

1957

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

Utah Supreme Court

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## Recommended Citation

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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.*

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APR 1 1957

Case No.  
8603

**BRIEF OF RESPONDENT**

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# In the Supreme Court of the State of Utah

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W. B. RUSSELL,

*Plaintiff and Appellant,*

vs.

THE OGDEN UNION RAILWAY AND  
DEPOT COMPANY, a corporation,

*Defendant and Respondent.*

} Case No.  
8603

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## BRIEF OF RESPONDENT

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### PRELIMINARY STATEMENT

This is a suit brought by the plaintiff for breach of an employment contract, praying for damages at the time of trial in the sum of \$40,000.00. This is the second appeal, the opinion of this court being found in 247 P. (2d) at page 257, decided August 6, 1952, but not yet printed in the Utah Reports. We do not agree with appellant's statement of the facts, for a number of reasons other than that the statement is incorrect and incomplete.

Note: To complete the record we found it necessary to obtain an order of the lower court pursuant to Rule 75(h) for the transmission to this court of a supplemental record, containing the verdict of the jury showing their special findings and a second supplemental record containing the second amended complaint and defendant's answer thereto, which pleadings formed the basis for the pre-trial order and defined the issues litigated in the court below.

## STATEMENT OF FACTS

The plaintiff was employed by defendant through the war years, from August of 1941 to August 3, 1945. His employment was governed, in part, by a carrier union collective bargaining agreement covering the wages, hours and working conditions of "yardmen" employed by defendant in its yard at Ogden. The parties thereto, the signatories, were respondent herein and the Brotherhood of Railroad Trainmen, bargaining agent for the employees:

So far as material the contract provided:

"55(b). LEAVE OF ABSENCE: 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."

## "ARTICLE VIII.—INVESTIGATIONS

"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 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. Charges will be investigated within 5 days and the result of the investigation will be made known within 3 days. In fixing hours at which investigation shall be held, due consideration of the need of rest by yardmen will be given by the company's officials. A yardman shall be entitled to an investigation before his record is assessed with demerits. In case dismissal is found to be unjust, yardman shall be reinstated and paid for all time lost, provided objection has been filed with Superintendent in writing not later than thirty days from date of dismissal; other-

wise pay for time lost will commence ten days after date of letter of objection" (Pl. Ex. E).

July 4, 1945, plaintiff Russell burned his leg with some steam while on the job. He did not work the following five days but was released to return to work by Dr. Keith L. Stratford, company doctor, July 11, 1945. He didn't report for work until July 19. He then worked only two days—the 19th and 20th of July, 1945 (Tr. 123-124). Dr. Stratford, after Russell had been discharged and was seeking reinstatement advised the company that Russell was, in his opinion, able to work after July 11, 1945 (Def. Ex. 6). Dr. Stratford knew when he wrote that letter, that the company was inquiring as to whether or not Russell was unable to work after July 20, 1945 (Def. Ex. 5). Dr. Stratford also testified at the trial that Russell was able to work after July 11, 1945 even though Russell had called at his office July 27 and was given some drops for his ear. After working July 19 and 20 only, Russell left the job. After the lapse of more than ten days during which nothing was heard from him, Russell was notified to appear before Assistant Superintendent Caulk, now dead, for an investigation on account of being absent in excess of ten days without written leave in violation of Rule 55(b) of the contract. He requested and received a continuance and the investigation was held August 3, 1945. The hearing was stenographically reported and transcribed and is in evidence (Pl. Ex. A). The plaintiff Russell was present in person and represented by the local chairman of his union, J. B. Hudgens. No complaint was made then nor throughout the long course of his litigation that the plaintiff was not given proper notice of

the hearing, or allowed to testify in his own behalf or produce any witnesses he chose or was denied the right to a representative of his own choice. The hearing was continued to a day of his own choosing, he was present with a representative of his own choosing. We mention this here because the only issue plaintiff has made in this case has been that the plaintiff was not guilty of violating Rule 55(b) relating to absence, under such circumstances as justified his dismissal. Now, and for the first time Mr. Patterson, counsel for Russell, endeavors to claim in his brief that Russell was deprived of the foregoing procedural rights.

The transcript of the hearing (Pl. Ex. A) reveals: 1. That plaintiff knew that written leave was required for an absence in excess of ten days. 2. That he did not secure written leave. 3. That he never at any time communicated with the company, requested any leave or advised them in any way of any reason for his absence. His excuse for his absence which he gave for the first time at the hearing was that he was "sick in bed."

He was interrogated as follows by Assistant Superintendent Caulk:

"Q. I understand you *own* a club up the canyon.

"A. I don't.

"Q. You work up there don't you?

"A. Yes."

Since discipline was assessed Russell had a right to a copy of the transcript and was supposed to sign it. After



the testimony was transcribed, he called at the office of the Assistant Superintendent and secured the transcript — changing the answer “Yes” and having it read “No” before he signed.

Russell received notice from Mr. Caulk on August 4, 1945, that he was discharged for being absent without written leave for a period of ten days (Tr. 61). He had six months thereafter within which to appeal. Five and one-half months thereafter, on January 14 he did appeal through the local chairman of his union to Mr. R. E. Edens, Superintendent of the respondent company. Mr. R. E. Edens, also now dead, declined to reinstate him and so advised his local chairman by letter of January 22, 1946 (Pl. Ex. C).

The next and final step required of Russell in handling his grievance with the company was to appeal his dismissal to the highest supervising officer of the company who was Mr. F. C. Paulsen, operating Vice President of the defendant company and General Manager of the Union Pacific Railroad Company (Tr. 152). This final appeal he took, being represented by Mr. C. E. McDaniels, acting Vice President of the Switchmen’s Union of North America. He authorized McDaniels in writing as an officer of the SUNA, to prosecute and progress his grievance claim, to act as his agent and representative in his place and stead and authorized McDaniels to “negotiate, adjust and dispose of” the grievance “in any manner” (Def. Ex. I). McDaniels proceeded to handle Russell’s claim and after some correspondence a conference was arranged in the office of Mr. Paulsen in Salt Lake City between Mr. Paulsen and Mr. McDaniels. This conference took place May 7, 1946,

