. Have you a copy of the letter? A. Yes.

Mr. Pesin: I offer this in evidence.

Mr. Moritz: Here is the original letter.

The Court: I suppose that ought to go in rebuttal. Mark it for identification now. 40

H. C. Forbes. Called by Defendant. Cross.

Mr. Pesin: Their contention is now they have given us a hearing and I want to, on cross examination, show they didn't give us a hearing. It is a matter of form and will save a little time.

The Court: All right.

(Letter marked Exhibit C-7 in evidence.)

10

Mr. Pesin: I would like to read it. It is not very long (Counsel reads letter).

Q. Now, in response to this letter did you ever call me? A. I called you by telephone.

Q. And what time did you call me, and when?

A. About three o'clock in the afternoon on Monday.

20

Q. Three o'clock in the afternoon on Monday. And I requested you to communicate with me at noon? A. Yes, but the men had been communicated with.

Q. The men? A. The men.

Q. In response to my letter the first time you got in touch with me was three o'clock in the afternoon of the date that was set for the hearing, isn't that so? A. Yes, that's so.

30

Q. And then I told you at that time I had already advised the men, because I wanted you to call me before noon, that they should not appear. Isn't that what I told you? A. Yes.

Q. And I couldn't get in touch with them. And in spite of that in the evening you went on with the executive board hearing? A. I had stopped my car in front of two of these complainants and asked them if they had heard from you and they said "Yes, they were coming down", but they didn't come.

40

H. C. Forbes. Called by Defendant. Cross.

Q. And when you held this executive board meeting you considered it closed, didn't you? A. We hold a meeting for the members. We hold it for them, but we do not allow attorneys in our organization.

Q. Did you consider that meeting closed so far as these men were concerned? A. If you had asked for another meeting you would have gotten it in the proper channels. 10

Q. Did you get another letter from me on June 14th?

Mr. Pesin: I ask for the production of that letter of June 14th.

(Letter produced.)

Mr. Pesin: I offer it at this time your Honor.

The Court: All right.

(Letter marked Exhibit C-8 in evidence.) 20

BY MR. PESIN:

Q. You say it was never requested of you after that? A. The next step was never requested.

Q. In other words, you considered the executive board complied with its task? A. I have no right to consider anything. The executive board made a decision. 30

Q. You got this communication of June 14th—
"As I stated over the phone to you on Monday, I did not think that I could communicate in time with my clients to notify them about being present at the supposed hearing before the Executive Board. I stated in my letter of June 9th, 1933, a copy of which said letter I also addressed to the Lighter Captains' Union, Local 996, at 11th Avenue, New York City, N. Y., that I would like to know wheth-

40

H. C. Forbes. Called by Defendant. Cross.

er this supposed meeting of the Executive Board was going to be a private hearing accorded to these men in accordance with Article 7, Section 11, of the By-laws of the Local, which By-law seems to be the only one applicable to the question of appeals on grievances. I asked you in that letter to let me know by 12:00 noon on Monday, June 12th, 1933, so that I could advise my clients accordingly. You failed to call me at that time, but you did call me at about 5:00 P. M. that evening when it was too late for me to communicate with my clients, having told my clients a few hours before that since I had failed to hear from you at the above stated time, they should not appear at this contemplated Executive Board meeting. What I would like to know now is whether this Executive Board meeting was held, and if so, what action they took with reference to the seniority rights of these men. If they have decided adversely to them, I wish to call your attention to the fact that this Executive Board, as I am informed, was composed of members who themselves were once responsible for the discrimination against these men, and, therefore, were not qualified to sit on the Executive Board. Furthermore, in said Article 7, Section 11, it states that the presiding officer shall determine if an appeal is warranted on the question at issue. What has been his determination in that respect? Apparently, your proceeding on appeal, even as it has been on the original question, has been illegal. I would like to know, therefore, definitely whether or not you have reconsidered the question of the seniority rights of these men. If you have, and if it is as originally decided, then no other recourse is left open to us but to litigate this matter in court. However, we are still willing, before we do

H. C. Forbes. Called by Defendant. Cross.

so, to give you this final opportunity to give us a hearing by an impartial and qualified Executive Board, wherein the matter will not be a public hearing, but a private one as laid down in Article 7, Section 11, of the By-laws. We would like to know also whether we could have the right to appear as counsel for these men. In any event, we would appreciate information in this respect. Since the letters which I had written to you and the Local previously have gone unanswered, and since the several communications and consultations which we had have been somewhat delayed on your part, I must insist that I have word from you or the Local as to your final intentions herein. We shall expect a reply from you not later than Tuesday, June 20th, 1933, at which time, should we fail to hear from you, we shall institute suit without further delay." You got that letter from me, did you not? A. I think I did.

Q. And did you reply to that letter? A. I don't know. Sullivan did. He was our attorney in New York.

Mr. Pesin: I would like to offer the letter of Sullivan & Dunn.

Mr. Moritz: No objection.

(Letter marked Exhibit C-9 in evidence.)
(Counsel reads letter.)

BY MR. PESIN:

Q. Now, did you get a letter from me in response to this letter of June 17th, the very next day by registered mail? A. I think you sent me a copy of the letter which you sent to Sullivan.

H. C. Forbes. Called by Defendant. Cross.

Mr. Pesin: Have you that letter of June 17th?

Mr. Moriz: Yes.

Mr. Pesin: This is the last letter if your Honor please. I offer this copy.

(Copy of letter marked Exhibit C-10 in evidence.)

10

(Counsel reads letter.)

Q. And from that time on no reply was made to me from the union or yourself, was there, with reference to this letter. A. Not to that, I don't think.

Q. And no further notice was given to these men?

A. If they wanted a meeting all they had to do was to ask for it.

20

Q. No notice was given. Was this the notice that was posted on the bulletin board, a notice to this effect—"NOTICE. Any member Lighter Captains' of the New York Central Railroad wishing to give any testimony with regards to seniority rights will kindly appear before meeting of Executive Board, to be held at 164 11th Ave., Monday evening, June 12th 33 at 8 P. M. when the matter will be brought up". A. That's right.

Q. Did you say the men were not entitled to call a special meeting? A. I beg your pardon.

30

Q. Did you say those men were not entitled to have a special meeting? A. I didn't say that.

Q. They are entitled to call a special meeting? A. Yes.

Q. And they requested it, didn't they, Mr. Forbes? A. But under the circumstances the by-laws made it impossible for them to bring up the grievance until the next meeting.

40

Q. And there is a provision which says they can appeal and so on to a convention? A. That's the last appeal.

H. C. Forbes. Called by Defendant. Redirect.

Q. When and where do they meet? Once in every two years? A. Yes.

Q. And these are the same provisions that practically were in the by-laws of that case which was heard of *Walsche v. Sherlock*.

Mr. Moritz: I object. The witness wouldn't know that. 10

The Court: You are putting it affirmatively assuming he does know it.

Mr. Pesin: I will withdraw that particular question. I think your Honor I will call that to your attention to show it is the same in the *Walsche-Sherlock* case and what the court there determined. That's all.

Mr. Moritz: If the court please on behalf of Local Union 996 I desire to offer in evidence at this time the notice that was attached to the bulletin board on June 6, 1933 informing members who desired to give testimony with regards to seniority rights to appear before the meeting of the executive board to be held at 164 11th Avenue, New York City, Monday evening June 12, 1933 at 8 P. M. when the matter will be brought up. 20

(Notice marked Exhibit D-5 in evidence.) 30

REDIRECT EXAMINATION BY MR. MORITZ:

Q. Mr. Forbes, have you got before you the minutes of Local 996 with reference to the meeting of September 2, 1931? A. I have.

Mr. Moritz: I desire to offer these minutes in evidence and without reading the entire minutes I state to the court that these minutes will 40

H. C. Forbes. Called by Defendant. Redirect.

reveal that the business agent was asked by way of a resolution to take the matter up of seniority and the transfer from one craft to another by officials of the railroad.

Mr. Pesin: Asked by who? When was that?

10 Mr. Moritz: September 2, 1931. If counsel insists I will have to read it into the record.

Mr. Pesin: Does that refer to the motion that was made to refer this matter to the board of mediation?

The Witness: Shall I read it?

Mr. Moritz: I will offer the whole minute book in evidence if the court please.

Mr. Pesin: Will you just make a note so the court can refer to it?

20 Mr. Moritz: I offer the minutes of Local 996 in evidence beginning January 5, 1927 and terminating November 4, 1931. I particularly call the court's attention to a meeting of September 2, 1931 at page 258 taking in September 16, 1931 at page 262, wherein after the conference was had with the officials of the railroad a report was made by the business agent Forbes that he had a conference with the New York Central officials on the seniority rights of the lightermen employed by their company and that no organization had a separate seniority agreement. He further stated that the New York Central is willing to in writing guarantee seniority rights of lightermen from now on.

30

Mr. Pesin: Does that book refer to the meeting when there was a motion to refer it to the mediation board?

Mr. Moritz: That would be in 1933.

Mr. Pesin: No, 1931.

40

Mr. Moritz: I offer this book in evidence.

H. C. Forbes. Called by Defendant. Redirect.

(Minute book marked Exhibit D-6 in evidence.)

Mr. Moritz: Meeting of July 6, 1932. I would like to offer that.

The Court: What is the page?

The Witness: There is no number on the pages in this book.

Mr. Moritz: I will offer that in evidence unless you prefer to have me read it into the record. 10

The Court: I think it would be better to read it into the record.

BY MR. MORITZ:

Q. Mr. Forbes, referring to the meeting of July 6, 1932, will you kindly read into the record any minutes pertaining to the subject matter involved here? A. "Brother W. Patustich wanted to know why he could not get his seniority from the floats the same as the rest of the captains did which were on the floats and tugs. Brother Forbes in answer to brother stated that his case leads into a question that brings up a lot of discussion and that it only puts him five or ten men ahead on the list. Brother Forbes also stated that there was a vote in our previous meeting to let the float and tug men's time go before the board of mediation and that if we asked for brother's time at the present it would only be going against the case which the board is to decide upon. Brother Bunnberry made motion to let his case go before the board with the rest of the floatmen and tugmen. Seconded by Brother William Patustich. Carried." 20 30

H. C. Forbes. Called by Defendant. Redirect.

BY THE COURT:

Q. Was that a resolution? A. That was just a motion.

Mr. Pesin: I wish you could find that because it is very important.

10

BY MR. MORITZ:

Q. The one of October 7, 1931 on page 266. A. "Communication from the New York Central Railroad guaranteeing seniority protection for lighter captains employed by them from 1st of October, 1931. Moved by Brother Bunnberry, seconded by Brother Pearson that action on this communication be taken up under new business. NEW BUSINESS. Brother James Fowler vigorously assailed the letter from the New York Central Railroad as an injustice to Lighter Captains. He pointed out that said railroad permitted men from tug boats and grain to exercise their seniority rights over Lighter Captains but that Lighter Captains who were laid off on their account could not exercise the same right over junior men now employed on tugs or grain boats."

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30

Mr. O'Mara: I want to object to that going into evidence as of any binding effect on the New York Central.

The Court: I can't see how it would be. It will be received with that reservation.

(Witness continuing) "His contention received the strenuous support of Brother Annawich. There was much discussion on this question some becoming very heated but the majority opinion held to the

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H. C. Forbes. Called by Defendant. Redirect.

belief that the New York Central letter should be accepted as they felt the officials of this organization could do nothing at present about it. Arguments flew thick and fast and there were threats of bringing charges against men of this organization for numerous offenses. However, no charges were filed. Brother Kerl made a motion seconded by Brother A. Unkavich that this organization accept the New York Central letter. It was amended by Brother Bunnberry seconded by Brother Jones that organization accept letter but that when the opportunity presented itself for this organization to go before the Arbitration Board that question be brought up and definitely settled. Unanimously carried." 10

Mr. Pesin: That is what we want. 20

The Court: Anything further now?

Mr. Moritz: That's all.

Mr. Pesin: No rebuttal or anything else.

The Court: Do you want to submit a memorandum?

Mr. Pesin: Yes.

The Court: All right, I will take it under consideration.

30

40

Exhibit C-1.

THE NEW YORK CENTRAL RAILROAD COMPANY

A. E. Lloyd
 General Superintendent
 New York Terminal District

A. W. Shaffer
 Marine Assistant

10 G. S. Clark
 Marine Superintendent

T. Acker
 Lighterage Agent

J. O. James
 Grain Agent

G. J. Schumacher
 Marine Auditor

6 Beaver Street
 New York

20

October 5, 1931

1 r-p

Captain. Howard Forbes, Bus. Agent,
 Lighters Captains' Union,
 217 Court Street,
 Brooklyn, N. Y.

Dear Sir:

30 Referring to our conference of September 23rd
 about the practice of deckhands and floatmen trans-
 ferring to our barges as captains:

Effective October 1, 1931, we will not permit any
 other employes of the Marine Department to accept
 positions as barge captains except as junior, or new
 men.

Yours truly,

(Signed) A. E. LLOYD
 General Superintendent

40

Exhibit C-2.

LIGHTER CAPTAINS UNION

Local 996, I. L. A.

FINANCIAL SECRETARY'S REPORT.

Date.....

No.	Name	Month	Amount	10
-----	------	-------	--------	----

Question.

Will the Captains who transferred from floats & tow-boats be allowed to carry their Seniority from floats & tow-boats to the barges.

Capt's in favor.	Capt's Opposed.	
7	96	20

Exhibit C-3.

January 5, 1933.

Mr. A. H. Wright, Superintendent, Eastern Terminal District, N. Y. C., R. R., 6 Beaver St., New York City	30
---	----

Dear Mr. Wright:

The several men transferred from towboats, floats and steam lighters to the barges previous to the depression, when forces were reduced, were allowed to carry their seniority from these crafts to the barges. Members of the Lighter Captains' Union went on record as being opposed to this practice.

40

I took the matter up with you and you stated that whatever the majority of the men on the New York Central wished you would agree to. So to prove the sentiment of the men in the employ of your company we have taken a ballot upon the question:

10 “Will the captains that transferred from towboats and floats be allowed to carry their seniority from towboats and floats to the barges?”

20 From the first fifty-eight men on the seniority list, none of whom were affected, forty-seven were opposed to these men carrying their towboat and float time; six I could not locate and three refused to sign. Of the one hundred nine men approached—ninety-four were opposed; seven in favor and eight refused to sign either way. There are a lot of men laid off who did not come looking for work as they are so far down on the list, and they would be opposed, if approached, as it would naturally affect them favorably.

30 Therefore, I am asking on behalf of the Lighter Captains' Union that the men transferred from tugs, steam lighters and floats be allowed seniority on the barge roster only from the date they entered the barges, and to prove this is the wish of the great majority of the men working for your Company I have the signatures of same on file in this organization.

Very truly yours,

LIGHTER CAPTAINS' UNION, No. 996, I. L. A.

MHR.

Exhibit C-4.

Revised By-Laws of the Lighter Captains' of the Port of New York and Vicinity, Local 996, International Longshoremen's Association, contains no reference on the question of Seniority.

ARTICLE VIII. Section 4, page 15, under RULES OF ORDER reads as follows:

Sec. 4. "All questions of a parliamentary nature not provided for in these rules shall be decided by Cushing's Manual."

10

Exhibit C-5.

(Copy)

UNITED STATES RAILROAD ADMINISTRATION

Director General of Railroads

New York District Conference Committee

New York, March 7, 1919.

20

Mr. Thomas L. Delahanty,
President, Marine Workers Affiliation,
26 Park Place, New York, N. Y.

30

Dear Sir:

The following rates of pay and working conditions are agreed upon to cover employees in the marine service of railroads under the jurisdiction of the Railroad Administration in New York Harbor:

(Then follows rates of pay, etc.)

40

GENERAL

10 This schedule becomes effective as of March 1st, 1919, and provided Federal control continues, will remain in force for one year and thereafter until thirty days notice is given by either party of a desire to change. No change will be made until approved by the proper officer, and the duly authorized committee representing the employees shall have been heard.

In filling a vacancy, qualifications being equal, seniority will prevail.

Yours truly,

(Signed) A. J. STONE
Chairman.

20

30

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Exhibit C-7.

PESIN & PESIN
 Attorneys and Counsellors at Law
 361 Central Avenue
 Jersey City, N. J.
 Tel. Webster 4-8200

Samuel Pesin
 Meyer Pesin 10

—
 Meyer Friedman

June 9th, 1933.

Mr. Howard C. Forbes,
 927 Broadway,
 Union City, N. J. 20

Dear Sir:

The letters which were sent to our clients stating that there would be a meeting of the Executive Board of Local 996, at 11th Avenue, New York City, N. Y. on Monday evening, June 12th, 1933, at 8 P. M., have been turned over to us. We cannot understand why notice was not sent to us. I have attempted to call you on the phone to find out whether or not this meeting is going to be strictly a hearing before the Executive Board which it apparently is not since there was a public notice given on June 6th, 1933, to all the members of the Union. What I requested in my letter was an opportunity to appear on behalf of these men before the Executive Board, which opportunity was not accorded to me. I am, therefore, writing this letter to inquire whether or not you are going to hold the Executive Board meeting on the above date at the aforesaid time and place, and if so, whether or not 30 40

I shall have the privilege accorded me to appear as counsel on behalf of these men.

