

1957

W. B. Russell v. The Ogden Union Railway and Depot Co. : Brief of Appellant

Utah Supreme Court

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Case No. 5000

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IN THE SUPREME COURT
of the
STATE OF UTAH

W. B. RUSSELL,
Plaintiff and Appellant,

vs.

THE OGDEN UNION RAILWAY
AND DEPOT COMPANY,
a corporation,

Defendant and Respondent.

Appellant's Brief

C. C. PATTERSON
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IN THE SUPREME COURT
of the
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W. B. RUSSELL,

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vs.

THE OGDEN UNION RAILWAY
AND DEPOT COMPANY,
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NEIL R. OLMSTEAD
C. C. PATTERSON

Attorneys for Appellant

STATEMENT OF FACTS

The plaintiff commenced his employment with the defendant on or about the 28th day of August, 1941. For almost four years he worked for defendant without ever having any disciplinary action against him. He had never been called for an investigation nor had any disciplinary action against him. He had never been called for an investigation nor had any demerits ever been assessed against him (Tr. 113, 170). His employment was covered by a Collective Bargaining Agreement. Rules 55(a), 55(b) and 38 thereof provide as follows:

“55. *Leave of Absence*: (a) Yardmen will not be granted leave of absence for a longer period than 90 days except in case of sickness, committee work, or by permission of the Superintendent.

“(b) Yardmen taking leave of absence for a period of over ten days must secure and fill out Form 153 so the leave will be covered as a matter of record.

“38. *Investigations*: No yardman will be suspended or dismissed without first having fair and impartial hearing and his guilt established. The man whose case is under consideration may be represented by an employe 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 . . .”

On or about the 4th day of July 1945 the plaintiff was scalded while working for the defendant and was off work at least eleven days by virtue of such scalding (Plaintiff's Exhibit “A” and Tr. 86). When he returned to work, having been gone for a period of time in excess of ten days, no one called him for an investigation nor suggested that he could not return to work because he had not obtained a leave of absence. At that time he did not obtain such a leave nor ask for one, believing the fact that as he had visited the doctor and was technically under his care, he was exonerated from any application of the rule (Tr. 234 and 235).

After the scalding plaintiff returned to work and worked for a matter of several days (Plaintiff's Exhibit “A”), and on or about July 20 or 21st he laid off sick because of a cold. He only intended to be gone a day or two and did not intend to be gone in excess of ten

days (Tr. 85, 86 and 216). After he had been off work for approximately six days he became sufficiently ill that his wife drove him to the doctor (Tr. 216 and 217). His condition was diagnosed as a mid-ear infection which frequently took a long series of treatment (Tr. 225). He received two prescriptions from the doctor on July 27, an atomizer for his sore throat and medication for his ear.

After treatment from the doctor he went home and remained home in bed until he was called on August 1st at 6:30 o'clock in the morning to report for a formal investigation at 2 P.M. of that date for reason of his alleged violation of the Collective Bargaining Agreement, by reason of his being absent without leave for a period in excess of ten days.

It is conceded by the defendant in its Answers to Interrogatories, Answers to Requests for Admissions, and the testimony of John E. O. Burton (Tr. 38-43) that no witnesses testified at said hearing except Russell; that Russell heard no testimony against himself; that he was not permitted to interrogate witnesses because no witnesses were produced; and that he was given no opportunity for rebuttal, there being no testimony adverse to him introduced which would require rebuttal; and that the transcript of the said investigation is a full and complete record of the alleged hearing.

On the 4th day of August, 1945, the defendant dismissed the plaintiff from it's service, assigning as its reason therefor that plaintiff had been absent from his employment for a period of over ten days in violation of Rule 55(b).

On January 14, 1946, and within a period of six months from the date of discharge, plaintiff filed with defendant written objections to his dismissal, and requested reinstatement (Exhibit "B"). On January 22, 1946 defendant, through it's Superintendent, reaffirmed the dismissal (Exhibit "C").

This case was tried previously and appealed to this court in *Russell vs. O.U.R. & D.* (Utah) 247 P. (2) 257. At that time the defendant based its appeal primarily upon the fact that it contended it had proof and could prove, but was denied the opportunity by the lower court, that the plaintiff had been guilty of a misrepresentation at the time of the hearing when he said he was ill, and that it could prove and had proof that the plaintiff was not ill but in fact the plaintiff worked each and every day during the period of his absence at the Pine View Inn selling beer, and that fact was also conceded by his Union representative, Mr. C. E. McDaniels, Vice President of the Switchmen's Union of North America. This court believed those representations and Mr. Justice McDonough held that it would be a travesty of justice to permit the plaintiff to recover on the basis of the hearing alone, when the defendant could prove the falsity of his statements. This view was concurred in by Justice Crockett who found that the plaintiff's own representative finally conceded that plaintiff was justifiably discharged. These findings were conclusions and not based upon fact. The facts were that Mr. McDaniels withdrew from the case solely upon instructions from Mr. Cashin, International President of the Switchmen's Union of North America (Tr. 192, 193 and 197) for the sole reason that the plaintiff was not a dues paying member of the Switchmen's Union of North America. He stated

further that he had personally made an investigation as to whether the plaintiff had testified falsely at said hearing and had come to the conclusion as a result of his personal inquiry that he could find no false testimony (Tr. 187), and that the facts contained in Mr. Hudgens' letter to Mr. Edens were in fact correct.

