

1952

# W. B. Russell v. The Ogden Union Railway and Depot Company : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Howell, Stine and Olmstead; Counsel for Plaintiff;

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Case No. 7647

**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

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W. B. RUSSELL,

*Plaintiff,*

vs.

THE OGDEN UNION RAILWAY AND  
DEPOT COMPANY, a corporation,

*Defendant.*

---

PETITION FOR REHEARING AND  
BRIEF IN SUPPORT THEREOF

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**FILED** HOWELL, STINE AND OLMSTEAD,  
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Ogden, Utah  
SEP 15 1952

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~~Clerk, Supreme Court, Utah~~

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IN THE SUPREME COURT  
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W. B. RUSSELL,

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THE OGDEN UNION RAILWAY AND  
DEPOT COMPANY, a corporation,

*Defendant.*

---

PETITION FOR REHEARING

Comes now the plaintiff in the above entitled cause and respectfully petitions this Honorable Court for a re-hearing in this cause, for the reasons and upon the following grounds:

I

The Court erred in holding that the lower court had no jurisdiction to order the plaintiff's reinstatement with defendant company with seniority rights unimpaired.

II

The Court erred in holding that the statements in the transcript relating to plaintiff's illness were hearsay, and should not have been considered by the court as substantive evidence of such illness.

### III

The Court erred in holding that the transcript was improperly considered by the court as the exclusive evidence of the facts therein testified to.

### IV

The Court erred in holding that the lower court erred in rejecting defendant's evidence, offered at the trial, that plaintiff was not in fact ill.

### V

The Court erred in holding that the provision of the contract

“No Yardman will be suspended or dismissed without first having a fair and impartial hearing and his guilt established”

did not require the establishment of guilt *at the hearing* in order to justify discharge.

## BRIEF IN SUPPORT OF PETITION FOR REHEARING

The fact that we are here confronted by a Court united against the position of our client places a double responsibility upon us as his attorneys. First, the responsibility of doing our best to protect the interests of our client. In this we have a present feeling of having failed miserably. Second, the responsibility of treading the narrow margin between respect for the court's opinions and honorable disagreement therewith.

The Court has stated that it would be “a travesty on justice” to permit the plaintiff to recover substantial

damages in this action. This obviously by reason of the fact that the Court is convinced that "good cause" for discharge in fact here existed. This point we are not disposed here to argue, because the question of whether good cause for discharge did in fact exist is not in this case. This case hinges upon the sole question of whether in the determination of the existence of cause for discharge the defendant complied with its contractual obligations to the plaintiff. What we here seek is a reconsideration by the Court of the single question of whether this plaintiff was accorded his contractual rights, that is, was Rule 38 of the contract complied with.

The language of the rule is as follows:

"Article 8, Rule 38. No yardman will be suspended or dismissed without first having a fair and impartial hearing and his guilt established. The man whose case is under consideration may be represented by an employee of his choice, who may be a committeeman, who will be permitted to interrogate witnesses. The accused and his representative shall be permitted to hear the testimony of witnesses."

We emphasize the phrase

"The accused and his representative shall be permitted to hear the testimony of witnesses."

for the reason that it is completely ignored by the Court in its decision, and we cannot help but believe that it was overlooked. In fact, in quoting the rule in the opinion, this portion thereof is indicated only by a series of dots.

The rule on its face requires, so far as we are here concerned, five conditions to proper discharge:

- (1) A fair and impartial hearing;
- (2) The right to be represented;
- (3) The right to interrogate witnesses;
- (4) The right to hear the testimony of the witnesses;
- (5) The establishment of his guilt.

It is upon this question alone that we seek reconsideration. If these conditions existed *prior to discharge* it would indeed be a travesty on justice to permit his recovery.

On the other hand, if they did not, it would be, and is a travesty on justice to deny him his rights under the contract, solemnly entered into by the Depot Company on the one hand, and the representative of the mass of employees on the other, for the benefit of all who come within its terms.