I shall expect to hear from you not later than Monday noon. If this privilege is accorded me, I will be glad to attend said meeting with my clients. Should I fail to hear from you at that time, I shall take it that you do not desire to proceed with this matter properly, and I shall refuse to permit my clients to appear.

10

Very truly yours,

PESIN AND PESIN,
By MEYER PESIN

MP:EP
Registered Mail

20

30

40

Exhibit C-8.

PESIN & PESIN
 Attorneys and Counsellors at Law
 361 Central Avenue
 Jersey City, N. J.
 Tel. Webster 4-8200

Samuel Pesin 10
 Meyer Pesin

—
 Meyer Friedman

June 14th, 1933.

Mr. Howard C. Forbes,
 927 Broadway,
 Union City, N. J. 20

Dear Sir:

As I stated over the phone to you on Monday, I did not think that I could communicate in time with my clients to notify them about being present at the supposed hearing before the Executive Board. I stated in my letter of June 9th, 1933, a copy of which said letter I also addressed to the Lighter Captains' Union, Local 996, at 11th Avenue, New York City, N. Y., that I would like to know whether this supposed meeting of the Executive Board was going to be a private hearing accorded to these men in accordance with Article 7, Section 11, of the By-laws of the Local, which By-law seems to be the only one applicable to the question of appeals on grievances. I asked you in that letter to let me know by 12:00 noon on Monday, June 12th, 1933, so that I could advise my clients accordingly. You failed to call me at that time, but you did call me at about 5:00 P. M. that evening when it was too late for me 40

to communicate with my clients, having told my clients a few hours before that since I had failed to hear from you at the above stated time, they should not appear at this contemplated Executive Board meeting.

10 What I would like to know now is whether this Executive Board meeting was held, and if so, what action they took with reference to the seniority rights of these men. If they have decided adversely to them, I wish to call your attention to the fact that this Executive Board, as I am informed, was composed of members who themselves were once responsible for the discrimination against these men, and, therefore, were not qualified to sit on the said Executive Board. Furthermore, in said Article 7, Section 11, it states that the presiding officer shall determine if an appeal is warranted on the question at issue. What has been his determination in that respect? Apparently, your proceeding on appeal, 20 even as it has been on the original question, has been illegal. I would like to know, therefore, definitely whether or not you have reconsidered the question of the seniority rights of these men. If you have, and if it is as originally decided, then no other recourse is left open to us but to litigate this matter in court.

30 However, we are still willing, before we do so, to give you this final opportunity to give us a hearing by an impartial and qualified Executive Board, wherein the matter will not be a public hearing, but a private one as laid down in Article 7, Section 11, of the By-laws. We would like to know also whether we could have the right to appear as counsel for these men. In any event, we would appreciate information in this respect.

40 Since the letters which I had written to you and the Local previously have gone unanswered, and since the several communications and consultations

which we had have been somewhat delayed on your part, I must insist that I have word from you or the Local as to your final intentions herein. We shall expect a reply from you not later than Tuesday, June 20th, 1933, at which time, should we fail to hear fro myou, we shall institute suit without further delay.

Very truly yours,

10

PESIN AND PESIN,
By MEYER PESIN

MP:EP

Exhibit C-9.

Telephone Lackawanna 4-3120, 3121

20

Frank X. Sullivan
Daniel F. Dunn

SULLIVAN & DUNN
Attorneys and Counsellors at Law
254 and 256 West 31st Street
(Opposite Pennsylvania Station)

New York June 16th, 1933.

30

Pesin & Pesin, Esqs.,
361 Central Avenue
Jersey City, N. J.

Gentlemen:

We are in receipt of your favor of June 14th, in which you enclose a copy of a letter written to Howard C. Forbes under date of January 14th, 1933. We have read both of your communications

40

and we are at a loss to understand your attitude in this matter.

10 Your previous allegation that your clients are entitled to be heard by the executive board of Lighter Captains' Union Local 996, by virtue of the provisions of the constitution and by-laws of that Union, on the theory that discrimination had been had against your clients, was without foundation. However, in order that the members of the union would not only receive their legal rights, but that they would be given an opportunity to be heard, irrespective as to whether such right existed, the Union notified your clients and other members of the Union interested, that a hearing would be held by the executive board and such notice was sent by registered mail. Your request to appear at the executive board of this local union as attorney while the Board was conducting its business, of course, 20 was beyond the authority of the local to grant. The men, through their constitution and by-laws have set up their own form of courts, and it is unfortunate that you advised your clients not to attend this hearing which was being held that they might have a hearing, thus depriving them of an opportunity to present their case so that the matter could be fairly presented to the local union at its meeting on the report of its Executive Board. It also 30 deprived them, obviously, of their opportunity to record and disclose their contentions in order that they might properly appeal within their organization and within their own laws to the Courts of their International Union.

40 It would appear that you have a misconception of its Constitution. Obviously, this Union conducts its affairs in accordance with its laws and attempts of intimidation will be futile. Any suggestion of court action until this matter is determined within

the confines of this organization itself, of course, has no standing at all in law.

Very truly yours,

SULLIVAN AND DUNN,
By FRANK X. SULLIVAN.

FXS:MA

10

Exhibit C-10.

June 17th, 1933

Sullivan & Dunn, Esqs.,
254-256 West 31st St.,
New York City, N. Y.

Att. Frank X. Sullivan, Esq.

20

Gentlemen:

We are in receipt of your letter of June 16th, 1933. We wish to call your attention to the fact that you have again dealt with generalities as you have done in your last letter. As attorneys for the Union, I should think that you would have at least communicated with me by phone when I had called you and left a message to that effect, and when I had written the several letters to the Union and to Mr. Forbes. I was constantly trying to obtain a hearing for my clients before the Executive Board. I finally gave them notice and waited over ten days to receive word from them about the hearing. Instead of receiving the courtesy of a reply from Mr. Forbes, the Union, or you as attorneys for the Union, they have seen fit to advertise for another general meeting for the purpose of discussing

30

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the question just as they had done previously. There was nothing in this notice that assured these men that they were going to have a hearing on appeal on the question of discrimination which they raised. It appeared to be nothing more than a meeting which was to be held with general steam-roller tactics as were used previously. However, when notice was brought to my attention by my clients of this general meeting, I again commu-
10 cated with the Union and Mr. Forbes, and stated that I would still be willing to appear at such a meeting which they contemplated holding, and that they should let me know by noon on the following Monday whether they would grant me the privilege of appearing on behalf of these men and place the question before the Executive Board properly and intelligently.

I received no reply to this letter nor any phone
20 calls, and I, therefore, advised my clients, in the meantime, not to appear at any such meeting as it by no means savored of an appellate hearing, fair and impartial. Mr. Forbes, however, did call me at about 5 P. M. on said Monday when it was too late for me to further communicate with my clients, and therefore, I gathered the impression as I had originally had that this was going to be a general free-for-all hearing for which the whole
30 Union giving their viewpoints on this question, which, of course, you can readily see, is not a proper hearing on appeal for my clients.

However, in my letter of June 14th, 1933, to which you made reply, I have stated my viewpoint and have asked the Union and Mr. Forbes and yourself to notify me of the out-come of the last meeting, and whether or not you were ready to ac-
40 cord us a fair and impartial hearing on appeal as provided under the Local's By-laws, or whether

you would accord to us any other hearing under any other laws as you seemed to intimate, and instead of receiving a reply with definite advice and information, you gave me nothing except a letter advising me that intimidation would be futile. This letter is dispositive of the entire attitude taken by Mr. Forbes, the Union, and yourself in this matter, that you have already determined the seniority rights of these men and neither heaven nor earth can move you to alter them. 10

Please, therefore, be advised that when I state in my letters that I am going to institute court action, I do not say that for the purpose of intimidation, but that I am actually going to do it so that the rights of these men will be protected. In fact, for your information, I wish to advise you that I had drawn the Bill of Complaint some time ago in this matter, but I have delayed the filing of some in order to make all the attempts I had made to straighten this matter out, if possible, in an amicable manner. I shall again withhold the filing of said Bill of Complaint and give you this *final* notice as attorneys for the Union and for Mr. Forbes, that we demand the right to a hearing on appeal as provided under Article 7, Section 11, by an unbiased Executive Board, to be a private one for the purpose of having an intelligent hearing, and not a free-for-all as you contemplated at your last meeting; or we demand an appeal before any other tribunal which we know not of but which you have referred to. We do demand that this hearing be granted to us without further delay since several months have already elapsed in trying to bring this matter to a culmination and these men have been deprived of a livelihood, some of whom are in dire circumstances. 20 30

We shall, therefore, await your reply no later than Thursday of next week which will be June 40

22nd, 1933, advising us of the time and place and any other details with reference to this hearing.

Very truly yours,

PESIN AND PESIN,
By MEYER PESIN.

MP:EP
Registered Mail.

10

P.S. I am sending a copy of this letter to Mr. Forbes and to the Union.

Exhibit D-1.

April 5th, 1933.

20

LIGHTER CAPTAIN'S UNION, LOCAL 996, I. L. A.

Regular meeting called to order at 8:15 P. M.

H. Lawrence, Presiding.

Roll call of officers showed all present.

Business Agt. and Delegate and Sec. reports read and approved as read.

30

The pass word of the I. L. A. for the ensuing year will be (optimism). Minutes of previous meeting read and approved as read.

Communications.

Steamship Clerks Union Local 975, I. L. A. asking this Local to take 10 tickets for their Dance. Motion made by Br. Pearson. Sec. by Br. Forbes

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that we take the tickets. Br. Forbes took 4; Br. Pearson took 4; Br. Lawrence took 2, to be paid for by themselves.

Resolution.

Be it hereby resolved: That the members of the Lighter Capt's. Union, Local 996, I. L. A. accept the arrangement arrived at between Mr. Wright of the New York Central R. R. and the Local's representatives whereby it was agreed that the men that transferred from Tug-Boats and Floats to Barges, are to receive Seniority rights from the time they went to work on the Barges, but would not receive Seniority rights on the Barges for the time served on Tug-boats and Floats. 10

Howard C. Forbes.

Motion made by Br. McKenzie, sec. by Br. O'mera that this be layed over for unfinished business. (Carried). 20

Exhibit D-2.

December 28, 1931.

Mr. H. C. Forbes 30
Business Agent,
Lighter Captains Union, Local 996, I. L. A.

Attention: Mr. Forbes, Mr. Pearson, Mr. Ryder:

We, the undersigned members of local 996 I. L. A., have resolved to petition you, as our elected representative, to take immediate steps, and in our behalf request of our employers The New York 40

Central R. R. Co. (Marine Department), a fair and just revision of our "Seniority List". We wish to inform you that we have reason to believe that several men are working continually who have broken time. Some of these men had resigned and after staying away for different periods *beyond time allowed*, to take up other vocations, returned and are now employed in preference to the members whose names are affixed.

10

We also wish to bring to your notice that we believe that other men who were discharged for unknown reasons and were away for periods of one year and over, have returned and are now working.

20

We deem it very unfair that this state of affairs be tolerated and continued considering the continuous service of the undersigned. We know such procedure is contrary to every clause of "Seniority" and exceedingly unfair to us.

We therefore request that you take immediate action to obtain for us what we deem our just rights.

Thanking you, we remain,

Signed:

Several names.

Complainants who signed:

William Anderson

H. Masten

P. Kralich

P. McKenzie

F. Marotta

Central R. R. Co. (Marine Department), a fair and just revision of our "Seniority List". We wish to inform you that we have reason to believe that several men are working continually who have broken time. Some of these men had resigned and after staying away for different periods *beyond time allowed*, to take up other vocations, returned and are now employed in preference to the members whose names are affixed.

10

We also wish to bring to your notice that we believe that other men who were discharged for unknown reasons and were away for periods of one year and over, have returned and are now working.

20

We deem it very unfair that this state of affairs be tolerated and continued considering the continuous service of the undersigned. We know such procedure is contrary to every clause of "Seniority" and exceedingly unfair to us.

We therefore request that you take immediate action to obtain for us what we deem our just rights.

Thanking you, we remain,

Signed:

Several names.

30

40

Copyrighted material

W. H. H. H.

W. H. H. H.

W. H. H. H.

W. H. H. H.

W. H. H. H.

Exhibit D-3.

(I. L. A.)

LIGHTER CAPTAINS' UNION

Local No. 996

Affiliated with

International Longshoremen's Association

American Federation of Labor

International Transport Worker's Federation 10

The Trades and Labor Congress of Canada

217 Court Street

Telephone 6453 Main

Brooklyn, N. Y., June 6, 1933

Mr. William Anderson

Mr. H. Maston

Mr. J. Carcich

Mr. C. Zmirich

Mr. P. Krolich

Mr. F. Marotta 20

Mr. E. O'Meara

Mr. P. McKennie

Mr. D. Vigoc

Mr. J. Kucich

Mr. A. Unkovich

Dear Sirs and Brothers:

This will advise that a meeting of the EXECUTIVE BOARD, LIGHTER CAPTAINS' UNION, Local No. 996, I. L. A., will be held at 164 11th Avenue, New York City, at 8 p.m. on next Monday evening, June 12, 1933. 30

As requested by Pesin & Pesin, Attorneys, the Board will be glad to give you a hearing relative to the question of seniority rights at that time.

Fraternally yours,

G. O. WRIGHT
Secretary.

MHR.