Mr. McDaniels and Mr. Paulsen being the only ones present (Tr. 159). There was but the one conference (Tr. 159). Mr. Paulsen and Mr. McDaniels reviewed the investigation (Tr. 160) and Mr Paulsen told McDaniels that Russell had falsified at the investigation (Tr. 161). Mr. McDaniels told Paulsen that if Russell falsified at the investigation “we don’t condone it” (Tr. 161). McDaniels asked for an opportunity to investigate the charge Mr. Paulsen had made, stating that if the accusation was correct he would advise Paulsen thereof, but that he wanted “to be sure that I’m right” and “I’ll not go along with a man that will not tell the truth” (Tr. 160-161-162). The conference closed on this note. No further conferences were held and Mr. Paulsen heard no more from either McDaniels, or Russell or anyone else on Russell’s behalf, (Tr. 162) except through a letter dated May ’14, 1946, written by Mr. McDaniels and addressed to Mr. Paulsen (Def. Ex. 13). McDaniels in this letter referred to the conference held May 7, and specifically to the charge made that Russell had falsified, advised Paulsen that he had completed his investigation and “we are withdrawing the grievance and the case is closed.” Mr. Paulsen upon receipt of McDaniel’s letter of May 14 closed his files on the case, and thereafter treated the matter as a “dead issue” and heard no more of the matter until Russell filed this suit for unlawful discharge in May of 1949, three years later (Tr. 165).

The issues of fact, and there were no questions of law, tried out in the court below were set out in the pretrial order (R. 12). We invite the court’s attention thereto. In view of the jury’s verdict in favor of the defendant the

matter of damages is, of course, out of the case. The pre-trial order recites that the "issues of law and fact as fixed by the court" so far as the plaintiff's case is concerned are "1. Did the plaintiff fail to perform his contract of employment in that he violated Rule 55(b) of the contract of employment." So far as the defendant was concerned the pre-trial order stated defendant's position as follows:

"1. That the plaintiff's discharge was in compliance with and in conformity with the applicable provisions of the contract.

"2. That the defendant was justified in dismissing the plaintiff from his employment for violation of Rule 55(b).

"3. That plaintiff's action is barred for the reason that the claimed grievance of the plaintiff was settled and disposed of by mutual agreement between the plaintiff and the defendant and in accordance with the provisions of the contract and the National Railway Labor Act."

It should be clear that counsel on both sides and the court were adhering strictly to the holding of this court in its former decision. Simply stated there were but two things litigated: viz., 1. Was the defendant justified in dismissing the plaintiff? 2. Did the parties settle and dispose of the controversy by mutual agreement?

In the former opinion 247 P. (2d) 257, Mr. Justice McDonough said at page 260:

"However, upon proof of the contract of employment such as that herein involved, the employee

established a prima facie case by proving such contract, his performance thereof up to the time of discharge, and damages (citing authority). The burden of proving justification for the discharge then falls upon the defendant."

We were entitled as Mr. Justice McDonough said at page 261 to "present any legal or equitable defense available to overcome such prima facie case." In other words *it was for the jury to decide whether or not cause for discharge existed.*

The court submitted the following special interrogatories to the jury:

"1. Did the Depot Company in fact breach the contract by not complying with Article VIII, Rule 38 as claimed?" Answer: "No."

"2. Was Mr. Russell in fact guilty of violating Article XIII Rule 55(b) by being absent from work from about July 20 to July 31, 1945?" Answer: "Yes." (See Supp. Record.)

In addition the jury returned a general verdict, which was unanimous (Tr. 261) in favor of defendant and against plaintiff of "no cause of Action."

## STATEMENT OF POINTS

### POINT I.

**VIOLATION OF RULE 55(b) DOES CONSTITUTE GROUNDS FOR DISCHARGE.**

## POINT II.

THE DEFENDANT DID ACCORD THE PLAINTIFF HIS RIGHTS UNDER RULE 38.

## POINT III.

THE DEFENDANT NEVER OFFERED ANY EVIDENCE TO PROVE OR CLAIMED IN "ORAL ARGUMENT" THAT PLAINTIFF WAS DISCHARGED FOR ANY REASON OTHER THAN VIOLATION OF RULE 55(b).

## POINT IV.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS OR IN ITS REFUSAL TO GIVE INSTRUCTIONS REQUESTED BY PLAINTIFF.

## POINT V.

THIS CASE WAS SETTLED AND DISPOSED OF BY MUTUAL AGREEMENT BETWEEN THE PARTIES.

## ARGUMENT

## POINT I.

VIOLATION OF RULE 55(b) DOES CONSTITUTE GROUNDS FOR DISCHARGE.

We admitted in our first brief, have always admitted and admit now that if it was impossible for an employee to comply with the rule. discharge would not be justified. In the former opinion Mr. Justice McDonough said at p. 262:

“\* \* \* it is practically conceded in the brief of the defendant that if the plaintiff was in fact unable, because of illness, to comply with Article VIII, Rule 55(b), the defendant would not have assessed the discipline that it did.”

Moreover we agree entirely with Mr. Justice Crockett in his separate concurring opinion that the company must not act “arbitrarily or in bad faith” in connection with any phase of the hearing or in the assessment of discipline. We agree with Justice Crockett at page 263 where he *rejects* any idea that after notice and hearing by the company “it is entirely up to their representative to make the determination regardless of how arbitrary it is.” May we say we never intended to give any such impression.

Plaintiff lifts out of context and quotes in his brief a portion of the testimony of the witness, H. C. Beckett, an employee, who was local chairman of the bargaining agent union from 1923 to 1953—a period of thirty years, and who signed the contract that is here involved on behalf of the employees—in an effort to show the parties did not consider violation of Rule 55(b) a ground for discharge. His testimony as a whole (Tr. 124-139) clearly shows the contrary. After calling the witness Beckett’s attention to the fact that no penalty was provided in the rule itself Mr. Patter-

son further interrogated the witness on cross examination as follows:

Mr. Patterson: "Q. In other words, it was mandatory to drop him from the service?"

Mr. Beckett: "A. There is plenty. There is a record down there, I guess hundreds of them who were dropped from the rolls because they were absent without proper leaves.

"Q. Mr. Edens testified yesterday sometimes they dropped them and sometimes they didn't. Would you say Mr. Edens is wrong?

"A. I would say the records down there, hundreds of men were dropped from the rolls during my period of time.

"Q. Mr. Beckett, can't you answer yes, or no?

"A. Yes, sir.

"Q. Well, I asked you one. Would you say Mr. Edens was wrong when he said sometimes they didn't and sometimes they did?

"A. Well, I don't know what Mr. Edens had in his mind. I couldn't explain that.

