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Guy M. Hicks
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August 10, 1999

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee*
Docket No. 98-00559

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Memorandum in Opposition to Motion to Strike the Testimony of Randall L. Frame. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee*
Docket No. 98-00559

BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Arrangement TN98-6766-00 for Maximum 13% Discount on Eligible Tariffed Services
Docket No. 98-00210

BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Arrangement KY98-4958-00 for an 11% Discount on Various Services
Docket No. 98-00244

BELLSOUTH TELECOMMUNICATIONS, INC.'S MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE THE TESTIMONY OF RANDALL L. FRAME

BellSouth Telecommunications, Inc. ("BellSouth") opposes the Motion to Strike and Objections ("Motion") Time Warner Telecom of the Mid-South, L.P. ("Time Warner") and NewSouth Communications, LLC ("NewSouth") filed with regard to portions of the testimony of Randall L. Frame.[1] The Motion, which relies almost exclusively on the Tennessee Rules of Evidence, overlooks the fact that the Tennessee Regulatory Authority ("TRA") "shall not be bound by the rules of evidence applicable in a court" and may admit "any evidence which possesses such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs." T.C.A. §65-2-109(1). Mr. Frame's testimony, which contains substantial factual evidence that is not refuted by the Motion, clearly complies with this controlling statute and is consistent with the type of testimony that regularly is admitted in contested case proceedings before the TRA. In fact, witnesses sponsored by the Consumer

[1] No other party has moved to strike any of the testimony that has been filed in this docket.

Advocate Division ("CAD") filed testimony that addresses virtually identical issues – i.e., whether CSAs are discriminatory or anti-competitive – in this very docket. Time Warner and NewSouth, however, conveniently turn a blind eye to the testimony they perceive as supporting their claims in this docket and attack only the testimony with which they do not agree. The TRA, however, should deny the Motion and consider all the testimony that has been filed in this docket in rendering its decision.

1. The Motion's Reliance on the Tennessee Rules of Evidence is Misplaced.

Although the Motion is predicated nearly exclusively on the Tennessee Rules of Evidence, these Rules plainly acknowledge that "[a]dministrative hearings are not governed exclusively by these rules." *See* Tenn. R. Evid. 101, Advisory Commission Comment. Moreover, Section 65-2-109(1) expressly states that the TRA "shall not be bound by the rules of evidence applicable in a court . . . ." *See also Miller v. Bible*, slip op. at 18 (Tenn. Ct. App. March 9, 1984) (copy attached) (recognizing that "administrative agencies are not bound to the same strict rules of evidence observed in courts of law.") Rather, the TRA may "admit and give probative effect to any evidence which possesses such probative value as would entitle it to be accepted by reasonable prudent persons in the conduct of their affairs." T.C.A. § 65-2-109(1). Mr. Frame's testimony clearly meets this standard, notwithstanding Time Warner's and NewSouth's claims to the contrary.

Although Time Warner and NewSouth claim that the CSAs at issue in this docket are discriminatory, anticompetitive, or otherwise improper, these parties cry foul when Mr. Frame addresses these claims in his testimony. *See* Motion, Objections 1, 2, and 4. Mr. Frame's testimony, however, clearly is admissible because it is the type of evidence that reasonably prudent persons would accept in the conduct of their affairs. *See* T.C.A. §65-2-109(1). In fact,

Mr. Frame's testimony is indistinguishable from other testimony the TRA has admitted over similar objections in other proceedings. In Docket No. 96-01692, for example, AT&T filed a motion to strike the testimony of Al Varner, arguing that Mr. Varner testified as to legal conclusions. The TRA unanimously rejected AT&T's motion during the hearing held on July 17, 1997. (Tr. p. 11, attached). The TRA should deny this Motion as well.

Additionally, the objections lodged by Time Warner and NewSouth are disingenuous in light of their failure (or refusal) to object to virtually identical testimony offered by the CAD's witnesses. Dr. Stephen Brown, for example, is asked "[i]n your opinion, is the company's position correct, that its CSAs are not anti-competitive and not discriminatory," and "[h]ow is the [BellSouth] policy anticompetitive in effect?" *See* Brown Rebuttal at 2-3. In addition to being asked whether Tennessee law prohibits discrimination, Buckner Rebuttal at 16, CAD witness Robert Buckner is asked "Does Bell directly or indirectly, by any special rate, rebate, drawback, or other device, charges, demands, collects or receives from any person a great or less compensation for any service within this state than it charges, demands, collects, or receives from any other person for service of a like kind under substantially like circumstances and conditions?" *See* Buckner Rebuttal Testimony at 16-17. This question essentially quotes substantial portions of T.C.A. § 65-4-122, yet Time Warner and NewSouth have raised no objection that Mr. Buckner is being asked a question that calls for a legal conclusion. Clearly, Time Warner and NewSouth want the TRA to hear the CAD's answers to these questions without hearing Mr. Frame's answers to virtually identical questions.

2. Mr. Frame's Testimony Properly References Tariffs that are on File with the TRA.

The objection to Mr. Frame's reference to CLEC tariffs that include termination liability provisions is curious to say the least. (See Objection No. 5). Although the basis for this objection is the claim that BellSouth failed to submit the "best evidence" of these tariffs, each of these tariffs is a matter of public record and is on file with the TRA. Time Warner and NewSouth do not allege that Mr. Frame misquoted these tariffs in his testimony, they do not argue that the termination liability provisions do not appear in the CLEC tariffs quoted by Mr. Frame, and they do not argue that they do not have access to these tariffs. Instead, they exalt form over substance by arguing that the TRA should not consider the existence of tariff provisions (which everyone agrees exist) unless "original" documents are introduced into the record. The parties, however, easily could stipulate to the existence of these tariffs, or failing that, BellSouth can introduce copies of the tariffs at the hearing during cross-examination, at which time Time Warner and NewSouth can attempt to keep these publicly-filed tariffs out of the evidentiary record. There is no basis whatsoever, however, for striking Mr. Frame's testimony references to the CLEC tariffs.

3. The Exhibits to Mr. Frame's Testimony Support his Testimony that the Two Customers Whose Negotiated Contracts are at Issue in this Proceeding have Different Product Mixes.

Time Warner and NewSouth object to Mr. Frame's testimony that "[b]ecause these customers have a different product mix, they are not similarly situated such that BellSouth can lawfully offer the customer different discounts and revenue commitments," claiming that Mr. Frame purportedly "fails to give factual support for his opinion." *See* Motion, Objection No. 3. Time Warner and NewSouth are simply wrong. Exhibits 1 and 2 to Mr. Frame's direct testimony

provide detailed factual support for this testimony. Indeed, these exhibits list the services for these two CSA customers in great detail.[2]

4. The "Speculative' and "Without Foundation" Objections are Without Merit.

Once again relying on Rules of Evidence that simply do not apply to this docket, Time Warner and NewSouth assert that certain portions of Mr. Frame's testimony are "speculative" or should be stricken because "an insufficient foundation has been laid." *See* Motion, Objections Nos. 6, 7 and 8). Although Time Warner and NewSouth may not like Mr. Frame's testimony, this evidence clearly "possesses such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs." *See* T.C.A. §65-2-109(1). The TRA, therefore, should admit this testimony into evidence. If Time Warner and NewSouth wish to challenge the weight or credibility of this evidence, the will have the opportunity to do so at the hearing.[3]

Additionally, Time Warner and NewSouth object to Mr. Frame's statement that "[t]hese two CSA customers may choose any other competitive service providers in addition to BellSouth," purporting that Mr. Frame "fails to provide factual support for his opinion." Mr. Frame can certainly testify about the language in the two CSAs, and he is competent to make

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[2] In contrast, the testimony of Time Warner witness Carmon Heilmon is long on generalities and short on facts. This testimony, for instance, makes no reference whatsoever to either CSA KY98-4958-00 or TN98-2766-00.

[3] Again, Time Warner and NewSouth do not object to the TRA's consideration of the CAD's answers to the same type of questions they find objectionable when posed to BellSouth's witness. The testimony of the CAD's witnesses contains numerous questions and answers that, under the reasoning espoused by Time Warner and NewSouth in their Objections, would be "speculative" or would "lack foundation." *See*, e.g., Brown Rebuttal at 11 ("Is it possible that the incumbent could trade off termination amounts with discounts in a given CSA or have the discounts and termination fees vary across different CSAs?"); Brown Rebuttal at 19 ("If the incumbent is rational, how does it persuade itself that a counter offer 10 percent higher than the competitor's rate is rational?") Additionally, Mr. Buckner is asked about BellSouth's "apparent" motives for CSAs. *See* Buckner Rebuttal at 3. Time Warner and NewSouth, however, raised no objections to this testimony.

factual assertions regarding what the CSAs do and do not provide. If Time Warner and NewSouth believe that the language of the CSAs prohibit the customers from choosing competitive service providers in addition to BellSouth, they are free to call this language to the TRA's attention and to question Mr. Frame about such language during the hearing.

CONCLUSION

While Time Warner and NewSouth may not like what Mr. Frame has to say, his testimony clearly is admissible and relevant to the issues asked by the intervenors. The TRA, therefore, should deny the Motion filed by Time Warner and NewSouth and render a decision on the basis of all evidence presented in this docket.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

Guy M. Hicks
Patrick W. Turner
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
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4TH CASE of Level 1 printed in FULL format.