Sent Registered Mail. 40

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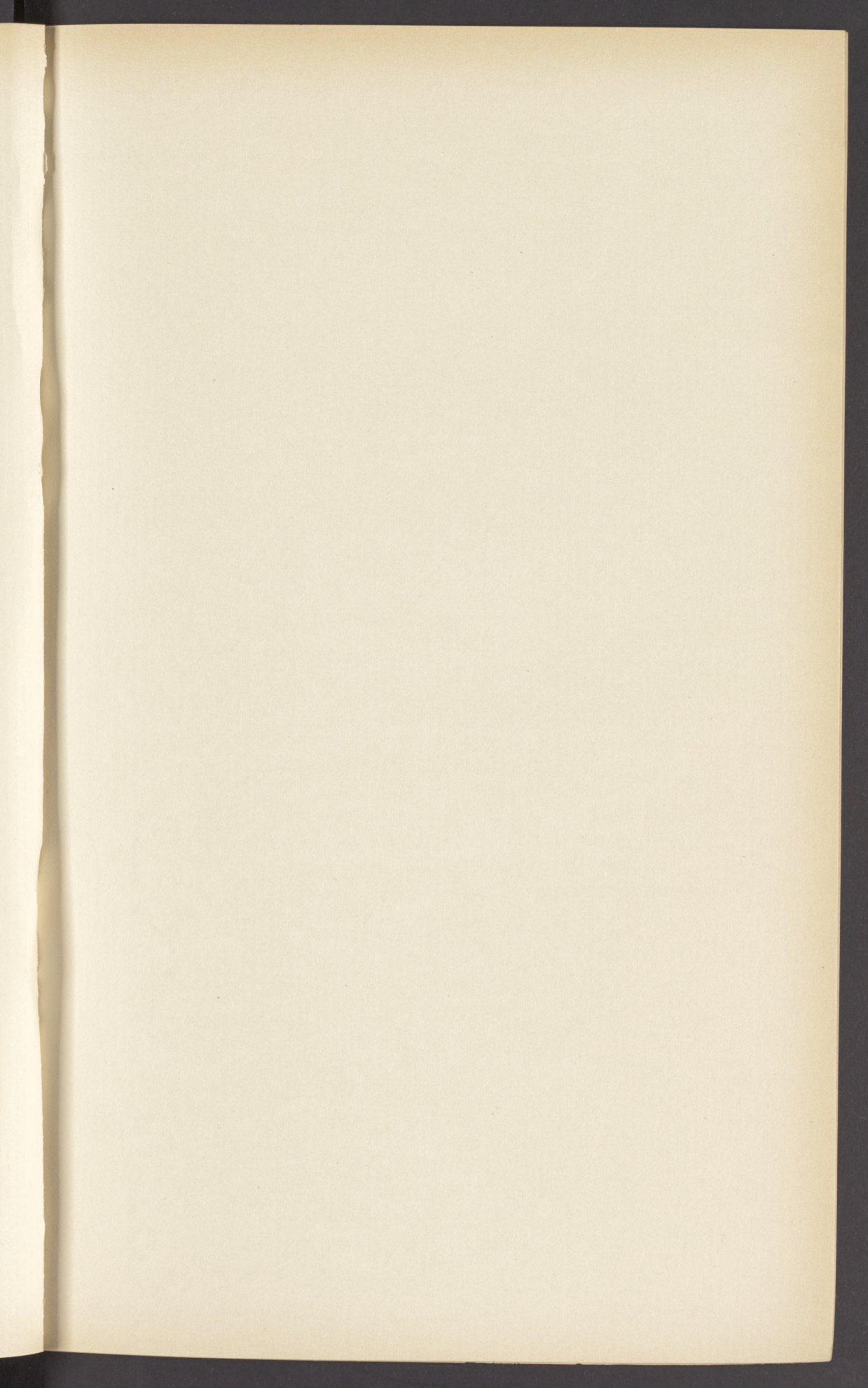
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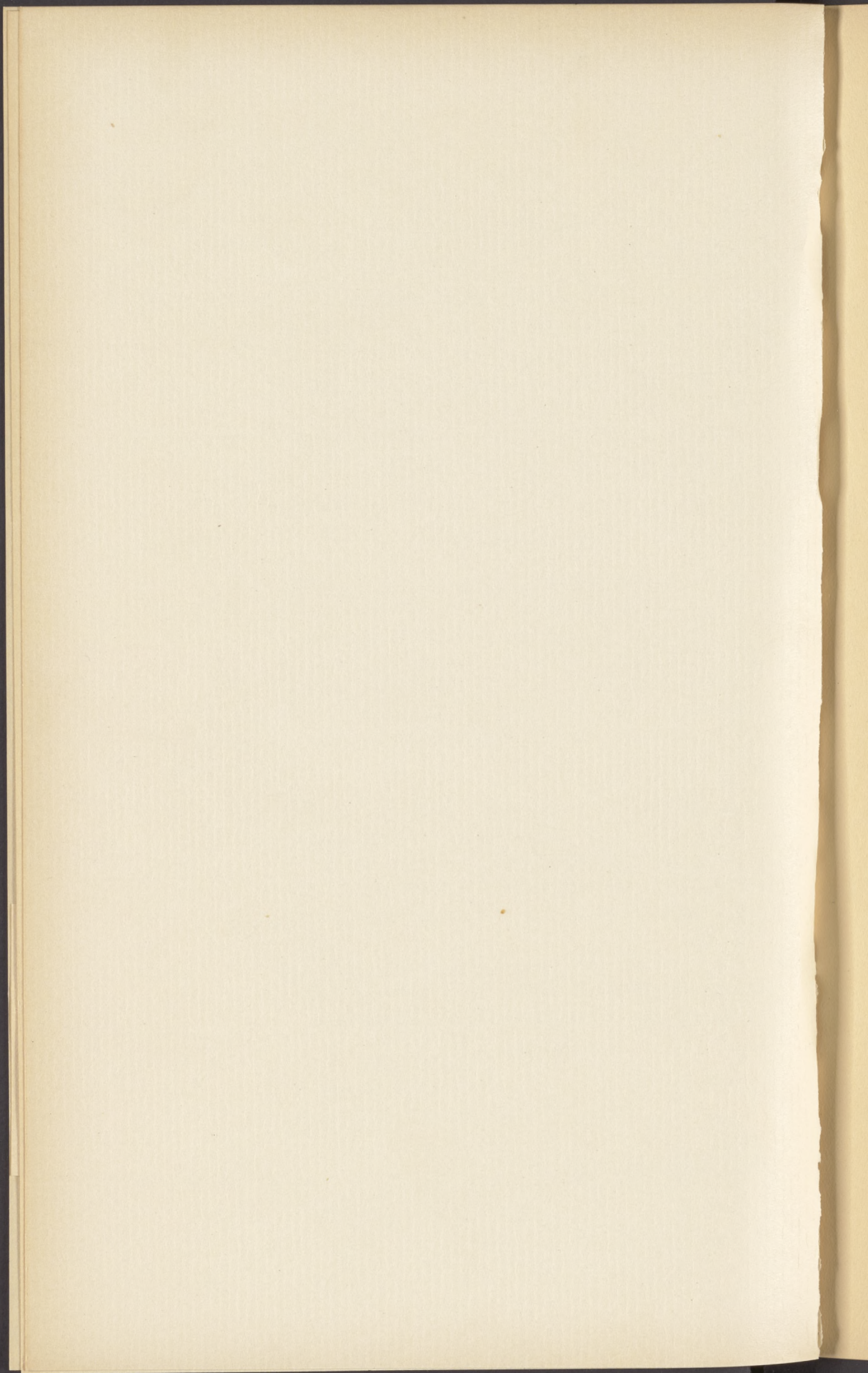
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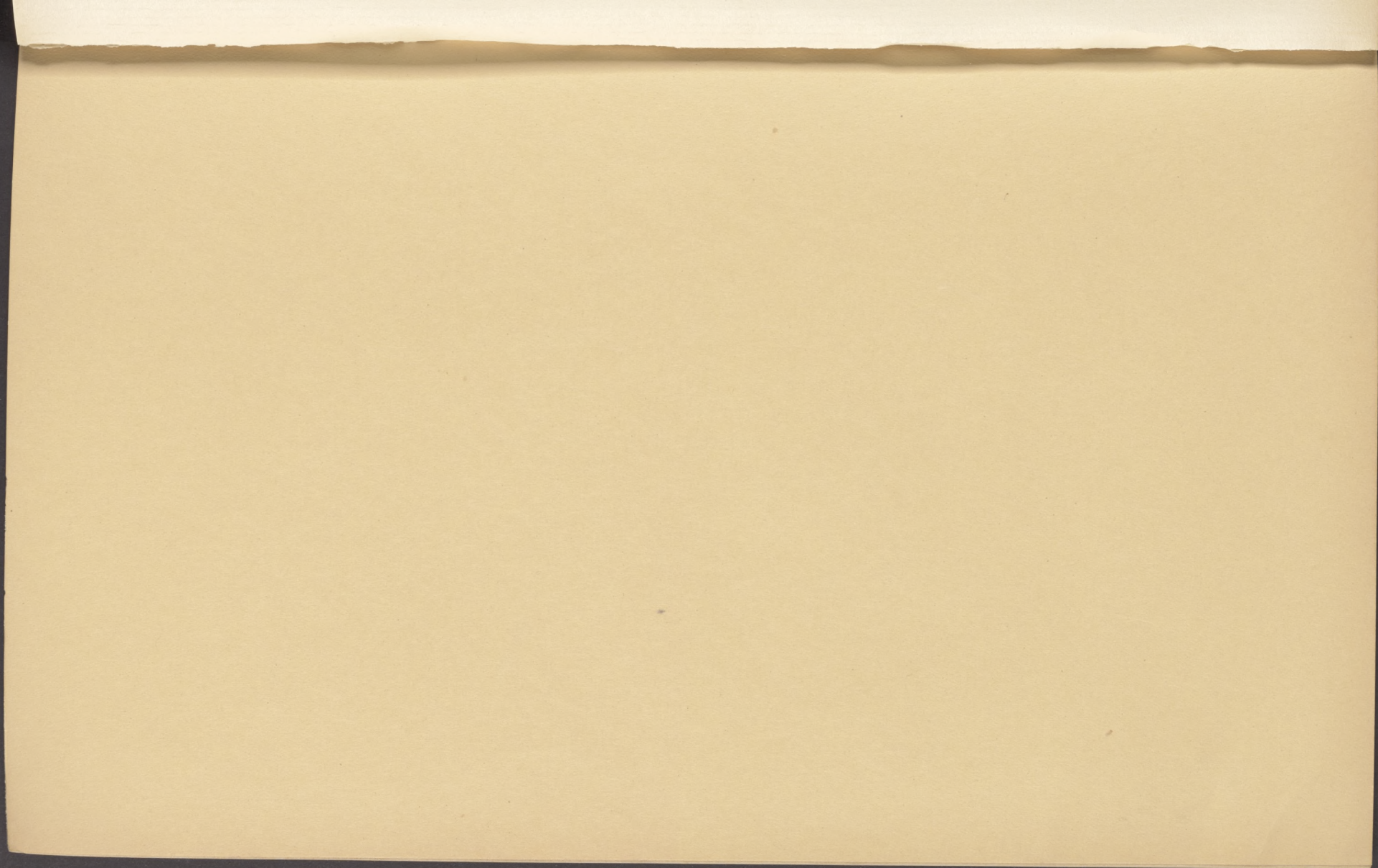
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11
state of case is hereby acknowledged this
30 day of April, 1934.

Wall Haight Carey & Harpner
Solicitors for Defendant-Respondent
New York Central Railroad Company

Laul Remser
Solicitor for Defendant-Respondent
Lighter Captain's Union

118MAY.T.1934

New Jersey Court of Errors and Appeals

Between,
ANTHONY UNKOVICH, *et als.*,
Complainants-Appellants,

and

NEW YORK CENTRAL RAILROAD COM-
PANY and LIGHTER CAPTAINS'
UNION OF THE PORT OF NEW YORK
AND VICINITY, LOCAL 996, INTER-
NATIONAL LONGSHOREMEN'S ASSO-
CIATION,
Defendants-Respondents.

APPELLANTS' BRIEF.

Statement of Fact.

This appeal is taken by eleven men who have been arbitrarily and illegally divested of property rights—the right to work and earn—according to established seniority ratings.

The men, the complainants-appellants in this cause, were employed by the New York Central Railroad, one of the co-defendants, in its Marine Department ranging from 1902 to 1933 when they were all laid off.

The Marine Department is an individual but complete department of the railroad. There is no such thing as a division in the Marine Department. The men working there are all employed under the

State of New Jersey
Case is hereby defended by this

supervision of the Marine Department (S. C., p. 72)—

“It is separate as to crafts, but there is no division of responsibility of authority in the Marine Dept.” (S. C., p. 72, l. 25).

There are three crafts in this Marine Department: the towing, the lighterage, and the repair shop (p. 39). But, nevertheless, they are all in one Department as testified by Relyea, the Railroad Superintendent, on page 72. There is another craft known as a grain-boat, but this is disputed by the Railroad who classifies it, according to Relyea, in the lighterage craft.

Leaving aside for the moment the repair shop and the grain boat crafts, we find only two crafts in the same Marine Department, namely, the floats and lighters. Now, there is no distinction between a float and a lighter, except that a float is a continuation of the rails which carries freight cars to various points in the harbor, and a lighter (sometimes called a barge) is a boat used to carry freight to a steamship or other points in the port (pp. 39 and 40). But they are both non self-propelled boats that are pulled by tugs. The man in charge of the floats is called a floatman, and the one in charge of a lighter is called a lighter captain (p. 40). There is no distinction, however, between these two men. They have no higher qualifications than one another. One may be employed as a lighter captain without being otherwise experienced, and *vice versa*. In fact, they both receive the same scale of wages. The lighter is more desirable than the float because it has certain conveniences such as house accommodations (house boats), but other than this, there is no distinction. And the complainant, O'Meara (p. 84, l. 30), says that there is no distinction in these crafts; he con-

siders them as one. And even Forbes, the business agent of the Union, the other defendant in this case, admits there is no difference between a floatman and a lighter captain, except that the latter performs more clerical duties. Then says Forbes, verifying the above statements (p. 59) :

“Q. A lighter captain lives on the lighter?

A. He lives practically on it.

Q. They have accommodations for their living quarters? A. Yes.

Q. Does the lighter captain get higher rate of pay than the floatman? A. No, sir. I think it is about the same. In fact the lighter captain gets less because the floatman only stays in the day, and the captain lives on it.

Q. What is the advantage that the lighter captain has, if any, over the floatman? A. I cant's say.”

It is essential to keep these explanations well in mind, for it will clearly illustrate how these men were discriminated against and ousted of vested property rights.

As stated above, these eleven men were originally employed in the Marine Department, as floatmen on various dates ranging from 1902 to 1926, when at different dates, as specifically set forth in paragraph 2 of the Bill of Complaint (S. C., p. 1), they were transferred by the Railroad onto the lighters, upon which they adopted the higher sounding appellations of “lighter captain”; in no wise substantially different from their original position of floatman except in name only—names without distinctions. And there they continued to work (that is on the lighters) with the exception hereinafter noted, steadily, until they were all laid off on January 12th, 1933.

When these complainants were shifted by the Railroad from the floats to the lighters, they joined at that time or shortly thereafter, a labor union known as Lighter Captains' Union of the Port of New York and Vicinity, Local 996, International Longshoremen's Association, the co-defendant herein, which had a membership of over 1500 composed of men who worked in the Marine Department of not only the New York Central Railroad, defendant herein, but in seven or eight other railroads operating in New York Harbor (S. C., p. 38). At the time that these complainants joined the Union, it was a duly organized branch of the A. F. of L.; and had a regular constitution and set of by-laws. Article 8 thereof reads as follows (Ex. C-4, p. 119) :

"All questions of a parliamentary nature not provided for in these rules shall be decided by Cushing's Manual."

The by-laws contained no provision, at any time, whatever, as to the seniority ratings or regulations of the members. *But the members did have a seniority rating with their employers as established by custom and agreement* (S. C., p. 54, l. 25).

"Q. How are the men in the lighter captains local recognized as regards working conditions—as to priority of service? A. We figure we have seniority in the Lighter Captains Union from custom and from agreement.

Q. And that's the way you operate? A. A. That's the way we try to operate."

So that now we have come to the point, by admission of the defendant Union itself, that the members of the Lighter Captains Union had seniority rating of employment with the Railroads, that is men would be employed in railroad according to their seniority with their fellow workers:

"Senior comprehends one older in office or whose entrance upon an office was anterior to that of another" (4 N. E. 471, S. C., p. 19).

Nor did the defendant railroad deny this. In fact, it failed to render any testimony in the case as did also the defendant Union. All testimony elicited from the defendants, the Railroad and the Union, was upon complainants' case. Not only did the Railroad not deny the positive evidence in the case that the members of the Lighter Captains' Union had seniority rights, or property rights by custom and agreement, but it was elicited from the Railroad's assistant superintendent of the Marine Department, although somewhat reluctantly and evasively, yet inferentially in part and positive in part (see S. C., pp. 69 to 72), on his direct evidence as part of the complainants' case.

Yet, notwithstanding the fact that these complainants, as admitted by the defendants, had vested seniority rights, the defendant Union ousted them from these rights by a mere request of the defendant Railroad to lay these men off from work and employing men junior to them, which was done.

And let us note how this wholesale discriminatory lay-off was effected. There was no arbitration meeting between the Railroad and Union; there was no notice given to complainants by these defendants; no hearing of any kind was held by any of the parties; no agreements entered into between the defendants or with the complainants; nothing except a ballot circulated in the railroad yards amongst the men, containing this question (see Ex. C-2, p. 117):

“Will the Captains who transferred from floats and tow-boats be allowed to carry their Seniority from floats and tow-boats to the barges.”

Ninety-six opposed the question and seven favored it. Now, it will be noted that this question wasn't voted at a regular meeting of the organization, as it should have been done, if it was at all legal or binding on these men (which we do not concede) since it will be recalled that this organization was to be conducted in accordance with parliamentary rules of Cushing as provided in the by-laws introduced in evidence (Ex. C-4). Furthermore, this very act, assuming it to be procedurally correct, was clearly illegal in that it attempted to enact a code of regulation that appertained to only a small fraction of the membership of the local; for it referred only to employees of the New York Central Railroad Company (co-defendant) and did not affect the great majority of several hundred employees on the other railroads who were members of the same local. The only presumption to be deduced from this is that the ouster of these complainants was a discriminatory and illegal act perpetrated by a clique for purely selfish reasons to obtain seniority over the complainants, which would not have been permitted if it came up for arbitration in an open and legal fashion before the entire organization.

Upon the presentation of this petition forthwith to the Railroad supervisor, he, probably in good faith, but illegally, accepted same and accordingly laid these complainants off, who have lost months of work.

“But there is a higher law than the law of Unions. Such associations are not however above the law of the land, nor altogether a law unto themselves. The requirements of good

government will not permit them (members) to be arbitrarily deprived by their leaders of their opportunity to work and earn" (*Bricklayers Union v. Bowen*, 183 N. Y. S. 855).

And so a bill was filed in Equity seeking a cancellation of the aforesaid ballot which was the basis for ousting these complainants of seniority rights and causing their lay-off; and for an injunction against the Union from further encroaching upon or impairing the seniority rights of these complainants based upon time of service with the Railroad from the date of entering into its employ in the Marine Department; and for a decree against the defendant Railroad compelling it to recognize in its seniority roster of their lighter captains, the seniority of these complainants from the date of their entry into service with it in its Marine Department, which includes their time on the floats; or for some appropriate decree against both defendants, particularly the Union, from divesting them of their seniority rights in favor of those who were junior in point of service with the Railroad in the Marine Department.

The Railroad, in this case, takes a passive attitude. It claims it was bound by what the Union decided as to the seniority of these men. Relyea, the superintendent of the Marine Department, as complainants' witness testified as follows (p. 67, l. 20):

"Q. And that is the way in which the Railroad was to accept the seniority rating of these men according to the petition which was handed in to the Railroad. A. I don't think I quite understand that question.

