A2/2004/2155

Neutral Citation Number: [2004] EWCA Civ 1539
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(MR JUSTICE WILKIE)

Royal Courts of Justice
Strand
London, WC2

Friday, 15 October 2004

B E F O R E:

LORD JUSTICE WALLER

LORD JUSTICE TUCKEY

SIR CHARLES MANTELL

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ENGLISH, WELSH & SCOTTISH RAILWAY LTD
ENGLISH WELSH & SCOTTISH RAILWAY INTERNATIONAL LIMITED
Claimants/Respondents

-v-

NATIONAL UNION OF RAIL, MARITIME & TRANSPORT WORKERS
Defendant/Appellant

- - - - - - -

(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
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Official Shorthand Writers to the Court)

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MR JOHN HENDY QC AND MR DAMIAN BROWN (instructed by Messrs Thompsons, London WC1B 3LW) appeared on behalf of the Appellant
MR JOHN HAND QC AND MR OLIVER SEGAL (instructed by EWS, Legal Department, London EC1V 7LW) appeared on behalf of the Respondents

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J U D G M E N T
(Approved by the Court)

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Friday, 15 October 2004

1. LORD JUSTICE WALLER: Last Friday, 8 October 2004, Wilkie J continued injunctions originally granted by Gibbs J in the absence of the appellants, RMT. Gibbs J had granted those injunctions on 4 October restraining RMT from taking industrial action. The urgency flowed from the fact that the industrial action was due to take place last weekend and then again this weekend. The appeal to this court has been brought on as a matter of some urgency, originally because the industrial action was due to take place this weekend. The case was then fixed in the list for today. We were informed last night that the industrial action would not in any event go ahead this weekend. However the case having been fixed, it being urgent in any event, there being no other day available conveniently, we heard it today.

2. Wilkie J continued the injunctions on the basis that RMT had failed to conform to the requirements of sections 226A and 234A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). Those are sections which require a union, if it is to achieve the protection granted by section 219 of the 1992 Act, to give certain notices to the employer. Section 226A requires notice of the employees that are to be balloted to be given to the employers. Section 234A is a section which follows the balloting and requires notice of any industrial action to be given to the employer.

3. It is common ground that RMT served notices on the first respondent, EWS Ltd. There were issues as to whether those notices were valid, even on EWS Ltd, having regard to the information supplied with the notices. But Wilkie J would have resolved those issues in favour of RMT. The point on which he ruled against RMT was a different point, he holding that RMT would fail to establish at a trial that they had served notices under those sections on the second respondents (EWSI Ltd), and it was on that basis he continued the injunction. Those points on the notices are the only points that arise on the appeal.

4. It is convenient to set out the sections insofar as they are applicable. Section 226A(1) provides that the trade union must take such steps as are reasonably necessary to ensure that the notice specified in subsection (2) is received by every person who it is reasonable for the union to believe (at the latest time when steps could be taken to comply with paragraph (a)) will be the employer of persons who will be entitled to vote in the ballot. Subsection (2) provides that the notice should be in writing, and specifies that it should be not later than the seventh day before the opening day of the ballot that the notice should be received. Section 234A provides that an act done by a trade union is not protected unless the union has taken such steps as are reasonably necessary to ensure that the employer receives in the appropriate period a relevant notice covering the industrial action.

5. The facts lying behind the giving of notices in this case are as follows. It is common ground that EWS Ltd and EWSI Ltd run rail freight operating companies. EWS Ltd has 5,200 employees. EWSI Ltd has only 273. Both employ ground staff and engineering staff, and EWSI Ltd employs about 193 employees in those categories. Both those companies employ members of the RMT.

6. RMT is one of several trade unions recognised by EWS and EWSI. The starting point is that their relationship is covered by a collective agreement, which is called a partnership agreement. That agreement refers to EWS and RFD, but it is common ground that RFD became EWSI and thus one can read EWSI for RFD. That partnership agreement refers to EWS and EWSI as "the company" in the singular, and provides the relevant bases for negotiating industrial relations, matters in relation to employment, working practices, covering, as it says in 9(iv) of Appendix B, EWS or EWSI as a whole.