Mr. McDaniels testified further that he did not concede at any time that his withdrawal from the case was not done with plaintiff's consent (Tr. 201), and that his letter to Paulson meant and should have been interpreted to mean that his withdrawal from the case was without any prejudice to the plaintiff's right to proceed further (Tr. 210, 212, 213), and that he so advised Mr. Russell to that effect (Tr. 214).

On the other hand, Mr. Edens, Superintendent of the defendant, conceded that he had never had any personal knowledge that plaintiff was not in fact sick and that he did not know of a single solitary soul who knew whether Russell was sick or not (Tr. 117). In answer to interrogatories and admissions the defendant conceded that no inquiry was ever made by anyone as to whether the plaintiff had been ill or testified falsely in the investigation until April of 1946, eight months after the plaintiff was discharged.

Mr. Paulson, Vice President of the defendant, admitted all of these facts and testified in addition thereto that plaintiff was not discharged solely because he had been absent for ten days but that part of the reason for the discharge was outside employment (Tr. 174), a subject not a part of the formal investigation and not a ground for discharge under the contract.

THE NATURE OF THE CASE ON APPEAL

The questions raised by this appeal are:

- (1) Does Rule 55(b) constitute a proper ground for discharge?
- (2) Did the defendant accord to the plaintiff his rights under Rule 38?
- (3) Is defendant bound by its testimony and oral argument that plaintiff was discharged at least in part for reasons other than Rule 55(b)?
- (4) Did the court err in its instructions and its refusal to give the plaintiff's requested instructions?

POINT I

RULE 55(b) DOES NOT CONSTITUTE A GROUND FOR DISCHARGE.

The defendant charged the plaintiff with a violation of Rule 55(b) and discharged him for an asserted violation thereof:

“55. (b) Yardmen taking leave of absence for a period of over ten days must secure and fill out Form 153 so the leave will be covered as a matter of record.”

It is necessary for a proper consideration of this problem to consider also Rule 55(a):

“55. (a) Yardmen will not be granted leave of absence for a longer period than 90 days except in case of sickness, committee work, or by permission of the Superintendent.”

It will be seen that no leaves will be granted in excess of 90 days unless they are approved by the Superintendent, except in case of sickness or committee work.

Nowhere is it indicated that permission is required for illness or committee work. Nowhere is it suggested that a man cannot be away for more than 90 days as a matter of right.

If that be true, and the language can't be denied, does it follow that if a man is away for a lesser period, that he must have the approval of anyone, particularly where, as here, the rule states that the *only purpose is so that the leave can be covered as a matter of record*.

Clearly the first requirement of the rule is that an employee intends to be away for more than 10 days. This is conceded by the defendant. Its Mr. Beckett, a signatory to the contract, testified (Tr. 128):

"A. Well, that rule itself tells you what you will do to secure a leave of absence.

Q. That means if you anticipate being off for a period of time in excess of ten days, doesn't it?

A. That's right."

Again discussing illness (Tr. 128-129):

"Q. Suppose you didn't anticipate being off for a period of ten days but just for example on the 10th day you were in an automobile accident and ended up in the hospital, did the union contend that he had violated the rule because he hadn't gotten the written leave before he went to the hospital?

A. Well, in cases of that nature the local chairman would be aware of those things and if a man was injured or in the hospital the local chairman made application for leave of absence. That covered the man."

And again (Tr. 131-132):

“Q. When he was sick in bed?

A. Well, if he was sick in bed we usually provided for that.

Q. What do you mean you usually provided for that?

A. Well, if we found that a man was sick in bed or was injured and so forth, that he was more or less granted a leave of absence when it was a bona fide fact that such was the case.”

This is the only testimony on this phase elicited from any of the defendant’s witnesses. The defendant is bound by it. On the other hand, the uncontradicted testimony is that the plaintiff did not anticipate being away for over 10 days. In fact he expected and planned to be absent for only a couple of days (Tr. 222-223). Nowhere did the defendant attempt to contradict or deny this fact.

Further, it was conceded that this was not a disciplinary rule. Mr. Beckett, the defendant’s witness, testified that he did not know of any rule of the defendant that provided for a penalty for the violation of Rule 55(b).

This conduct on the part of the defendant and its agents, and its recognition that it is the only reasonable and proper interpretation finds ample support in law.