The decision herein is not limited in scope to the rights of this single individual. It lays down a pattern which affects the employment rights of large numbers. The blessing here given by the court to the methods here employed in applying Rule 38 is of concern to many persons. We respectfully urge that further consideration be given to the meaning of Rule 38, to the end that not only this plaintiff be accorded the benefit of its proper interpretation, but an interpretation be given commensurate with the rights of all the other employees subject thereto.

For convenience our views will be presented under two points of argument:

- (1) The Court erred in holding that the lower court had no jurisdiction to order the plaintiff's reinstatement with defendant Company with seniority rights unimpaired.
- (2) The Court erred in holding that it was for the trial court to determine whether the grounds for discharge in fact existed, and in this determination it was not limited to the transcript of the hearing.

## ARGUMENT

### I

THE COURT ERRED IN HOLDING THAT THE LOWER COURT HAD NO JURISDICTION TO ORDER THE PLAINTIFF'S REINSTATEMENT WITH DEFENDANT COMPANY WITH SENIORITY RIGHTS UNIMPAIRED.

Insofar as this case is concerned, what the Court does on this particular phase of the matter is of little consequence. However, as a matter of general policy we respectfully question the propriety of this holding.

In the lower court the plaintiff sought reinstatement. The lower court ruled against him on this point. He did not appeal from this ruling. The correctness of this ruling was not before this court for approval or disapproval. In fact, the plaintiff carefully avoided being drawn into any controversy in this court over the question of whether the court as a matter of law had or had not jurisdiction to reinstate.

In view of this situation it seems that this court might well await the time when this question comes before it on appeal before taking the momentous step of judicially determining that the courts of Utah are without jurisdiction to order reinstatement under agreements such as these, rather than so to hold in this proceeding without benefit of argument pro and con. Other courts have taken a contrary view.

*Coyle v. Erie Ry. Co. (N.J.)* 63 A. 2d 702.

*Fine v. Plat (Tex.)* 150 S.W. 2d 308.

*Heasley v. Plasterers' Local No. 31 (Pa.)* 188 A. 286.

*Locomotive Engineers v. Mills (Ariz.)* 31 P. 2d 971.

As indicated, these particular observations are of no moment insofar as the plaintiff is concerned, as he is bound in this case by the holding of the lower court. They are purely gratuitous with us, as attorneys, and directed toward what we conceive to be an erroneous position upon a point that need not here be decided.

## . II

THE COURT ERRED IN HOLDING THAT IT WAS FOR THE TRIAL COURT TO DETERMINE WHETHER THE GROUNDS FOR DISCHARGE IN FACT EXISTED, AND IN THIS DETERMINATION IT WAS NOT LIMITED TO THE TRANSCRIPT OF THE HEARING.

We approach this assignment upon the assumption that the court agrees that the requirement for filling out Form 153 does not apply in the case of an absence

occasioned by illness; and, hence, if illness were the cause of the extended absence, a failure to comply with Rule 55(b) and fill out the form would not justify a discharge. The reverse of the proposition is that if the cause of the absence were not illness that the defendant had the right to discharge him for his failure to comply with the rule.

We also observe that the court likewise agreed that the burden of proving the propriety of the discharge is on the defendant.

Our position, briefly and bluntly stated, is that if Rule 38 was complied with prior to discharge, the defendant's right of discharge is full and complete. If Rule 38 was not complied with, the discharge was wrongful. The court's position, as we interpret the opinion, is that the right of discharge is dependent upon the existence in fact of the ground for discharge assigned, and this is a matter to be determined by the court. This latter view disregards, as we see it, the fact that the parties themselves contracted the conditions for discharge, and having so contracted it is for the court only to determine whether those conditions existed — neither adding conditions, nor subtracting conditions. We look, accordingly, to Rule 38, as follows:

“No yardman will be suspended or dismissed without first having a fair and impartial hearing and his guilt established. The man whose case is under consideration may be represented by an employee of his choice, who may be a committeeman, who will be permitted to interrogate witnesses. The accused and his representative shall be permitted to hear the testimony of witnesses.”