NELSON MILLER, JR. Petitioner-Appellant, VS. ROBERT J. BIBLE, in his capacity as the Commissioner of the Tennessee Department of Employment Security; and PACKAGING SERVICE CORPORATION OF KENTUCKY, Defendants-Appellees.

Court of Appeals of Tennessee, Middle Section at Nashville

Slip Opinion

March 9, 1984

PRIOR HISTORY:

MAURY CHANCERY

APPEAL FROM CHANCERY COURT, MAURY COUNTY, TENNESSEE

THE HONORABLE ROBERT L. JONES, JUDGE

DISPOSITION: REVERSED AND REMANDED

COUNSEL: SUSAN D. CLASBEY, Legal Services of South Central Tn. Inc., P.O. Box 1256, Columbia, Tn. 38401, ATTORNEY FOR PETITIONER-APPELLANT

CHARLES LAURENCE WOODS, III, Baird, Kirven, Westfall & Talbott, 501 S. Second Street, Louisville, Kentucky 40202

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DIANNE STAMEY, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219, ATTORNEYS FOR DEFENDANTS-APPELLEES

JUDGES: Todd, P.J. wrote the opinion. CONCURS: BEN H. CANTRELL, JUDGE, LEWIS H. CONNER, JR., JUDGE

OPINIONBY: Todd

OPINION: HENRY F. TODD, PRESIDING JUDGE, MIDDLE SECTION

This appeal involves a judicial review of an administrative decision of the Board of Review denying unemployment compensation to plaintiff on grounds of discharge for misconduct as provided by T.C.A. 50-7-303(2)(B).

The Chancellor affirmed the decision of the Board. The employee has appealed and presented the following issues for review:

1. Whether the Employer proved by competent evidence that Mr. Miller was guilty of misconduct within the meaning of T.C.A. § 50-7-303(2)(B).

2. Whether the Board of Review applied improper standards in evaluating Mr. Miller's appeal.

On February 17, 1983, appellant applied to the Department of Employment Security for unemployment compensation as a result of his discharge from the employ of Packaging Service Corp.

In response to an inquiry, the Department received the following letter from the employer:

Mr. Miller was employed on 4-10-78. On 12-17-79 he was made lead man in his department. On 11-13-80 the plant manager discussed what Mr. Miller's direct responsibilities were and what his expectations were. He agreed to accept these effective immediately. On 11-19-81 the plant manager again discussed with Mr. Miller that if he wanted to keep his job he must accept the responsibility for it immediately.

On 12-9-81 Nelson Miller had a meeting with the manager in charge of the divisions in reference to not performing duties as a supervisor, responsibilities of supervisors and if these responsibilities aren't meant, a warning notice will be issued. Mr. Miller acknowledged that he understood.

On 2-3-82, it was decided that Mr. Miller's performance and record be reviewed until 2-5-82, at which time a decision would be made. On 2-5-82 Mr. Miller was discharged for failure to perform job duties and insubordination toward supervisor.

In view of the above, we do not feel our reserve account should be charged for this claim.

On March 1, 1982, appellant was notified of the denial of his claim for the following reason:

We find this claimant was discharged from last covered employment for failure to perform duties satisfactorily

and for insubordination. Claimant's duties as leadman were adequately explained. He was reluctant to work overtime although leadman is expected to set example. He had words with plant mgr. twice. Claim denied for reluctant attitude and for insubordination. 50-1324B(2)

On March 4, 1982, appellant filed a notice of appeal containing the following:

I REQUEST A HEARING ON THIS DECISION FOR THE FOLLOWING REASONS: 2-26-82 Wilson Broyles, former plant mgr., came by my house to tell me he was instructed to weed out leadmen as co. had too many. Since he told me this, I believe the co. failed to cooperate with me in order to get rid of me.

On April 1, 1982, an appeals referee filed a decision as follows:

After carefully considering the testimony and the entire record in this case, the Appeals Tribunal makes the following

FINDINGS OF FACT: Claimant's most recent employment prior to filing this claim was with Packaging Service Corporation in Columbia, Tennessee, from April 17, 1978 to February 5, 1982, when he was discharged for failure to properly perform his duties. The claimant was working as a leadman, which consisted of operating a machine in addition to supervising five people. He had been instructed as to his job duties and the correct manner in which to perform them. He had failed to function as instructed on more than one occasion. He had been advised that he was to work overtime on January 28, 1982, but instead, he left to get his hair cut. He was suspended on February 3, 1982, for three days, and told to report back on February 5, 1982, at which time he was discharged.

COMMENT: The Appeals Tribunal finds no error in the Agency decision, which denied this claim under Section 50-1324 B (2) of the Tennessee Code.

DECISION: The determination of the Agency, which rejected this claim under Section 50-1324 B (2) of the Code, is in all matters affirmed, as is the non-charge heretofore awarded to the above mentioned employer.

On April 9, 1982, counsel for appellant by letter requested a reversal or rehearing, supported by affidavit of Wilson Broyles that:

... Packaging Service Corporation determined for economic reasons to terminate Mr. Miller's employment and further to build a case against him so that he would be disqualified from collecting unemployment compensation.

On April 15, 1982, in response to an inquiry from the Board of Review, appellant's attorney wrote:

1. What is the nature of new evidence or testimony you may wish to present that was not presented before the Appeals Tribunal? See my letter dated April 9, 1981 and affidavit enclosed with it.

2. Why do you believe the decision of the Appeals Tribunal was incorrect? It was based on incomplete evidence.

On the same date, appellant, himself, responded to the Board of Review as follows:

1. What is the nature of new evidence or testimony you may wish to present that was not presented before the Appeals Tribunal? I have some witnesses

2. Why do you believe the decision of the Appeals Tribunal was incorrect? Because I was set up by the supervisor.

3. Are there any documents, legal briefs, or written material you wish to present at this time? Yes

On July 28, 1982, the Board affirmed the decision of the appeals referee denying compensation.

On August 17, 1982, appellant filed in Chancery Court a petition for certiori.

On September 30, 1982, by agreement of the parties, the cause was remanded to the Department "for a new hearing and the taking of additional proof" and the petition for certiori was dismissed.

On October 20, 1982, a new hearing was held by a referee of the Board of Review of the Department of Employment Security who made the following opening statement:

... this matter is before the Board of Review on an Agreed Order from Chancery Court of Murray County, Tennessee. My copy of the Order indicates that the case was remanded to the Department of Employment Security, Board of Review, for a new hearing, and the taking of additional proof.

Following said hearing, the employer filed a brief which contained the following:

The claimant in this case is Mr. Nelson R. Miller, Jr. Mr. Miller was discharged from the employ of Packaging Service Corporation of Kentucky on February 5, 1982 because of his failure to perform his job duties, insubordination toward a supervisor, and failure to work required overtime.

During the hearing, a representative of the employer stated that he had in his files certain documents material to the case. Certain documents appear in the record

which appellee insists are the documents referred to by said representative, but said documents contain no indication of how they were received, by whom, from whom, or how identified.

On December 13, 1983, the Board of Review mailed to the parties its written decision as follows:

FINDINGS OF FACT: This case came before the Board of Review based upon an Order of Remand from the Honorable Chancery Court of Murray County, Tennessee, at Columbia, wherein the Board of Review was ordered to conduct a new hearing and the taking of additional proof. Subsequent to the Order of the Court, a hearing was conducted on Wednesday, October 20, 1982, at which time both parties appeared and were represented by counsel. Based upon the entire record in this case, the Board of Review finds that the claimant was discharged from his employment with Packaging Service Corporation of Kentucky on February 5, 1982. The claimant was employed as a leadman and supervised approximately five employees. As previously related, the claimant, other leadmen and supervisors, had attended several meetings with company management in which they were exhorted to improve the efficiency of the Tennessee Division. The record further reflects the claimant had been counseled on several occasions concerning problems which had occurred due to his failure to carry out orders. Prior to the separation, the claimant was advised that he was to work overtime on January 28, 1982, and as previously related, the claimant left at 4:30 P.J., in order to get his hair cut. There is some conflict in the testimony as to whether the claimant was absolutely forbidden to leave early; however, we find as a fact that the claimant was aware that the employer wished him to remain on the premises. The claimant's failure to work the required overtime on the above date precipitated his discharge. In appearing before the Board of Review, the claimant's former supervisor who was employed as plant supervisor, has appeared and testified that in January of 1983, he was told by the plant manager and the manager of manufacturing that the company could not afford to give raises to all three leadmen. This witness has further testified that he was instructed to build a case against the claimant that would hold up in court and that he was given thirty days to discharge the claimant. According to the testimony of this witness, he was advised as to the various ways in which he might harass the claimant and was asked each day what he had done to get rid of the claimant. The plant manager and the manager of manufacturing have also appeared before the Board of Review and have emphatically denied that a conspiracy existed which was intended to culminate in the discharge of the claimant. In offering rebuttal to the testimony of the claimant's witness, counsel for the employer has pointed to exhibits in the record which were submitted as actual notes made by the claimant's former supervisor, and which offer detailed accounts of problems enjcountered with the claimant by the witness. One such exhibit dated January 25, 1982, concerns the failure of the claimant to run certain parts as instructed by this supervisor. An additional note bearing the same date concerns the claimant's failure to make a change over as instructed by his supervisor and which resulted in the lack of finished parts for shipping. The record contains at least two other notes reportedly made by this supervisor which detailed problems experienced with the claimant. The last notation dated January 27, 1982, relates the details of the incident which resulted in the separation and we note that the supervisor has stated that he advised the claimant on two occasions that he was needed and that he could not leave early. According to this exhibit, the claimant then said that he could not help it, and that he still had to go.