It has long been recognized that the mere failure to obey orders not involving wilful insubordination is not enough to justify discharge. Thus in 1886 the Supreme Court of Michigan recognized the rule, *Shaver vs. Ingerham*, 26 N.W. 162. The plaintiff had been hired for one year. He absented himself from work for one day con-

trary to the express desires of the defendant who discharged him. The court, in affirming judgment for the plaintiff, reviewed the law and concluded:

“In *Filleiul v. Armstrong*, 7 Adol. & E. 557, the failure of a teacher to return within a day or two after vacation, although it was strongly urged that the course of the school was seriously interfered with, was held not sufficient when set up in a plea to answer the case made by the declaration, and no ground to justify the discharge. The language of the court is clear on the insufficiency of the showing, and it was suggested that, even if actual loss was shown, it would be the ground of claim for reduction of wages, and not of discharge, where there was no serious moral wrong. In *Callo v. Brouncker*, 4 Car. & P. 518, the jury were told that there must be moral misconduct, pecuniary or otherwise, willful disobedience, or habitual neglect, to justify dismissal from service for a year; and, although both disobedience and neglect of orders were shown in several instances, the court would not let the jury act upon them as a serious enough to be sufficient. In that case the servant was a traveling courier. In *Edwards v. Levy*, 2 Fost. & F. 94, where there was a single act of neglect accompanied by insolence, the court held the plaintiff's case should go to the jury, as this could not be held, as matter of law, ground for discharge. The cases of *Cussons v. Skinner*, 11 Mees. & W. 161, and *Smith v. Allen*, 3 Fost. & F. 157, in addition to requiring disobedience to be willful, call attention to another element of decision, which is especially applicable here. It is held, not only that a sufficient cause must be shown, but also that the wrong was actually the real cause of dismissal, and not merely an ostensible reason.

“Willful disobedience, in the sense in which the word is used by the authorities, means something more than a conscious failure to obey. It involves a wrongful or perverse disposition, such as to render the conduct unreasonable, and inconsistent with proper subordination. We are not prepared to hold that, even in what is known as menial service, every act of disobedience may be lawfully punished by the penalty of dismissal and the serious consequences which it entails upon the servant put out of place. No doubt domestic employment may be closer than that in business employment; but there must be a limit to the arbitrary power of masters. In such employments as involve a higher order of services, and some degree of discretion and judgment, it would, in our opinion, be unauthorized and unreasonable to regard skilled mechanics, or other employes, as subject to the whim and caprice of their employers, or as deprived of all right of action to such a degree as to be liable to lose their places upon every omission to obey orders, involving no serious consequences.”

In 1899 the Supreme Court of Indiana in *Hamilton v. Love*, 152 Ind. 641, 53 N.E. 181, reached the same conclusion independently, and affirmed a judgment for the plaintiff, stating:

“The master would have no right to discharge the servant for trivial or unimportant acts of disobedience or negligence.”

It must be concluded therefor that a mere breach of a rule or neglect to adhere to it, if done inadvertently, is not sufficient to justify a discharge. More is required. The additional elements are intent and wilfulness.

In the case of *Ehlers v. Langley*, (Calif.) 237 Pac.

55, the court held:

“Although it is not necessary that the violation be perverse or malicious, or that it be the result of an evil intent toward the master, it must be made clear that the thing done or omitted to be done was done or omitted intentionally, the rule being grounded on the theory that willful disobedience of specific instructions of the master, if such instructions be reasonable and consistent with the contract of employment, is a breach of duty—a breach of the contract of service; and like any other breach of contract, of itself entitles the master to renounce the contract of employment.”

In *Goudal v. DeMille Pictures Corp.*, (Calif.) 5 Pac. (2) 433, it was held:

“To constitute a refusal or failure to perform the conditions of a contract of employment such as we have here, there must be, on the part of the actress, a willful act or willful misconduct. (May v. New York Motion Picture Corp. 45 Cal. App. 396, 187 P. 785; Ehlers v. Langley & Michaels Co. 72 Cal. App. 214, 237 P. 55).”

So even though it be said that the failure of an incapacitated employee to secure and fill out Form 153 covering his absence constitutes a technical violation of the rule, still such violation, being neither willful nor intentional, cannot be used by the employer as a ground for discharge.

And in *Bang v. International Sisal Co.*, Minn. 4 N.W. (2) 113, the court held:

“The privilege of discharge has been said to exist in those cases where there has been a material breach of the employment contract, and

“wilful disobedience” is recognized as such a breach.”

The above cases set forth a rule that has been recognized as a rule in the federal court since 1913. In *Carpenter Steel Co. v. Norcross*, 6th Cir. 204 F. 537 the court had the problem of a wrongful discharge and for the first time discussed what type of misconduct would in fact justify a discharge. In so considering the problem, the court laid down the following rule:

“And preliminary thereto a word or two should be said as to the nature of the misconduct which the law makes a justification for a discharge. It is certain that conduct involving moral turpitude, willful insubordination, or habitual neglect is such misconduct as to justify a discharge. An early case limited justification thereto. But it is now well settled that any conduct which is prejudicial or likely to be prejudicial or injures or has a tendency to injure the master is misconduct that warrants a discharge, 20 A. & E. Enc. of Law, p. 27; 26 Cyc. pp. 988, 990.

“In Wood, Master and Servant, p. 208, the law is stated thus: ‘Misconduct prejudicial to the master’s interests, although not exhibiting moral turpitude, is good cause for the discharge of a servant. And conduct exhibiting moral turpitude, although productive of no damage to the master’s interests, is a good ground for terminating the contract. Mere misconduct, not amounting to insubordination, or exerting a bad influence over other servants, or producing injury to the master’s business, or members of the master’s family, is not enough to warrant the discharge of a servant. The misconduct must be gross or such as is incompatible with the relation, or pernicious

in its influence, or injurious to the master's business.'