The first ten words are of primary importance. They are:

“No yardman will be suspended or dismissed without first having \* \* \*.”

Now what must he “first” have before he may be discharged? Five things are named, (1) a fair and impartial hearing; (2) the right of representation; (3) the right to interrogate witnesses; (4) the right to hear the testimony of the witnesses; (5) the establishment of his guilt.

If those five conditions existed the discharge is proper. If any thereof did not exist the discharge is improper. This case is just that simple, and the sole duty of the court is to determine whether those five conditions did exist prior to the discharge. And where does it go to make that determination? Of necessity it must go to the record made *prior* to discharge, and not to some record, or to some evidence, or to some witnesses first appearing on the scene after discharge, because those conditions must first exist before a discharge is proper.

Thus it is that we urge that the record of the hearing is the best, and in fact the only evidence of whether those conditions did exist. Anything less makes a mockery of the provisions of the Rule. If the employer may simply pay lip service to the rule by holding a so-called hearing at which it withholds its evidence, and after the hearing is closed, secretly interrogate its witnesses, and develop grounds for discharge (which admittedly is what here occurred if there is any evidence contrary to that appearing in the transcript) then at

least four of the conditions necessary to discharge do not exist. The employee has not had a fair and impartial hearing; he has not had an opportunity to interrogate the witnesses; he has not been permitted to hear the testimony of witnesses; and his guilt has not been established at the hearing.

We turn now to some decisions which we believe support our views.

The word hearing has been variously defined, but running through all of the decisions is the idea that a hearing includes the opportunity to hear as well as to be heard. In *Anthony v. Gilbrath* (Ill.) 71 N.E. 2d 184 the court held:

“Hearing is generally understood to mean a judicial examination of the issues between the parties whether of law or fact.”

In *State v. Milwaukee* (Wis.) 147 N. W. 50, the court had to decide what was meant by the word “hearing”, and it ruled as follows:

“There are at least three substantial elements of a common-law hearing, (1) the right to reasonably know the charges or claims preferred, (2) the right to meet such charges by competent evidence, and (3) the right to be heard by counsel upon the probative force of the evidence adduced by both sides. \* \* .”

And in *Inland Steel Co. v. N.L.R.B.*, 109 F. 2d 9:

“A hearing means trial by a tribunal free of bias and prejudice and imbued with a desire to accord to the parties equal consideration”.

In the case of *United States v. Appalachian Electric Power Co.*, 107 F. 2d 769, the government attempted to enjoin the defendant from the erection of a hydro-electric dam. As a part of the action it was maintained that the Commission had ruled against the plaintiff as a result of a hearing. The Court, at page 792, said:

“If the public hearing granted by the Commission in 1926 and above referred to is to be regarded as a hearing in the sense of due process, and therefore the defendant is to be affected by the finding of the Commission that the interests of interstate commerce would be affected by the dam, we could hardly conclude that the finding was based on substantial evidence, in view of the fact that the only evidence then introduced was the report and opinion of Gen. Taylor to the contrary. At the hearing counsel for the defendant inquired whether further or other evidence was to be considered by the Commission, and if so, indicated his desire to be informed of it. Nothing was then said to indicate that the Commission desired or would consider other evidence. It is now said by counsel for the Commission that it did have available, and must have considered, other information upon the subject to be found in various official reports, public documents, and Acts of Congress, many of which were offered in evidence by the plaintiff in this case. But as these matters were not brought to the attention of the Company at the hearing, it is not perceived how they could be regarded as evidence affecting it in the sense of due process. *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U.S. 88, 91, 33, S. Ct., 185, 57 L.Ed. 431: *Morgan v. United States*, 304 U. S. 1, 14, 15, 19, 58 S. Ct. 773, 99, 82 L.Ed. 1129. For the same reasons we do not think that the subsequent declaration or finding