"Q. All right. And you don't know whether Mr. Edens was right or wrong.

"A. I can't tell you what Mr. Edens had in mind when he made that statement, but I know that Mr. Edens and myself closed out many records because of the fact the man didn't protect himself by a leave of absence.

"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” (Tr. 131-132). (Italics ours.)

Beckett was uncontradicted, and it thus appears that violation of Rule 55(b) was customarily regarded by the parties as a grounds of discharge, it further appearing that it was not administered arbitrarily or in bad faith (Tr. 132-133).

In the case of *Ward vs. American Linen Supply*, ( . . . Ut. . . . ) 307 P. (2d) 210, decided by this court as recently as February 8, 1957, Mr. Justice Wade refers to the common law rule that gave the employer the right to discharge for any cause without incurring liability. We realize this case dealt with a rather narrow issue and that under the contract now before the court no employee can be discharged *for any cause* without first receiving a fair and impartial hearing. But the “causes” for discharge are not set out. We can discharge for *any cause*.

But the real reason that this Point I should be summarily resolved against the plaintiff is that here—in plaintiff’s brief, *for the first time* in this seemingly endless litigation, the point is raised. At no time in the pleadings, stipulations or pre-trial order, or in any other place or manner was this point ever placed in issue, nor was it litigated at the trial. The lower court never passed on the question, which if it had been present, would have been a question



of law. We do not see how this court can notice a point such as this, raised for the first time in a brief on appeal.

## POINT II.

### THE DEFENDANT DID ACCORD THE PLAINTIFF HIS RIGHTS UNDER RULE 38.

What were his rights under Rule 38? He was entitled among other things to a fair and impartial hearing on the charge made against him. The jury in answer to the special interrogatory "Did the Depot Company in fact break the contract by not complying with Article VIII, Rule 38" answered "No." Apparently what plaintiff's counsel intends to say here is that the evidence was insufficient to warrant the jury in finding that the plaintiff was accorded his rights under Rule 38. But he points to nothing whatever, as evidence that the investigation was not conducted openly and fairly, or suggests that it was conducted arbitrarily and in bad faith. To be sure, the transcript does not reflect the skill, learning and artistry to be expected of a hearing conducted by lawyers or men engaged in presiding at administrative hearings. Mr. Caulk was a railroader—no more adept in this medium than Russell or his representative Hudgens, local chairman of the Union, or than railroaders generally are in this situation. These investigations always leave much to be desired from the critical standpoint of a lawyer. But Russell had notice, he asked and was granted a continuance, he was present in person, given a chance to explain his absence, he was represented by Mr.

Hudgens, the local chairman, he had a right to call any witnesses he desired. He produced no witnesses in his behalf, yet Russell knew when he went to that hearing on August 3, 1945, that his job was in the balance. Plaintiff's counsel calls our attention to nothing in the evidence indicating he was not given all these procedural rights.

Whatever the evidence or lack thereof may have been at the investigation when Russell elected to sue in the courts for a breach of contract, it became the duty of the court (the jury in this instance) to decide on the basis of the evidence produced at the trial the same as in any other suit for breach of contract, whether there had been a breach. *Russell vs. OUR&D*, supra. And all evidence as Justice McDonough said, that was competent and relevant, whether legal or equitable was admissible on the question of whether or not the contract had been breached by defendant. If the former opinion makes anything clear, it is that the jury were the ones to decide whether Russell was guilty of the charge that led to his dismissal. It is well worth quoting. At page 261, it is said:

“At this point, we refer briefly to a contention of the plaintiff. He contends that since Rule 38, Art. 8 of the collective bargaining agreement provides that ‘no yardman will be suspended or dismissed without first having a fair and impartial hearing and his guilt established,’ the correct construction of such rule requires that the evidence taken before the investigating officer must clearly reveal the yardman’s guilt. For several reasons we think that this contention is without merit.”

After a discussion of some other facets of the problem, Mr. Justice McDonough concluded this portion of the opinion by saying:

“We here reiterate that he is here seeking redress *in the courts* for an unjust discharge. *The court as the trier of the fact must determine whether or not his guilt was in fact established.*” (Italics added.)

And that was the process followed in the trial below, the question being submitted to the jury on all the evidence in the case.

If this Point II of plaintiff means that the evidence at the trial was insufficient to support a finding that Russell was guilty of a violation of Rule 38 under such circumstances as warranted his dismissal (and we cannot imagine what else counsel could mean by it), it would seem that plaintiff would discuss the evidence in an effort to show its insufficiency. Except for a brief discussion of the evidence of Dr. Keith Stratford, the company physician, plaintiff's attorney does not point out wherein the evidence was “wholly insufficient” to support the verdict.

Instead, he appears to contend that some “Federal Rule” is involved. He advises us that cases in State Courts under the Federal Employers Liability Act are governed by the federal concept of negligence and federal decisions. That of course is well known. He cites *Urie vs. Thompson*, 337 U. S. 163; 93 L. Ed. 1282, wherein the Supreme Court held that an employee in interstate commerce by rail might recover damages for occupational disease, in this instance

“silicosis,” which it was contended resulted from the use of sanders on locomotives.

*Jester vs. Southern Ry. Co.*, 29 SE (2d) 768, is an FELA case where an engineer shot and killed his fireman for not obeying orders. Plaintiff says the same requirement to follow Federal decisions in FELA cases is also mandatory in contract cases; citing *Transcontinental and Western Air, Inc., vs. Koppal*, 345 U. S. 653; 97 L. Ed. 1325. Koppal holds the very opposite, to wit: that in suits for breach of a union carrier agreement in a State Court substantive and procedural laws of the State govern. Koppal brought suit in the Federal Court in Missouri, an action under Missouri law, for wrongful discharge. As the court knows, collective agreements of air lines, are governed by the Railway Labor Act. Missouri State Law requires the exhaustion of the administrative remedies in *all contracts* as a condition precedent to maintaining action in court. The Supreme Court of the United States held that Koppal could not maintain his action in the Federal District Court of Missouri until he had shown that he had brought himself within the requirements of the Missouri State Law even though the contract involved was entered into pursuant to the Railway Labor Act. It is thus clear that the Supreme Court of the United States has said actions for breach of a contract of employment, contracts entered into under the Railway Labor Act, shall proceed according to State Laws, substantive and procedural, the exact opposite of plaintiff's contention. We say again this case is nothing but a simple “garden variety” type of action for breach of contract under Utah law. The former decision of this court so held, and

the Supreme Court of the United States so holds in the *Koppal* case.