CONCLUSIONS OF LAW: After considering the entire record in this case, the Board of Review finds that the thrust of the claimant's testimony is directed to an alleged conspiracy between the plant manager and the manager of manufacturing and that this conspiracy was intended to result in the claimant's discharge. In support of this allegation the claimant has submitted the testimony of his former supervisor who has stated that such a conspiracy existed and that he became a part of it in the execution of his duties. We note, however, that this witness was also discharged by the employer and has been characterized by counsel for the employer as hostile to the company. In this respect we find that this same witness had repeated problems with the claimant concerning the running of parts and the meeting of shipping deadlines. It would further appear that this supervisor's objections to the alleged conspiracy only surfaced after he himself had been discharged.In rebuttal, the two officials who allegedly conspired to discharge the claimant have testified that no such conspiracy existed. The Board of Review, therefore, lacking conclusive evidence that members of management conspired against the claimant, must determine whether the claimant's actions will support a finding of work-connected misconduct and in this respect we find that the claimant on several occasions failed to follow the instructions of his supervisor with the result that production schedules were disrupted, and that on January 28, 1982, the claimant left the premises without permission, if not in direct violation of an order to remain. In our opinion the record will support a finding that the claimant was guilty of work-connected misconduct as contemplated by TCA 50-1324 B (2). The previous decision of the Board of Review is in all things and matters affirmed.

DECISION: The previous decision of the Board of Review which denied this claim under TCA 50-1324 B (2) remains undistrubed.

Appellant again sought judicial review of the decision, and the Chancellor affirmed in a judgment reading as follows:

This civil action came on to be heard on the 18th day of March, 1983, before Robert L. Jones, Judge, holding the Chancery Court, upon the pleadings, briefs and oral arguments of the parties, together with the 248-page record; from all of which, the Court finds and holds that the findings of fact of the Board of Review are supported by sufficient material evidence so as to be conclusive in this Court.

If this Court was permitted by statute and case law to weigh the evidence, it might well conclude that the Petitioner was terminated for reasons other than misconduct, since the plant was experiencing economic difficulty at the time and since the Petitioner's position was not filled by employment of another person. In fact, the small plant had one plant manager, one production supervisor, and three lead men, each supervising approximately five hourly employees. Shortly after the Petitioner was discharged from one of the lead man positions, the production supervisor was also terminated, and the plant manager testified (B.R. 29 and 30) that neither man would be replaced because of current economic problems. That clearly objective evidence is supportive of the Petitioner's version of the disputed facts in the case. However, the Board of Review as the fact finder could discredit certain testimony of the Petitioner and the former production supervisor who testified in the Petitioner's behalf. It is undisputed that the Petitioner "had words" with his supervisor on two occasions, and at least on one of those occasions "cussed" his supervisor in front of hourly employees. That evidence of misconduct, coupled with intentional or reckless misrepresentations about the scheduling of work and his leaving work early on January 28, 1982, after being denied permission to leave, constitutes sufficient evidence to support the Board of Review's findings of fact.

In the last hearing for the Board of Review, the employer and employee put considerable emphasis upon the employee handbook and which particular handbook was in effect at the time of the Petitioner's termination. Even though the Petitioner may not have had a copy of the most recent handbook which was in effect at the time of his termination, this Court finds no material distinction between the two. On page 13 of the handbook with which the Petitioner was familiar (B.R. 240) disciplinary action for attendance deals with "being absent, late or leaving early", while page 14 of the latest handbook dropped the "leaving early" words and dealt only with "being absent or late". The two handbooks still provide for a first written warning after six violations, a second written warning after five additional violations, and a final written warning and three-day suspension after the third violation. Even under the newest handbook, leaving early could still be interpreted as absence. The hadbooks are the same in that both list "repeated absence, tardiness or leaving work early" as subjecting an employee to discharge.

In spite of all of the emphasis placed upon the January 28 incident by counsel in the last hearing, and in spite of this Court's conclusion that the company policy as stated in the handbook would appear to permit a number of absences by leaving early without the threat of discharge, this Court recognizes the authority of the Board of Review to conclude that that action, taken together with the inadequate performance of duties and insubordination to his immediate supervisor, constitutes misconduct under T.C.A. 50-1324 B (2) [now recodified as T.C.A. 50-7-303 (2) (B)].

The Petitioner contends that the Board of Review in its last conclusions of law (B.R. 246, 247, and 248) improperly placed the burden on the Petitioner to show the lack of misconduct. This Court certainly agrees that the Board's language about "conclusive evidence" suggests that the Board may not only be putting a burden upon the claimant, but also making that burden substantially higher than any party before a Board of Review would have on any issue. However, the context in which that language was used shows that the Board recognized that the lack of such evidence still was not determinative of the issue of "whether the claimant's actions will support a finding of work-connected misconduct". Therefore, the Court concludes that the Board did not place the burden upon the Petitioner to disprove the alleged misconduct, even though the Court does find that the Board's drafting of its conclusions of law leaves a lot to be desired.

The Petitioner next contends that the Board of Review failed to make an independent, de novo decision on this claim, but instead merely reviewed the record to see if it supported earlier decisions of the department. The Board's latest decision made findings of fact and concluded that "the record will support a finding that the claimant was guilty of work-connected misconduct." No authority has been presented which sets forth the nature of the review, however, T.C.A. 50-1325 E [now codified as T.C.A. 50-7-304 (e) (1)] states, "The board of review may on its own motion affirm, modify, or set aside any decision of an appeals referee on the basis of the evidence previously submitted in such case, or direct

the taking of additional evidence... The board of review shall permit such further appeal by any of the parties...". This Court found further guidance in T.C.A. 50-1325 C [now codified as T.C.A. Sec. 50-7-302 (c) (1)], which provides that an appeals referee (the first level of review above the decision by the deputy commissioner) shall "affirm, modify, or set aside the findings of fact and decision of the deputy" after a fair hearing. This Court interprets the language of both provisions dealing with the appeals referee and the Board of Review as calling for a review of the immediate preceding decision, which may be affirmed, modified, or set aside. Therefore, the Court concludes that the Board of Review committed no error in wording its conclusions of law in such a manner as finding support in the record for the work-connected misconduct.

One matter not specifically raised by counsel, but of some concern to this Court, is that the Board of Review gave more weight to the unsworn written memoranda of the supervisor in the Petitioner's personnel file than it did to the supervisor's sworn testimony before the Board. Even the testimony of the plant manager and his superior from Louisville, Kentucky, was based upon the written memoranda and other hearsay evidence from the supervisor, much of which was discredited by the supervisor's sworn testimony before the Board. A full review of the record, including these evidence matters, would have caused this Court as the trier of facts to reach a different conclusion than did the Department. However, admissions of insubordination by the Petitioner and other evidence in the record constitute sufficient evidence to support the findings of fact made by the Board of Review, and this Court is not permitted to disturb those findings of fact thus supported.

This Court has already addressed the various legal issues raised and concludes that the Board properly applied the law to the facts as it found them. IT IS, THEREFORE, ORDERED that the Department's decision be, and is hereby, affirmed, and the Petitioner's petition be, and is hereby, dismissed. It is further ordered that all costs and litigation taxes be, and are hereby, adjudged against the Petitioner, for which execution may issue, if necessary.

The foregoing extensive details have been reviewed in an effort to determine precisely what issues were presented to the administrative agency, by whom and how decided.

It is seen that, initially the employer justified the discharge on 2 grounds:

1. Failure to perform duties as a supervisor, as to which appellant had been told that if he failed to perform "a warning notice will be issued".

2. Insubordination toward supervisor.

It also appears that the initial denial of compensation was on grounds:

1. Failure to perform duties.

2. Insubordination.

However, the denial explains that appellant was a "leadman" (not a supervisor), that he was reluctant to work overtime, that he "had words" with the plant manager twice, and that the claim was denied for "reluctant attitude" and for insubordination.

It next appears that appellant's first appeal was for the reason that Mr. Broyles, his former supervisor, had told him, appellant, that he, Broyles had been "instructed to get rid of me", appellant.

It next appears that the appeals referee found that:

1. He failed to perform as instructed on more than one occasion, and

2. He left to get his hair cut after being advised that he was to work overtime.

It next appears that appellant's counsel sought a reversal on the basis of an affidavit of Mr. Broyles as to the "conspiracy to get rid of" appellant.

It next appears that appellant's counsel stated in writing that the nature of new evidence to be presented was set forth in her letter and attached affidavit, but appellant himself stated in writing that, "I have some witnesses" and "Because I was set up by my supervisor".

It next appears that the remand from Chancery Court was for "a new hearing and the taking of additional proof".

It further appears that, after the conclusion of the hearing on remand, the employer stated in its brief that its charges were:

1. Failure to perform job duties.

2. Insubordination toward a supervisor, and

3. Failure to work overtime.

It next appears that the final decision of the Board of Review found that:

1. Appellant's failure to work the required overtime precipitated his discharge.

2. Appellant had been advised as to his duties and had been "counseled on serveral occasions concerning problems which had occurred due to his failure to carry

out orders".