7. So although it is accepted that the two respondent companies are separate legal entities, they are part of a group and they are reflected in that partnership agreement as one company. It is of some interest that in a description of the way the companies operate there is a document (concerned with railway safety) which describes the relationship between EWS and EWSI, making clear that they are separate companies and that they do have a discrete portfolio of business. However it also provides at 1.7.3:

> "While there are three train operating companies [there is another company, RES, which we have not heard much of], there is only one management structure in control of the railway operations covering all EWS, EWSI and RES trains. This management structure is the EWS organisation. There is no separate organisation for EWSI or RES."

So far as staff is concerned, it provides at 1.7.8:

> "Although both EWS & EWSI have staff who are employees of the respective companies, for the purposes of the Railway Safety Case Regulations 2000, they are all treated as if they were employees of EWS. EWSI staff are included in EWS staff numbers in sections 3 & 4 of this RSC. There is therefore no separate ratio or supervisors and staff for EWS & EWSI staff groupings. EWSI staff are therefore not considered as 'hired in' by EWS when working EWS trains."

It is also common ground that Mr Skelton, who is the "Corporate Industrial Relations Manager" of EWS, is also the "Industrial Relations Manager" of EWSI. The industrial relations of these two companies, EWS and EWSI, have for a considerable period, at least since the partnership agreement, been conducted jointly. Mr Hendy QC, for the appellants, showed us some documents in 2000 and 2002, but there really is no issue. Mr Hand, on behalf of the respondents, has accepted that industrial relations for the respondents were at all times conducted jointly. What is more, he conceded the industrial relations negotiations in relation to the particular dispute with which this appeal is concerned were no different from any others.

8. One finds, when one goes to the documents which were appended to Mr Skelton's witness statement supporting the application for these injunctions after the partnership agreement, the documents that led up to the notices with which the appeal is concerned. The first document, dated 5 August, is at page 17. It is addressed to Rachel Bennett, HR Director EWS, with an address in Doncaster. It is headed "Breakdown in Industrial

Relations - EWS". It is a letter from Mr Bob Crow, the General Secretary of the RMT, who states:

> "My General Grades Committee has recently considered a report over a variety of issues that this union believes constitutes a breakdown in industrial relations with your company.
>
> This includes the following issues:
>
> - Drivers' Duties impinging on Engineering Staffs' duties & working arrangements
> - Imposition of Rosters without Agreement
> - Abrogation of PT&R arrangements
> - The company's proposals for the regrading of Team Leaders
>
> All these issues have either been the subject of correspondence and/or meetings and have not been resolved to our satisfaction.
>
> Consequently, this union is now in dispute with your company and I shall be balloting my Engineering and Groundstaff members for industrial action. I shall write to you again in the near future with the appropriate notice as required by legislation.
>
> This union is available for talks at any time to resolve this dispute."

One notes in that letter the use of the singular "your company", "the company", and the heading "Breakdown in Industrial Relations - EWS", but it is not in dispute that insofar as there were problems being discussed as between the employer's side and the union's side the problems related across EWS and EWSI.

9. The next letter is that of 17 August. This time it is addressed to Mr Skelton, Corporate and Industrial Relations Manager EWS, at the address in Doncaster. The heading is the same, "Breakdown in Industrial Relations - EWS". It wishes to make clear that:

> "... the issues over which this union is in dispute with your company affect both our Groundstaff and Engineering members.
>
> These issues are as follows:
>
> - Drivers' Duties impinging on Engineering and Groundstaff duties & working arrangements

- Imposition of Groundstaff and Engineering rosters without Agreement
- Abrogation of PT&R arrangements
- The company's proposals for the regrading of team leaders."

Again the singular company, and again it is not in issue that the letter is being addressed in the context of discussions that are going on in relation to both EWS and EWSI for both of whom Mr Skelton was the Industrial Relations Manager.