The only piece of evidence plaintiff refers to is the testimony of Dr. Stratford and two letters which he wrote in connection with this case. We think that a brief reference by us to all of the evidence including that of Dr. Stratford is called for under this point. If the Court will be kind enough to indulge us briefly, we think such a review of the evidence will also dispose of the next point in plaintiff's brief (Point III) with very little additional comment.

The plaintiff in his brief says that all that can be accorded Dr. Stratford's testimony and his letter of April 30, 1946 is that Russell was able to work on July 11, 1945, and that we torture the evidence by claiming the evidence of Dr. Stratford related as well, to the period Russell was absent without leave. However, while Russell was seeking reinstatement and on April 27, 1946, Superintendent R. E. Edens wrote to Dr. Stratford (Def. Ex. 5) and in that letter, among other things, said: "Mr. Russell was dismissed for being absent without proper leave of absence and he is endeavoring to secure reinstatement with pay for time lost on the basis that his absence was due to illness." \* \* \* "Shall appreciate it if you will check your records further and advise whether or not you consider the *earache* was of such nature as to cause him to be incapacitated from work from July 27 to August 6." The doctor was thus advised that Russell had been dismissed for being absent without proper leave, was claiming that his absence was due to illness and that he was being asked specifically as to whether the earache was of such a nature as to cause Russell to be

incapacitated from work. On April 30, 1946, three days after the foregoing letter was written, Dr. Stratford wrote Mr. Edens as follows: "In checking our files on William B. Russell, former switchman, I found all the dates correct. Mr. Russell complained of very much pain during the visits (visits for the burn on his leg as well as the earache—see Edens' letter Def. Ex. 5) to our office. *I believe he was capable of working after his release on July 11, 1945* (Def. Ey. 6). Moreover, Dr. Stratford testified as follows at the trial.

Questions by Mr. Bronson calling his attention to Exhibit 6.

"Q. You say here, 'I believe he was capable of working after his release on July 11, 1945,' is that correct?

"A. That's correct.

"Q. And was that your opinion at the time when you wrote it?

"A. That was my opinion at that time.

"Q. Will you testify it is your opinion now?

"A. Yes, sir."

There is no question but that Russell called on Dr. Stratford on July 27 complaining of an earache and received some drops therefor. The plaintiff makes much of the fact that Dr. Stratford, a company physician, gave him a release for work on August 6. Russell obtained the release from Dr. Stratford by trick (there is no other word for it) in order to bolster his claim that he was sick and under the care of a doctor during the period of time which was the subject of the investigation. Russell testified that he re-

ceived notice of his discharge August 4 (Tr. 61). He also admitted that thereafter (after he was discharged) and on August 6 he went to Dr. Stratford's office, requested and received, a release to return to work (Tr. 61). He also testified that *he did not tell* Dr. Stratford when he got the release that he had been discharged (Tr. 64). He also admitted that he never turned this release into the company, which ordinarily would be the only purpose for obtaining it, (Tr. 64) but that he retained it and *gave it to his counsel*, Mr. Patterson (Tr. 63). Dr. Stratford testified that he did not know at the time he gave Russell the release to return to work that he had been discharged (Tr. 147).

Both Russell and his wife, Margaret, were subpoenaed by the defendant to appear as witnesses at the trial. Russell testified that the Pine View Inn was leased in December 1944 "by his wife." Russell took out a beer license from Weber County for the Pine View Inn, the application being dated May 10, 1945 and signed "Mrs. Margaret Russell by W. B. Russell" (Def. Ex. 2). This signature was in the plaintiff's handwriting (Tr. 73), and the application recited as follows: "The names, ages and addresses of all persons directly or indirectly connected with said business for which license is hereby applied for are Mrs Margaret Russell, legal age, and W. B. Russell, legal age." He testified this license cost \$200.00 and that the lease rental on the Pine View Inn was \$150.00 to \$175.00 per month (Tr. 74). That it was also necessary to stock the establishment with supplies, that both bottled and draught beer was sold and the dining room specialized in steaks, chicken and trout dinners (Tr. 80). They also sold various sundry items. All



of the money to start this business Russell said he loaned to his wife, Margaret (Tr. 76). Mrs. Margaret Russell also testified that Russell loaned her the money to get the business started (Tr. 91). Russell testified that as between him and his wife he took no note, made no memorandum, or record of the transaction that it was, as he said, "all in the family" (Tr. 76). Apparently the Pine View Inn was a fairly substantial "set-up." According to testimony of Mrs. Margaret Russell, they served bottled and draught beer at a bar where twenty or thirty men could stand at one time (Tr. 95), they had seven or eight tables in the dining room where they served principally trout, steak and chicken dinners (Tr. 95). The Ogden area was swarming with military personnel in the summer of 1945 (Tr. 79-80). They were able to sell all the beer, steaks, etc. that could be obtained (Tr. 80), there being a shortage of such items. Mrs. Russell testified that in July and August they were "as busy as they could be," that she didn't know how much they took in each month as *Mr. Russell kept the books*, but that it was at least \$1,000.00 a month "maybe more" (Tr. 95). That July 24, Pioneer Day, (which was during the period of Russell's absence from work), was a big business day. Mr. Russell testified that beer was hard to get at that time and one had to have contacts to get it (Tr. 79). Apparently, Russell had these contacts having worked as a bar tender for Combe, who owned the Marion Bar in Ogden, and from whom the Pine View Inn was leased. After his discharge, he was employed most of the time by beer distributing companies.



Mrs. Russell prior to the venture with the Pine View Inn had no business experience whatsoever according to her own testimony (Tr. 93). She testified that she had never before worked for anybody (Tr. 93) and that she had had no previous experience running a restaurant or bar (Tr. 93). It appears from the evidence that the Pine View Inn was usually opened sometime in the afternoon and kept open until 12, 1, or 2 o'clock in the morning. Russell, was working the 11 P.M. to 7 A.M. shift, which permitted him after he had obtained his rest to have at least five or six hours which could have been devoted to this business and of course Russell seldom worked for the defendant company, putting in only sixty two days in the first seven months of 1945. There were thus five months out of the first seven in 1945 that he could have devoted to the business.