"And again on page 220 the matter is put thus: 'In order to justify a master in discharging a servant the servant must have been guilty of conduct that amounts to a breach of some express or implied provision of the contract of hiring. Anything less than that will not amount to a legal justification or excuse. The mere fact that he has been guilty of improper or unbecoming conduct, or that he has, in some slight matters, been guilty of a violation of his master's orders, will not warrant his discharge; but his conduct must have been such as to involve moral turpitude and his insubordination must have been willful and such as is inconsistent with the relation which he holds to the master and the duties he owes him.'"

See also *Keserich v. Carnegie Ill. Steel Corp.*, 7th Cir. 163 F. (2) 889; *Seagram & Sons v. Bynum*, 8th Cir. 191 F. (2) 5, *Sawyer v. E. F. Drew & Co.*, 111 Fed. Supp. 1; *Thomas v. N.Y., C. & St. L. R. Co.*, 97 F. Supp. 687; *Crisler v. Ill. Central R. Co.*, 5th Cir. 196 F. (2) 941.

In addition, to justify the discharge, it must be shown that the plaintiff knew that his failure to fill out and secure Form 153 might be used by his employer as a ground for discharge. True it is in this case the defendant proved that it had in the past used a violation of Rule 55 (b) as a reason for discharge, but it did not prove nor offer to prove that it had ever discharged an employee for violating the rule where the absence resulted from illness or accident. On the contrary, the defendant's witnesses conceded that such persons were protected.

We submit the following cases as additional authority for the proposition that the defendant could not properly discharge this employee for a violation of the rule resulting from illness without a showing that it had in the past invoked the same penalty against other employees for similar violations: *National Labor Relations Board v. Kohen-Ligon-Folz*, 128 F. (2) 502; *National Labor Relations Board v. Weyerhaeuser Timber Co.*, 132 F. (2) 234; *National Labor Relations Board v. Viking Pump Co.*, 113 F. (2) 759; *National Labor Relations Board v. Empire Worsted Mills*, 129 F. (2) 688; *National Labor Relations Board v. Oregon Worsted Co.* 96 F. (2) 193.

Finally, as the rule itself states, the filling out of the form is solely to make the absence a matter of record. Unless, therefore, defendant has shown (and it has not) that in failing to have a form covering this particular absence as a matter of record it has been adversely affected, the purely technical violation of the rule could not be relied upon as a basis for discharge. Moreover, that the filling out of the form is merely for the record shows that the requirement of the rule relates only to intentional, voluntary absences. Imagine an employee being required to fill out a form stating in substance, "I hereby apply for a leave of absence for the purpose of being sick for a period in excess of ten days."

It is submitted that Rule 55 (b) was not available as a basis for an investigation or as a reason for discharge for the following reasons, any one of which standing alone obviates the acts of the defendant:

(1) The defendant never has pleaded, claimed or offered to prove that the plaintiff intended, when he

laid off, to be gone in excess of 10 days.

(2) The defendant never pleaded, claimed or offered to prove that the absence was willful or intentional.

(3) The defendant never pleaded, claimed or offered to prove that the plaintiff knew that the rule applied to illness or sickness.

(4) The defendant never pleaded, claimed or offered to prove that the violation of the rule materially damaged the defendant.

POINT II

THE DEFENDANT DID NOT ACCORD TO THE PLAINTIFF HIS RIGHTS UNDER RULE 38.

It has been conceded that plaintiff's employment was governed by a contract made and entered into by the defendant and the Brotherhood of Railway Trainmen. The contract was authorized by the Railway Labor Act. As such it has been ruled that substantive questions of law are to be governed by the federal interpretations. Thus concepts of negligence are governed by federal decisions and do not vary with the varying concepts of negligence applicable under state and local laws, and federal decisional law formulating and applying to concept governs, *Urie v. Thompson*, 337 U.S. 163, 93 L. Ed. 1282. The law, as established by decisions, is binding upon state courts, *Jester v. Southern Railway Co.* (S.C.) 29 S.E. (2) 768. This view is substantiated and followed on contract cases, *Transcontinental & Western Air, Inc., v. Koppal*, 345 U.S. 653, 97 L. Ed. 1325.

The federal rule is laid down in *Transcontinental & Western Air, Inc., v. Koppal*, 199 F. (2) 117, which was not available to this court at the time of its first decision

in this case. In the Koppal case, the plaintiff was employed under a contract between the defendant and the International Association of Machinists. The provisions for a hearing are substantially identical to the case at bar. The contract was likewise one under the *Railway Labor Act*, 45 U.S.C.A. § 181 et seq. The 8th Circuit had to define fair hearing and held:

“In so far as the term ‘fair hearing’ in its use in this provision could be said to imply that a discharge should depend, not simply upon whether cause might exist in fact, but rather upon whether proof of the existence of such cause was sufficiently made against the employee at a hearing as to be capable of inducing and to have constituted the basis of the employer’s action, what we have said above is here equally controlling of plaintiff’s lack of right on the evidence to have these questions tested by a jury as a matter of ‘fair hearing.’ No more on this particular aspect than on the general question considered above, does the evidence afford any basis for a jury to say that sufficient cause legally for discharge was not proved or that the employer’s action was not taken on the basis of this proof. It should be added also that the question of bias or prejudice in the hearing officer as an element of ‘fair hearing’ is not here involved.