of the Commission on October 12, 1932, can be regarded as in any way affecting the rights of the defendant, because it was made *ex parte* without notice or hearing. It is not meant to suggest that the Commission at any time intentionally proceeded arbitrarily, or without proper regard to the rights of the Dam Company, or that its proceeding was inappropriate to the 'investigation' directed by the Act; but only that its finding, to the extent based on information obtained informally and *ex parte*, and not brought out at the notified hearing where it would be subject to cross-examination and possible refutation, cannot properly be considered as consistent with due process, if sought to be made conclusive on the defendant. The reasonable assumption would seem to be that the procedure followed was adopted as appropriate to an 'investigation' by the Commission, rather than a 'hearing' with the legal implications thereof. See *Norwegian Nitrogen Products Company v. United States*, 288 U. S. 294, 317, 53 S. Ct., 350, 77 L. Ed. 796."

In *Coyle v. Erie Ry. Co. (N. J.)*, 63 A. 2d 702 the court had before it a contractual provision that did not contain a provision for a hearing, but it did contain a provision permitting the employee to examine the evidence of the employer. The New Jersey court said:

"Although the language of the quoted rule does not provide for a hearing in the technical sense of a court proceeding, there can be no doubt that the terms of the rule were not complied with. The provision for notice 'in writing, in advance, of the charge and time of investigation' coupled with 'the right to be represented by the duly accredited representative' clearly

imply such notices will give the employees a fair opportunity to get in touch with their representatives and to prepare their defense. The one day's notice given on October 15th to appear on October 16th is obviously inadequate. *Schlenk v. Lehigh Valley Railroad Company*, 62 A. 2d 380, 381, decided by this court in an opinion filed December 6, 1948, not yet officially reported. The statements of Hastings and Whaley were read to the complainants, but neither was present despite the fact that the complainants asked why Hastings was not there. They obviously desired to question Hastings and it would seem that they were fairly entitled to do so either under the contract provision giving them the right to 'have witnesses of their own choice \* \* \* present or under the clause providing that 'evidence pertaining to the case will be made available'. The defendant railroad has failed to comply with the terms of the contract with the Brotherhood in the investigation."

The court then concluded:

"The decree below will be reversed and a judgment will be entered, directing the reinstatement of the complainants as of October 11, 1947, with back pay, retirement and pension rights, and enjoining the defendant from conducting an investigation of the charges against the complainants except in conformity with the terms of the Brotherhood contract."

A related field of inquiry is found in cases growing out of the discharge of employees covered by civil service statutes. The distinction, which is without a legal difference, is that there the statutes condition the right of discharge, whereas here the contract sets forth those conditions.

We refer, for example, to the case of *Roberson v. City of Rome* (Ga.) 25 S. E. 2d 925:

“It is evident that the hearing contemplated by the act is not a common-law or a criminal proceeding. But while it is not a common-law or criminal proceeding it is of a judicial character and must be so conducted. *Stiles v. Lowell*, 233 Mass. 174, 123 N.E. 615, 4 A.L.R. 1365; *State v. McColl*, 127 Minn. 155, 149, N.W. 11. The power of the Civil Service Board of the City of Rome is derived from the act creating it, and it has no power not granted by the act, and in performing the functions it must do so in terms of the act. ‘The full performace of all conditions established by the civil service laws is an essential prerequisite to the jurisdiction of the removing body over the subject matter of the removal of an officer (citing *Stiles v. Lowell*, supra, and *Thomas v Lowell*, 227 Mass. 116, 116 N. E. 497), *and where there is no substantial compliance with the statutory procedure, an order of removal is a nullity.*’ 43 C. J. 679.” (Italics added)

And *Steen v. Board of Civil Service Commissioners*, (Calif.) 160 P 2d 816, the court said:

“The rule is firmly established that if by statute an officer or civil service employee may not be removed or discharged except for cause, the clear implication is that there be afforded an opportunity for a full hearing to accomplish his removal; that unless the statute expressly negatives the necessity of a hearing, common fairness and justice compel the inclusion of such a requirement by implication. See *Bannerman v. Boyle*, 160 Cal. 197, 116 P. 732; *Carrol v. California Horse Racing Board*, 16 Cal. 2d 164, 105 P. 2d 110; *Welch v. Ware*, 161 Cal. 641, 119 P.