It appears that, in its final decision, the board considered "exhibits in the record" offering detailed accounts of problems encountered with the claimant by the witness.

It also appears that the Board in its conclusion determined that "the record will support a finding that the claimant was guilty of work-related misconduct as contemplated by TCA 50-1324 B (2)", but the Board did not expressly find such misconduct.

Finally, it appears that the Chancellor found that it was undisputed that appellant:

1.Had words with his supervisor on two occasions, on one of which he "cussed" the supervisor in front of hourly employees.

2. Making intentional misrepresentations about scheduling of work, and

3. Leaving work after being denied permission to leave.

The allegations, counter allegations and various "findings" create an almost impenetrable maze through which it is difficult to consider clearly the issues quoted at the beginning of this opinion.

Perhaps the only lucid and reasonable course is to review carefully the evidence in the record.

Four witnesses testified. In descending order of authority, they were:

1. Carl Hammond, manager of the manufacturing division of the employer, whose office was in Louisville, who managed seven "out of town divisions", including the plant where appellant worked, and who visited each plant "every month or two". Hammond had no personal knowledge of any misconduct of Miller. He was present at some employee meetings at which various general oral exhortations were made.

2. Mike Pittelko, manager of the plant where appellant worked. He had no personal knowledge of any misconduct of Miller. He was present at employee meetings and knew of general oral exhortations.

3. Wilson Broyles, plant supervisor who was the immediate supervisor of appellant. He testified as to misconduct but also stated it was not sufficient for discharge under the existing practices of the company.

4. Appellant, Nelson Miller, Jr., who was one of three "lead men" in the plant. Each functioned in a separate section. Each lead man was required to plan and direct the work of the employees in his section and to replace any absent employee and do his work.

Mr. Pittelko testified that On October 23, 1981, "the vice president" came down and had an extensive meeting with him, the supervisor and the lead men in which it was stated that the operation of the plant had become unprofitable, that production must improve, and those present were told what must be done to improve performance. (No specifics were related by the witness as to who was to do what)

Mr. Pittelko further testified:

Mr. Pittelko: ... On November 9 - or... November 19th, I received these things and reviewed each lead person and supervisor accordingly. And based on my own observations and on information I had received back from my supervisor, at that time it was felt that the proper progress was not being made. Problems, things that were not being done that should be responsibility of a lead person were again laid out and made clear that they were not being taken care of. I did have a personal meeting with Nelson Miller and Wilson Burrow, the supervisor, covered these points again to be sure that everyone understood and was on the right line. A couple of weeks later, Mr. Hammond came to our division and basically reviewed myself, the supervisor, and all the lead people. At this point and time it had been 3 or 4 months since we set out on this project to get our problem solved. And it was pointed out by him several things that were not being done and who they were not being done by, what needed to be changed, what kind of responsibility should be laid out, and what - who was responsible for what. And the improvements that still needed to be made had not near come to pass with Nelson or - from my point of view - the same thing that I had gotten information from the supervisor there was little or no improvement. In January - on January 19th, we again had a meeting, and each lead person and supervisor was given a written document that outlined their responsibilities and each signed a copy of it, and was made aware of what they were responsible for, what they were assigned to, and what was expected. Continued on, and I got the feedback from my supervisor again, Wilson Burrows, that Nelson had not made an (sic) progress whatsoever in turning a thing around and taking responsibility for what he had accepted. Later that month, on January 28th, it was stated to the supervisor, Wilson Burrows, that Nelson had to leave for personal business to have his - had a hair appointment. He told the supervisor this on the 27th. The supervisor relaid to him that---

Mr. Pittelko: ... that everyone in the plant was scheduled to work overtime that week, and it was necessary that he worked and be responsible for his area of the plant. On the 28th, again, Nelson told the supervisor

that he would had to be leaving early that day. Here again, everyone was scheduled to work in the plant and he said "he would just to have to leave anyway." This put extra responsibility on the other lead people and on the supervisor. The supervisor then came to me saying that we must take action to correct this problem with Nelson Miller. At that point, with the instance of the past which the supervisor, himself, has relaid to me as far as some of the problems - the actual problems that he had in communicating with Nelson with getting him to accept his responsibilities, which he did talk to me about on several occasions. And also has submitted to me written reports of incidents that did occur in the plant that reflected the idea that Nelson was not taking the responsibility he should have. Even after the numerous meeting by myself, by Mr. Hammond and the vice president. At that point and time, with this information and with the attitude that I saw and the information I got from the supervisor, I made a decision to put Nelson Miller on a suspension, this was on 2-3 - until I had a chance to review this with my boss, Mr. Hammond, about the situation, about the progress that was - not been made and the overall decision that would have to be made as to what, what should be done as far as this lack of responsibility. I then, during this period of time, got with my boss, Mr. Hammond, and reviewed the events over the past 6 months meetings, the progress which was not made in which was accepted and was not held up to. And with the information that we had gotten back from the supervisor on observations and so forth, the decision was made to discharge Nelson on 2-5-82.

Mr. Dowlen: And what was the bases for that suspension?

Mr. Pittelko: Failure to work overtime---

Mr. Dowlen: 1-28?

Mr. Pittelko: Yes, sir, written reports and verbal conversations I had had from the supervisor, Wilson Burrows, and a review of the records of Nelson and the responsibility which he was not living up to and had accepted.

Q. Okay, does he work directly under the plant manager or under your supervision?

A. No, sir. He workd under the direction of the supervisor.

Q. Okay, now when the - at some point - and I believe this happened back in - sometime in '81 - when your boss came down and said you were going to have to start producing. And then - I believe you stated that you had discussed this with all your supervisors, your lead people. Did Mr. Miller seem to accept the responsibility at that time or was he very relucant in going along with what you said?

A. There was no relucancy, there was no reason to - that no statement was made, no attitude was reflected that he did not understand his responsibilities and proceed from there.

Q.Okay, so apparently sometimes in January, it became apparent that Mr. Miller was not accepting his responsibilities. Is that the case?

A. Yes, sir.

Q. And especially when he left on the 27th and 28th of January after ha had been asked to work overtime.

A. Yes, sir.

Q. ... You still have the same number of leadmen?

A. No, sir, we do not now. I have two. We will replace and have the third one when economic conditions

A. We don't have - I did not replace Mr. Miller.

Q. Okay, what is - normally is the policy - is your company policy in regard to discharging an individual as far as warnings" Or do you have a certain number of warnings that you give an individual - say, 2 oral warnings or 3 written warnings or whatever.

A. Yes, sir, we do have a policy of written and verbal warnings.

Q. And what is that policy?

A. As far as absenteeism is concerned, which is not voluntary, we have a certain amount of absentee. Times are allowed to be late or absent and so forth before the first written warning is written. There is then another amount of times that occurs before the second written warning. And then the last and final written warning is written after so many other occurences.

Mr. Hammond testified in pertinent part as follows:

Q. Mr. Hammond, anything you want to tell me?

Mr. Hammond: Well, I'd like to say that the warning notice that you're referring to is only for absentee and late. Were an employee - we have to give an amployee three written warning notices for absentee and late. For anything else, violation of complany policy, depending on circumstances, an employee can be discharged. There is no set written warning notices on that.

Mr. Curtis: Did you get any written reports from mr. Pittleko concerning Mr. Miller's performance?

Mr. Hammond: The copies of the things, meetings,

that Mile would have with him, those copies are made up in, we keep a employee file in the Louisville division, also. Anything that is in Mike's files is in our Louisville files, also.

Mr. Curtis: Do you know when it came to your file?

Mr. Hammond: No, I do not know. They mail them out to me after they write them up.

Mr. Miller testified in pertinent part as follows:

Mr. Dowlen: Okay, you - how long had you had this appointment to get your hair fixed?

Mr. Miller: I tried to set it up, you know, at a convenient time. And she said she was full time but the latest she could get me was 5 o'clock. And we were scheduled to worked over at 5:30, we were working over 5:30 every day that week.

Mr. Dowlen: What was the normal time that you get off?

Mr. Miller: 3:30.

Q. 3:30. And you worked till 4:30?

A. Yes, sir.

Q. Okay, had Mr. Broyles - when you told him on Monday and you reminded him again on Wednesday, what did he tell you?

A. He said it would be okay. He didn't tell me about work release. I set everything up, everybody was working, everybody was busy for the last hour. He really didn't have nothing to do, everything was there, everybody was busy. I made sure of that before I left.

Q. Had you ever been warned at any time prior to this about your work in any way or when - I believe at one time Mr. ---

A. Yes, sir, me and Mr. Burrows, like I said, we had words.

A. And on two occasions that I know of. And the reason why I felt like I had the right to speak up is because of my position. And I was busy - Mike had fired the operators, saw operators, so that left me setting up the machines and a lot. Most of the time I was running it. So as - my duties as a lead person, I had to let go because I was on a machine. And when the other people run out of work, they would stop and they would come and get me, then I would stop and I would go check. And then we started this note system and then I was still operating---

Q. A note system?

A. Yes, sir.

Q. And what that consist of?

A. Well, that's like - I would have to get with the other two lead people, which they both was out in the warehouse. And I was supposed to give them notes for the raw materials to be brought to the machine for the operator. And then Mr. Broyles told me that 10 minutes, 15 minutes wasn't enough time. You know, I told him, I said "Well, I know this wasn't enough time but with me on a machine - when I find time to go and check, then this is all the time we have. So he told me I needed to correct that. So I done my best - corrected. I started giving it more time, bring material. But at the same time I was still operating.