“If therefore any jury question existed in the situation in relation to the contractual provision for ‘fair hearing,’ it would only be because of the impossibility of saying as a matter of law that all of the processes which the agreement required to underlie the hearing, and which accordingly constituted incidents thereof, had been properly complied with, and so a legal doubt

could exist as to the significance of such omission or deviation as had occurred, which the employee was entitled to have appraised in relation to whether on all the circumstances there had been a breach of the prescription for 'fair hearing' with its intended incidents, and whether the employee had been prejudiced thereby."

See also *Atlantic Coast Line v. Brotherhood*, 210 F. (2) 812; *New Orleans Public Belt R. v. Ward*, 195 F. (2) 829; *Buster v. M. & St. P. & P. Ry. Co.*, 195 F (2) 73.

This court has recognized that the contract must be adhered to as a condition precedent to discharge. *Russell v. Ogden Union Ry. & Depot Co.*, *supra*. At page 261 it stated:

"It is true that in a proper case 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."

The contract, and in particular Rule 38, provides in part as follows:

"38. *Investigations*: 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 ac-

cused and his representative shall be permitted to hear the testimony of witnesses.”

It is readily ascertained that as a condition to discharge the plaintiff is entitled to the following, unless he admits his guilt:

(1) The rule must be applicable to the facts involved.

(2) He is entitled to hear the testimony of witnesses.

(3) He is entitled to interrogate witnesses.

(4) He is entitled to have a fair and impartial hearing and his guilt established.

(5) He is entitled to notice.

(6) He is entitled to be represented by an employee of his choice.

Of these six elements only the last two were accorded the plaintiff. Indeed the defendant concedes by interrogatory admissions and testimony that no evidence was introduced against him, no witnesses appeared, so that he was deprived of his opportunity to cross-examine. Indeed, by the admission of the defendant, it possessed, even under it's version of the facts, no testimony or evidence contradictory to that adduced at the hearing until over eight months had elapsed.

Under the Federal rule, as well as the Utah rule, it must be conceded that the defendant did not comply with its required condition precedent and that the discharge thus effected was in violation of the contract and the law.

It might be appropriate to examine the defendant's

claimed evidence based upon which it claims plaintiff was not ill. It is based upon two letters (Defendant's Exhibits 3 and 6) in which Dr. Stratford states that plaintiff was capable of working after his release on July 11, 1945.

There is no argument about that. It will be recalled that plaintiff was scalded prior to July 11, and was being treated by Dr. Stratford. At the conclusion of his treatment he was released for work and did in fact work. Dr. Stratford's letter related to that accident and not to plaintiff's subsequent illness.

Dr. Stratford did not state that he wasn't ill subsequent to that time. Defendant attempts to draw that inference, but in so doing it of necessity must make a liar out of Dr. Stratford and accuse its own witness of unethical conduct. Subsequent to July 11, the plaintiff saw Dr. Stratford who treated him for an infection of the inner ear and a sore throat, who later certified that he needed no more treatment, and released him from his care to return to work. The release would be pointless and needless if plaintiff had never been under any disability to start with and would itself have constituted a fraud on the defendant.

It is suggested that plaintiff was entitled to judgment as a matter of law. There was no jury issue to submit relative to whether the contract was complied with, as all of the evidence was to the effect that it was not. There was and is no dispute as to the relevant facts adduced at the hearing. It is so well established as to require no citations that where there are no issues of fact, it is for the court to decide.

POINT III

DEFENDANT IS BOUND BY ITS TESTIMONY AND ORAL ARGUMENT THAT PLAINTIFF WAS DISCHARGED AT LEAST IN PART FOR REASONS OTHER THAN RULE 55(b).

This was conceded by counsel in his opening statement. In commenting on what he intended to prove, he quoted Mr. Paulsen, the Vice President of the Defendant, as follows (Tr. 11):

“Mr. Paulsen said in substance and effect, and these men will have to tell you exactly what it is, and this will be the evidence, it’s the position of the company that Mr. Russell did not tell the truth at that investigation, that he was not sick during that period as he contends that he was, but that he was operating the Pineview Inn at the head of Ogden Canyon.”

And again (Tr. 13):

“Now, it’s our position that during all this ten day period and prior thereto Mr. Russell was not taking care of his job but was operating a beer tavern at Pineview Inn, quite an establishment.”

The defendant in so stating actually bound itself to the fact that it was trying the plaintiff for acts other than that upon which the investigation was based. This position was born out in the testimony of Mr. Paulsen, *supra* (Tr. 174).

