North Dakota Law Review

Volume 33 | Number 1 Article 4

1957

The Practice of a Railroad Lawyer in North Dakota

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THE PRACTICE OF A RAILROAD LAWYER IN NORTH DAKOTA

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The railroad lawyer not located at headquarters but with the duty to handle the railroad's work in the State of North Dakota, finds his work to be:

(1) Office work which includes the consideration of a thousand and one legal questions that arise such as the handling of garnishment and attachment actions, the preparation of all pleadings, appeal work and the writing of briefs, and opinions are written on all legal questions which includes a study of the claim file as to every accident occurring in North Dakota and a written opinion as to liability in each case. Every accident involving the railroad is promptly investigated by the claim department, written statements taken from all known witnesses, and it is on this investigation file that we render our opinions. We do no investigating ourselves but if more is needed, we ask the claim department to do that work.

(2) Trial work in the District Courts and appellate work before the Supreme Court and the Federal Circuit Court of Appeals.

(3) Trial work before the Interstate Commerce Commission, the Public Service Commission and other state quasi-judicial bodies.

Contrary to the general impression, the trial and appeal of personal injury cases is only a small part of our railroad work. Before the passage of the Federal Employers Liability Act we had much more of this kind of work but that Act has resulted in a great reduction of employee cases.

As our railroad pays a large amount of taxes, there is, of course, considerable work in rendering opinions on tax questions and also many tax matters which get into the courts.

Because the railroad, of which I am counsel, was a land grant line we have much real estate work. Often when government subsidies of transportation agencies are mentioned, the question is asked: "What about land grants to the railroads? Weren't they subsidies?"

The railroad land grants actually proved to be one of the most

* Member of North Dakota Bar. This is the text of an address to the Order of the Coif, University of North Dakota Chapter, May, 1955.

lucrative and rewarding bargains ever made by the Federal Government. The so-called grants were not outright gifts, because in transferring title to the railroads, it was provided that government transportation would be handled at reduced rates. Actually, for 131 million acres of land which then had a value of 123 million dollars, the railroads gave the government, in the ensuing years, more than a billion dollars in reduced charges. In other words, they paid back to the government nearly ten times the value of the land they received, and at the same time developed the unknown and remote plains and forests that were then the west. Furthermore, the early railroad construction was a necessity to make possible military protection of a far-flung frontier. In the case of the railroad which I represent, General William T. Sherman, the celebrated Civil War leader, said: "The Northern Pacific must be built, both as an economic and military necessity. The west can never be settled, nor protected, without the railroads."

And so it was in the Indian wars, when our nation was young, and in the two World Wars, when the American railroads were vital arms of defense. Today, with our country and free nations of the world threatened by the hordes of Communism, the American railroads again are doing an outstanding job in meeting the transportation requirements of national re-armament and at the same time, meeting the needs of agriculture and industry.

Let me pause here to briefly mention a very unusual situation, which came to light only three years ago. In the early years, our railroad, in an effort to build up agriculture and its own business, sold many quarters of land to new settlers. Ordinarily and prior to around 1908 there was a ten year contract with a reservation of coal and iron only, but from 1908 on, practically all contracts reserved all the minerals, including oil and gas. The contracts were not recorded but deeds issued on the contracts were recorded. To make his work easier, the Register of Deeds of Morton County, in the earlier years, set up a deed recording book which contained printed forms such as the railroad was then using and which forms reserved only coal and iron. Unfortunately he failed to note the change later made by the railroad in its deed forms whereby it reserved all minerals, and erroneously recorded deeds covering over 27,000 acres of land as reserving only coal and iron when in fact they reserved all minerals. In the meantime many mineral deeds and oil and gas leases have been issued to subsequent grantees. It would take all evening to tell you the legal questions involved so I

will do no more than say that four quiet title actions have been tried and in all four cases the trial court has quieted title to the minerals in our client.

The preparation for trial and the trial of actions is an important part of the railroad lawyer's practice, as it is of any lawyer's practice. So I am hopeful that the following suggestions and ideas will be of help to you in your future practice of law.

PREPARATION FOR TRIAL

(a) Interview all your witnesses some days before trial and do not put a witness on the stand until you have thoroughly acquainted yourself with the testimony that he can give. Tell your witness to not conceal from opposing counsel the fact that he talked with you.

(b) When you have your facts, prepare plainly-worded, full and complete requested instructions covering all points of your defense. Include alternate instructions to be given if your primary request is refused. This is important, as it will enable you to present your case better and will be of great help in the event of appeal.

(c) Prepare a trial brief setting forth the defense that you rely upon and the authorities in support of that defense. All trial courts welcome such a brief and most of them will accept it without requiring that a copy be delivered to opposing counsel.

(d) Prepare another and different trial brief for your own use. This is just to insure that you do not overlook putting in necessary testimony to support your legal points and to enable you to present your testimony clearly and in a co-ordinated fashion.

(e) Outline for your own benefit the motions that you will want to make, particularly your motion for a directed verdict and be sure that it fully raises the legal points that you are relying upon. Remember a motion for a directed verdict, if made at the close of the plaintiff's case, must be renewed at the close of the entire case. Because of our peculiar statutes with reference to directed verdicts it is sometimes advisable to make a motion for a non-suit because of failure of proof. There is no statute prohibiting a trial court from granting such a motion. It is not as valuable as a directed verdict because in non-suit, ordinarily a new action can be brought later. If no new suit can be started because of the running of the statute of limitations it is as effective as a motion for a directed verdict.