10. One then comes to the first and important notice. Indeed it is in one sense the only notice which we now have to consider for reasons which will appear hereafter. This is the notice which is a 226A notice, as the RMT would suggest and which the respondent suggests was a notice to EWS alone and not to EWSI. Again it is addressed to Mr Skelton. The next line reads: "EWS Corporate Industrial Relations Manager", to the address in Doncaster. It is headed "Notice of ballot under section 226A of the Trade Union and Labour Regulations (Consolidation) Act 1992", and it reads as follows:

> "Further to my letters of 5th and 17th August 2004, this Union intends to hold a ballot in relation to the trade dispute concerning 'Breakdown in Industrial Relations - EWS'.
>
> This Union reasonably believes that the opening day of the ballot will be 21st September 2004.
>
> The employees of the company who it is reasonable for the Union to believe will be entitled to vote are all the members of this Union who are Engineering and Groundstaff employees. Please note the Union possesses information as to the number, category or workplace of such employees and this information is attached."

There is then attached a sample of the voting form and a schedule. That schedule contains a list of sites and numbers of employees at various sites. It is three pages long and contains a very large number of sites. It is now common ground that certain of those sites are sites at which EWSI employees were employeed. Of course a very large number of them were sites at which EWS employees were employed.

11. One of the points taken by Mr Skelton when providing evidence - and in one sense in order to criticise the form of notice - was that certain of those sites were ones at which EWSI employees were exclusively the employees at the site. This was to make good his case that the notice was not a good notice if it was served on EWS alone. The sites he refers to were Dollands Moor, Wakefield, Allerton and Washwood Heath. Since that statement was put in and since the hearing before the judge, Mr Skelton has corrected that paragraph, but still Washwood Heath remains exclusively EWSI employees. So far as Dollands Moor is concerned, he says the accurate position is that it has 1 EWS and 34 EWSI employees, that Wakefield has 1 EWS and 4 EWSI employees, and that Allerton has 5 EWS and 28 EWSI employees, therefore (he says) it is not right to use the word "exclusively", it would be more accurate to say of

Dollands's Moor that the staff are predominantly employees of EWSI, and at Wakefield and Allerton that a significant majority of the staff are employees of EWSI.

12. That notice having been received by Mr Skelton, Mr Skelton replied by letter dated 17 September 2004. It is headed "EWS", but contains at the bottom a reference to EWS, meaning English Welsh & Scottish Railway Ltd, ie EWS itself.

13. The letter relates first of all in its body to negotiations that had been taking place, and expresses disappointment in the attitude that has been taken by the union in relation to particular matters. There is no necessity to go through them, save to say that it is clear that this is a continuation of the negotiations over a dispute that preceded the notice of ballot and relates clearly to both EWS and EWSI. At the end of the letter Mr Skelton takes two points. The first relates to the inadequacy of the information which he said was supplied with the notice (and that gave rise to the points which Wilkie J decided in favour of the union in the court below), but the final paragraph is in these terms:

> "Finally, I note that the RMT has not given any notice of balloting for industrial action in accordance with the provisions of s226A, to EWS International. I assume that this is because the RMT does not intend to ballot employees of EWS International or to call on them to take industrial action. Perhaps you could confirm this as a matter of urgency."

14. Following that letter, there was a meeting between the two sides on 24 September (which Mr Skelton deals with in his statement at paragraph 21), and it appears that an attempt was made to try and see whether some consensus could be reached. Once again that meeting must have been concerned with the position overall and not the peculiar position of EWS. That meeting unfortunately did not achieve any consensual results and, on 29 September, Mr Skelton wrote again to Mr Crow. Again the letter was headed "EWS". It referred to the meeting, and it referred to the request to EWS and to the Engineering and Groundstaff Company Councils, and to their proposals aimed at bringing about a satisfactory conclusion of the current industrial dispute, making it quite clear that it was the overall position that was being looked at. It also refers in the body of the letter to one aspect of the dispute, which is headed "The Application of the 1997 DRI Agreement". Mr Skelton says:

> "EWS is prepared to commit that no new transfers of work will take place from Engineering or Groundstaff grades to Driver grades until local discussion and an implementation agreement has been reached with representatives of all affected grades.
>
> The only current failure to agree at Washwood Heath will be revisited as a matter of urgency.
>
> EWS cannot agree to your request to reinstate to 1 January 2004 all operating changes as a result of our applying the 1997 DRI agreement."