The defendant was and is bound as a matter of law by its uncontradicted testimony and the statement of its attorney.

See: *Lehigh Valley R. Co. v. McGranahan* 6 F. (2) 431; *Security State Bank v. Mossman*, 131 Kan. 505, 292 P. 935; *Simmons v. Harris*, (Okla.) 235 P. 508; *Rorvick v. Astoria Box & Paper Co.*, Ore. 299 P. 333.

It is contended that that statement and testimony conclusively demonstrate that the defendant's alleged position is a farce, because it concedes that they were trying him for causes not within the scope of the rule.

Under a contract such as this, a proper discharge may not be had without a hearing, nor may a discharge be supported upon grounds other than those stated in the specific charge. In *Kiker v. Insurance Company*, (N.M.) 23 P. (2) 366, the court said:

"Generally, in an action for wrongful discharge, the employer may plead in defense any sufficient cause, though it may have been unknown to him at the time, though his real reason or motive may have been something else, and though another cause may have been expressly assigned. Williston on Contracts, Sec. 744, 839; Labatt on Master and Servant, Sec. 187; Page on Contracts (2d Ed), Sec. 3058; 19 R.C.L. 516; 39 C.J. 89.

"But the parties of course have the right to stipulate the manner in which the employer may terminate the contract. If they stipulate that it shall be by written notice specifying the cause, a discharge specifying no cause, or an insufficient cause, would be wrongful. It follows that, under such a contract, a cause not specified would not be available in defense. 620, 55 Am. St. Rep. 375, cited; 18 R.C.L. 516, *Mortimer v. Bristol*, 190 App. Div. 452, 180 N.Y.S. 55."

In *Cole v. Loew's Inc.*, 8 Fed. Rules Dec. 508, the court said:

"Where the contract specified grounds for termination or suspension and written notice is provided for, the employer, in order to justify his action, must show that the ground given in

the notice actually existed. He cannot justify his action on other grounds named in the contract, which, although true, were not stated in the notice.”

And in *Levy v. Jarett*, (Tex.) 198 S.W. 333, the court said:

“If the acts of misconduct other than planning to enter business for himself now charged against the plaintiff would have justified his discharge, they were not made the basis of the termination of the contract and could not affect the plaintiff’s right to recover on it, as the defendant at that time did not treat such acts as being a breach of contract * *”

Thus we submit the action of the defendant was illegal and in breach of the contract and the law.

POINT IV

THE COURT ERRED IN ITS INSTRUCTIONS AND ITS REFUSAL TO GIVE THE PLAINTIFF’S REQUESTED INSTRUCTIONS.

The court refused to give any instructions that in any way encompassed the federal rule or even those phases of it that this court has recognized and adopted. On the contrary, the court went far and beyond any established law in the giving of its instructions. It went far beyond any request of the defendant who advised the court of that fact. An examination of the following part of the record is illuminating:

“Mr. Olmstead: Comes now the plaintiff, both sides having rested in this action, and in the absence of the jury, excepts to the instructions of the court to the jury as follows:

“1. Excepts to that portion of instruction number two designated as sub paragraph two

thereof. Excepts to that portion of instruction number two under sub paragraph 3A thereof appearing in parenthesis and reading as follows: 'In other words an employee cannot recover for being dismissed on a charge which is true, regardless of whether or not he was accorded a proper investigation because the law presumes that had he been accorded a proper investigation he would have been dismissed anyway. Under such a circumstance, the sufficiency of the investigation is immaterial.'

"Mr. Bronson: In that connection, your Honor, I believe that is a little bit too favorable to me. I think maybe it would be accurate if it read in substance something like this: In other words an employee cannot recover for being dismissed on a charge which is true regardless of whether or not he was accorded a proper investigation because the law presumes had he been accorded a proper investigation, and something to the effect right in there and the fact was made to appear that he had violated the rule or that he was guilty of the charge, he would have been dismissed anyhow.

"The Court: I think that is covered well enough."

The quoted instruction is diametrically opposite, not only to the rule of *Transcontinental & Western Air, Inc., v. Koppal, supra*, but it is also diametrically opposed to the rule of this court which states that compliance with the contractual provisions is a condition precedent to discharge.

Where, it might be asked, is there a presumption that the hearing and compliance with the contract is immaterial if grounds for discharge did in fact exist?

If such is the law, of what value is a contract? It is submitted that the Instruction No. 2, and particularly the quoted portion thereof, is erroneous, contrary to law, and prejudicial to the rights of the plaintiff.

The court's Instructions No. 3 and No. 5 are also incorrect statements of the law and prejudicial to the rights of the plaintiff. These errors are similar and these two instructions can more easily be considered together. In Instruction No. 3 the court gratuitously raised an issue neither raised, pleaded or contended by the defendant as to an implied waiver of his contractual rights. No evidence was directed to that issue.

In addition, the second paragraph of such instruction states:

Rule 38 above does not insure an employee that he will not be dismissed on a charge for which he is innocent because it may be possible that after an investigation in full compliance with Rule 38 a mistake might occur. In such an event the Railroad is not libel."