The Russells lived in a house or cabin behind the Pine View Inn. Russell, himself, admitted that he sometimes cooked, that he sometimes tended bar and did other work about the Pine View Inn "to help his wife" (Tr. 78). Mrs. Russell had four little children, ages one to nine, to take care of in the summer of 1945, in addition to all her other duties of operating the Pine View Inn. Is it any wonder that the jury did not believe that Russell, seldom working at his job on the railroad, experienced in the beer business and having contacts that enabled him to get beer, would do nothing; while his wife, Margaret, who had never worked for anyone, who had no previous business experience whatsoever and had the care of four little children, operated this fairly substantial restaurant and bar business by herself?

Moreover, in addition to Russell admitting at the trial under oath that he did work to some extent around the Pine View Inn, Mrs. Russell testified:

Questions by Mr. Bronson:

“Q. And you had four little children at that time, ages one to nine to take care of, didn’t you?

“A. Yes.

“Q. And you ran this business yourself?

“A. Yes.

“Q. Your husband, did he help you?

“A. Yes.

“Q. And he was working up there?

“A. He helped me as a husband” (Tr. 96).

During the examination of Mr. Russell we referred to the transcript of the official investigation and asked him if the true answer to the question by Mr. Caulk, to wit, “You work up there don’t you?” was not in fact “yes,” which was the answer he had changed to “no” and he answered \* \* \* “Mr. Bronson, if you don’t receive wages for anything there’s no work” (Tr. 85).

We submit that the foregoing testimony out of the mouths of the plaintiff Russell and his wife was amply sufficient together with the other evidence to warrant the jury in returning the verdict they did. A jury does not have to believe any witness—even though he is uncontradicted if his testimony is inherently improbable either in an absolute sense, or in the light of other evidence in the case.

## POINT III.

THE DEFENDANT NEVER OFFERED ANY EVIDENCE TO PROVE OR CLAIMED IN "ORAL ARGUMENT" THAT PLAINTIFF WAS DISCHARGED FOR ANY REASON OTHER THAN VIOLATION OF RULE 55(b).

The plaintiff says the evidence we produced shows plaintiff was discharged "at least in part" for reasons other than violation of Rule 55(b). If the evidence was sufficient to warrant the jury in finding plaintiff violated Rule 55(b) under circumstances warranting dismissal, that is enough; and if it shows something additional that certainly gives the plaintiff no grounds for complaint. We have never claimed and do not claim now that we have a right to justify Russell's discharge for any cause other than violation of Rule 55(b). The evidence we detailed under Point II was competent and relevant as tending to show justification for the discharge and its probative value was for the jury. We see no need for further discussion of this point.

## POINT IV.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS OR IN ITS REFUSAL TO GIVE INSTRUCTIONS REQUESTED BY PLAINTIFF.

Plaintiff's attorney claims that the court's instructions do not comport with a "federal rule." The federal rule he refers to is the rule followed in cases tried under the Federal Employers Liability Act as indicated earlier in this brief. Again, we say there is no "federal rule" whatever

involved. Counsel says that the instructions are diametrically opposed to the case of *Transcontinental & Western Air, Inc.*, vs. *Koppal*, supra. As pointed out above, this case holds that state rules of procedure apply to suits for breaches of contracts entered into pursuant to the Railway Labor Act, the same as to any other suit in a state court for breach of contract. We are not going to repeat ourselves and refer to this matter again, although plaintiff's counsel belabors it throughout his discussion under Point IV.

*The plaintiff's exceptions to instruction given:* The plaintiff excepted to paragraph 2 of Instruction No. 2 but gave no reasons. This the court might overlook but the plaintiff does not point out any error in the *brief* with respect thereto. We should not be required to defend an instruction of which the plaintiff has not offered a single word of criticism.

The plaintiff excepted to the court's instruction Number 2, paragraph 3(a). The court there instructed the jury:

“However, if you find the above has been proved by a preponderance of the evidence you will award Mr. Russell damages in accordance with instructions that follow, unless you also find that *the Railroad has proven by a preponderance of the evidence*  
\* \* \* that

“(a) Mr. Russell was in fact guilty of violation of Rule 55(b) by being absent from July 20 to July 31 without proper leave *under circumstances* justifying his dismissal.”

This is unquestionably correct law and the court might well have stopped at this point. The court added parenthetically:

“(In other words an employee cannot recover for being dismissed on a charge which is true, re-

ardless 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 any way. Under such a circumstance, the sufficiency of the investigation is immaterial.)”

We will concede that it is doubtful that the court added anything to his instruction by the parenthetical explanation. We do not concede it was in error. Preceding the parenthetical explanation the court made a clear, concise and accurate statement of the law when he said the railroad had the burden of proof to show that Mr. Russell was in fact guilty of violation of Rule 55(b), by being absent from July 20 to July 31, without proper leave, *under circumstances justifying his dismissal*. Moreover counsel in making his objection did not advise the trial court of “the grounds of his objection” in this instance *as required by Rule 51 of Utah Rules of Civil Procedure*. We are not unaware that the court in its discretion may disregard his failure to do so. Plaintiff contends that we conceded the error in this instruction. We suggested to the court that he elaborate, explain the matter further to the jury, so that it would not appear to be too favorable to the defendant. The court stated “I believe it is covered in a later instruction.” We concluded the matter was covered adequately and accurately and did not refer to it again. There was a constant effort throughout this trial on the part of the plaintiff to implant in the minds of the jury, in the teeth of the former opinion of this court, that the transcript of the official investigation did not reveal the plaintiff’s guilt and plaintiff was therefore entitled to recover. The court sought to make plain to the jury in the questioned

instruction that regardless of the evidence at the investigation, the jury was to decide the validity of the discharge *upon all the evidence produced before them at the trial.*

The plaintiff complains of Instruction No. 3 because it tells the jury the railroad was required to comply with the provisions of Rule 38 requiring notice of the hearing, notice of the charge, according the plaintiff the right to appear in person, to be represented by someone of his own choice, etc. "unless these requirements were waived by the plaintiff." This is a correct statement and while there was no *specific* evidence that the plaintiff had waived these provisions, he did in fact waive part of them by not producing any witnesses and not taking the witness stand in his own behalf. There was no harm in the court making this explanation to the jury.