So if ever there had been any doubt about it, there is a reference to one of the sites, indeed the site at which EWSI employees are exclusively employed.

15. However in that letter Mr Skelton also drew attention to the fact that he was waiting for clarification of the lack of information. That led to a response from Mr Crow, again addressed to Mr Skelton, EWS, Corporate Industrial Relations Manager, and the Doncaster address. It referred to the letter of 17 September and to the final three paragraphs (these are the ones raising the problems on information). It then goes on:

> "With regard to purported inaccuracies in the information given to you. Could you please give me more detailed and specific information on these in order that they may be investigated and addressed accordingly in order with your request.
>
> I would point out that the information given to you was in your capacity as the 'Corporate' Industrial Relations Manager for EWS operations."

16. That itself led to a response from Mr Skelton, in which he provided some further information which it is unnecessary to go into. Then he said in the penultimate paragraph:

> "Despite asking for your urgent response on that point, all you have done is, belatedly, to point out (correctly) that I am the Corporate Industrial Relations Manager for EWS operations. Do I take it that this means you *did* intend to ballot EWSI employees as well as EWS employees? If so, then it is our view that your Notice of Ballot was defective in that regard also, particularly given that no mention is made of EWSI employees, but instead the Notice purports to give the best information reasonably possible about '*The employees of the company*' (underlining added). It is hard to read that as including employees of another company in addition to EWS, and, as you know, I did not do so."

17. That led to the two notices which the union say are the 234A notices giving the results of ballots on both strike action and action short of a strike. They are again addressed to Mr Skelton, EWS, Corporate Industrial Relations Manager, give the results of the ballots, and say that "this is notice pursuant to section 234A".

18. The position factually was that Mr Crow of the union did not appreciate, what is now clear, that EWSI had employees. He thought all the employees, even those with EWSI's business, were employees of EWS. It was that subjective intention of Mr Crow that led the judge to rule that the notices were not notices under either 226A or 234A. The judge said:

> "True it is that EWS and EWSI acted in tandem for certain purposes and that did mean that Mr Skelton could act for both, if it was the intention that he should. But it seems to me that it cannot be right to say that the Union has given notice to somebody in a capacity where it was its specific intention not to give that person notice in that capacity. The purpose of the requirement to give notice in 226A and in 234A is precisely to inform the employer that the Union intends to take certain action in respect of its members employed by that employer, so as to

> enable that employer to take certain actions at different stages in the conduct of the ballot and thereafter the calling of industrial action. That is entirely undermined if the Union can give that notice accidentally without any intention of so doing.
>
> 24. It seems to me that it was possible for Mr Crow to rectify the position by clarification in response to the point being missed in correspondence because the notice that was originally given using the term 'the Company' in the context of the industrial relations arrangements between the Trade Unions and these two companies was capable of constituting notice to both. But he chose not to clarify the position until it became clear from the evidence that in fact he did not intend to give notice to EWSI."

19. Therefore, the judge concludes, the prospects of the union establishing a section 219 defence are remote in the extreme, because it has not complied with section 226A or 234A, and failure to comply causes the section 219 defence to be excluded.

20. Mr Hendy for the RMT has submitted that the subjective intention of Mr Crow is irrelevant. He submits that the notices must be themselves construed objectively and in their context, and the question whether those notices objectively construed gave notice to the recipient must itself be construed objectively. Thus his submission would be that the right question to pose would be whether a person in the position of Mr Skelton as he was on the day he received notices would say to himself that a notice was being given to him in his capacity as Manager of Industrial Relations for EWSI as well as EWS.

21. Mr Hendy emphasises the background through which I have been, which includes the partnership agreement using the description "the company" as applying to both EWS and EWSI. He points to the negotiations that were taking place between Mr Skelton and the union dealing with both EWSI and EWS addressed to EWS. He points to the fact that the same title is used in the letters that preceded the 226A notice. The 226A notice is in the same form and directed to Mr Skelton as Corporate Industrial Relations Manager. He points to the schedule attached to the notice which identified sites which were either exclusively EWSI employee sites or sites where there was a large proportion of EWSI employees.