Q. But you - did you have an argument with him or talk back to him or - you think you were insubordinate?

A. Mike - well, we had built up some corregated you know. And, like I say, we were on a note system. And Mike, the last - that week we had words, but it wasn't no argument. It was just - he told me to take 30 build ups off of one job and use it for another. And I told him I said "well, it's built up different than the job required, you know." And then he said "well, you think Mike, you know, - do you know - do you think Mike know about it?" I said "well, yeah, I guess so, but that's quality." I mean, if you run that and then they reject it, then that's poor quality. So he said "well," he said "Mike knows best." So I said "okay," so I done it. I mean, it's - I tried to be quality, I tried to do my work as best I could under the circumstance. Because, like I say, I was real busy, I stayed busy. I never would let up, I tried to work as hard as I could. And, I mean, when he told me this I didn't argue with him and I didn't ask him no questions. And I don't see why he told me to think about my job.

Mr. Dowlen: Okay, do you have anything else to offer?

Mr. Miller: Right there when we had our first disagreement with Mr. Broyles, I told Mike that, you know, if it's going to be like this then I would rather step down and not be a lead person.

Mr. Dowlen: And when was this?

A. I can't remember the date, it was in '81 about October or somewhere like that. And Mike told me that I was doing a pretty good job and with I wouldn't step down, but it was my decision, you know. So since he told me that, I tried to stick it out and I tried to work with Mr. Broyles and.

During the testimony of Mr. Miller, Mr. Hammond interrupted with the following statement:

Mr. Hammond: This was in the meeting that I brought

down personally to every leadmen and the supervisors gave them so that there would be no questions about what their responsiblities were and what they were responsible for. And I personally handed these - they signed them and we made copies at that time and gave it to - each men were a copy of this.

Here's the leadmen job description. And also we have documentations we keep on every employee that we have. It's our personnel file, and any coversations that we have with an employee pertaining to job performance, we document date and put it in their files. We keep track of all their separation - under absentee notices, the warning notices. And we have documentations in our - Nelson's file that are personally affirm his supervisor on times that he actual told his supervisor that he had parts that was going out the next morning. And the supervisor was trying to make a determination or whether to close the plant down at 3:30 or work till 5:30, because he'd have to have the person the next morning for a truck. In 2 or 3 instances, Nelson, for his department, told the supervisor he had the parts. And the supervisor made a determination at that time to shut the plant down at 3:30. Then the next morning when the shipping and receiving clerk was to look for the parts, went to look for the parts, they had not been run off for the saw. Nelson had told the men the day before that they were finished. But in the next morning - and it held our trucks up - instead of going out at 9 o'clock, we had to hold our trucks up until 11:30 or 12 o'clock that afternoon for him to produce the parts off of his equipment. And the whole issue here is not based on the fact that Nelson left work on the 28th, or whatever day it was. It is based on everything that is in his folder pertaining to job performance, conversations that his supervisor, his plant manager, myself and my boss have had with all of them in trying to make sure that these people knew what they were responsible for and accepted that responsibility. And walking off the job when his - he's a leadman in the department - he is example to set an example for his people. When he left at 4:30 that day, and his people were working till 5:30, that is not setting a very good example and causes a moral problem with the rest of the people. Especially if a leadman, who has a responsibility, leaves and they have to work. This is based on just pure neglect and not cooperating and trying to bring the Tennessee Divison to where it should be.

Yes, sir, we have documents on all of it.

Mr. Dowlen: Maybe you ought to, for the record, read some of those docuemntations or explain what they are.

Mr. Hammond: Want to read them all? This is on 1-21-82. This was written by the supervisor, Wilson Broyles:

I got with John Gibbs (the other - one of the other lead people) Nelson about a 758 part #1 is being ran on the finish saw. These parts had to ship by 9 o'clock on 1-22.

... He then did change over but we had to hold the truck up until 11:30 or 12 o'clock.

1-23, - basically the same type of thing on 1-23. He had 2 skids so we could stop at 11 and we were okay. At 8 o'clock on 1-25, I got with John and Nelson about the parts. And I found out that we do not have any finished parts, that Nelson was still running the parts the first way. I asked him about the 2 skids, he told me about on Saturday. He said what he was talking about was 2 skids ran the first way, that he wanted to run all the parts up the first way. I told him to change over now that we had to have the parts by 9, knowing that he should have made sure he was set up at 7:00 to run finished parts. He just said "okay," and walked away.

Mr. Dowlen: Mr. Miller, do you want to comment on these two incidents here?

Mr. Miller: Yeah, see, when I walked away, I went to do what he had said to do. And on that first incident, If I can recall correctly, we had some - we didn't have enough - we had a lot of hot jars plus, it was not the corner post that held that truck it was the press that held the truck up. So then we in turn Produced more parts of what they were needing.

Mr. Miller: And, let me refresh Mr. Hammond's mind. The day we had that meeting on that note, Mike said he would make me a copy and give it to me. He did not give me that copy that day. And I never did receive a copy or anything.

Mr. Hammond: Can we submit the documentations that we have for you

Mr. Dowlen: If you want to present them as exhibits, of course, I'm going to have to let Mr. Miller review them. Could I see what you want to present?

Mr. Hammond: All - the whole ---

Mr. Dowlen: The whole file.

Mr. Broyles further testified as follows:

Mr. Curtis: At some time during the course' of your supervision of Mr. Miller, did you have complaintis about his ability to work?

Mr. Broyles: I complained about Nelson to Mr. Pittelko on several occasions.

Mr. Curtis: On one occasion in particular, you com-

plained about the fact that he had - you had had a conversation, or he had cussed you out?

Mr. Broyles: Yes, sir, in front of some hourly people.

Mr. Curtis: And in that context, you also prepared, I believe, some write-ups. You did- at some time you did make written reports about what...

Mr. Broyles: At a later date, yes.

Mr. Curtis: When did you do that? Do you remember?

Mr. Broyles: It was just before - a week or two weeks before he was terminated. I was told to go back and write up everything that I could memorize that had happened and back date it to those specific dates.

Mr. Curtis: Did you do that?

Mr. Broyles: Yes, sir, I did.

Mr. Curtis: They were all back dated?

Mr. Broyles: Yes, sir.

Mr. Curtis: And, at some time Mr. Miller apparently took off early one afternoon to get his haircut, is that correct?

Mr. Broyles: Yes, sir. Nelson came and talked to me about wanting to take off early one afternoon. At this time he was working over-time, and I told Nelson that I'd have to talke to Mike, that I couldn't just authorize him to take off.I went, and, of course, Nelson had explained to me that he had to have something done to his hair, that was the only time he could get it done. I went and talked to Mike about it, and explained to him what Nelson wanted, and Mike told me that we couldn't let him go, but not to be concerned about it, if he had to go, then we'd just write him up for it. And, I went back and told Nelson that I couldn't o.k. him leaving, but if he did, I'd have to give him a write-up on it. He said, o.k., Mr., goodbye. Either three or four days prior from Nelson taking off, we gave him about three days notice on it.

Mr. Curtis: What, and he did leave early that day?

Mr. Broyles: Yes, he did.

Mr. Curitis: Now, based upon your, your experience as a supervisor and what, what you observed at the plant in Columbia, would there ordinarily be sufficient grounds for discharge of a person based, considering Mr. Miller's record?

Mr. Broyles: No, sir.

Mr. Curtis: Or, because he took an hour, he ---

Mr. Broyles: No.

Mr. Curtis: ... left early that afternoon?

Mr. Broyles: No, sir, no way.

Mr. Curtis: Had that ever happened before while you were there?

Mr. Broyles: Not while I was there, no, sir.

Mr. Curtis: When Mr. Miller told you he had to leave that afternoon to get his hair cut, you never told him that he would, he might possible get fired for that?

Mr. Broyles: No, sir, I, that never entered my mind. We've had people that leave early before, and we've said we'd give them a write-up. We've had people scheduled to work over-time on our Saturdays, in fact, right after Nelson was terminated, we had an individual that was scheduled to work on a Saturday, that didn't come in, didn't call in, and I wasn't even allowed to give him a write-up.

Mr. Curtis: So, that's not, that hasn't, while you were there, that sort of thing was never considered a serious infraction?

Mr. Broyles: Right.

Ms. Ellis: And, that's the only problem that you had with him?

Mr. Broyles: Well, again, I'll have to elaborate on this. I had problems with Nelson, but it reflected back where I was, he was to answer direct to me, I would give him instructions to do something. Mr. Pittleko would go back, and I don't think, I think he done it without thinking, and counterman my orders.

Ms. Ellis: Were, was there any instance that he gave you erroneous information, or incomplete information?

Mr. Broyles: Yes, I can remember one occasion where I was given information that was not accurate.

Ms. Ellis: Did any of your other lead people, at times, give you erroneous information?

Mr. Brovles: Yes.

Ms. Ellis: Did you ever have an instance of lead people asking you to be relieved of over-time, other than Mr. Nelson?

Mr. Broyles: Yes. I had, one of the other people had asked to leave early one day, it was on over-time.