Q. That ballot that was handed in to the Railroad, that computed the seniority rating of the men, did it not? A. It led up to the final decision in connection with the seniority standing on the lighter captains' roster of these eleven particular barge captains.

Q. And do you know what effect that had on these eleven men? A. It changed it, or it placed rather, these eleven captains on our official lighterage captains' seniority roster, giving the date that they entered the service of the barges as lighter captains."

Now thus far, there can be no question that the lighter captains had a seniority rating with the Railroad. This is evident from Relyea's testimony and Forbes' (the business agent of the Union) on page 54, line 28, where he acknowledges that the lighter captains have seniority from custom and agreement. This is definite; there can be no dispute about it. It must be borne in mind that both defendants, the Railroad and the Union, offered no evidence whatever in the case (except the Union did as to its defense of exhaustion of remedies, which the Vice Chancellor failed to decide and hence is not for decision before this court) and that whatever evidence we have on these questions from these defendants, is as part of the complainants' case.

What Then Is the Question for Determination in This Case? It is: Did These Complainants as Members of the Lighter Captains' Union Have Rights of Seniority Over the Other Members of the Union Who Were Junior in Service to the Complainants in the Marine Department?

With this question in mind, the entire issue becomes very simple. All this court has to determine is how the complainants are entitled to seniority; whether from the original entry date into the float service of the Marine Department, or from their transfer date into the lighter service, particularly in view of the custom and agreements previously invoked in determining this question. And if from this it is determined that the complainants had acquired seniority rating from the date of their original entry into the service of the Marine Department, even though they were first on the floats and then later transferred by the voluntary action of the Railroad onto the lighters, then clearly these complainants have been divested of substantial property rights for which the Court of Chancery should have given them relief; and if not, then their Bill of Complaint should be dismissed.

Now unfortunately, the Vice Chancellor misunderstood this to be the question. His entire decision is out of line, for he evidently labored under the assumption that these complainants had to establish that there was a seniority rating amongst members of the Lighter Captains Union by agreement or custom with the Railroad.—True it was, we originally thought we would have to do this; but when it developed that this was admitted by the Union and the Railroad on the direct evi-

dence for complainant, as illustrated above, and no defense or dispute put in by either defendant, then the only question for determination of the Vice Chancellor was that which we have just propounded in the paragraph above. And when in his opinion he speaks of the Stone Award, he was dwelling on that which had nothing to do with the case, which, it is true, it might have had, if the question of all the lighter captains of the Union right to seniority was contested by the defendants; but having admitted same (and this is evident not only by the admissions of the Union through Forbes, and the Railroad through Relyea at the pages enumerated in the State of Case, page 54 for Forbes, and page 69, etc. for Relyea, but it is evident throughout their entire testimony by the several allusions and accepted usage of the term "seniority"), then the Stone Award became immaterial.

And further do we submit that the Vice Chancellor's opinion was erroneous, wherein he cited from a Craigmyle decision upon the question of custom of seniority as between a railroad and its employees. There was nothing in our case that called for the determination of such custom. This was admitted. There was no question that the Lighter Captains had a seniority rating with the Railroad, as they had operated so (Forbes, p. 54, and Relyea, p. 69, etc.). There wasn't a word of testimony to contradict this, since there was no testimony offered on the part of the defendants. On this the Vice Chancellor's opinion rested, and we respectfully submit that he lost sight entirely of the question that the case called for determination.

Now the question, however, of the custom of establishing seniority as between the men of the

Union themselves does enter into this case and so do the agreements which we will hereafter discuss, but not as between the Railroad and men of the Union, for the Railroad did recognize the seniority of these men as formerly established by the Union. In short, the Railroad did and now does recognize the right of seniority of the men, and in fact, it has posted a new list of seniority in accordance with the ballot that was illegally circulated by the Union. It is this new rating of seniority by the Railroad which these complainants attack, and we say that the Union acted illegally by influencing, and the Railroad by accepting such influence (p. 67, l. 28), which actions were in violation of the vested rights which these complainants had acquired by previous agreement and custom of operation between the Railroad and the Union for the benefit of all its members.

We will illustrate to this Honorable Court at the close of this brief from the facts of the very *Craigmyle* case cited by the Vice Chancellor in his opinion, that these complainants should have been awarded relief.

Now then, let us briefly review the evidence of our case to see by what right we claim that these complainants have acquired vested property rights of seniority, which could not have been divested by the arbitrary acts of the Union and the Railroad.

In the first place, we wish to repeat excerpts of the evidence which we have discussed at the very outset of this brief—that these complainants who entered the employ of the Railroad on the floats entered in the Marine Department of this Railroad; that a float is like a lighter; they are both non-propelled flat bottom scows, except that a float carries freight in freight cars which are a continuation of the rails of a railroad, and a lighter car-

ries the freight without the freight cars. A lighter also has living conveniences, such only as to eat and sleep, which makes it more desirable, by some men, than a float. Both the lighter and float are the main parts of the Marine Department of this defendant railroad. In fact, the evidence of the Railroad Superintendent, Relyea (p. 72), and of O'Meara (p. 84, l. 30), discloses that these two parts are not considered a division as there is but one Department.

“(Relyea) :

Q. Aren't there two different divisions like a tug or a float and a lighter? A. I don't quite understand your definition of division. There is no such thing as division in the Marine Department.

Q. There isn't? A. No. These men are all employed under the supervision of the Marine Department.

Q. I see. There is really no distinction or difference at all. A. There is no separation by divisions. It is separate as to crafts. There is no division of responsibility of authority in the Marine Department.”

What could be clearer than the fact that a float and lighter are almost alike and are both integral parts of the Marine Department which has no division and has the same responsibility of authority. It may be that a lighter captain (or keeper) considers his job better than that of the keeper of a float, because of certain living conveniences, but they get no better pay; in fact, they get less (S. C., p. 59, l. 18). And it may very well be that the captain of a tug which pulls both the float and the lighter could fire the float keeper but not the lighter keeper, although it is disputed that this could be done (O'Meara, p. 82) :

"Q. Now before we go further, we have heard some remarks about the captains of tugs firing men on the floats. Did they fire any on the floats?

(Interruption by counsel.)

Q. They couldn't do it on the floats, could they? A. No, sir."

And even though this is disputed, yet, supposing it were so, we, nevertheless, contend that this in no way alters the subject of our inquiry whether or not these complainants had seniority rights which were recognized by the Railroad and the Union by custom or usage and agreement. This was another point which the Vice Chancellor misinterpreted as will be noted in his opinion.

Now then, with this evidence in mind that a floatman and lighter captain do practically the same work, and on a similar scow, and in the same Marine Department which has no divisions, we say that there could be no discrimination between them as to seniority rating. But whether this be so or not, we came to the very custom and usage and agreements which established this right of seniority, particularly in these complainants, and that they carried their seniority, and were permitted to do so by both the Union and the Railroad, when the latter transferred these men from the floats to the lighters. And well may it be borne in mind that these complainants were transferred by voluntary act of the Railroad. And if the Railroad or the Union and the men considered this a desirable transfer, is there any justice, any legal or moral rule that would say (what these defendants have unlawfully done) that these men should lose all their months and years of service, when it came to a question of seniority, by being transferred onto the lighters. Let us specifically put it this way. Should Unkovich, the first complainant, who faith-

fully served on the floats from 1902, when he first entered in the employ of the Marine Department of the New York Central Railroad Company, lose 16 years of seniority rating because the Railroad transferred him to the lighters, which transfer was probably deemed by both as a reward and not a punishment? Should the same hold true for complainants, Masten and Marotta who first entered the service in 1920 on the floats and then transferred in 1925 and 1926 to the lighters? And this is the case with all eleven complainants. Shall faithful service be punished instead of rewarded? Yet this is exactly what the defendants have done to them. But we claim that this action was arbitrary and illegal. Let us see how.

First, we have the occurrence of 1927, to which nearly all complainants testified. There was a lay-off in that year, and at that time the Railroad, without objection by the Union, laid lighter captains off who were senior in time to the complainants in point of service on the lighters but were junior to them in point of service in the Marine Department, that is, including the float time of the complainants. For example, let us take the testimony of Masten, one of the complainants, page 78, line 35:

“Q. Now at any other time during your employment in the barge or lighter service were there any men that were laid off that were senior in time to you on the barge craft but junior to you from the time of your entering into the Marine Department service? A. Why, yes. In 1927 they laid men off.

Q. That were senior in time to you? A. That was longer on the barges (lighters) than I was.

Q. But were less in years to you in the Marine service department. A. Right you are."

Certainly there could be no more affirmative act of recognition of the fact that these complainants were entitled to carry with them their working time from the floats when they transferred to the lighters; else, why would men senior to complainants on the lighters be laid off while complainants continued working?—This was the first usage invoked which laid down the custom that was next followed.

In April, 1931, there was a lay-off of men due to shortage of work. Nine of these eleven complainants, according to their seniority rating were laid off (S. C., pp. 35 and 36). They protested to Forbes, the Union business agent, page 35, that this was in violation of their seniority as men junior in service to them in the Marine Department were laid off. Forbes said these nine complainants blamed him for the lay-off, page 35, line 30, and he said to them page 35:

"A. To prove my innocence I says, 'I will tell you what I will do, I will make an appointment with Mr. Relyea, the assistant superintendent, and we will find out who laid you off'."

Forbes then went to see Relyea and after an interview with him, the men were restored to employment four days later, pages 36-37.

McKenzie, one of the complainants, on page 85, line 21, says this:

"Q. Were you one of those nine men that were laid off in April, 1931? A. Yes, sir, I was laid off at that time with my rights of seniority regardless. With all the seniority rights I had I was laid off regardless at that time.

Q. Were you taken back? A. Yes, sir, I was put back in my proper place, sir.”
 Relyea, the Railroad Superintendent, completes the picture of this April, 1931, incident as follows, page 63, line 9:

“Q. And what did Mr. Forbes say to you at this conference you had with him? A. Why Mr. Forbes, when he came in with the barge (lighter) captains, explained to me the barge captains had asked him to accompany them to our office over some question of these mens’ rights.

Q. What rights, Mr. Relyea? A. Why the seniority, or something along that line.”

* * * * *

“Q. And what decision did you make, Mr. Relyea? A. After conferring with our Assistant Marine Superintendent (Relyea was not the assistant then) who handled matters of this kind, we decided to let the men remain where they were.

Q. And they were re-employed, is that right? A. They were not dismissed, sir.”

* * * * *

“Q. And it was decided that these men would retain their seniority rights? A. It was decided we would make no change as to the lighter men. They were to remain on the same boats they were.

Q. And that was the first time so far as you knew that any dispute had arisen as to lighter captains whether they would carry their time in seniority from the tows and floats, is that so? A. That was my first knowledge because I had only been in the Marine Department about six months before that question was raised.”

Here then we have the completed picture of this incident of April, 1931. This is the second usage which established the custom as regards these com-

plainants carrying their float time upon transfer on to the lighters; and furthermore, this was the first definite agreement and affirmation of the previous understandings of the Union, that these complainants' float time was to be included in computing seniority on the lighters.

And now, last and most important is the agreement had with the Railroad and the Union (after a conference upon the subject) regarding the seniority of these complainants. If there were nothing else in this case, this agreement should have been dispositive of the whole case. It is Exhibit C-1, page 116, introduced in evidence, page 40, and reads as follows:

"Oct. 5, 1931.

Capt. Howard Forbes,
Lighter Captains Union

Dear Sir:

Referring to our conference of September 23rd about the practice of deckhands and floatmen transferring to our barges as captains:

Effective October 1, 1931, we will not permit any other employees of the Marine Department to accept positions as barge captains except as junior or new men.

Yours truly,

(Signed) A. E. LLOYD
General Superintendent."

This letter could not set forth any clearer the agreement and understanding that these complainants were to carry their float service years into seniority calculations on the lighters. It specifically stated that transfers after October 1, 1931, would not carry float time in seniority, which, of course,

excluded these complainants having transferred several years before such time. And let us note how fair the Railroad and Union intended to be as is evident by the form of their words. They said:

“They will not permit any other employees from the Marine Department to accept positions as barge (lighter) captains except as junior or new men.”

In other words, they knew that they had by their choice transferred these complainants, and that it would be unfair that they should lose their time, but hereafter, that is, after Oct. 1, 1931, they would not permit transfers unless the floatmen at their own peril of losing float time service, voluntarily wanted to transfer. This, of course, would be fair for floatmen who would be apprised beforehand that they would enter the lighter service upon pain of losing all float service.

And this written agreement of October 5, 1931, was accepted and adopted by the Union in open meeting October 7, 1931, two days later (although not necessary, since they couldn't destroy the already recognized rights of these complainants). Yet, they did accept and ratify it, see page 114, line 12. Although some of the men at the meeting expressed dissatisfaction with this letter, not because it gave these complainants their float time, but because as one of them pointed out, page 114, line 22, that the Railroad “permitted men from tug boats and grain to exercise their seniority rights over lighter captains, but that lighter captains who were laid off on their account could not exercise the same right over junior men now employed on tugs or grain boats”. This, of course, didn't refer to these complainants. The Union accepted the agreement unanimously, see page 115, line 19.

To corroborate the fact that the members of the Union knew that these complainants had contractual rights of seniority in time from the floats, we might note Exhibit D-2, page 131, where it happened that five of these complainants signed a certain petition, addressed to Forbes, their agent, dated December 28, 1931, about two months after the Railroad letter of October 5th, 1931, asking him to take steps for a just revision of seniority with respect to several men whom they believed had broken time by resigning and staying away for different periods, then returning and being employed in preference to the members who signed the petition. The members who signed the petition, including five of these complainants, finally say,

"We know such procedure is contrary to every clause of seniority and exceedingly unfair to us."

It is by reason of the above that we claim these complainants were vested with seniority rights, that were property rights (the right to work and earn) of which they were illegally divested. What possible answer can these defendants make to the usage and custom and the agreement established by the incident of the 1927 lay-offs when these complainants were given their float time in determining their seniority? What possible answer can they make to the April, 1931, incident when nine of these complainants were laid off and almost immediately reinstated to their lighters, because the Railroad realized that they were to be credited with float time? What answer can they make to the agreement, stated even in writing, of October 5, 1931, and accepted, adopted, approved or ratified by the Union members themselves on October 7,

1931? What can these defendants say that not one act inconsistent with the claim of credit for seniority for float time was ever committed either by the Union or the Railroad, except the April, 1931 incident, which was immediately righted, and thereby affirmed the right of these men?—They can say nothing. And they have said nothing in evidence! For neither defendant took the stand to refute complainants' evidence. And they didn't, because they couldn't!

The voluntary action of Forbes, the business agent, in circulating the ballot of December, 1932, more than a year after the agreement and understanding of the Railroad and Union in October, 1931, Exhibit C-2, S. C. page 117, introduced in evidence on page 42, was a high-handed and illegal act contrary and destructive of the contractual rights of the complainants. There was no authority for the circulation of such a ballot. The by-laws didn't permit it. Parliamentary procedure, by which they were bound under their by-laws didn't permit it. Right or reason didn't permit it; nor did the law permit it. Yet, notwithstanding, 97 men, not at a regular meeting, and being only a small fraction, less than ten percent of the membership of the Union, and not all being the ones to be affected by the complainants' time of seniority with their float time, signed this ballot, and on the presentation of same to the Railroad Superintendent, with one fell swoop, the complainants were laid off, with the result that these working men walked the streets, idle, for months with a consequent loss of a few thousand dollars, which they sought to recover in this action.

This Union, as all other labor Unions, is organized for the enhancement of its members' welfare. "The primary purpose in the organization of labor Unions and kindred organizations is to protect

their individual members and to secure for them a fair and just remuneration for their labor and favorable conditions under which to perform it. Their agreements with employers look always to the security of some right or privilege for their individual members—*Piercy v. L. & N. Railroad Co.*, 33 A. L. R. 322". It is the ruthless disregard and wanton subversion of this principle that gave rise to this action, when this defendant Union ratified the illegal ballot at its meeting of April, 1933. Said the Kentucky Court of Appeals in this *Piercy* case :

"The Union's agreements with employers look always to securing of some right or privilege for their individual members, and the right or privilege so secured by agreement is the individual right of the individual member and such organization can no more, by its arbitrary act, deprive that individual member of his right so secured, than can any other person."

This is the complainants' case; we have nothing further to offer except a short resume of the *Craig-myle* case, which the Vice Chancellor used to decide against us, but upon a theory that had no applicability whatever in this case. He used it to demonstrate that these complainants had no rights of seniority by custom, but he failed, by a clear misapprehension of the testimony, to understand that the testimony clearly showed, by the defendants' own admissions, that the members of the Union had seniority rights guaranteed by custom and agreement. The only question herein to determine was whether these complainants, who were members of the Union and hence had these seniority rights, could have been and were properly divested of them, and the only way that could be determined was to find whether these complainants had a right to be credited with time, in computing their senior-

ity from the floats. And this, we submit, was preponderantly proven by the testimony which remained wholly uncontradicted by defendants who failed to testify.