22. Mr Hand in his submissions appreciated the force of the point made that negotiations related to both EWS and EWSI employees, and indeed he appreciated the force of the point that in the partnership agreement the words "the company" covers both EWS and EWSI; but he submitted that it is important to construe these notices and how they should be viewed in the context of the 1992 Act strictly. He submitted thus, that it was not right to conclude that the words "the company" must automatically refer to EWS and EWSI. There were other documents to which he drew attention where EWS and EWSI are divided or both described. Thus, he says, in the context of the sections which we are being asked to look at, those points are not determinative.

23. Mr Hand also submitted that there were a large number of inaccuracies in the schedule, therefore someone in the position of Mr Skelton could reasonably take the view that it was not clear that a notice was being served on EWSI simply because in the schedule

with the notice there was a reference to sites with EWSI employees. Taking a strict construction point, he submitted that if one just looks simply at the letter of 14 September it is one letter addressed to Mr Skelton at apparently EWS and describing him as their "Industrial Relations Manager". It is a letter addressed to the company in the singular, and thus his submission was that on that basis it should not be construed as a notice to EWSI.

24. He supported these submissions by saying first, that this court should not encourage uncertainty or flexibility in its approach to these notices. He relies very much on the language of the section which he said required trade unions to ensure that a notice was given to the appropriate employer, and he submits that that should apply both to the form of the notice and to getting the notice to the employer. He submits that this was an important case because it was the first case in which it had been suggested that a notice to one company could be held to be a notice in fact to two companies.

25. He accepted that the subjective intention of Mr Crow was strictly irrelevant, but he submitted the point comes in in a different way. He submitted that someone in the position of Mr Skelton was entitled to assume that a trade union official as experienced as Mr Crow would know the way in which the employment of his members had been organised in a particular group, and indeed would be familiar with giving notices under the trade union legislation. Therefore if a notice of this sort arrived on his desk someone in the position of Mr Skelton was entitled to take the view that this was a notice for one company and one company alone.

26. There is clearly some force in what Mr Hand submits in terms of it being important that the requirements of the these sections are not watered down. These sections do provide for notices being given to the employers, and it is very important that the burden on the trade union of having to give an accurate notice to the right employer is upheld so that an employer knows precisely where he or she is. But I do not accept that in the very particular circumstances of this case it is as simple as saying that because the notice has arrived on the desk of one company then it cannot be said to have arrived on the desk of another company. That would not be the correct approach.

27. There are special circumstances in this case which do need some emphasis. Although we are dealing here with two corporate entities, one was very much larger than the other and in terms of their organisation and in particular so far as the partnership agreement was concerned, they were dealt with as one negotiating entity. What is more, it is reasonably apparent (from page 149 of the bundle that was handed to us today) that in the past EWS has been treated as representing both EWS and EWSI in the context of negotiations in relation to employment of staff at both those two entities.

28. Furthermore, the document to which I have already referred (page 106) demonstrates the degree to which the management of EWS was effectively the management of EWSI as well. Indeed, there was a provision relating to staff going from one entity to another, which made it effectively imperative for there to be one person, such as Mr Skelton, on the EWS and the EWSI side negotiating with the union on the other side.

29. In addition, this was a case in which all the disputes between these two entities and RMT were negotiated in the same way - that is the industrial relations manager of EWS acting for both EWS and EWSI, and certainly in the letters in relation to this dispute not distinguishing between the two. Let me re-emphasise that Mr Skelton acted for both and was certainly authorised to negotiate for both and was certainly authorised to receive notices for both. Furthermore, the negotiations that took place on this occasion in August were no different from the negotiations that had taken place on every other occasion, that is to say EWS and EWSI being treated as one, although the heading "Breakdown in Industrial Relations - EWS" is all that is used as the heading.