Plaintiff complains that in instruction Number 3 the court erred further, in "gratuitously" injecting the question of mistake into the case. Assuming it was not necessary to the determination of the two principal issues in the case, and that the trial court was acting "gratuitously" we submit it was harmless in view of the issues, the other instructions and the findings of the jury on the special interrogatories. In no single particular does the plaintiff point out how this instruction could or did mislead the jury from a proper determination of the two issues involved, or how or in what manner it was prejudicial to the substantial rights of the plaintiff, preventing him from having a fair trial. The court was again telling the jury here, that apart from the claims of plaintiff concerning the official inves-

tigation, they had to decide the issue on the evidence before them at the trial.

The plaintiff complains principally of Instruction No. 5, which reads 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.’ ”

His complaint is that it places the burden of proof upon the plaintiff “to prove bad faith on the part of the defendant and in addition to a physical impossibility on his part to perform.” But he does not point out wherein or how this instruction places the burden on the plaintiff as claimed. The court clearly told the jury in its Instruction No. 2 that *the burden was upon the railroad* to prove “Mr. Russell was in fact guilty of violation of Rule 55(b) by being absent from July 20 to July 31 without proper leave *under circumstances justifying his dismissal.*” The jury was therefore instructed that not only was the burden upon the defendant to prove violation of Rule 55(b) by a preponderance of the evidence, but that the defendant had the burden of negating plaintiff’s claim that it was physically impossible for him to comply with the rule. The instructions also



placed on the defendant the burden of proving that it did not act arbitrarily or in bad faith which we think is established if the evidence satisfies the jury that the plaintiff was not so incapacitated as to be unable to comply with the rule. We think the instruction is strictly in line with the former decision of this court and was most favorable to the plaintiff, giving him every advantage he was entitled to. This instruction was a correct, albeit an abstract statement of the law. It did not purport to deal with the burden of proof and of course must be read in the light of all the instructions. This court has many times said that the court cannot and need not cover the entire case in one instruction. The court told the jury in Instruction No. 15 that the instructions were "to be considered and construed as one connected whole," and that the instructions were to be considered as a whole. The instructions as a whole clearly placed the burden of proving all elements set forth in Instruction No. 5 squarely on defendant.

Plaintiff's counsel next discusses errors in the instructions given by the court on damages and, since a verdict was returned in favor of the defendant, instructions on damages, right or wrong, are moot, and we do not feel called upon to discuss them. The foregoing constitutes all of the exceptions taken to the instructions given by the court.

*Plaintiff's exceptions to the court's refusal to grant requested instructions:* The plaintiff complains of the court's refusal to grant his requested Instruction Nos. 1 to 12, inclusive, his exceptions mainly being that his requests "correctly set forth the law."



His Request No. 1 is palpably in error because it says in effect that the jury was required to find from the transcript of the unsworn testimony at the investigation (all hearsay evidence) that the plaintiff's guilt was established, a question the jury, according to the former opinion of this court and the theory on which the case was tried, was required to determine from all *the evidence produced before it at the trial*.

Plaintiff's Requests Nos. 2, 8 and 9 are concerned with damages and call for no comment.

Plaintiff's Request No. 3 is subject to the same vice as Request No. 1, as it tells the jury they must find that the defendant's guilt was proved at the hearing.

Plaintiff's Request No. 4 clearly assumes that Russell was ill during the period of time which was the subject of the investigation and this was one of the two principal and disputed issues in the case. If it had not been, the plaintiff would have been entitled to a directed verdict, and it cannot be said that there was not a great deal of conflicting evidence thereon.

Plaintiff's Request No. 6 tells the jury that Mr. McDaniels had no authority to bind Russell in his negotiations with Paulsen, which is palpably erroneous, and it goes so far as to instruct the jury to ignore the entire transaction and negotiations between Mr. Paulsen for the company and Mr. McDaniels, the personal representative of the plaintiff. It is actually a request for a directed verdict on this important issue.

Plaintiff's Instruction No. 7 tells the jury that there can be no violation of the contract unless the evidence shows

that Russell intentionally and wilfully violated the contract. The plaintiff had no right to such an instruction under the contract of employment or otherwise. Nonetheless the burden placed upon the defendant in the instructions required the defendant to prove that the defendant's absence was not due to the claimed cause, to wit, sickness, that kept him "right down in bed;" and therefore this instruction was given in effect.

Plaintiff's Requested Instruction No. 10, while correct in the last sentence, is otherwise in error and seriously so. It tells the jury that the plaintiff does not need to prove his performance under the contract. The former decision of this court specifically holds that he must "prove his performance (under the contract) up to the time of discharge" and we are quoting.

Plaintiff's Request No. 11 again tells the jury that McDaniels as a matter of law, did not have authority to dispose of Russell's case with Mr. Paulsen, and is palpably erroneous.

Plaintiff's Request No. 12 is substantially correct, and it was given in substance. It is nothing but a stock instruction. The requested matter was adequately covered.

In the instructions that the court did give to the jury the law was fully and accurately stated as it applied to the two issues involved in the case. Simply stated, these two issues were (1) was the defendant justified in discharging the plaintiff and (2) did the parties settle and dispose of the controversy by mutual agreement.

Even though there was error in the instructions given on that issue which dealt with the validity of the discharge, it does not control the disposition of this case. For the plaintiff assigns no error whatever in the court's instructions in submitting to the jury the issue as to whether the grievance had been settled and disposed of by mutual agreement long before suit, nor does plaintiff claim the evidence on this issue was insufficient to support the verdict.

We submit, on this issue alone, to which we now turn, the unanimous verdict of "no cause of action" disposes of the case and warrants affirmance of the judgment.

#### POINT V.

#### THIS CASE WAS SETTLED AND DISPOSED OF BY MUTUAL AGREEMENT BETWEEN THE PARTIES.

The plaintiff has nothing whatsoever to say concerning this issue in his brief, but because we think that standing by itself it is sufficient to warrant the verdict of "no cause of action" and to indicate to this court the proper disposition of this case, we feel it should be discussed separately. We call the court's attention to the fact that all of the assignments of error in plaintiff's brief relate to the other issue in the case which involved the "validity of the discharge." No error at all is claimed in connection with the above issue either as to instructions given or the sufficiency of the evidence to support the verdict thereon. The only error assigned in the brief is that the court was in error in not granting all of plaintiff's instructions num-

bered 1 through 12. I assume this covers plaintiff's Request No. 11, but plaintiff says nothing about it in his brief, except to point out that Instruction No. 11 told the jury that the burden of proof was *upon the defendant* (page 30 of plaintiff's brief. He argues that this is correct and we agree. The jury was so instructed. The plaintiff did take an exception to the court's Instruction No. 6, which sets forth both the theory of the plaintiff and that of the defendant on the issue now under discussion and concluded by telling the jury that the burden was on the defendant to prove that the case had been settled and disposed of by mutual agreement between the parties (R. 24). No claim whatever is made in the brief that the court erred in this instruction and the reasons given for the exception taken at the trial are not mentioned or discussed by plaintiff except for plaintiff's exception to the court's refusal to grant his Request No. 11 (the error of which he does not discuss at all in the brief). There is no error claimed by the defendant with relation to the issue now under discussion as to instructions given by the court, instructions requested and refused and no complaint is made that the evidence is insufficient to warrant the verdict of the jury.