Ms. Ellis: And, what did you do in that instance?

Mr. Broyles: We let him take off early.

Ms. Ellis: Did he give you a reason?

Mr. Broyles: Yes, I don't remember what it was, now; but it was, he did give a reason, and, but I didn't o.k. it, I went to Mr. Pittleko about it. And, Mike said it was o.k.

Ms. Ellis: ... Mr. Broyles, what type of employee did you consider Mr. Miller to be?

Mr. Broyles: He got the job done, I suppose, 90% of the time. Most of the time he didn't do it, the way it was specified, he didn't, was the only one, been there some time in that job.

Mr. Pittleko was recalled and testified further:

Ms. Ellis: Mr. Miller has testified that he came to you, and there was some discussion about his offer to step down, do you recall that discussion?

Mr. Pittlko: Yes, I do.

Ms. Ellis: And, what was the substance of that discussion?

Mr. Pittlko: Basically, what would happen if he was to go back into the plant, and I told him that I needed a lead man, and I thought he was capable, and if he'd want to put the effort and cooperation there, I'd be willing to work with him, because I needed a lead person, rather than someone in the plant. And, that was about it.

Ms. Ellis: Do you recall when this conversation took place?

Mr. Pittlko: I believe in late November or December.

Mr. Curtis: Do you have any written warnings that you gave to Mr. Miller, indicating that his job performance was not adequate?

Mr. Pittleko: No. sir.

Mr. Cutis: I would like to see any written warnings concerning his being absent, late, or leaving early. Well, in fact, Mr. Miller, the only absentee report you have is one in your file dated January 28, 1982, which concerns the one hour that Mr. Miller took off on that afternoon?

Mr. Pittleko: Yes, sir.

Mr. Curtis: That is the only report that you have?

Mr. Pittleko: Within the 12-month period.

Mr. Curtis: And, in fact, the notation that you have in your file is not a warning, is it? It is, in fact, an absentee report, isn't it?

Mr. Pittleko: Yes, sir.

Mr. Curtis: And, under your regulations, they were presumably in effect on January 28th of 1982. The, that is an absentee report which is made pursuant to those regulations, is that correct?

Mr. Pittleko: Yes, sir.

Mr. Curtis: And, in fact, under these regulations, Mr. Miller would have to be absent six times before he gets a written warning, wouldn't he?

Mr. Pittleko: That's correct.

Mr. Curtis: But, in fact, you have a record of only one absence, that is his absence for one hour --

Mr. Pittleko: That's true.

Mr. Curtis: ... on the afternoon of January 28th, is that correct?

Mr. Pittleko: Yes.

Mr. Curtis: .... So, in fact, in, in fact, Mr. Pittleko, there are no contempor-, contemporaneous reports of any problems, specific problems, written reports, relative to Mr. Miller, from the time that he talked to you about changing jobs, and you told him that you thought he was capable, until the time you discharged him? That's true, isn't it?

Mr. Pittleko: Yes, sir.

Ms. Ellis: Did you have a system of written warnings for your lead men?

Mr. Pittleko: Yes.

Ms. Ellis: Why, if you know, did Mr. Miller not receive written warnings?

Mr. Pittleko: Basically, for the same reason that the other lead people didn't, they were (inaudible) people.

Ms. Ellis: (inaudible)?

Mr. Pittleko: No, not, not actually that they weren't warned, they, but most all, all the problems were handled in the meetings with the three lead people, and that's the way it was relayed to them, as far as their problems, and we expected to be straightened out.

At this point, the following is recorded:

Ms. Ellis: All we're submitting is records, written records of these meetings, and what was told to both Mr. Miller and the other two lead people.

Mr. Curtis: We're going to object to all those other things.

Mr. Hibdon: I'll note your objection, but as I noted before, and it's very difficult in conducting a hearing which someone else will decide. And, I'm reluctant to exclude something that the Board might want to see in reaching their decision. So, we'll admit that over your

objection, Mr. Curtis. And, ask Ms. Ellis to send you copies of everything that we receive.

Mr. curtis: And when did you make the decision to terminate Mr. Miller's employment?

Mr. Hammond: After Mike called me and discussed with me the situation, what it still was, and I told Mike that I would got the files out, review it, and he was to suspend Nelson for three days. And, after I reviewed it, I would get back with him and see it I agreed with him and Wilson as far as termination. And, I did agree.

The volume certified by the Department to the Chancery Court contains a series of documents marked "Ex 75" - "Ex 345", inclusive. There is no record of how these documents were presented or how or by whom they were identified. It may be surmised that they were in some manner transmitted to the Department by Mr. Hammond from his files in Louisville. However, this is mere surmise. Nevertheless, the documents have been examined for relevant information even though there is probably insufficient basis in the record for their consideration.

The following are selected excerpts from the unauthenticated documents:

RULES OF CONDUCT AND SAFETY

For the protection of all employees, disciplinary action will be taken for violation of the following. The degree of discipline will depend on the offense. For serious offenses, or for repetition of lesser offenses, disciplinary measures will be taken. Anyone that is in violation of these rules is subject to discharge:

Leaving work area without supervisor's permission.

DISCIPLINARY ACTION FOR ATTENDANCE

During 60-Day Evaluation Period

First Warning

A combination of being absent or late three times will result in a written warning by your supervisor. You will be asked to sign this warning.

Final Warning

Being absent or late one time after your first written warning will result in your second and final warning. This warning will be given by your plant manager. You will be asked to sign this warning. Any violation after this may result in discharge.

After 60-Day Evaluation Period

First Warning

Being absent or late six times will result in a written warning by your supervisor. You will be asked to sign this warning. (Your attendance record during the 60-day evaluation period will be carried over.)

Second Warning

Being absent or late five times after your first warning will result in your second written warning by your supervisor. You will be asked to sign this warning.

Final Warning

Being absent or late four times after your second warning will result in your Final Warning.

This will be done by your plant manager and you will be asked to sign this warning. Any violation after this may result in discharge.

When disciplinary action is necessary, your attendance record for the twelve-month period preceeding such action will be considered.

Ex. 192 appears to be a "job description" dated 1-18-82 and signed by appellant and Mr. Pittelko. The only relevant portions of same are as follows:

9) Sets examples to their fellow workers by their attitude toward the company and management.

14) Check with immediate supervisor before clocking out.

Ex. 194 is an unsigned longhand memo dated 11/4/81 reading as follows:

11-4-81

10:15

Wilson and Nelson came to me because Wilson said Nelson was not following his plans and cussed him in front of the people.

Wilson said he wanted the problem corrected because the people would never respect his authority if it continued. I told Nelson I would not tolerate this in the plant and I would fire him it is happened again.

Ex. 195 is an unsigned memo dated 10/23/81 - partly longhand, partly printed as follows:

10-23-81

Meeting - 3:45

Eddie - John - Nelson

Wilson -

I - OBJECTIVE -

To Turn Around - ENTIRE

System In The Plant To Improve Our Effieciency

Confused And Eliminate The Inconsistent Manner In Which We Have Operated Under.

Wilson And

II. I Personally Will Be Involved With Each Machine And We Will Improve Everything And See That It Does Not Change.

Ex. 196 is an unsigned, undated longhand memo as follows:

We will get the work orders correct and properly filled out, 100% of the time.

We will get ahead 2 weeks and stay that way on all parts.

The small things will be done over until they are correct.

I will not nor will Wilson accept nothing until it is correct and there will be no excuses.

Ex. 197 is an unsigned undated longhand memo as follows:

Buck did not come down here to spend the day walk around look at things, tell us what was wrong and then leave and he forget it and we go back to the same thing. It may have been that way before - it was but this time it will not.

Ex. 198 is an unsigned, undated memo, partly longhand, partly hand printed, reading as follows:

BEGINNING MONDAY it will change and whatever it takes to do it will be done. Anyone who wants it and is willing to try will make it, if not the answer is simple they will no longer be here. -- SIMPLE

THE BOTTOM LINE IS --

NO MORE EXCUSES

THIS IS THE LAST

CHANCE. IT IS SERIOUS.

Ex. 199 is an unsigned, undated, hand printed memo as follows:

AND NOTHING EXCEPT THE CORRECT WAY WILL BE ACCEPTED. CONCERNING ANYTHING.

THE ANSWER IS -- WORK AS A TEAM OR THERE WILL BE A NEW TEAM

THE WAY THINGS HAVE BEEN WILL NO LONGER BE ACCEPTED.

Ex. 201 is an unsigned longhand memo as follows:

I expect results immediately -- and by next Friday I will review them and decide what is necessary to do at that point.