(f) Have all necessary plats made and photographs taken. In

railroad crossing cases and in many other cases it is most important to show the physical situation as physical facts will overcome oral testimony clearly contrary to the physical facts and often get you a directed verdict as a matter of law.

(g) Outline your argument to the jury so that you can quickly revise it after the testimony is in and when you have heard the plaintiff's testimony. Without this preliminary preparation you will often be forced into a jury argument without proper preparation.

(h) If you have an issue of fact which is controlling it is always smart to prepare special questions for a special verdict. As you are not entitled to have these submitted as a matter of right, be prepared with sound argument for use in convincing the trial court that they should be submitted.

TRIAL OF YOUR CASE

(a) In examining your jury, especially if you have a corporate client, bring out through bold questioning of the juryman that he has no prejudice and will treat your client just as he would expect to be treated if he were a party to a lawsuit. When you are in a court which makes a practice of giving to jurors a booklet on jury duty, refer to this and ask them to study and follow it. Be sure to find out the extent of their acquaintance with the opposite party and his witnesses so you can better learn how to use your peremptories.

(b) Study your witness so you can better know how to question him and present his testimony. Use common every-day language so both the witness and the jury will understand it. Be direct and clear-cut with your questions. Remember that testimony which a jury does not understand is worthless. Your vital testimony should be enlarged upon as much as possible without exposing yourself to the objection of unnecessary repetition.

(c) Do not visit with or fawn upon jurors. They will know what you are up to and will not respect you for such tactics. Your appeal should be directed to their honesty and intelligence.

(d) Never warn your witness not to change his testimony or to present it in an exact pattern. Tell him to give his testimony in his own language, be responsive to one question at a time and that you will take the responsibility of asking all questions necessary to bring out the material facts that he knows. You can assure him that if he will know and understand the question and stick to the truth in

giving his answer and not volunteer answers or be over-zealous in answering, no cross-examiner can make him look bad.

(e) Use down-to-earth language in talking to your jury. Emphasize and repeat your vital points so you can be sure the jury understands them. Do not shout. Keep your voice down to a conversational tone. Noise never has won a lawsuit.

(f) In jury argument, do not go outside the record facts. This is something that is done too often and most trial courts, when objection is made, merely caution the jury to not consider the statement of counsel as to facts outside the record. A lawyer who uses such tactics is cheapening himself and some day when he gets before a judge who has real pride in his court and in the administration of justice, he will be told plainly that his tactics are cheap, unethical and unworthy. I saw this happen twice and both times the offending lawyer lost his case and it was pretty apparent that his overstepping which occasioned the court's rebuke, tipped the scales against him.

I am hopeful that some of the above suggestions will be absorbed and be of help to you. You probably will, though, have to learn much in trial practice the hard way, as we all do. Let me tell you of just one of my early experiences. It was back in the horse and buggy days. A woman had been seriously injured when her team of horses ran away and threw her out of the buggy. She claimed they had been frightened by some nail kegs which had been left on the station platform at Medora, at a point quite close to the crossing. The trial was had in the District Court of Billings County. In picking the jury I neglected to inquire of them if any of their relatives or close friends were to be witnesses. It developed afterward that the star witness for the plaintiff was the wife of one of the jurors. The Court was asked to exclude him from the jury box but this request was denied. Motion for a directed verdict was denied, and it took the jury only five minutes to bring in a verdict for the full amount asked. My chagrin because of this error was somewhat eased when the Supreme Court held that the motion for a directed verdict should have been granted as there was nothing in a nail keg intrinsically dangerous or usually calculated to inspire fright in a team of horses. (See Rozell v. Northern Pacific Ry. Co., 39 N. D. 475, 167 N.W. 489.)

Let me, in closing, and in support of the suggestion previously made as to the use of "down-to-earth" language, quote from a speech made before the American Bar Association by an Oklahoma

lawyer: "There is a story told of the trial of a lawsuit in Oklahama which may be only legendary. A case was being tried in one of the rural communities of the state, which involved the proverbial story of a railroad train striking a cow. The evidence had been concluded. The attorney for the plaintiff was a young lawyer. The attorney for the railroad was one of the distinguished and great scholars of the state. After the attorney for the plaintiff made a few remarks the railroad attorney rose to his feet and said to the jury. 'This case is a simple case. It is just a plain case of damnum absque injuria.' After he had resumed his seat the young lawyer commenced his closing argument. He said to the jury, 'I am not skilled in the classics. I understand that the distinguished railroad attorney knows a great many languages. He can translate Latin into English and English into Latin. He has a conversational knowledge of many languages. I do not know very much Latin. As a school boy I attended Wapanucka High School where I studied Latin I. I will translate the phrase "damnum absque injuria." "Damnum absque injuria" translated from Latin into English means that it is a damn poor railroad which will kill a cow and won't pay for it.' He needed to say nothing further — he won his case."

A lawyer's education is never complete. If his training, when he starts out, has taught him to think, much has been done for him. If he learns reasonably soon, by further application and study, to think straight, he is on the way to success.

NORTH DAKOTA LAW REVIEW

Member, National Conference of Law Reviews

VOLUME 33 | JANUARY, 1957 | NUMBER 1