Here is the *Craigmyle* case: *Aulich v. Craigmyle*, 59 S. W. Rep. (2nd series) 560, Kentucky Court of Appeals. The appeal presented for determination the right of seniority of Craigmyle over other members of his Union on the L. & N. Railroad. The lower court held that he had such seniority.

In May, 1905, Craigmyle entered the service of the Railroad as a telegrapher. He shifted about from train-dispatcher to telegrapher several times, until 1921 he re-entered a certain division as a telegrapher and continued therein until 1930, when he was laid off because his seniority had not been recognized by the O. R. T. (Union Telegraphers) prior to his re-entry of service in the division in 1921. Prior to the organization of the O. R. T. in 1919, there was no binding agreement as to seniority of employees. But the Local Union of Telegraphers, i. e. the O. R. T., had a by-law in effect which read as follows: "Service age will be dated from the last time of entering service on the division". It was on the authority of this section that the O. R. T. denied Craigmyle's right to seniority dating from 1905 when he first entered the employ of the Railroad. The Railroad accepted the ruling of the Union because of its by-law, and laid him off. He brought action against both. The appellate court reversing the lower court based its decision upon the fact that there was no agreement with the railroad and the complainant or Local; and that as a member of the local, he was bound by its by-laws which were in effect when he joined it as a member, and, therefore, he had no vested seniority rights. The attorneys then urged before the court that Craigmyle had vested seniority rights because

of the custom of the railroad to recognize such rights; and custom is tantamount to a contractual relation.

The distinguishing features of the *Craigmyle* case are readily apparent. Craigmyle contended first that he was not bound by the by-laws of his Union which were in effect when he joined it, which gave him seniority only from the time that he last transferred into the Telegraphers division. The court held otherwise. Having been defeated in this contention, he then urged that he had contractual rights with the Railroad by its custom of recognizing seniority which could not be aborted by this Union by-law. But the court again said that the evidence failed to disclose the generality, fixedness and uniformity essential to the establishment of a custom which would arise to the dignity of a contractual right, and hence, it declared Craigmyle to have no seniority rights prior to his last entry into the telegraphers service in 1920, and that all his prior time where he shifted from one department to another would be lost.

But in our case, there was no by-law regulating seniority as was conceded by the defendant Union (S. C., p. 512, l. 35) :

“Mr. Moritz (Atty. for Deft. Union) : I will admit in behalf of the defendant local 996 there is nothing in the by-laws as to seniority.”

Therefore, the most important element, was missing in our case, that was present in the *Craigmyle* case, and upon which the Court of Appeals predicated his failure to enforce seniority rights prior to his entry into the Union. And since the evidence in our case discloses the fact that members of the defendant Union were all entitled to seniority from the defendant Railroad by agreement and custom (p. 54, ll. 25-32) then the only thing

left to determine is whether these complainants carried their time from the floats on to the lighters. And since there was no by-law, no custom, no agreement, contrary thereto, but in fact, a custom and usage, and agreements recognizing such rights as was more fully demonstrated above; we respectfully submit that these complainants should have prevailed.

And so we conclude as we have commenced: Eleven men have been deprived illegally and arbitrarily of property rights, the right to work and earn, according to established seniority rights. Shall the defendants thrust this wrong upon them or shall they be enjoined?

We respectfully submit that the decree entered below should be reversed.

PESIN AND PESIN,
Solicitors of Complainants.

MEYER PESIN,
Of Counsel,
On the Brief.

Service of three (3) copies of the within brief is acknowledged this 9th day of May, 1934

Wall Hought Carey, Attorney
Solicitor for Defendants Respondents
N.Y. & N.J. Central Railroad Co.

Saul Remsen
Solicitor for Defendants Respondents
N.Y. & N.J. Central Railroad Co.

18 MAY 7 1934

New Jersey Court of Errors and Appeals

Between

ANTHONY UNKOVICH, *et als.*,
Complainants-Appellants,

and

NEW YORK CENTRAL RAILROAD COM-
PANY AND LIGHTER CAPTAINS'
UNION OF THE PORT OF NEW
YORK AND VICINITY, LOCAL 996,
INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION,
Defendants-Respondents.

On Appeal
from the
Court of
Chancery.

BRIEF OF RESPONDENT, LIGHTER CAP- TAINS' UNION OF THE PORT OF NEW YORK AND VICINITY, LOCAL 996, INTER- NATIONAL LONGSHOREMEN'S ASSOCIA- TION.

Nature of Case.

This suit was originally instituted in the Court of Chancery, by the eleven complainants, against the defendants-respondents, wherein they sought an injunction against the defendants-respondents from depriving them of certain seniority rights of employment, to which they claim they were entitled, by reason of their service age in the employment of the defendant-respondent, New York Central Railroad Company, and enjoining the defendant-respondent, New York Central Railroad Company from recognizing any petition or other instrument

passed by the respondent, Lighter Captains' Union of the Port of New York and vicinity, Local 996, affecting their seniority rights, and that their seniority rights standing be recognized by both respondents.

The appellants charge that they were arbitrarily deprived by Local 996 of their seniority rights and others, who were junior to them, were employed by the New York Central Railroad Company, under orders of the respondent, Local 996, in preference to them, and in violation of vested, contractual rights of seniority, which alleged vested rights of seniority were likewise attempted to be established upon usage and custom.

The respondent, Lighter Captains' Union, Local 996, denied that the appellants had any seniority rights, either by contract, custom or usage. The appellants were members of Lighter Captains' Union, Local 996, and that as such members, the appellants agreed to be bound by a written constitution as amended July 13th and 18th, 1931, of the International Longshoremen's Association; and that the said Constitution provided various methods of appeal, which the complainants-appellants could have taken within their own organization, for the purpose of redressing any alleged grievance which they may have before resorting to a Court for redress (See pp. 14, 15, 103, 104 of State of Case).

The respondent, New York Central Railroad Company likewise denied that there was any contract, custom or usage of seniority in service age, in force among its employees, until 1933, and to which the complainants-appellants may have been entitled.

It has been agreed between the solicitors for the respondent, New York Central Railroad Company, and the Solicitor for the respondent, Lighter Captains' Union, Local 996, that the respondent, New

York Central Railroad Company file a brief as to the facts proved at the trial, all questions of law pertaining to whether the complainants-appellants have proved their case as alleged in the bill-of-complaint, and whether seniority is a property right, which would warrant the intervention in a Court of Equity.

The present brief of the respondent, Lighter Captains' Union, Local 996, will be confined solely to the question of law involving exhaustion of remedies by the appellants within their own organization. The brief of the New York Central Railroad Company has the approval of Lighter Captains' Union, Local 996, and therefore it accepts and adopts and is deemed to be bound by all statements of fact and law therein contained, as if originally repeated herein verbatim. The purpose of this is to prevent unnecessary repetition and prolixity.

Statement of Facts.

The appellants respectively between the years 1902 and 1923, entered the service of the Marine Department of the New York Central Railroad, and were assigned to the towing craft of said department. Some time later and at different times, the respective complainants-appellants, were transferred to the lighter crafts. These transfers took place between the years 1918 and 1925 (See pp. 1 and 2 of State of Case).

In the year 1931, due to the general industrial and commercial business depression, the New York Central Railroad Company, found it necessary to reduce its forces, and place some of the lighter captains on an inactive list. It thereupon became important to the New York Central Railroad Company, to determine the seniority status of Lighter Captains. At that time, the respondent, Lighter

Captains' Union, Local 996, as a representative of the Lighter Captain Employees of the New York Central Railroad, were carrying on negotiations with the Railroad for the purpose of establishing seniority rights among the Lighter Captains. There was a difference of opinion pending then among the Lighter Captains as to whether the seniority rights which the Railroad would agree to establish, should be computed from the date of original entry into service, in the Marine Department, or only from the day of taking service as Lighter Captains (See p. 61 of State of Case). All of these appellants originally entered the towing craft of the Marine Department as distinguished from the lighterage craft, and which towing craft had never prior to 1931 practiced or maintained seniority rights, and where the Captain of a tow boat or float would hire and fire employees, regardless of the length of service, or regardless of the reason for hiring or discharging an employee (See p. 55 of State of Case).

The New York Central Railroad Company, and Lighter Captains' Union, Local 996 through its business agent, Howard Forbes, endeavored to establish when seniority rights of Lighter Captains, were to begin—whether it should begin from the date of entry in the towing or float craft, or the date of entry into the Lighterage Craft (See p. 67 of State of Case).

During the course of numerous meetings of Lighter Captains' Union, Local 996, a majority of the Lighter Captains indicated that the seniority rating should begin from the date of entry into the Lighterage Craft as Lighter Captains. Before the New York Central Railroad Company adopted this, it asked for an expression of opinion from the men themselves, with the result that a petition or ballot was circulated by the Business Agent, Forbes, among Lighter Captains, who were employed by the

New York Central Railroad Company, with the result that out of a total of 103 votes, 7 voted that Captains who transfer from floats and tow boats, be allowed to carry their seniority from floats and tow boats to the barges, and 96 voted in opposition to the same (See p. 117 of State of Case, Ex. C-2).

It is important to note that the Lighterage Craft is a separate and independent craft from that of the Floats and Tow Boats which belong to the Towing Craft (See p. 72 of State of Case).

It is likewise important to note that barges and lighters are synonymous and that the same are classified and belong lighterage craft (See p. 40 of State of Case).

As a result of the ballot aforementioned, which is expressive of the opinion of the majority of the lighter captains, employed by the Railroad, the Railroad established seniority lists in accordance with the said opinion, and in January 1933, it found it necessary to put some Lighter Captains on the inactive list. The complainants-appellants being junior men in the lighterage craft, were temporarily displaced from active service. As a result of this, the complainants-appellants instituted the within suit.

POINT I.

The appellants must exhaust their remedies by appeal within their own organization before resorting to a Court of Equity.

When the appellants were laid off in January 1933, as a result of the adoption of a seniority rating by the New York Central Railroad Company, the appellants thereupon proceeded to seek redress

within their own organization, and on May 24th, 1933 they requested the Executive Board of Local 996, who in pursuance of Article 7, Section 11 of the By-laws of Local 996, did grant them a hearing in the matter in issue herein (See pp. 101, 103 of State of Case).

In pursuance to this request, the Executive Board fixed a day and place for the hearing of the appellants' grievances, and thereupon by registered mail, notified the appellants of the same (See pp. 101, 133 of State of Case, Ex. D-3). In addition thereto, a notice of this meeting was tacked on certain Bulletin Boards, in certain places where the appellants were known to frequent. They were likewise on June 12th, 1933, personally notified to appear before the Executive Board by Howard Forbes, the Business Agent (See pp. 105, 110, 111 of State of Case).

The appellants failed to appear at the meeting of the Executive Board, and the said Executive Board proceeded in their absence. Thereupon the Executive Board handed down a decision upholding the ruling of the New York Central Railroad Company fixing the seniority status of Lighter Captains (See p. 102 of State of Case).

In addition to appealing to the Executive Board of Local Union 996 (See p. 103 of State of Case), the appellants have the right to take the following appeals to secure redress from any of their grievances. The New York District Council of International Longshoremen's Association, whose address is No. 164 Eleventh Avenue, New York City, and which Council meets the first Tuesday of each month (See p. 103 of State of Case). The Executive Board of the International Longshoremen's Association, or to any member of the Executive Council of the International Longshoremen's As-

sociation, or to the International President, whose duties are to investigate the grievances of any member so appealing. The office of the Executive Council, and the Executive Board of the International Longshoremen's Association, is located at No. 265 West Fourteenth Street, New York City (See Constitution of International Longshoremen's Association, Article 15, pp. 23, 24 and 25) (See pp. 103, 104 of State of Case).

Appeal to the International Convention (See p. 104 of State of Case).

None of these steps which could have given the complainants a complete redress of any grievance, which they may have had, were taken by them (See p. 104 of State of Case).

Our courts have continuously held that the courts will not interfere with the internal affairs of a voluntary, unincorporated association, and that members of such association, must first exhaust the remedies within their own organization before appealing to the courts for relief.

See,

International Hod Carriers, Local 426 vs. Local 502, 101 N. J. E. 474;

O'Brien vs. Musical Mutual Protective & Benevolent Union, Local 14, National League of Musicians, et als., 64 N. J. E. 525 at page 531.

Our courts have held that where the complainants-appellants have agreed to submit their grievance in the first instance to an internal tribunal of their society, they cannot maintain a civil action against it until the condition precedent of submission has been in legal contemplation complied with.

See,

Grand Lodge of United Workmen vs. Geddis, 65 N. J. E. 1;
Ocean Castle vs. Smith, 58 N. J. L. 545;
Zeliff vs. Knights of Pythias, 53 N. J. L. 536;
Roxbury vs. Hocking, 64 N. J. L. 439;
Emma Loggia Fasci Italici, 7 N. J. Misc. 388;
Purcaro vs. Grand Lodge, 107 N. J. L. 82.

All members of an organization of the character herein involved, must first exhaust the remedies provided within the organization, before resorting to the courts, even if property rights are involved.

O'Brien vs. Musical Mutual Etc., 64 N. J. E. 525, at page 531;
Bauer vs. Sampson Lodge, 102 Indiana 362; 1 N. E. 571;
Harris vs. Detroit Union No. 18, 104 N. W. 362.

A court will not entertain an application for an injunction where the constitution and by-laws of a voluntary, unincorporated association provide for an adequate remedy and where the aggrieved has not exhausted his remedy to redress his wrongs within the body itself, as provided for within the constitution and by-laws of the association, and that a suit brought before the remedies within the organization are exhausted, is premature.

See,

Cabanna vs. Holstein-Eriesian Association, 196 N. Y. Appellate Division, 842-850; affirmed 233 N. Y. 644;
Johanssen vs. Blum, 53 N. Y. Appellate Division, 526;

Shirt Cliffe vs. Wall, 68 N. Y. Appellate
Division 375;
Burticci vs. United Cement Masons Union,
No. 1, 249 N. Y. Supp. 635;
Cavanagh vs. Hutcheson, 250 N. Y. Supp.
127.

This latter case explains the reason why the courts do not grant the appellants relief unless they first exhaust the remedies by appeal within their own organization. The court therein held

“The purpose of the law of exhaustion of remedies is to prevent litigation that would be endless if persons who joined organizations of this character should be permitted to apply to the courts in every squabble that arose in the organization. By joining the organization such persons contract to submit to the tribunals of the organizations and where appellate tribunals are also provided for, they must first take their appeal to that tribunal.”

In our own State, in the case of *Zeliff vs. Knights of Pythias*, 53 N. J. L. 536, our courts lay down the reason why the appellants must exhaust the remedies within their own organization. The court therein held:

“Where there is an appeal to a superior body, within the organization, the remedy must be exhausted before the aid of a law court can be invoked. The presumption is that such appellate body could do justice between the parties.”

CONCLUSION.

It is, therefore, respectfully submitted that this court affirm the decision of the Court of Chancery, and dismiss the appeal of the appellants because the appellants have adequate remedies by appeal

within their own organization, which appeals were not taken by the appellants, although step of appeal were instituted by them in the first instance.

SAUL NEMSER,
Solicitor of Defendant-Respondent,
Lighter Captains' Union of the
Port of New York and Vicinity,
Local 996, International Long-
shoremen's Association.

JOSEPH MORITZ,
Of Counsel.

118MAY.T.1934

New Jersey Court of Errors and Appeals

Between

ANTHONY UNKOVICH, *et als.*,
Complainants-~~Defendants~~ *Appellants*,

and

NEW YORK CENTRAL RAILROAD
COMPANY and LIGHTER CAP-
TAINS' UNION OF THE PORT OF
NEW YORK AND VICINITY, LOCAL
996, INTERNATIONAL LONGSHORE-
MEN'S ASSOCIATION,
Defendants-Respondents.

ON APPEAL FROM THE COURT OF CHANCERY

BRIEF FOR RESPONDENT, NEW YORK CENTRAL RAILROAD COMPANY.

Preliminary Statement.

Nature of the Action.

The bill of complaint in this cause was filed by Anthony Unkovich and ten others, employees of the Marine Department of the New York Central Railroad. It sets forth as its alleged cause of action that the complainants were originally employed by this defendant in the Tugs and Floats Division of the Marine Department, and that some time during the course of their employment they

were transferred to the Lighterage Division. It alleges that through custom and usage in all fields of human endeavor and particularly in the field of railroad transportation, seniority in service age determined the priority of employment and benefits among the employees, particularly of this defendant, and that a contractual right to vested interests in seniority privileges was conferred upon the complainants and other employees of this defendant by the so-called Stone Award of March 7th, 1919. The bill further alleges that this defendant entered into an agreement with the Lighter Captains' Union, Local 996, whereby complainants were deprived of seniority rights, except as such rights should be computed from the date of their beginning of service as lighter captains, and in January, 1933, as a result of the aforesaid agreement with the Union, were wrongfully laid off from their regular employment. The bill, among other things, prays that this defendant be compelled to recognize the seniority rights of the complainants "according to its custom which bases such rights on service age" (Case, pp. 1-7).