Ex. 202 - 205 appears to be a 4 page longhand memorandum signed by Mr. Hammond. It appears to be incomplete because the text of the first page does not begin with a capital letter. It reads as follows:

for over one year our buisness was increasing but our profits were decreasing.

my job was to find out why, by working with the plant manager.

we checked the quotes on all customer parts to see if we had misquoted, and found nothing to indicate we had. we then took completed work orders and check them against the rate sheets, which we use for quoting, and found that we were not making the rates on our equipment, and there was no reason why we could not make the rates, this meant we had inefficiency in the plant. it is the responsability of the supervisor, and lead people to work with and train their pople to make the (Illegible). on 10-21-81. Buck Thacker, the vice president of manufacturing, went to Tenn. and had a meeting with the plant manager, supevisor, and lead people, to let them know the seriousness of the situation, and what was expected of each one, in order to turn the Tenn. div. around, and made it clear, if anyone failed to cooperate with us in turning the div around and did not put forth the effort, they would be terminated.

on 10-23-81 after Buck Thacker's visit, Mike Pittelko had a meeting with these same people to let them know what he expected from each one in order to accomplish the goals set by Mr. Thacker.

he told them he and Wilson Broyles, the supervisor would be working with them and giving them all the help they would need to reach these goals. but if anyone failed to give them the cooperation and put the effort into their jobs, they would be terminated.

on 11-19-81 after Wilson came to Mike and told him that Nelson was not cooperating with him, and that Nelson had a bad attitude toward him and his job. Mike called Nelson to the office and had a meeting with Nelson, and Wilson was present. Nelson was told if he wanted his job he would have to accept the responsability for it, and a bad attitude would not be tolerated.

on 12-9-81 I went to Tenn. and had a meeting with the plant manager, supervisor, and lead men.

at that time I had a meeting with the lead men on an individual basis and pesented each of them with a job discription sheet outlining their responsabilities, had them sign these sheets and gave them a copy.

before every meeting I had with the lead men, I would have a meeting with Mike and Wilson regarding the the progress they felt had been made. and in every meeting Wilson stated he felt like all the lead men were giving him the cooperation and effort he needed except Nelson. he felt Nelson was not trying and did not care. in several instances Wilson recommended that Nelson be terminated because of his lack of cooperation and bad attitude. Both Mike and myself overrulled Wilson because we felt Nelson should be given another change because of the length of time he had been with us and we felt he would come around.

on 2-2-82 Mike called me in Louisville and stated Wilson had come to him and said he could no longer work with Nelson, and something had to be done. Mike said there had been several incidents since our meeting on 1-19-82 which made him agree with Wilson incidents

1-21-82 false information about 758-1 corner post so he would not have to work overtime.

1-23-82 false information about 758-1 corner post so he would not have to work overtime.

1-26-82 false information about hot past for Amonia 1-27-82 walking off job to get his hair fixed after being told he had to work.

2-2-82 not filling out work order on 753-2 causing us to have more parts than needed.

I told Mike to put Nelson on suspension until friday and in the mean time I would review everything in Nelson's file and give him my decision on whether to terminate Nelson or not.

my decision was to terminate because I felt he had been given every oppertunity to do his job, and these incidents were inexcusable.

Carl Hammond

Manager of Mfg. Divisions

Ex. 206 - 210 appears to be an unsigned, undated, hand printed memo. In an upper corner in different colored ink it bears the notation, "Notes made by Wilson Broyles". It reads as follows:

1-25-82

Nelson Miller

On 1/21/82 I got with John Gibbs & Nelson about a 758-1 that was being ran on the finish saw, these parts had to ship by 9:00 on 1/22/82.

I explained that I had to make a decision on shuting the shift down at 3:30 or running to 5:30 to make sure we had the parts. Nelson told me that he could have the parts on time and that he could do it by shuting down at 3:30. Based on this I did not work the overtime but shut down at 3:30.

At 8:10 on 1/22/82 I find out from John that we do not have the parts ready. I went to Nelson to find out why - He had not told me about haveing a problem or anything - Nelson said that we was running the parts the first way and was going to run all of them up first. I told him that he was aware of the time that we needed finished parts and that he had to change over now. He then did change over but we had to hold the truck up till 11:30 of 12:00.

1-25-82

Nelson Miller

On 1/23/82 at 9:30 I got with Nelson on Parts that he was running a 758-1. I explained that we had to have at 2 skids by 9:00 on 1/25/82. That this was a must - That I had to make a decision on where to work till 11:00 or go on to 3:30 to make sure we had the parts ready on time. He told me that he had 2 skids then so we could stop at 11:00. And we were O.K.

At 8:00 on 1-25-82 I got with John and Nelson about the parts, and I find out that we did not have any finish part that Nelson was still running the parts the first way. I ask him about the 2 skids he told me about on Sat. He said what he was talking about was 2 skids ran the first way that he wanted to run all the parts up on the first way before changeing over. I told him to change over now that we had to have the parts by 9:00. Knowing this that he should have made sure he was set-up at 7:00 to run finish parts. He just said O.K. and walked away.

1-26-82

Nelson Miller

At 7:35 I got with John and Nelson about some hot part that had to be at Amana by 12:00 -- a 5176409 - we needed to leave the plant no later than 10:30 to make. I ask Nelson how soon he would be before he had finish parts. He told John and myself that he would have them right after the 9:30 break at 10:00. John was loading the truck and saw that he did not have any 5176409. I got back with Nelson and tryed to find out what happend. Nelson said that he understood he did not have to have finish part untill 12:00. I got back to John about what Nelson said at 7:35, about haveing the finish parts right after the 9:30 break. John said that Nelson did in fact say he would have finish part after the 9:30 break.

2-2-82

Nelson Miller

Mike and I were going over a inventory of a 758-2 part -- Our count of finished parts vs. the work order count was way off. We had more part than we showed running -- But by the work order that we had out we were behind on our dates. We could find no record of any work done on these parts.

I got with Nelson on this and he said that at the time he ran the parts he did not have a work order and he did not have the time to go get one, and when he did get one -- 2 day later -- he said that he forgot to put it on the work order.

I explained to Nelson that because he did not put this on the work order that I was still running this part and that we had over ran the work order and by running this part I had to get behind on another work order. He said that we still could use the parts and we did not lose anything. I told him we lost a lot of time on doing this. He said O.K. and left.

Ex. 211, 212 appear to be a two page, unsigned memo, partly hand printed and partly handwritten, as follows:

Meeting with Carl -- 12-9-81 4:15 to 6:25

EDDIE OLIVER - NELSON MILLER - JOHN GIBBS WILSON - MIKE

1) No one in this room has performed properly this year.

2) Next year bonuses will be considered only on good performances.

3) Chain of command is Mike to Wilson - Eddie, Nelson and John report directly to Wilson. It was made very clear he is their boss.

4) Ne more meetings, direct approach only, you are responsible for certain things and if these responsibilities are not met and constantly kept up you will be given a warning notice if it continues or the sense of urgency does not return - you will be replaced. this was made clear and everyone acknowleged that they understood.

5) Plant will be orderly and clean at all times. Examples of several areas and small items were pointed out by Carl.

6) It was made clear that all employees would develop the attitude of order and keeping all areas clean at all times with the help and training from the lead men and Wilson, if not they will be replaced after being told and warned.

7) Carl emphasized that it must start first with us, we must get our act together and then transfer it to the people.

8) Company policy -- we will start having sessions on all phases of the co. policy booklet to become better able to answer questions that employees ask.

9) VALUE OF ORDER - booklets everyone will read and follow what ideas and guidelines that it has to offer. Carl read several statements from it concerning Initiative and Order and the importance of them.

10) The fact that we may be busy will not be accepted as an excuse nor will anything else. Production must continue it must be improved, order and clean areas must also be maintained and each person will be held directly responsible for his personal areas and the people and material in them at all times.

Ex. 213 is an unsigned, partly hand printed and partly handwritten memo as follows:

11-19-8

3:55

NELSON - WILSON MILLER

I had the following meeting with Nelson and Wilson was present. It covered the following points.

1) If Nelson wanted to keep the job he had, he must accept the responsibility for it immediately.

2) Results must be seen immediately.

3) The small things would be corrected.

4) Bad attitudes or escuses will not be accepted for anything or anyone not doing their job.

NELSON MADE NO COMMENTS

MEETING ENDED AT 4:10 P.M.

Ex. 218 - 223 appear to be an unsigned longhand memo reading as follows:

SUMMARY

2-5-82

on October 23, 1981 at 3:45 I held a meeting of the supervisor and lead people to review what had been relayed to us by Buck Thacker. At that time our problems were discussed and what would be done to correct them and what was expected from the lead people and supervisor was explained. On Dec. 9, 1981 from 4:15 to 6:25 Carl Hammond held a meeting at which all lead people and supervisor were present. He reviewed the performance of everyone and reviewed what was not acceptable, he explained the chain of command and what he expected from each person and set a policy of order, discipline and iniatitive to be followed, first by all lead people, supervisor and myself, and then related to all employees. He also explained that he expected each person

there to show progress and results.

On January 13, 1982 Nelson called in at 9:50 A.M. and said he would not be in because of bad weather, all other lead people and supervisor were at work and on time although several employees were absent due to the weather.

On January (Sat.) 16, 1982 Nelson did not come in because he had to work on some water pipes. All of the people in his area did come in that day, as well as the other lead people and supervisor who had to take over his responsibilities as well as theirs.

On Jan. 21, 1982 Nelson told the supervisor that he had a corner post B1175801 ready and the supervisor used this information in making a decision to work overtime or shut down at 3:30. On 1-22-82 at 8:10 the supervisor found out that Nelson did not have the parts ready at 9:00 to be shipped out. Nelson did not make him aware of any problem and had assured him the parts would be ready. It turned out that the parts could not ship out until 11:30 because of the information received on 1-21-82 that overtime was not needed.