30. It is in the above context and in particular the negotiations that have been going on, that the form of notice must be objectively construed. It is a notice which was addressed to Mr Skelton. It is true that it refers to "the company", but in the context of the negotiations that had been going on, somebody in the position of Mr Skelton could not say that there was any indication in that letter that it was intended to be addressed to him in his role as Industrial Relations Manager for EWS alone. Some suggestion has been made that the notice is in some way ambiguous. I do not think it is right to call it ambiguous. In the context of the partnership agreement and the descriptions used to cover both companies, the natural reading of anyone who had taken part in the negotiations would be that this was a letter addressed to Mr Skelton acting in the same position as he had been throughout. There was certainly nothing that pointed away from that. But if that person had any doubt about that and had turned to the schedule, there could be no remaining doubt in that that schedule identified sites, some of which were exclusively EWSI employee sites and some of which were overwhelmingly EWSI employee sites.

31. It is fair that I should add one point. Mr Hendy I think properly withdrew any suggestion that Mr Skelton when he made the point in his final paragraph of the letter of 17 September was acting disingenuously. That was a suggestion made at the commencement of the appeal and I do not remember who it was who first made the suggestion. But in my view that is an unfair suggestion. It is particularly unfair when Mr Skelton has not had a proper opportunity of saying what was in his mind when he wrote that paragraph. My own conclusion in relation to that paragraph would be that he did think there was available to the Union a technical point that since the notice had been addressed to one company, the company, and since it had been addressed to him as EWS Corporate Industrial Relations Manager at the address in Doncaster that there had not been a notice served on EWSI.

32. For the reasons I have given I think he was wrong in that conclusion. I would also make clear that it seems to me that in the same way that the subjective intentions of Mr Crow were irrelevant to the question of whether or not this is a valid notice, also the subjective view of Mr Skelton would be irrelevant. The question is whether somebody reasonably in the position of Mr Skelton occupying the position he was occupying, and in the context of the negotiations that had been taking place, should appreciate that this was a notice which was being provided to him both wearing his EWS hat and wearing his EWSI hat. In my view, a reasonable person would have so appreciated, both because the description would have covered both, ie the words "the company", and

because of the schedule that was attached to the notice. In those circumstances, I would hold that the 226A notice was a valid notice.

33. Some argument was addressed to the 234A notice. A point arose in relation to the letter (at page 33) in the paragraph where Mr Skelton is taking the point about the use of the singular "the company". Thus it is argued that the union had been informed that a notice addressed to "the company" would not be accepted by Mr Skelton as notice to EWSI; so it is argued this altered the position and the 234A notices were invalid. Having regard to the fact that the industrial action had been called off for this weekend and it would be necessary to serve a further strike notice, there is no need to get into a debate on this point. On balance, my view would be that since it was in the same form as the previous notice, it would qualify as a 234A notice, but there clearly is an argument the other way.

34. LORD JUSTICE TUCKEY: I agree. The central question for us on this appeal is: did the union take such steps as were reasonably necessary to ensure that EWSI Ltd received notice of the ballot? I think it is very likely that it did. It is accepted that EWS Ltd received good notice by means of the union's letter of 14 September. Was it also a good notice to EWSI Ltd? I think it was. It was addressed to and identified the industrial dispute with "EWS" and referred to employees of "the company". But the context to which Waller LJ has referred shows that these terms were used and understood to refer to both limited companies. The schedule attached to the notice listed employees of both companies. Judged objectively, with these matters in mind, I think the notice was a good notice to both companies. Any other conclusion would, I think, be taking technicality too far. This is not to say that the notice provisions in the statute do not have to be strictly complied with. They have a vital role to play in preventing precipitate strikes, but on the facts of this case a reasonable employer in the position of EWSI Ltd would have understood that the notice related to its employees as well as to those of its fellow subsidiary.

35. SIR CHARLES MANTELL: I agree that this appeal must be allowed for the reasons given by both my Lords, bearing in mind always, of course, that it has turned upon its own very special facts.

(Appeal allowed; Respondents do pay the Appellants' costs; application for permission to appeal to the House of Lords refused).