The answer of this defendant denies that there was any custom or usage of seniority in service age in force among its employees prior to 1931, (the evidence established 1933 as the proper date) at which time this defendant agreed, at the behest of representatives of the employees, to establish seniority ratings; that there being a difference of opinion among the employees as to the time from which seniority rights should be computed, this defendant agreed to establish the seniority ratings in accordance with the wishes of the majority of its employees engaged as such lighter captains; that a substantial majority of the lighter captains manifested a desire that said priority should date

only from the beginning of their service as such lighter captains and filed with this defendant a petition or ballot to that effect; that thereupon this defendant established seniority rights among its employees engaged as lighter captains and computed the seniority of the various employees so engaged from the date of commencement of service as such lighter captains. This defendant further pleaded that the so-called Stone Award had no application to the matters set forth in the bill of complaint and conferred no contractual rights on the various employees in connection with such matters. Furthermore, this defendant, by its answer, denied that the complainants, or any of its employees, ever had or now have a vested property right in any seniority rights or benefits (Case, pp. 8-11).

The Facts.

The facts involved are simple and require no prolonged statement.

Although, strictly speaking, there were no divisions in the Marine Department of the Railroad, and all employees of that Department were subject to the same authority, there was a well-recognized division within the Marine Department as to the different crafts (Case, p. 72). The crafts with which we are concerned in this case were the Towing Craft or Division (which comprised self-propelled boats, such as tug boats, and floats, which were the continuation of the rails for the purpose of carrying freight cars, etc.), and the Lighterage or Barge Division (which was composed of non-self-propelled boats, except floats).

These complainants entered the service of the Marine Department and were assigned to the Towing Division. Some time later they were

transferred to the Lighterage Division. Most of these transfers were made about the year 1925 or 1926. In the year 1931 it became apparent that, due to the falling off in business of this defendant, occasioned by the great industrial and commercial depression, it would become necessary to lay up some of the lighters of the defendant and to place the men in charge thereof on the so-called inactive list. It thereupon became important to determine which men should be laid off.

There were at the time no definite seniority lists for the men in either the towing or the lighterage division and no official seniority lists were compiled for the lighterage division until about January 1, 1933 (Case, p. 67). Prior to this time the appellant Local 996, as the representative of the employees, was carrying on negotiations with the railroad for the establishment of seniority rights among the lighter captains. There was a difference of opinion among the lighter captains as to whether the seniority rights, which the railroad had agreed to establish, should be computed from the date of original entry into service in the Marine Department or only from the date of taking service as lighter captains. Before the railroad determined this question it asked for an expression of opinion from the men themselves with the result that the so-called petition or ballot was circulated by Forbes, the business agent of Local 996, among the members of his Union who were employed by the New York Central as lighter captains (Case, p. 42). A great majority of the men indicated that they desired that seniority rights be computed only from the date of entry into service as lighter captains (Exhibit C 2; Case, p. 117). Thereupon the railroad established a se-

niority list on that basis, and when in January of 1933 it was found necessary to put some men on the inactive list, the complainants, being the junior men in the Lighterage Division were temporarily displaced from active service.

The learned Vice Chancellor advised a decree dismissing the bill of complaint (Case, pp. 28 and 29). In doing so he found that the appellants' contentions that they were entitled to seniority by custom and usage, by virtue of the so-called "Stone Award" and by agreement, were not supported by the evidence (Case, p. 27).

The Argument.

On the final hearing, appellants attempted to establish their alleged seniority rights by (a) custom and usage and (b) definite contractual rights of seniority. Apparently, they have abandoned their position in this court and are basing their entire contention upon alleged admissions by the respondents, claimed to have been made on final hearing, that there were such seniority rights (Appellant's Brief, p. 9). We shall demonstrate (a) that there were no such admissions, (b) that there was no evidence of custom or usage establishing seniority rights in the appellants, and (c) that there was no contractual right of seniority in the appellants.

It is to be noted also that appellants have assumed that if seniority were established, it conferred a vested property right upon the employee and that such right could not be disturbed by an agreement between the Railroad and the Union. This the respondent Railroad does not concede.

POINT I.

There was no admission by respondent, New York Central Railroad, that appellants had seniority rights dating from the time of their original employment in the Marine Department.

The evidence to which appellants point as supporting their contention that there was an admission that appellants had seniority rights from the date of their original entry into service in the Marine Department, far from supporting such a position, actually contradicts it. There is cited the testimony of Forbes, the business agent of the respondent Local (Appellants' Brief, p. 4). The testimony is set out on page 54 of the State of the Case, as follows:

“Q. How are the men in the Lighter Captains' Union recognized as regards working conditions—as to priority of service? A. We figure we have seniority in the Lighter Captains' Union from custom and from agreement.

Q. And that is the way you operate? A. That's the way we try to operate.”

In the first place, the question was directed to the present time. By definite agreement and the promulgation of seniority lists in January of 1933, such seniority rights were established. The controversy in this case, however, related to whether or not there were seniority rights prior to January, 1933. In the second place, the answer is that the witness “figured” that they had senior-

ity in the *Lighter Captains' Union*. The same witness testified (Case, p. 53) that seniority is a man's length of service in his particular craft. Therefore, the seniority would only commence at the time that the appellants transferred to the Lighterage Division. In the third place, it is self-evident that the idea of the Union or its representative as to what the seniority rights of the appellants were, if any, would in no way be binding upon the respondent Railroad.

Appellants also claim that the Assistant Superintendent of the Marine Department of the Railroad admitted that appellants had seniority rights and cites the testimony of the witness Relyea on pages 69 to 72 of the State of the Case (Appellants' Brief, p. 5). Not only does that testimony fail to make such an admission, but it positively establishes that prior to 1933 there were no seniority rights in the Marine Department (Case, p. 68) and that in the event of a lay-off a junior man might be kept in employment if, in the judgment of the operating officer, it was thought proper to do so (Case, p. 71, l. 33). How in the face of this testimony, counsel can work out an admission of seniority rights dating from the original entry into service in the Marine Department is more than we can understand. Furthermore, as we shall point out in detail later on, it was established on appellants' case and by appellants' witnesses that the men in the Towing Division never considered that they had seniority, while employed in that division. It is difficult to see, therefore, how they could carry with them, when they transferred to the Lighterage Division, a right which they never had.

POINT II.

There was no evidence of custom or usage which would confer upon complainants seniority rights from their date of entry into service in the Marine Department.

Although the bill of complaint alleged a custom or usage of seniority among employees in all fields of human endeavor and especially in the field of railroad transportation, and particularly among the employees of this defendant, there was not a particle of evidence introduced to substantiate this allegation. It must be remembered that any custom or usage which would be of benefit to the complainants in this case would not only have to establish seniority as a general proposition, but would also have to establish the right of employees to carry seniority from one craft or division of employment into another. Indeed it would have to go even further. It would be necessary to establish a custom whereby employees who had no seniority rights whatever while engaged in one craft (towing) should be entitled to have the time spent in such craft included for the purpose of computing seniority on their transfer to another craft (lighterage). Far from establishing any such proposition, the complainants did not attempt to offer any evidence whatever even on the question of custom or usage of seniority generally. As a matter of fact, the evidence is all the other way and tends to support the answer of this defendant in its denial of any seniority rights whatever prior to the establishment of definite seniority lists by the railroad under the circumstances outlined above.

It would seem to be fundamental that for the complainants to establish that they were entitled to carry seniority rights from the Towing Division to the Lighterage Division, they would first have to establish that they had seniority rights in the Towing Division. Otherwise they would have nothing to carry with them. It would seem to be clear that if A were employed for two years in a division which had seniority rights, and B were employed for three years in a division which did not have seniority rights and that B then transferred into the division in which A had been employed, he would do so as a new man and junior to A. This proposition seems to be so clear and so in accordance with equitable principles that discussion of it should be unnecessary.

The evidence is entirely clear that there were no seniority rights among the men of the Towing Division. By this we do not mean to concede that there were seniority rights among the men on the lighters. This has been flatly denied by the defendant's answer and no proof whatever was adduced to establish that there were such seniority rights. The evidence as to seniority rights among the men in the Towing Division was adduced by the complainants through the testimony of Messrs. Forbes, Relyea and Masten (one of the complainants). Both Messrs. Forbes and Relyea testified (Case, pp. 55, 71) that a tugboat captain had the right to hire and fire his crew at will without regard to seniority or any other factor. This testimony would in itself be sufficient to demonstrate the lack of seniority among the employees of the Towing Division. But the final and conclusive touch was given by the complainant Masten, who testified that he was originally employed on a tugboat, and that when the tugboat was laid up be-

cause the captain was going on a vacation, he was, at his own request, transferred to a lighter. On cross examination, he testified that at the time his tugboat was laid up there were many men who had come into the Towing Division subsequent to him who retained employment when his boat was laid up. When asked why he did not seek the position of one of his juniors in the Towing Division, he answered that they had no right "to bump off" younger men (Case, p. 81). How, in the face of this testimony by one of the complainants, it can be contended that there were seniority rights among the employees of the Towing Division, it is difficult to understand. On the other hand, if complainants concede that there were no such seniority rights, it is equally difficult to understand how they can logically contend that they carried with them into the Lighterage Division something which they never had.

As to what facts need be proved to establish the existence of a custom or usage, the courts of New Jersey seem to adopt bodily the rule as laid down in Greenleaf, Vol. 2, paragraph 251, *i. e.*:

"It must be established, known, certain, uniform, reasonable and not contrary to law."

In *Barton v. McKelway*, 22 N. J. Law 165, the Court said:

"It is not necessary that a usage of trade should have existed immemorially. It is sufficient if it is established, known, uniform, and reasonable, and not contrary to law. Its true office is to interpret the otherwise indeterminate intention of parties, and the nature and extent of their contracts, and fix and explain the meaning of words."

2 Greenleaf 251.

The case of *Steward v. Scudder*, 24 N. J. Law 96, stands as authority for the proposition that usage cannot be allowed to explain or limit a contract unless it be certain, uniform and notorious, so that it must have been known by the parties and formed part of the contract. In this case, plaintiffs were corn factors doing business in New York City. They accepted a shipment of corn from defendant for "cash sale" and sold it to a third party. On the defendant's assertion that he needed the money immediately, the plaintiff, after deducting expenses and commissions, and before receiving payment from the vendee, forwarded the purchase price to the defendant without any intimation that it might be required to be refunded. Subsequently, the vendee failed without making payment to plaintiff, who sued to recover from the defendant on the ground that in New York there was a custom by which cash sales were made upon the basis of a few days' credit, and that consequently the risk remained with the vendor until the vendee had paid the factor. The case turned on the question of whether or not this alleged custom was so definitely established as to have the force of law. The Trial Court left it to the jury to determine whether such a custom was established by the evidence, charging them that if they so found, plaintiff was entitled to recover. The verdict was for the defendant and a rule to show cause why the verdict should not be set aside as contrary to the evidence was obtained.

Justice ELMER, admitting that trade usage may be given in evidence to interpret the otherwise indeterminate intention of parties and to ascertain the nature and extent of their contracts, quoted with approval the statement that "such a usage to be available must be *established, known, cer-*

tain, uniform, reasonable and not contrary to law'' (p. 100). He held that the evidence of the usage was not definite, since plaintiff's witnesses declared it customary to allow a credit period of from three to seven days, while defendant's witnesses testified that they had never heard of the usage. Some of them who had heard of it considered it entirely optional with the seller.

Justice HAINES in the same case, quoting from *Cope v. Dood*, 1 Harris Rep. (Pa.) 33, and *Nichols v. De Wolf*, 1 R. I. Reports 277, says:

''Usage cannot be proved by isolated instances, but must be so certain, uniform, and notorious that it must be presumed to have been understood by the parties as entering into and constituting a part of the contract'' (p. 106).

In *Runyon v. Central Railroad Company*, 64 N. J. Law 67, plaintiff was denied by the defendant the privilege of carrying small articles of merchandise on a journey from New York City to Elizabeth, New Jersey. He claimed that by virtue of an alleged custom or practice of the railroad, his passenger ticket entitled him to carry these articles with him in the passenger compartment of the train. His evidence did not establish that others were in the habit of carrying similar packages, but merely that he himself had been accustomed to do so at irregular intervals during a period of ten years. The Court, at page 71, said:

''The plaintiff in this case relies entirely upon the establishment of a previous custom, usage or practice of passengers to carry small packages of merchandise with them into the cars and on the journey. * * * It is clear

that such a custom or usage is in derogation of the contract at common law. * * * It interpolates itself into the contract, and therefore the custom, usage or practice must be strictly proved, the evidence adduced to prove it must be clear, it must be strictly construed, and great care should be exercised in allowing a custom, usage or practice to change contracts, either expressly entered into or implied at common law."

Again, at page 76:

. "There does not appear in the case any evidence touching the existence of such a general usage, either so general that the acquiescence of the defendant could be presumed, nor any facts of acquiescence on the part of its officers, agents or servants, and nothing to show any actual knowledge on their part. * * * Such evidence is quite material when the establishment of a usage is insisted upon."

Again,

"Usage cannot be proved by isolated instances, but must be so certain, uniform and notorious that it must be presumed to have been understood by the parties as entering into and constituting a part of the contract." Citing *Cope v. Dood*, 1 Harris (Pa.) 33; *Nichols v. De Wolf*, 1 R. I. 277.

At page 78:

"The contract by the common law was just as explicit in its terms as if it had been expressed in writing, and the evidence of usage to modify it must show it to be a general one in respect to the business or matter in which it is invoked." Citing *Barton v. McKelway*, 22 N. J. Law 165.

The whole matter seems to have been summed up succinctly in an excerpt from the case of *In re Schooner Reside*, 2 Sumner 567, in which Justice STORY says (p. 77):

“I own myself no friend to the almost indiscriminate habit of late years of setting up usages or customs in almost all kinds of business and trade to control, vary or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages or customs, often unknown to the parties and always liable to great misunderstandings and misinterpretings and abuses, to outweigh the well known and well settled principles of law, and I rejoice to find that of late years the courts of law, both in England and America, have been disposed to narrow the limits and operation of such usages and customs, and to discountenance any further extension of them.”

We have cited the above cases to indicate something of the burden which was upon the appellants if they attempted to establish seniority rights by custom and usage. Their utter failure to adduce any testimony in an attempt to establish such custom indicates how complete has been the failure to sustain the burden which the law cast upon them.

Counsel seems to rely upon the testimony of several appellants who testified that in 1927 some men (the number is indefinite), who were senior to them in the Lighterage Division, but junior to them if the appellants' entire service in the Marine Department was calculated, were laid off while appellants remained at work, as evidence of

a custom to calculate seniority from the date of original entry into service in the Marine Department (Appellants' Brief, p. 14). The difficulty with this contention is that, as the cases above cited point out, the existence of a custom cannot be established by proof of isolated instances. If there had been evidence to establish that there was such general custom, the evidence just alluded to might have been important as establishing a recognition of that custom by this defendant. But, there was no such evidence of general custom. Furthermore, the action of the railroad was just as consistent with the contention of the defendant as it was with the contention of the complainants. The defendant contends that there was no seniority either in the Towing or the Lighterage Division prior to the establishment of a definite list in 1933. For all that appears in the case, the action of the railroad in laying off these men might have been taken without regard to any seniority at all. There was no attempt on the part of the complainants to establish that the defendant gave as a reason for laying off these men that they were junior in service to the complainants. The record is entirely silent as to the motive which actuated the defendant in selecting the particular men who were laid off. Under such circumstances, complainants can hardly expect the Court to speculate, and from two equally consistent conclusions, choose the one which would be of benefit to complainants' case. The complainants certainly cannot expect the Court to supply by speculation on its part the vital evidence which it has failed to supply through the medium of proof.

We contend, therefore, that it is clear that the appellants have utterly failed to establish that by

custom and usage they had seniority rights in the Towing Division which they carried with them to the Lighterage Division and which, consequently, entitled them to the computation of such rights from their respective dates of entry into service in the Marine Department.

POINT III.

There was no contractual right of seniority in the appellants prior to the establishment of seniority lists in 1933.

Appellants' insistence on alleged contractual seniority rights was based primarily on the so-called Stone Award of 1919 and especially the following clause therein:

“In filling a vacancy, qualifications being equal, seniority will prevail” (Ex. C-5; Case, pp. 119, 120).