1080; *Knights of Ku Klux Klan v. Francis*, 79 Cal. App. 383, 249 P. 539; *People v. Bailey*, 30 Cal App. 581, 158 P. 1036; *Scott v. Donahue*, 83 Cal. App. 126. 269 P. 455; *Abrams v. Daugherty*, 60 Cal. App. 297, 212 P. 942; *Boyd v. Pendegast*, 57 Cal. App. 504, 207 P. 713; 99 A. L. R. 336. Thus it is clear that the charter, by prohibiting removal except for cause, impliedly requires a hearing. There is nothing in the charter which negatives that implication. True, it is provided in section 112 (a) that the board shall investigate the grounds for discharge. But an investigation is not necessarily inconsistent with a hearing. It may mean the same thing. See *Luellen v. City of Aberdeen*, 20 Wash. 2594, 148, 148 P. 2d 849; *Matter of Gilchrist*, 130 Misc. 456, 224 N. Y. S. 210."

"\* \* \*. The term investigation does not detract from the fact that a hearing is required with all that the term implies."

The Utah Civil Service Statute (Section 15-9-21, U. C. A., 1943) provides:

"All persons in the classified civil service may be removed from office or employment by the head of the department for misconduct, incompetency or failure to perform his duties or failure to observe properly the rules of the department, but subject to appeal by the aggrieved party to the civil service commission. Any person discharged may within five days from the issuing by the head of the department of the order discharging him appeal therefrom to the civil service commission, which shall fully hear and determine the matter. The discharged person shall be entitled to appear in person and to have counsel and a public hearing. The finding

and decision of the civil service commission upon such hearing shall be certified to the head of the department from whose order the appeal is taken, and shall be final, and shall forthwith be enforced and followed by him."

In the case of *Erkman v. Civil Service Commission*, 114 *Utah* 228, 198 *P. 2d* 238, this court had no difficulty in confining the court to the record before the Commission, and held:

"The judgment of the District Court was based solely on the record of the hearing before the Civil Service Commission on plaintiff's appeal to that commission from his discharge by the Chief of Police. Since our action on this appeal will likewise be based altogether on that same record, we may treat this for the purpose of simplicity as if it were a direct appeal from the defendant commission to this court, although technically the question before us is whether the district court erred in refusing to set aside the order of the defendant commission. But that question depends upon whether the defendant commission failed regularly to pursue its authority, or, in other words, whether it acted arbitrarily, or, stated still another way, without basis or reason."

And finally we refer to the case of *Buster v. M. & St. P. & P. R. Co.*, 195 *F. (2)* 73, wherein the plaintiff sued for damages for a claimed improper discharge. The contractual provision there involved was not dissimilar from ours. It read:

"Defendant's yardman or switch tenders taken out of service or censored for cause shall be notified by the company of the reason therefor

and shall be given a hearing within five days after being taken out of service. \* \* \* yardmen \* \* \* shall have the right to be present and to have an employee of their choice at hearings and investigations to hear all oral and read all written testimony and bring out any facts in connection with the case.”

On appeal, the Illinois court held:

“The sole question involved in this appeal is whether or not the plaintiff was given a ‘fair and impartial hearing’ on the charge that he violated the company rules.”

That, in a sense, is the point we are here making. As evidenced by the foregoing decisions, the view of the courts is that a “fair and impartial hearing” implies the right to hear, the right to be heard, the right to examine witnesses, the right to have the witnesses present, the right to be apprised of the evidence against him, and the right to argue its probative force.

In the present contract it was not, in part at least, left to any implication to be drawn from the word hearing, because, in addition to providing for a “fair and impartial hearing” with all of its implications, Rule 38 specifically spelled out what the parties had in mind, namely, the right to interrogate the witnesses, the right to have the employee’s guilt established.