Mistake is not a defense to a breach of an employment contract. The rule is laid out in 56 *C.J.S. (Master and Servant) Section 51*:

"It has been held, however, that a master may defend an action for wrongful discharge by showing that the discharge was by mistake, and that as soon as the mistake was discovered, and before the servant had sustained any damages, he offered to revoke, and insisted in revoking, the discharge."

The defendant did none of the things necessary to set up or claim the defense of mistake, nor did it at any time revoke or offer to revoke a mistake, or even

claim any mistake was made. The instruction in its incomplete form was not only inapplicable to the issues and incorrect, but it could only serve to mislead and confuse the jury.

The court compounded this error by its instruction No. 5 as follows:

“You are instructed that the defendant had a right to dismiss any employee, including the plaintiff W. B. Russell, for violation of Rule 55 (b) of the contract which is in evidence, so long as the defendant was not acting in bad faith and arbitrarily, and so long as the employee was physically able to comply with the provisions of said rule 55 (b). And if you find that the plaintiff did violate said rule 55 (b) being physically able to comply therewith, and that the defendant was not acting in bad faith and arbitrarily when it dismissed him for such violation, your verdict should be in favor of the defendant and against the plaintiff ‘no cause of action.’”

It will be observed that before the plaintiff can win he must show two elements:

(1) “bad faith on the part of the defendant.”

(2) That it was physically impossible for the plaintiff to go down and get his form No. 153 prepared.

This is another way of stating if in good faith the defendant made a mistake there is no liability. Is this the ordinary contract law that the defendant talks about? Is this the standard treatment for the breach of an ordinary garden variety contract?

It was impossible for the plaintiff to win if the jury followed these instructions. It should be no sur-

prise, therefore, that the jury found against the plaintiff.

It was never claimed nor conceived that the law was such that if it was physically possible for a man to leave a hospital or sick bed, no matter how critical his condition might be, that his failure to do so would justify his discharge. Such a statement and conclusion is contrary to every case cited above. Nor was it ever claimed or conceived that even if a person did so remove himself from a hospital or sick bed and was discharged, that the defendant should go free if it made a mistake and acted in good faith.

If, by the provisions of Instruction No. 5, the plaintiff to recover had to prove bad faith on the part of the defendant and in addition a physical impossibility on his part to perform, the defendant was entitled to a directed verdict because the plaintiff did not claim and he made no effort to prove that it was physically impossible for him in his illness to have gone to his place of employment or that the defendant acted in good or bad faith. The jury thus had no alternative but to find as it did.

Similarly the jury could well find that the defendant made a mistake, because the defendant did make a mistake in not according the plaintiff his contractual protection—or it could find that it acted in good faith. If it found either, it would have to conclude that the plaintiff had a fair hearing notwithstanding the defendant's admissions that illness, not physical impossibility, was a defense, and notwithstanding the defendant's admitted flagrant breach of the contract requirements.

By so instructing the jury, the trial court effec-

tively prevented the plaintiff from a fair jury trial. Even had the jury been instructed properly, the plaintiff would not have had a chance to recover his proper legal damages because by Instruction No. 7 the court departed from the rule of damages laid down by the court in *Russell v. O.U.R. & D.*, *supra*, and substituted one that permitted speculation and completely ignored the rule that the defendant must prove mitigation:

“If you believe from the evidence that the plaintiff has sustained the burden of proof and is entitled to recover, you will then have the duty of assessing his damages, if any.

“The damages plaintiff is entitled to recover, in the event you decide he is entitled to recover at all, is the amount you may believe from the evidence he would have earned on account of his continued employment by the defendant, less whatever amount you believe the evidence shows he has earned since he left the defendant’s employment.

“Therefore, you should first determine what you believe he would have earned had he continued in the employment of the defendant, taking into consideration his rate of pay and the number of days you believe he would have worked, so far as shown by the evidence. In considering the amount he would have so earned, you should, so far as is shown by the evidence, consider whether he would have worked every day he was entitled to work during the period in question, or whether he would have been off work at times on account of holidays, vacations, leaves of absence, illness or other causes.

“From such an amount as you thus determine plaintiff would have earned had he continued

working for defendant, you must next deduct what the evidence shows he has earned during the period of time in question in other employment or business.”

Finally, it is submitted that the court erred in refusing to give plaintiff’s proposed instructions 1 to 12, which set out the rules of law as set forth in the federal decisions hereinabove discussed, to the effect that the contractual condition precedent must be complied with, that the type of misconduct that would justify discharge must be defined, and the correct rules relative to the burden of proof must be set forth.

The only instructions offered or given that purport in any way to comply with these federal rules, as set down in *Transcontinental & Western Air Inc., v. Koppal*, *supra*, were plaintiff’s proposed instruction No. 1 which was refused by the court. As it is written it is entirely within the scope of the former decision in this action. It is a correct statement of the law and it is not covered by any of the court’s instructions, and states:

“You are instructed that the contract of employment, Article 8, Rule 38, provides as far as is here material, as follows:

“‘Investigations: 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.’