This was, of course, a proper issue to be submitted; as the National Railway Labor Act requires in contracts such as here involved, that "disputes between an employee or group of employees and a carrier, or carriers, growing out of grievances \* \* \* shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." 45 USC Sec. 153 (i). The same section of the Act then provides

that if the grievance is then *not settled by mutual agreement* that either party may submit it to the Railroad Adjustment Board. The employee, of course, may sue in the courts as well, if an *only if*, agreement is not reached by negotiation on the property. *Slocum vs. Delaware Lackawana Western Ry.*, 339 US 239, 94 L. Ed. 795, 61 Sp. Ct. 577. Paulsen was the chief operating officer and the case *was settled* by mutual agreement, as contemplated by the Railway Labor Act. The parties were following the procedure provided in the Railway Labor Act for settlement of the grievance, and by mutual agreement reached a settlement thereof. The Railway Labor Act, designed to keep litigation concerning railroad labor matters from flooding the courts should be maintained by the courts.

After Russell's application for reinstatement had been rejected by Superintendent Edens, he had the unquestioned right under the contract to appeal to the highest supervising officer of the company, Mr. F. C. Paulsen, who was the Vice President and Chief Operating and Executive Officer of the defendant company (Tr. 152). This final appeal he took, being represented by Mr. C. E. McDaniels, acting Vice President of the Switchmen's Union of North America. He authorized McDaniels in writing as an officer of the SUNA, to prosecute and progress his grievance claim, to act as his agent and representative in his "place and stead" and authorized McDaniels to "negotiate, adjust and dispose of" the grievance "in any manner" (Def. Ex. I). McDaniels proceeded to handle Russell's claim and after some correspondence a conference was arranged in the office of Mr. Paulsen in Salt Lake City between Mr. Paulsen and Mr.

McDaniels. This conference took place May 7, 1946, Mr. McDaniels and Mr. Paulsen being the only ones present (Tr. 159). There was but the one conference (Tr. 159). Mr. Paulsen and Mr. McDaniels reviewed the investigation (Tr. 160) and Mr. Paulsen told McDaniels that Russell had falsified at the investigation (Tr. 161). Mr. McDaniels told Paulsen that if Russell falsified at the investigation "we don't condone it" (Tr. 161). McDaniels asked for an opportunity to investigate the charge Mr. Paulsen had made, stating that if the accusation was correct he would advise Paulsen thereof, but that he wanted "to be sure that I'm right" and "I'll not go along with a man that will not tell the truth" (Tr. 160-161-162). The conference closed on this note. No further conferences were held and Mr. Paulsen heard no more from either McDaniels, or Russell or anyone else on Russell's behalf, (Tr. 162) except through a letter dated May 14, 1946, written by Mr. McDaniels (Def. Ex. 13) and addressed to Mr. Paulsen.

McDaniels in this letter referred to the conference held with Mr. Paulsen on May 7 and specifically to the charge that Russell had falsified and then said:

"As agreed during our conference, further action on the subject matter was to be held in abeyance pending our investigation of undesirable procedure on the part of Mr. Russell resulting *in false testimony* evidenced during formal investigation of August 3, 1945.

"This investigation has been completed and it is without prejudice to our contentions and position as expressed in our letter of February 15, 1946 and without establishing a precedent as to adjustment of future grievances possessing dissimilar facts and



circumstances devolving upon similar allegations as appear in the introduction of the formal investigation of August 3, 1945, *we are withdrawing the grievance and the case is closed.*"

Upon receipt of the foregoing letter from Mr. McDaniels, Mr. Paulsen closed his files on the case and thereafter treated the matter as he testified, as a dead issue and heard no more thereon until Russell filed this suit for unlawful discharge in May of 1949, three years later (Tr. 165). Mr. McDaniels testified that under defendant's Exhibit I, which was the authorization admittedly executed by Russell, he had authority to dispose of the grievance in any manner (Tr. 201-202). His written authority (Def. Ex. I) speaks for itself, but this testimony shows that McDaniels knew when he advised Paulsen that the grievance was withdrawn and the case closed that he was terminating the controversy with finality. It was claimed by plaintiff that the language in McDaniel's letter, viz.: "it is without prejudice to our contentions and position as expressed in our letter of February 15, 1946 and without establishing a precedent as to adjustment of future grievances possessing dissimilar facts and circumstances devolving upon similar allegations" was a statement to Mr. Paulsen that he, McDaniels, was withdrawing as Mr. Russell's representative leaving Mr. Russell to negotiate further with Mr. Paulsen, and to prosecute his grievance and claim against the company in any way he saw fit. Perhaps this language may be considered to inject some ambiguity into the letter. In the former opinion, referring to this letter, Mr. Justice McDonough said:

"The letter heretofore referred to from the Vice President of the union to the Vice President of de-

fendant *indicates* that conferences were had between the representatives of the employer and employee, after which the representative of the latter *apparently indicated* that his investigation showed that the plaintiff had given false testimony at the hearing before the Assistant Superintendent."

Further Justice McDonough said:

"It would be a travesty of justice to permit the plaintiff to recover in this proceeding substantial damages based upon an unsworn statement of the interested plaintiff which his duly authorized representative *evidently* concluded was false."

The italics in the foregoing quotations are ours, made to indicate that the court thought (and certainly with some justification) that McDaniels's letter closing the case was not wholly unequivocal. To remove all doubt on this score, we brought Mr. F. C. Paulsen, from Los Angeles to testify with respect to the conference between him and Mr. McDaniels, which precipitated the letter in question. We thought if we could show what transpired at that conference it would remove all ambiguity and any question of the meaning of Mr. McDaniels's letter. We think we accomplished our purpose. The testimony of Mr. Paulsen quoted above shows that after he told McDaniels at the conference that Russell had falsified at the investigation McDaniels said "we don't condone it," asked for an opportunity to investigate the charge stating he would advise Mr. Paulsen if he found the accusation was correct and as Mr. Paulsen testified McDaniels said he wanted "to be sure that I'm right" and "I'll not go along with a man that will not tell the truth."