This court in its opinion says:

“It is true that in a proper cases the transcript of the hearing might itself reveal unjust discharge. Thus, if it showed conclusively that the plaintiff was not accorded his rights under the contract; that he was not given adequate notice, or was not given opportunity to be heard

or to be represented by an employee of his choice, the discharge would be wrongful, because according the employee such rights is, under the contract, a condition precedent to discipline or discharge. But that is not the case before us.”

We cannot reconcile that holding with the ultimate decision. Here it is established that the plaintiff was discharged upon the basis of evidence not adduced at the hearing — that the defendant accepted and acted upon testimony or statements of witnesses made outside the hearing — that the plaintiff was never apprised of the nature of the evidence or who gave it — and that he was not given an opportunity to refute it or argue its probative force.

Wherein is there a fair and impartial hearing in that type of proceeding? Wherein is there any compliance of the rule that requires, as a condition to discharge, that the employee shall have the right to interrogate the witnesses and be permitted to hear their testimony?

The court recognizes that the transcript of the hearing on its face may show improper discharge, as where he was not given adequate notice, or an opportunity to be heard, or to be represented by an employee of his choice. But why so limit it? The parties themselves did not. They further provided that the employee at the hearing should have the right to interrogate the witnesses and hear the evidence against him. Why is it less important that he know the evidence against him than that he be represented by a fellow employee? Why is it less important to the employee that witnesses be permitted to testify against him in secret than it is

that he have adequate notice of the hearing? Aren't all of these conditions equally important, and actually if *any* are absent hasn't the employee had less than a fair and impartial hearing? We can't conceive that this Court intends to hold that the requirements for a fair and impartial hearing are met where evidence against the employee is developed and determined in secret, and a discharge predicated thereon.

Neither does it suffice to say that the trial court will correct the matter if injustice was done and the employee discharged when no grounds therefore existed. The injustice arises through the breach of the conditions of the contract, which provides that no employee shall be discharged until he *first* shall have a fair and impartial hearing, etc. If the employer can first discharge, and then try out de novo in the courts the question of the propriety of the discharge, the provisions of Rule 38 are meaningless and the benefits to the employee intended thereby nonexistent. Certainly neither the employees nor the employer who negotiated this contract intended any such result, nor can the language they used justify any such interpretation.

To some extent the responsibility for what we believe to be the erroneous interpretation of Rule 38 may lie with us for our oversight in our original brief in omitting to set forth the whole of Rule 38, rather than stopping with the words "and his guilt established". However, the whole of the rule appeared in the defendant's brief, including that portion relating to the right to interrogate witnesses and hear the testimony of witnesses, which we now deem of particular importance,

in view of the apparent holding of the court that the right to a "fair and impartial hearing" in and of itself does not include these latter rights.

Our only explanation for this dereliction is that it never occurred to us that this court would hold that the plaintiff had had a fair and impartial hearing, where there was a taking of evidence against him in secret and the predication of his discharge on that secret evidence. It is not, however, too late to right the wrong, and regardless of what this court may say in regard to what constitutes a fair hearing, the contract here spelled out in black and white that *before* the plaintiff could be discharged he would have the right to hear and see the witnesses against him, and admittedly this right was not accorded him.

On the question of the measure of damages we yield in this case without further argument. However, we believe that the right to back pay is inextricably woven in to the right to reinstatement, and that they go hand in glove. In other words, if there is the right to reinstatement, and jurisdiction to grant it, there is a co-equal right to back pay, and as heretofore indicated, we trust the court will not in this case foreclose the matter of the court's jurisdiction to order reinstatement, because the pro of the proposition has not been adequately presented or argued.