It seems clear that this clause has absolutely no application to the situation disclosed by the evidence in this cause, and the learned Vice-Chancellor so found (Case, pp. 21, 22). The clause is limited by its terms to the filling of vacancies. There were no vacancies to be filled. Quite the contrary, this was a reduction of forces. Furthermore, even if it should be conceded that the Stone Award did not apply to a situation where the employer was reducing his forces, there is nothing in the award which gives to employees a right to carry seniority from one craft to another, the very nub of this controversy. Certainly there is nothing in that document which gives employees who had no seniority rights in one craft, credit for time in that craft on their transfer to another craft.

The most that could be said for the award if it were held that it applied to the situation disclosed by the evidence in this case, is that it established a general right of seniority. Seniority was defined by Mr. Forbes and Mr. Relyea, when they were called by the appellants, as service age of employees in their *respective crafts* (Case, pp. 53, 65). If this definition is accurate, and its accuracy was not questioned by the appellants, we could admit that the Stone Award applied to the facts in this case, and the net result would be exactly in line with respondents' position, *i. e.*, lighter captains would be entitled to seniority from the date of service as lighter captains.

Appellants indulge in fanciful assumptions when they contend that there was a definite agreement to recognize seniority rights of these complainants as of the time of their original entry into service, in April, 1931, and at a conference on September 23, 1931; that evidence of this agreement, as established at the conference of September 23, 1931, was contained in a letter of October 5, 1931, wherein it was said:

“Referring to our conference of September 23rd about the practice of deckhands and floatmen transferring to our barges as captains. Effective October 1st, 1931, we will not permit any other employees of the Marine Department to accept positions as barge captains, except as junior or new men” (Appellants' Brief, p. 17).

Counsel argues from this letter (we paraphrase his brief) that on September 23rd, 1931, a conference was had presumably with reference to the regulation of seniority of the men who transferred to the barge or lighterage craft from tugs and floats, and it was agreed in that conference

that the men then and there employed as barge captains should carry seniority time from the tugs and floats, but as to the future from October 1st, 1931, any other employees of the Marine Department would be transferred only as a new man. Counsel is drawing on a fertile imagination when he reads into this letter evidence of an agreement that men who had already transferred should be credited with their full time of service. As was indicated before, this conference was held and the letter written when the question of carrying seniority from tugs to lighters was in dispute and was in the process of being definitely settled through negotiations between the union and the railroad. The most that can be said for the letter is that it established a definite rule for future application. The Court below so held (Case, p. 23). It says nothing about the disposition of the cases of the men who had already transferred, and in view of the fact that the evidence is uncontradicted that the men had no seniority rights whatever in the Towing Division, it is fanciful to read from the letter of October 5th an agreement on the part of the railroad to give the men rights which they never had. Just as counsel is asking the Court to read into the Stone Award clauses and provisions which it does not contain, so he is asking the Court to draw from this letter inferences which it does not support and which are repugnant to the other evidence in the case. If counsel wanted to find out what happened at the conference of September 23rd the ordinary way of doing it was to put on the stand as witnesses persons who had participated in that conference. He did not do so.

Likewise, his attempt to draw from the fact that some of these complainants were restored to work in April, 1931, an agreement on the part of the railroad that their so-called seniority rights were

to be recognized is far-fetched. As was said by the Trial Court (Case, p. 20), there is absolutely no testimony that the men were put back to work on that basis, and the testimony of Relyea was to the contrary (Case, p. 63, l. 40). The logical conclusion to be drawn from all the testimony is that when the men protested about being laid off they were temporarily put back to work until the question which was then occupying the attention of the union and the railroad officials, namely, the establishment of definite seniority ratings, had been determined.

We submit, therefore, that the appellants have utterly failed to establish that there was any contract by which they would be entitled to carry with them alleged seniority rights from the Towing Division to the Lighterage Division.

POINT IV.

Seniority is not a vested property right.

Throughout this case, appellants proceeded on the theory that seniority is a vested property right and that, consequently, the union and the railroad could not enter into an agreement which would be valid in so far as it altered or destroyed the alleged rights of seniority of the appellants. We do not for a moment concede the accuracy of this position. Furthermore, we assume that since appellants have failed to establish their right to seniority from the date of their original entry into service, either by custom or by contract, it will be unnecessary for the Court to determine whether or not seniority is a vested property right. Nevertheless, we deem it proper to call the Court's attention to the decisions of the courts of other jurisdictions, on this point.

It would seem on general principles that even admitting that the appellants had seniority rights from the time of their original entry into service in the Marine Department, the mere fact that they were members of the union would, in legal effect, make the agent of the union, in this case Forbes, the business agent, the agent of the appellants for the purpose of negotiating agreements relative to their working conditions with the employer. This certainly is the theory of the Railway Labor Act of February 28th, 1920, Chapter 91, Section 301, 41 Revised Statutes 469, which puts upon the carrier the duty of conferring and negotiating with the representative of its employees in order that disputes may be quickly adjusted without the inconvenience to the general public which would ensue from an interruption of operation of the facilities of the carrier. If this contention is sound, it would follow that the change in status of complainants brought about by the agreement between the union and the railroad, was by agreement with the complainants themselves, through their duly accredited agent.

In *Burger, et al. v. McCarthy, et al.*, 84 W. Va. 697; 100 S. E. 492, a bill for an injunction was filed by Burger and others, who were railroad conductors employed by the Chesapeake & Ohio Railway Company, against T. J. McCarthy, and thirteen others, constituting the general grievance committee of the Brotherhood of Railroad Trainmen of the Chesapeake & Ohio Railway Company, for the purpose of enjoining the grievance committee from putting into operation, by agreement with the Railway Company, a new regulation affecting the right of preference acquired by plaintiffs under an old regulation respecting the same matter which had existed for a number of years,

and thus taking away from the plaintiffs a preference in making runs of passenger trains over certain districts or divisions of the railroad, acquired by them under the former regulation, based on seniority of service. The general grievance committee is the legislative body of the organization known as the Brotherhood of Railroad Trainmen, and is given power and authority by the constitution and by-laws of the Brotherhood to make rules and regulations governing the members of the Brotherhood, and to contract with the Railway Company in respect thereto. A temporary injunction was awarded, but on final hearing was dissolved, and the plaintiffs' bill dismissed. From that action this appeal was taken.

The new rule modifying the old one, the operation of which the bill sought to enjoin, reads as follows:

“Paragraph 7. *In Passenger Service.*—

All passenger trains that run over more than one freight district will be manned by the oldest man from either district over which the train runs; passenger trains that are confined to one freight district, or run over a part or all of only one district, shall be manned by men of that district; branch lines will be manned by men from the freight district with which they intercept, except Piney Creek, Loup Creek, Hawks Nest, Powelton, Paint Creek, Cabin Creek, Laurel Creek, Keeney's Creek, and South Side branches, which will be manned from New River & Kanawha Coal District crews; this to mean all service performed on these branches. The foregoing not to be operated west of Huntington. Crews, baggagemen, brakemen and flagmen will not be run from one passenger division to another; nor will they be run through terminals, where it is now being done. This

agreement provides for future vacancies. Men now assigned to passenger runs not to be disturbed.”

The old rule on the same subject read as follows:

“Paragraph 7. Trainmen who have served the longest on any division or district of the road shall, if other things are equal, be given preference to runs on that division or district, except that men assigned to any division prior to July 1, 1892, shall not be affected.”

The bill avers that the plaintiffs had been in the railroad service from 15 to 18 years, having commenced as brakemen and worked up to the position of conductors, and had been members of the Brotherhood of Railroad Trainmen for thirteen years or more, and had thereby acquired contractual property rights under the old rule or regulation. It was seriously contended in the brief of counsel that this right of seniority is a thing of value; that it is one of the cherished rights of railroad men, gained only by long and arduous years of service.

It was established by the evidence that the new regulation was adopted in the manner and by the body of representatives provided for by the constitution and by-laws of the Brotherhood.

After remarking that the plaintiffs should have exhausted their remedies within the organization and that they had failed to do so, the Court said:

“Presumably the action of the general grievance committee was for the general good of the Brotherhood; nothing appears to the contrary. We are furthermore of the opinion that the old rule, giving preference in

making runs of trains according to seniority, *did not create a property right* in plaintiffs such as to justify the interference of a court of equity to prevent the operation of the rule.

“We affirm the decree of the Circuit Court.”

See also *McMurray, et al. v. Brotherhood of Railroad Trainmen, et al.*, 50 Fed. Rep (2d) 968, where Judge GIBSON, writing for the United States District Court for the Western District of Pennsylvania said:

“As to the claim of pecuniary injury, it is at least doubtful whether the seniority rights which are based upon the joint agreement between the Brotherhood and the Pennsylvania Railroad are property rights of such a nature as to justify the court in intervening in the internal operations of the Brotherhood. The railroad and the Brotherhood, by mutual consent can vacate the seniority regulations at any time, and either party can withdraw from them after thirty days’ notice to the other. The right is, therefore, somewhat intangible.”

In *Shaup v. Grand International Brotherhood of Locomotive Engineers* (Sup. Ct. of Alabama), 135 So. 327, the Court approved the cases of *Burger v. McCarthy*, and *McMurray v. Brotherhood of Railroad Trainmen*, and said:

“ * * * The seniority rights of complainant were by virtue of agreement between the brotherhood and the railroad company, and it would seem subject to be vacated by mutual consent, either party having the right to withdraw therefrom on thirty days’ notice. As said by the court in *McMurray’s* case, *supra*, this right is therefore ‘somewhat intangible’,

and it is quite clear such seniority right *did not create such a vested property right as to justify the interference of a court of equity.*"

See also *O'Brien v. Musical Mutual Protective and Benevolent Union*, 64 N. J. Eq. 525, wherein Vice Chancellor EMERY held that rights of membership evidenced by a charter granted by the American Federation of Musicians, a national association to a local association were not property rights.

Aulich v. Craighmyle, 59 S. W. Rep. (2d series) 560 (Court of Appeals of Kentucky) is a case in which the facts bear a striking similarity to the facts in the case at bar. In that case Craighmyle, who was employed as a telegrapher by the Louisville & Nashville Railroad Company, attacked an agreement between the railroad and the Order of Railroad Telegraphers on the ground that it abridged seniority rights to which he was entitled by custom and usage which the employer had recognized. The Circuit Court entered a judgment favorable to the employee's contention. This judgment was reversed by the Court of Appeals, which said in part:

"Craighmyle's cause of action is based on his claim to seniority as against both the Order of Railroad Telegraphers and the Railroad Company by virtue of his continuous employment since 1905, and the custom of the Railroad Company and its employees, during this period of time, to recognize and observe the right of the employees to seniority.

"The courts have for a long time used the term 'custom' as co-ordinate with 'usage' and we will so regard it in our consideration of this case. *Thomas vs. Charles*, 119 S. W. 752; *Brumfield vs. Consolidated Coach Corpora-*

tion, 240 Ky. 1; Franklyn Sugar Refining Company vs. Cane Milling, etc. Co., 122 Atl. 231. To establish a custom it is not enough to prove the act is frequently done, it must be both alleged and proven to be *certain, general, uniform* and *recognized*. Where it is so alleged and proven, it is a fair presumption that the parties on entering into their engagement do it with reference to the custom, and agree that their rights and responsibilities shall be determined by it.

“A practice to arise to the dignity of a custom so as to enter into and form a part of a contract must possess those elements of certainty, generality, fixedness and uniformity, as are recognized by the law as essential to constitute a custom. A *loose, variable custom or discretionary practice* does not arise to the dignity of a custom so as to control the rights of the parties to a contract. If the usage leaves some material element to the right of exercising an option, or discretion, of one of the parties, it does not constitute a custom. (Citing cases.)

* * * * *

“In the stipulation of facts in this case it is agreed, ‘that there was no binding agreement as to seniority of the employees of the telegraphic department prior to 1919, but that such right was merely recognized, the railroad company reserving for its discretion, the final decision as to whether it would or would not apply this usage’. This language leaves no doubt in the disinterested mind that the railroad company was under no obligation to recognize or observe the rights of seniority of its employees, unless it chose in the exercise of its discretion to do so. * * * We are convinced in the present case that there was no such custom existent and recognized by

either the company or its employees, between 1905 and July, 1921, sufficient to support the presumption that the right of seniority was a part of Craigmyle's contract of employment. The converse is established, i. e., his seniority was to be determined and fixed in the discretion of the Railroad Company at the time the right thereto was asserted by him. When he returned to the Cincinnati Terminal Division in 1921, his right to seniority, or service age, was optional, or discretionary, with the railroad company and was not enforceable against it as a part of his contract of employment.

* * * * *

“The members of the railroad telegraphers' union possessed the absolute right to formulate and adopt such constitution and by-laws as they deemed proper to accomplish the purpose of the organization. Being a voluntary association its constitution and by-laws become a part of the obligations entered into by a member when he joins. In a controversy between a member and the association, the remedies provided by its constitution and by-laws were the remedies within the organization, and as a general rule they must be exhausted before an appeal by a member to the courts. *Emma v. Loggia Fasci Italici*, 145 A. 630, 7 N. J. Misc. 387; *Roxbury Lodge v. Hocking*, 60 N. J. Law, 439, 38 A. 693, 64 Am. St. Rep. 596. The general applicable rules in such cases were formulated and stated in *Roxbury Lodge v. Hocking*, supra; *Walsche v. Sherlock*, 110 N. J. Eq. 223, 159 A. 661. It is not within the province of the court to inquire into and determine the expediency, practicability, or wisdom of the constitution and by-laws of the Order of Railroad Telegraphers, nor to relieve its members of the operation or enforcement thereof, so long as

they do not violate, trespass upon, or destroy the property or contractual right of its members, or transgress the bounds of reason, or contravene public policy or the laws of the land. In connecting himself with the organization Craigmyle subjected himself fully and completely to the power of its administration, within the legal limits of the powers of the organization. On becoming a member there-of his right of seniority was controlled thereafter by its by-laws which were at that time in force, or thereafter adopted. *Fish v. Huddell*, 60 App. D. C. 263, 51 F. (2d) 319; *Yazoo & M. V. R. R. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669; *Malloy v. Carroll*, 272 Mass. 524, 172 N. E. 790; *State ex rel. Smith v. Kanawha County Court*, 78 W. Va. 168, 88 S. E. 662, 20 A. L. R. 1030. His right to seniority before becoming a member of the organization was subject to the right of adoption, or discretion, of the railroad company to recognize it or not. His right thereto prior to his return to the Cincinnati Terminal was in no sense a vested, contractual, or property right, justifying the court, either then or now, in interfering to preserve it. *Schaup v. Grand International Brotherhood of Locomotive Engineers et al.*, 223 Ala. 202, 135 So. 327; *Porterfield v. American Surety Co.*, supra; *McConville v. Milk Wagon Drivers Union*, 106 Cal. App. 696, 289 P. 852, 853; *Clark v. Morgan*, 271 Mass. 164, 171 N. E. 278."

The case of *Chambers v. Davis*, 128 Miss. 613, 22 A. L. R. 114, attacks the problem from a different angle but arrives at the same conclusion as the foregoing cases. In that case the Court refused to interfere where a railroad was giving men junior in service age preference over their

seniors, allegedly in violation of an existing agreement between the railroad and its employees establishing seniority rights, on the ground that to do so would be to decree specific performance of a contract for personal services, which, it is elementary, equity will not do. The facts are sufficiently set forth in the opinion from which we quote:

“This is a suit in equity in which the appellees obtained an injunction enjoining the Mobile & Ohio Railroad Company to replace them as brakemen on one of the regular trains from which they had been displaced by the company in favor of the appellants, Davis, Guin, and Robertson, and enjoining the said appellants from continuing to assist in running that train. The appellees have been employed by the railroad company for several years and the said appellants have just entered its service. The complaint of the appellees in substance, is that under the Company’s contract with its employees it must assign its employees to its trains in accordance with the length of time they have been in its service; that is to say, it must always prefer an employee over another who has been in its service a shorter time than the former; that in violation of this contract, the company displaced the appellees from one of its regular trains in favor of the said appellants, resulting in the appellees being transferred from the list of regular to that of extra brakemen, because of which they are given runs only when a regular brakeman fails to take his run.

“The company alleges that it has no real interest in the controversy, that it is in fact a controversy between its employees, and

that it is willing to abide by and to comply with the court's decree.

“The disposition which we have decided to make of the case will render it unnecessary for us to set out the reasons assigned by the said appellants in support of their claim to the right to be assigned to the train in question.

“The contracts which the appellees here seek to have specifically performed is one for personal services, and it is well settled that equity will not decree the specific performance of such a contract. *Sims v. Vanmeter Lumber Co.*, 96 Miss. 449, 51 So. 459. Counsel for the appellees admit that such is the general rule, and that a court of equity would not interfere should the company discharge the appellees. Their contention is that the rule should not apply here, for the reason that the company has not, and does not intend to discharge the appellees, and is willing to accord them their claimed right of seniority if the court should decree that they are entitled thereto. But this simply amounts to a request of the court to relieve the railroad company of an embarrassing situation by arbitrating a dispute between its employees as to their relative rights under their contract with the company, and it would seem to be unnecessary for us to say that such is not a proper function of the courts.