The defendant called Mr. McDaniels to testify at the trial. Mr. McDaniels' testimony was to the effect that Paulsen told him Russell had ~~testified~~ <sup>fulfilled</sup> at the formal investigation (Tr. 109). Mr. McDaniels claimed that he withdrew on instructions from the Grand Lodge of the Switchmen's Union of North America (Tr. 194) because Russell was delinquent in his dues. He did not produce this letter, but testified it and all other correspondence that he had with the Grand Lodge of the Switchmen's Union of North America concerning this case had been destroyed (Tr. 197).

When asked the following question by Mr. Bronson:

"Q. Why do you destroy official communications of that kind concerning the business of the SUNA?"

He answered:

"Because such letters of that description, Mr. Counselor, establishes policy procedure on the part of the organization, and by reason of a certain degree of intimacy between the operating railroad organizations we are not permitted to keep those letters on file whatsoever. They could possibly be confiscated and used as propaganda.

"Q. In other words you destroy all your correspondence in your organization?"

"A. Where they establish policy.

"Q. That is what happened to this letter?"

"A. Exactly" (Tr. 198).

With respect to the portion of the letter which plaintiff contends was a statement by McDaniels that he was withdrawing the grievance without prejudice to Russell, it

is clear that this is an after-thought and a desperate attempt to avoid the true meaning and effect of the letter. McDaniels testified that the language "without prejudice etc." was more or less formal language commonly used in communications making final disposition of labor claims (Tr. 211). He was asked:

"Q. And didn't it mean this Mr. McDaniels, that you say to management when you are disposing of a case one way or another, you say that to them, so that you put them on notice; that if in the future a case of another man comes up where the facts are different, different situation, that they won't point to this case and say 'you did thus and so; and therefore this thing is your precedent'?"

"A. That's right. Part of the purpose; yes sir."

While he was on the stand in the trial below, his attention was called to a deposition he had given before trial and after the proper preliminaries (Tr. 212-213), he was asked if he did not make the following statements:

"Q. I asked you this question:

" 'Question. Now, as a matter of fact, this expression you used in your letter "without prejudice to any position you wanted to take in connection with the handling of future grievances" is almost a formal expression which is used by you and other men handling grievances with railroad carriers so that if a case arises in the future the company won't refer to this case you have handled and call it a precedent and use it against you to your prejudice. Isn't that the reason?'

“Q. And your Answer:

“ ‘Answer: That’s correct.’ ”

To which Mr. McDaniels answered at the trial:

“A. It remains unaltered, if that is the question” (Tr. 213).

And, futher, (referring to the deposition) :

“ ‘Question: Well, isn’t that what you had in mind; that you wanted to say and did say there that regardless of your handling of this case and the decision that you made and that Paulsen made in the disposition of the case that you didn’t want it to be considered as setting a precedent as to adjustment of future grievances possessing dissimilar facts and circumstances.’

“Q. And your Answer:

“ ‘Answer: That’s correct.’

“Q. Did you so answer?

“A. Yes, sir” (Tr. 215).

It cannot be said that McDaniels was a completely disinterested witness. Plaintiff’s attorney, Mr. Patterson, is the regional counsel for Mr. McDaniels’ organization, the Switchmen’s Union of North America (Tr. 215).

We think that having now proved what transpired at the conference, which later precipitated this critical letter of Mr. McDaniels, together with the evidence bearing on the meaning of that portion of the letter, which states in effect that McDaniels does not want his action to be used as a precedent to prejudice him in the handling of future grievances where the facts are different, that we have removed all ambiguity as to the true meaning of the letter. It was

not the defendant railroad but the plaintiff, through McDaniels, who withdrew the grievance and closed the case. The railroad of course assented. McDaniels' authority to thus handle and conclude the matter is undisputed and it was never revoked.

We think that if there was nothing more in the case; that this issue, would be entirely sufficient to warrant affirmance of the judgment. If we concede *error* in the court's instructions and in its refusal to grant plaintiff's requested instructions, as well as insufficiency of the evidence to support the jury's findings that Russell violated Rule 55(b) and was not denied his rights under Rule 38; we nonetheless submit that the judgment should be affirmed on this other issue in the case. *One count sustained by sufficient evidence and free from error is all that is required to support a verdict.* With respect to the issue as to whether or not the case was "settled by mutual agreement" it is our position that the evidence was sufficient to support a verdict in defendant's favor and that there was no error in connection with the instructions or otherwise in submitting this issue to the jury. No error is assigned relative to the court's instruction other than plaintiff's exception to the court's refusal to grant his Request No. 11, which was in effect a request to direct a verdict in favor of the plaintiff on this issue an issue on which there was much conflicting evidence.

In *Berger vs. Southern Pacific Company, The Pullman Company and J. V. Zeno*, ( . . . Cal. App. . . . ) 300 P. (2d) 170, decided, Sept. 1956, the plaintiff sought damages on account of an alleged assault by a pullman porter. The case was dismissed as against the Southern Pacific Com-

pany and proceeded against The Pullman Company and the individual defendant on two counts, one based on negligence, the other on assault. Both issues were submitted to the jury, who returned a general verdict against both defendants. It was thus impossible to determine whether the general verdict was based on the first or second counts or issues, or both. The Appellate Court held that there was no evidence whatever to support a verdict based on the first count. Nonetheless it held that "the erroneous submission to the jury of the first count and the giving of instructions therein is not prejudicial if the second count can be sustained."

The court cited with approval the language in the case of *Leoni vs. Delany*, 83 Cal. App. (2d) 303, 188 P. (2d) 765, which had this to say in considering the question we now urge on the court:

"If one count is not affected by error and there is substantial evidence to support a verdict with respect to it, it is immaterial that there may have been errors committed in connection with another count or that there is not sufficient evidence to sustain a verdict as to such other count. One count sustained by sufficient evidence and free from error is all that is required to support a verdict. The specifications of error which the appellant has made with reference to giving and the refusal to give certain instructions, all pertain to the first cause of action and are immaterial to the second count."

There being no error and the evidence being sufficient to warrant the general verdict in favor of the defendant on this issue, we submit that this court can affirm on that ground alone.

CONCLUSION

We respectfully submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

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