One other matter, and then we are going to fold our tent. The Court apparently gives considerable importance to the fact that the agent for plaintiff in his bids for reinstatement finally himself concluded that plaintiff had testified falsely as to his illness. We

cannot help but believe that in so holding the court has reached the same tortured conclusion as to the meaning of Mr. McDaniel's letter as the defendant asserted; but, regardless of that, there are two complete answers to the conclusion which we believe the court has overlooked. The first is that if the agent did become so convinced it must have been upon that same secret testimony which is the nub of this whole law suit.

The second is, that McDaniel's whole interest in this matter was in regard to *reinstatement*. McDaniel never came into the matter at all except insofar as plaintiff's request that he be reinstated was being processed by the defendant. The letter on its face relates to reinstatement alone. *We do not now care about reinstatement.* We gave up on that when the trial court ruled against us. Yet despite the fact that reinstatement is not and never has been involved in this appeal, we are constantly confronted with its apparition, and the defendant's denial to plaintiff of a fair and impartial hearing is blessed by the reminder that he had no right to reinstatement.

We sincerely wish that the court would throw the question of reinstatement out the window — discard it permanently insofar as this case is concerned, once and for all — and decide the plaintiff's rights as we believe they should be decided, solely upon the question of whether the defendant breached its contract in not first complying with Rule 38 before making the discharge effective. Upon this issue, which is and can be the only pertinent one, questions of whether the plaintiff was a liar or not, of whether he was a good worker or a poor

one, of whether he should in fact have been discharged for a dozen different reasons, become immaterial. There may have been a hundred good reasons for dismissing him from service, but the defendant contracted with him that *before it would discharge him* it would give him a fair and impartial hearing, permit him to interrogate the witnesses, to hear the testimony, and in that manner establish his guilt. Unless the court can and will say that these conditions, so embodied in Rule 38, are contrary to public policy and so void, then the defendant is bound by them, and the only question is whether they were complied with.

## CONCLUSION

It is upon this question and upon this question alone that the plaintiff seeks to be reheard. The issues are momentous. The rights involved are multitudinous. We beg of the court not to permit the decision to stand in its present form. Far better it be, if the court so wills, that the plaintiff be summarily cut off upon some other ground, as for example laches or waiver as urged by the defendant, than that it be said that he was here given a fair and impartial hearing in accordance with the judicial requirements of this enlightened state.

The real travesty on justice in this case is not in the award of damages pointed to by the Court, but rather in the subordination of the rights of plaintiff under this contract to the cavalier treatment given by the defendant. It exists in the approval voiced to the conclusions reached by the defendant, and in the blessing accorded to the manner of the termination of plaintiff's employment.

Particularly it exists in permitting the defendant, a great and wealthy corporation, to violate and ignore the plain import of its obligations under the contract and to deprive the plaintiff, by that farce they called a hearing, of the job security so zealously sought to be safeguarded by the provisions of Rule 38.

Plato argued that the great and worthy had a duty to the public proportionate to these gifts. We do not so approach the matter, but do argue that the defendant's employees have the right to require it to live up to its contractual obligations to them, and the right to expect the courts to enforce those obligations, painful though it may be.

Mr. Justice Henriod states the principle here involved in a way that cannot be improved upon in the case of *Creamer v. O. U. R. & D. Co., Utah*, 242 P. 2d 575, as follows:

“Our sympathies extend to plaintiff, but we must subordinate it, if in the honoring of it, we uproot the principle that there can be no recovery if no legal duty has been violated.”

The converse of this of necessity is true. Sympathies must be subordinated if in honoring them violence is done to the principle that there shall be no wrong without a remedy. Plaintiff here was wronged when he was discharged without first having a fair and impartial hearing, without having the opportunity of interrogating the witnesses against him, without having the right to hear their testimony, and without his guilt being established at the hearing.

We sincerely apologize if anything we here have said seems offensive to anyone. Certainly it was not so intended. Presenting the arguments on petitions for rehearing constitutes the most difficult task the writer ever undertakes, because they of necessity are directed against the logic and reasoning of members of the court. We can, however, honestly disagree without such disagreement militating in any way against our respect for those who judge us, and it is in that spirit that this petition and brief is submitted.

Respectfully submitted,

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