“We have not overlooked the case of *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459, cited by, and which supports the contention of the appellees, but that case is not in accord with the rule governing controversies of the character of the one here in question, and, moreover, was not decided by a court of last resort, but by one of the judges of such a court on a motion for a temporary injunction.

“Reversed, and bill dismissed.”

It is clear, therefore, that even if the appellants had succeeded in establishing seniority rights from the time of their entry into service in the Marine Department, such rights would not rise to the dignity of vested property rights for the protection of which a court of equity would be warranted in exercising its jurisdiction.

Conclusion.

Originally, this respondent had no interest whatever in the outcome of the dispute which arose in 1931 as to the proper method of computing seniority among the employees of the Lighterage Division. As a large employer of labor, it could not be concerned with the personal fortunes of its individual employees, but had to pursue a course which was most likely to assure peaceable relations between it and its employees, to the end that the duty of transportation which it was performing as a common carrier should not be interrupted. In absolute good faith, it performed the duty enjoined upon it by the Congress of the United States in dealing with the accredited representative of its employees in the settlement of the dispute. It would have been entirely justified in establishing its seniority lists upon the mere representation of the business agent of the union that the union desired seniority to be computed only from the date when the men took service as lighter captains. It went further than that, however, and asked for an expression of opinion by its employees who would be affected by the decision. When it was convinced that an overwhelming majority of those employees desired that seniority be computed from the date of entry into service as lighter captains, it promulgated its seniority lists on that basis.

It seems clear, therefore, from all the facts in evidence, that the respondent, New York Central Railroad Company, has been actuated by entirely proper motives; that its decision was one which countenanced the greatest good for the greatest number of its employees, and that it has faithfully carried out the duties imposed upon it by the Railway Labor Act. It is of tremendous importance to the stability of its relations with its employees in this and other branches of the service that an agreement arrived at in the manner in which this agreement was negotiated, should not be impaired.

We have not touched upon the validity of the union's action, especially with relation to the resolution which ratified the actions of Mr. Forbes, the business agent. Nor have we dealt with the question of the exhaustion of remedies by the complainants within their organization. These questions we have left for counsel for the union to discuss.

We respectfully submit, therefore, that the decree of the Court of Chancery should be affirmed, with costs.

WALL, HAIGHT, CAREY & HARTPENCE,
*Solicitors for Respondent, New
York Central Railroad Company.*

EDWARD J. O'MARA,
Of Counsel.

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118 MAY. 1. 1934

New Jersey Court of Errors and Appeals

Between

ANTHONY UNKOVICH, *et als.*,
Complainants-Appellants,

and

NEW YORK CENTRAL RAILROAD
COMPANY and LIGHTER CAPTAINS'
UNION OF THE PORT OF NEW
YORK AND VICINITY, LOCAL 996,
INTERNATIONAL LONGSHOREMENS'
ASSOCIATION,
Defendants-Respondents.

APPELLANTS' REPLY BRIEF.

We are constrained to reply to the respondents' briefs; first because the respondent-Union dwells in its brief on the question of exhaustion of remedies by the complainants in the Union before resorting to court; which question has not been touched upon at all by the Vice-Chancellor, although it was submitted for determination, and hence we have not mentioned it in our brief as one of the grounds of appeal. And then we are compelled to reply to respondent-Railroad's brief, for it devotes practically all of its brief to legal decisions about "custom" and the Stone Award which only tends to confuse the issues as has been done in the Court below.

This case has nothing to do with legal decisions concerning custom. It is true that our complaint spoke about a general custom as well as the custom and agreements, including the Stone Award agree-

ment of the parties as to seniority. But when the testimony of Forbes and Relyea, as we have set forth at length in our original brief, clearly demonstrated that seniority of lighter captains existed by custom and agreement with the Railroad, then all there was for determination of this case was whether the complainants as members of the Union were discriminated against in the application of seniority rights between them and the other members of the Union. And if they were, then they were deprived or ousted of substantial property rights, the right to work and earn a livelihood, which the Court of Chancery should have enjoined.

Almost three-quarters of the Railroad's brief is devoted to legal citations which have nothing whatever to do with the case, except those decisions by which they attempt to prove that the seniority rights of these complainants are not a property right. We shall very shortly refer to one of their own decisions which will illustrate the contrary.

First we must refute certain statements made in the Railroad's brief (p. 7) :

"Furthermore, as we shall point out in detail later on it was established on appellants' case and by appellants' witnesses that the men in the Towing division never considered that they had seniority while employed in that division."

This was a very broad statement to have made, for they did not refer to one witness or scintilla of evidence that the men never considered they had seniority rights. If they meant that Forbes and Relyea, both hostile witnesses for complainants, testified that a tugboat captain had the right to fire his crew, then certainly that doesn't prove that the men, as the brief says, "never considered that they had seniority in that division". What Forbes,

Relyea and Masten may have said about a tugboat captain firing his crew proves nothing and means nothing in this case. At first we were inclined to believe that these defendants were arguing unwittingly upon extraneous and confusing matter, but we are now inclined to believe that they deliberately miss the point. We repeat it again—Forbes and Relyea, complainants' hostile witnesses (pp. 54 and 67, etc. S. C.) proved that Lighter Captains amongst themselves were entitled to seniority with the Railroad by custom and agreement. The question then for determination is whether these complainants who transferred from one scow onto another scow,—no difference except that one conveyed loose freight and the other pulled freight on box cars and both are in the same Marine Department,—carried with them their service time on the first scow (the floats) onto the other scow (the lighters), in determining seniority ratings amongst the members of the latter crafts, in view of the custom and agreements that were applied by the defendants themselves in determining this question. And it makes no difference whatever whether or not seniority ratings were had on the first scow or floats. For if there were seniority ratings on the float craft as well as on the lighter or barge craft, even then they would not automatically carry with them seniority ratings unless they acquired such right by some custom, usage, agreement, or implication.

And this is wherein the railroad in its brief confuses the issues and has so succeeded with the Vice Chancellor as was evident from his opinion and his error in sustaining objections along this line (see p. 54, l. 8).

And when the Railroad in its brief on page 7 says that the men never considered they had senior-

ity rights in the towing division (even though, as we have just stated, it would be immaterial) it is not so, for everything in the case shows that they always considered seniority rights. Even the defendant Union, through its agent, Forbes, did, else why would he have circulated the ballot (Ex. C-2, p. 117), under the following question, "Will the captains who transferred from floats and tow-boats be allowed to carry *their* SENIORITY from floats and tow-boats to the barges".

The facts involved are indeed simple as the Railroad says in its brief, page 3, but by no means does it permit the facts and issues to remain simple. The farrago of argument in which it indulges, has nothing to do with the very simple issue to be determined in this case which we have dwelt upon in our original brief at length and have again adverted to hereinabove. We must not let the issue become confused. The question is not whether there were any rights of seniority in the float craft, but whether these complainants, by the custom and usage and contract between the Railroad and the Union (defendants), argued at length in our original brief, were entitled to have their service—not seniority—credited from the floats onto the lighters in determining seniority ratings among the members of the lighter captains Local, whose members it was proven had seniority rights and which was not contradicted by the Railroad or Union who failed to even interpose a defense at the trial.

The Railroad says in its brief, page 6, that the testimony of Forbes, page 54, to the effect that the Lighter Captains had seniority by custom and agreement, referred to the time from the circulation of the ballot after which the Railroad posted a new seniority list, in January 1933, when these complainants were laid off, and not to the time prior

thereto. This is not so. A reading of the testimony prior thereto will convince that the questions were directed to a time prior to the new seniority rating after which the men were laid off. The fact that this was a new seniority rating; that the ballot circulated prior thereto was directed to the previous seniority of these complainants; that when Forbes mentioned "custom" he could not have referred to anything except prior thereto, for the very term "custom" connotes antecedent usage. However, a reading of this testimony will a priori disprove the railroad's contention.

Now, then, as to the contention that seniority rights are not property rights, we turn to the Railroad's own citation, page 23, where the court says:

"We are furthermore of the opinion that the old rule giving preference in making runs of trains according to seniority did not create a property right in plaintiffs such as to justify the interference of a court of equity to prevent the operation of the rule."

It will be noticed that this case refers to preference in making runs of trains; it does not deal with the ouster from all employment on the Railroad with consequent result of loss of earnings as happened in our case. We cannot believe that the respondents seriously say that the deprivation from the right to work and earn is not the deprivation of a property right. Why, it is the only right without which life itself has no value!

Even the Vice Chancellor treated this case as one involving property rights, for he cited the *Craigmyle* case, on another point however, which held that the right of seniority was a property right,

the violation of which this court would restrain. We shall argue this point no further.

Now, a concluding word as to the argument raised by the respondent-Union in its brief that the complainants should have exhausted their remedy in the Union before it resorted to the Court of Chancery.

We had mentioned in our original brief that although this was one of the defenses used by the defendant Union, nevertheless, the Vice Chancellor made no reference whatever to it, and, therefore, we thought that this Honorable Court would not or could not be called upon to determine this question. But since it is raised, we are constrained to make answer thereto unless we might be deemed to go in default thereof.

The Court of Chancery has, in a few recent cases, decided and reaffirmed the legal aspect on the question of exhaustion of remedies. They have categorically denied the right of Unions to defeat the courts of jurisdiction on the plea that the complainants should first have exhausted their remedies in the forum of the Unions, for to compel the aggrieved parties to seek relief in the prejudiced tribunals of the Union over a long period of time would only tend to exhaust complainants and deprive them of a remedy.

The respondent Union in its brief, page 6, outlines the steps of appeal which the complainants had in the Union and which it is claimed should have been exhausted by them. They are almost the same steps as were outlined in the case of *Walsche v. Sherlock*, 110 N. J. E. 223. Here is what Vice Chancellor Berry says in the *Walsche* case:

“Five appellate remedies are claimed to be open to the complainants. The very number of these so-called remedies and the alleged necessity of their complete exhaustion justifies this statement. And if five such appeals may be required, why not twenty-five? The increased number of successive compulsory appellate remedies would certainly tend to the exhaustion of the complainants which suggests itself as the design of the author of this constitution. I am of the opinion, therefore, that the pursuit of these so-called remedies within the order by these complainants would have been futile, illusory and vain, and that it was not, therefore, necessary for them to exhaust such remedies before appealing to this court.”

And this decision was repeated by Cice-Chancellor Bigelow a few months later in *Harris v. Geier*, 164 Atl. 50, wherein he says:

“The subject of remedies within the union is most ably discussed by Vice Chancellor Berry in *Walsche v. Sherlock*, 110 N. J. Eq. 223, 159 A. 661. I summarize some of his conclusions: The by-laws of a voluntary association constitute a contract, by which a member is bound. If the by-laws create a tribunal within the organization which has jurisdiction of the controversy, then, if the question is a social one, the member must first seek relief in that tribunal. But, if the question involves property rights, he need not exhaust his remedies within the organization, unless he has agreed to do so. As every citizen has the common right to have his property protected by the courts of the state, a contract whereby he foregoes, or postpones that right must be strictly construed. Again, even if the member has agreed to resort to the tribunals of the union before entering the courts of the state, he will not be required to do so if it appears that his remedy within the organization is unsubstantial.

Vice Chancellor Berry enumerated several factors which relieved Walsche and his associates from the necessity of seeking relief from the union tribunals: The great number of successive appeals, tending to exhaust complainants, before complainants could exhaust the remedies. The remoteness, or uncertainty, of the time and place for the sitting of the union tribunals. Refusal of a tribunal to receive the complaint or failure to act thereon. Prejudice on the part of the judges."

And a few months later, Vice Chancellor Fallon in *Local No. 11, etc. v. McKee*, 169 A. 351, said:

"Counsel for defendants has urged herein that this court should not afford to complainants relief in the premises for the reason that they have not exhausted their remedy within the councils of the international for a redress of their grievances before appeal to this court. The proofs herein clearly manifest that it would be futile for the complainants to seek any redress from the international, see *Walsche v. Sherlock*, 110 N. J. E., 223 p. 239; 159 A. 661; citing *Coreia v. Supreme Lodge*, 218 Mass. 305, wherein the court said: 'Of course the plaintiffs would not be bound to go through a useless formality or to seek for justice at the hands of a tribunal which had forejudged the matter in issue,' and see also *Malloy v. Carroll*, 272 Mass. 524, wherein the court said, 'The law does not require a vain form. * * * It will not, in such a case as here, make a mockery of justice by requiring a party to submit his cause to a tribunal from which he cannot expect the impartiality he may rightfully demand.'"

This is what Vice Chancellor Fallon said, and the strange thing of it all is that in the *Walsche* case and in this latter case before Vice Chancellor Fallon, the attorney for the Union defendants in each

case was Saul Nemser, the same attorney who appears as attorney of record in our case.

Yet, notwithstanding this excoriation by Vice Chancellors Bigelow and Fallon, this Union interposes the same defense and had the temerity to offer proof of it in this case. It didn't dare offer testimony on the merits of the case, but it would offer testimony to oust these complainants from Court as it did in their employment and have them go back grovelling at the feet of a biased and prejudiced executive board and the rest of a long appellate tribunal until they dropped, as Vice Chancellor Berry said, of exhaustion. We must quote again from Vice Chancellor Berry in the *Walsche* case, page 668:

Mr. Nemser: "That is absolutely absurd. They are going to make terms with us.' Ridiculous. The international imposes terms upon them. This case will never be settled if that is the case." * * *

"What hope," said the Vice Chancellor, "could the complainants have for an impartial trial presided over by any one displaying such prejudice? And, as I have suggested, the attitude of counsel is but a reflection of the attitude of those they represent."

And so, in our case, when Forbes testified that, notwithstanding our objections to a hearing before a prejudiced executive board, as has been charged in our letters to them which are in evidence (Exs. C-7 and 8, p. 121, *et seq.*), they held such a hearing in the absence of the complainants, which, in the first place, was not a private one, and they reached a decision that the Union's ouster of these men from their jobs was perfectly proper. Could we expect, even if they desired to grant us a hearing, a lawful and honest opinion from them?

But, assuming, for the sake of argument, that there was no prejudice and that the decisions of Vice Chancellors, Berry, Bigelow and Fallon were not rendered and there was no precedent in other states as cited in these cases, then its defense must fail; for the course of correspondence introduced in evidence between counsel for these complainants and the defendant Union will show that although we demanded such hearing, the same was refused (Exs. C-7, 8, 9, 10, p. 121, *et seq.*). And even were they to be heard to say that such a hearing was accorded to the complainants by the letter in evidence which shows it, then we say that the correspondence will show that such notice was sent to the complainants in utter disregard of their attorneys whom they knew were demanding such hearing. And after the receipt of these notices, we communicated with Forbes, the Local, and their attorneys, stating that we objected to such hearing on the ground that it was not a private hearing, and contrary to the by-laws, etc.; and they were then asked to assure us that it would be a proper hearing and whether the right of counsel would be accorded to those complainants, not that we insisted upon such right—we merely asked them, and yet, they disregarded these letters, except by a call from Forbes three hours before the hearing, when we had given them a few days to answer us, and proceeded to a hearing without the complainants and acquitted themselves in the grandeur of the Shibleth that says, "the king can do no wrong".

Yet, notwithstanding, we appealed to them for another hearing as will be evidenced by our letter of June 14th, 1933 (Ex. C-8, p. 123), and the only response we got was from their attorneys who warned us not to intimidate them. And yet, we wrote them again (see letter of June 17th, 1933, p. 127) asking for a hearing. To this, we received

no reply; and so suit was instituted. Shall they, in the face of such action, be heard to say that the complainants must first seek to exhaust their remedies in the forum of the Local and International?

The cases cited in respondent Union's brief are all covered in these later and very recent cases of Vice Chancellors Berry, Bigelow and Fallon. Nor do they attempt to comment on these cases, yet, very adroitly, omit even the mention of them. We believe the reason to be quite palpable.

We respectfully submit, since they have submitted the question to this tribunal, that this defense of exhaustion of remedies be determined by this Honorable Court; and that on the original and reply brief submitted herein, the decision of the Vice Chancellor be reversed and the case be remitted to ascertain the money damages sustained by these complainants as prayed for in the bill of complaint.

PESIN & PESIN,
Solicitors for Complainant-Appellants.

MEYER PESIN,
On the brief.

The first part of the book is devoted to a general
 introduction to the subject of the law of the
 land. It is divided into two parts, the first
 dealing with the law of the land in general,
 and the second dealing with the law of the
 land in particular. The first part is divided
 into three chapters, the first dealing with
 the law of the land in general, the second
 dealing with the law of the land in particular,
 and the third dealing with the law of the
 land in particular. The second part is
 divided into two chapters, the first dealing
 with the law of the land in general, and
 the second dealing with the law of the land
 in particular.

The second part of the book is devoted to a
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