“You are instructed that plaintiff was on

August 4, 1945 discharged for an alleged violation of Rule 55 (b) of the contract in that he had been absent from work for a period in excess of 10 days without leave. In order for such discharge to have been lawful and just it is essential that plaintiff have been afforded the type of hearing described above. Accordingly, if you find from a preponderance of the evidence that he was not afforded a fair and impartial hearing, or that his guilt was not established, or that he was not permitted to hear the witnesses against him or was not provided the other rights therein set forth, his discharge was not lawful.

“In considering this matter you are first to consider the transcript of the record of such proceedings which has been received in evidence. If you find therefrom that the same conclusively shows that plaintiff was not afforded his rights under the contract, then you will find that plaintiff’s discharge was wrongful. On the other hand, if you find that such transcript does not conclusively show that plaintiff was not afforded his rights under the contract, then in determining this matter you will consider such other evidence touching upon the matters referred to as is before you.”

Plaintiff’s proposed instructions Nos. 4, 5 and 7 were prepared in accordance with the rule laid down in *Ehlers v. Langley*, *Goudal v. DeMille Pictures Corp.*, and *Bang v. International Sisal Co.*, *supra*. They present the only correct definition of the type of misconduct that will justify discharge. They set forth correctly the standard by which the acts of the plaintiff must be measured and judged. Nowhere did the court attempt to advise the jury on these points other than in its erroneous instruction No. 5.

Plaintiff's proposed instructions No. 10 and No. 11 set forth the defendant's duty relative to the burden of proof. The court in the previous case recognized that the burden of proving justification for the discharge rests upon the employer. As a part of this justification is the requirement that the defendant must prove that it was complied with the conditions precedent to discharge, *Russell v. O.U.R. & D., supra*. These rules are universally recognized, not only by the federal courts but by the courts of the various states.

See: *New Orleans Belt Ry. v. Ward, supra*; *Cole v. Loew's, Inc., supra, cert. denied* 95 L. Ed. 686; *Sawyer v. Drew & Co., supra, affirmed* 209 F. (2) 566; *Hansen v. Columbia Brewing Co. (Wash.)* 122 P. (2) 489; *Lambert v. Laing & Thompson Iron Works (Ore.)* 264 P. 362; *Lone Star Cotton Mills v. Thomas (Tex.)* 227 S.W. (2) 300; *Schaffer v. Park City Bowl (Ill.)* 102 N.E. (2) 665; *Johnson v. Thompson (Mo.)* 236 S.W. (2) 1.

The trial court refused to so instruct the jury as to the burden of proof. Indeed a reading of the court's instruction No. 5 shows it to be erroneous on the further ground that it implies that the burden of proof to show justification is on the plaintiff rather than the defendant. This misconception was prevalent throughout the trial. The counsel for the plaintiff vigorously contended (Tr. 57-59) that the defendant must first prove its compliance with these conditions precedent before attempting to justify plaintiff's discharge under any theory. All objections of plaintiff were overruled and the record is devoid of any proof that the defendant did in fact comply with its contractual prerequisites to discharge.

In so ruling on the evidence, and in so failing to instruct on the burden of proof, the court prejudicially and adversely affected the rights of the plaintiff.

CONCLUSION

It is submitted that plaintiff should have been entitled to judgment as a matter of law by reason of the points hereinbefore set forth. However, it is submitted that there is an even more cogent reason for the reversal of this judgment and the reinstatement of the initial judgment in favor of the plaintiff and against the defendant. The Supreme Court has heretofore held that the plaintiff made out a prima facie case for judgment, but on the strength of the representations of the counsel for the defendant that it all times had proof that the plaintiff was not in fact ill and was in fact working at the beer tavern all during the ten days' absence, which was the subject of the law suit, this court determined that justice compelled affording the defendant the opportunity of making that proof. The defendant was afforded the opportunity of producing any and all witnesses to show that the plaintiff was in fact working each and every day at the Pine View Inn and of producing evidence to show that the plaintiff was not in fact ill. The record reflects the wide discrepancy between the claims and the proof. The record is devoid of any evidence that plaintiff was in fact working during the ten day period. The record is likewise devoid of any evidence to the effect that he was not in fact ill. The medicines and testimony and conduct of the doctor in releasing him to return to work all militate against the defendant's proposition.

We reiterate that the fundamental basis for the re-

versal by this court of the judgment in plaintiff's favor in the first trial was defendant's representations to this court that it could, and would if given the opportunity, prove the complete falsity of plaintiff's claimed illness; and that it could and would prove that he had lied at his hearing concerning his illness, and that in truth and in fact he was not ill but he was working elsewhere during the period of his absence from the railroad. Based thereon this court reversed on the previous appeal, and sent the case back to the lower court with directions that defendant's evidence on these matters be received and considered. The case has now been retried, and the record on retrial is as devoid of any proof of these asserted facts as was the original trial record—indeed, as devoid of proof of these facts as was the record of the hearing that led to plaintiff's discharge.

It is submitted, therefore, in conclusion, that the defendant was afforded an opportunity to which he was not entitled under the federal rule, but that even this wide latitude was insufficient to permit the defendant to produce any evidence to justify plaintiff's discharge.

Respectfully submitted,

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