On 1-23-82 Nelson told the supervisor that on a part B1175802 he had ran what was needed and he could shut down at 11:00 and have no problem Monday. The supervisor again used this information to decide production plans for Monday. On 1-25-82 It was discovered that the parts which were supposed to be ready were not, instead they had only finished a secondary operation and were not ready for shipment. Also after being told Sat. by the supervisor to have the machines set up in his area to produce finished parts they were not. At 9:00 A.M. the supervisor got with Nelson about this and made sure he understood that he should have had everything set up for 7:00 Mon. Nelson said he was going to run them the first way and then the finished way. The supervisor said that would be fine, but in this case we needed finished parts and that Nelson was aware of this and yet did not do what was planned to get the parts that were needed.

On 1-26-82 Nelson told another lead man that he would have a part B51764-9 ready at 9:30 he told him this at 7:35 A.M. At 9:30 Nelson told him he didn't think he had to have them until 12:00 and he would do what he could.

On Jan 19, 1982 Carl Hammond again had an individual meeting with each lead person and reviewed with them what their responsibilities and duties are they each were given a copy of their duties and a description of their job. Nelson as well as the other lead people acknowledged again an increase in hourly pay and also signed a job description form that they understood and accepted the responsibilities of the job.

On 2-2-82 it was discovered that build ups for B1175802 had been produced but there was no work order for them. When whilson asked Nelson about this, he said he just had not had time to let him know it and had forgotten to get the work order and put the time and information on it. While Nelson was suspended it was discovered that a major machine in his area was in disrepair. The gears that raise and lower the blades on the saw were badly worn. One of the people who have worked in that area said Nelson told them that there was a "trick" to raising and lowering them. the supervisor, maintenance man, or myself.

In the past 6 months we have had a serious quality problem plant wide.Of all the complaints and rejections well over 50% of them are on corner posts which has been almost the sole responsibility of Nelson in all operations. Although he is the lead person for production areas, his time and the defective parts were produced.

It was clearly defined in his job duties that quality and maintenance were a definite part of his responsibilities and it was his job to control and keep his supervisor advised of problems that he had.

This Court is fully aware of the fact that the private business sector does not always operate in precise accord with what the courts consider "good practice".

This Court is also aware that administrative agencies are not bound to the same strict rules of evidence observed in courts of law.

After making allowances for the foregoing differences, this Court cannot avoid amazement at the form and contents of this record.

Common reason and a sense of justice would suggest to any person, lawyer or laymen, that a person being discharged should be informed of the reason for the discharge in terms of what, when, how and why.

Even though an employee is employed at will and may be discharged at any time without cause and without notice, in view of his statutory rights to unemployment compensation, the employee has a right to have the reasons for his discharge explicitly reported to the Department of Unemployment Security for evaluation of his claim for compensation.

It is not enough to report in nebulous and generalized subjective terms such as "unsatisfactory performance", "did not measure up", or "unsatisfactory attitude". In order to constitute cause for denial of compensation, the reasons for discharge must be in measurable, ascertainable, objective terms.

An accusation of giving false information is too gen-

eral and nebulous to be readily evaluated. Such an accusation should specify the time of the false communication, the contents of the communication and the true facts contradicting the accusation.

An accusation of failure to meet production schedule should include the schedule, a statement of the amount produced and a showing that the scheduled amount could and should have been produced and that failure to do so was due to some specific culpable action or inaction of the employee.

Ordinarily, misconduct forfeiting unemployment compensation must occur after reasonable notice that the misconduct will result in discharge; or the misconduct must be of such extreme and wanton nature as that any reasonable person would anticipate discharge for such misconduct.

As indicated in the record, the precipitating cause of appellant's discharge was his early departure from work on January 28, 1982. He normally left at 3:30. He was scheduled to work overtime until 5:30. He worked one hour overtime, but departed at 4:30, one hour early. He had reported to his superior two days earlier that it was necessary for him to leave at 4:30. He requested permission to do so. He was not granted permission, but was told that he would be "written up" if he did so. It was well understood that a "write up" was something less than a warning which was expected before discharge. It is uncontradicted that other employees left early without even a "write up". There is no evidence that appellant had ever received a "write up" or a warning regarding early departure.

It is uncontradicted that when appellant left at 4:30, his crew had work assigned to them and everything was running smoothly. There is no evidence of any disruption in plant operation by appellants' absence during the last hour of a two hour overtime.

The reason for departure was not a compelling one. Appellant was not faultless in leaving without express permission from his superior. However, in the view of this Court, the departure did not constitute that degree of misconduct contemplated by the statute, TCA 50-7-303 (2) as disqualification for unemployment compensation.

According to the brief filed by the employer with the Board of Review, the other two grounds of disqualification for benefits were "failure to perform job duties" and "insubordination toward a supervisor".

As to "failure to perform job duties", if all of the evidnece in the record is considered regardless of competency, it can be said that appellant's duties were explained to him in general terms on a number of occasions; but this record fails to disclose specifics of precisely what it was that appellant failed to do. It contains no evidence that he ever received a written warning of any kind in spite of the admitted policy and practice of giving written warnings. Moreover, the record contains no evidence that appellant's "failure to perform" consisted of any act or omission which would disentitle appellant to unemployment compensation.

As to insubordination toward a supervisor, appellant admitted that he sometimes was obliged to disregard instructions from either the supervisor or the manager because he had received conflicting instructions from both and could not obey both. This is uncontradicted. Appellant admitted to occasions when he "had words with" or "cussed" Mr. Broyles, but appellant testified that this was "worked out" satisfactorily with Mr. Pittleko, and Mr. Broyles confirmed this in his testimony. This evidence is uncontradicted.

Moreover, as to "failure to perform" or "insubordination" or any other kindred misconduct, the evidence is uncontradicted that, after most of the incidents complained of and shortly before his discharge, appellant went to the plant manager and offered to "step down" (accept a reduction in responsibility and pay) because of the "confusion" (constant demands for improvement and contradictory orders) but that he was informed by the plant manager that he was capable of doing a good job and encouraged to remain in his present position. This circumstance clearly negatives any suggestion that appellant was "on the brink of discharge" when he committed the indiscretion of leaving work an hour early. The alleged misconduct in January, 1982, was not the subject of any warning, and the uncontradicted evidence is that it was not serious enough to merit discharge without warning.

As to appellants "affirmative defense" of a concerted conspiracy to "get rid of him", it appears that the Board believed the denials of Mr. Pittleko rather than the testimony of Mr. Broyles. This finding is of course binding on this Court and will not be questioned. It should be stated, however, that the so-called defense of conspiracy was not a true defense; for, if appellant was guilty of conduct disentitling him to workers compensation, the existence of a conspiracy to fire him would hardly entitle him to benefits.

In summary, this Court finds that there is no evidence in this record of misconduct of sufficient gravity to disentitle appellant to benefits under TCA § 50-7-303 (2) (b).

It is to be earnestly hoped that there can be an improvement in the manner in which claims, defenses and

evidence can be presented and preserved for review so that the courts will not again be required to review a record such as this.

TCA § 50-7-303 (2)(B) states that the employee is "disqualified" for benefits if the Commissioner finds the discharge was for "misconduct connected with his work". However, a number of decisions have interpreted the expression "misconduct connected with his work".

The courts must decide on a case by case basis what constitutes gross misconduct and simple misconduct under the statute. *Troutt v. Clark K. Wilson Co., 219 Tenn. 400, 410 S.W. 2d 177 (1966),* cert. denied, *389 U.S. 13, 88 S ct 116, 19 L Ed., 1d 11, 1967.*

Repeated refusal to carry out instructions of a department manager and supervisors to the harassment and discomfiture of other sales personnel and customers supports a finding of simple misconduct. Ibid.

Excessive absenteeism may be the basis of a finding of misconduct. *Wallace v. Stewart, Tenn. 1977, 559 S.W. 2d 647.*

Disqualification because of misconduct connected with the employer's work is penal in nature and as such will be construed liberally in favot of the employee, and the burden is upon the employer to prove disqualification. *Weaver v. Wallace, Tenn. 1978, 575 S.W.2d 867.*

Evidence that an employee had threatened his superior and had failed after written warnings to report to work on scheduled overtime shifts without notifying his superior was sufficient to sustain a disqualification. *Irvin v. Binkley, Tenn. App. 1978, 577 S.W. 2d 677.*

In Clemons v. Bible, Tenn. App., unpublished, eastern section, 12/4/81, a convenience store employee requested a co-worker to substitute for her during the first two hours of her shift so that she could attend to a personal matter. Store policy required that the store manager be notified of any intended absences. The absent employee relied upon her substitute to notify the store manager. This Court held that the reliance on the coworker was a good faith error in judgment and there was nothing to indicate that the absent employee should have reasonably expected to be summarily discharged for her conduct. This Court adopted from *Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941)* a definition of misconduct as follows:

[L]imited to conduct evincing such silful (sic) or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

In the same opinion, this Court adopted the language of *Babcock v. Employment Division, Or. App. 1976, 550 P2d 1233, and 76* Am Jur 2d. Unemployment Compansation, § 52, pp. 946, 947, as follows:

... [M]isconduct does not mean mere mistakes, inefficiency, unsatisfactory conduct, failure of performance as the result of inability or incapacity, inadvertence in isolated instances, good faith errors in judgment or in the exercise of discretion, minor but casual or unintentional carelessness or negligence, and similar minor pecadilloes. Thus, ordinarily, a single instance of misconduct would not disqualify a claimant.... (Emphasis supplied.) *24 Or. App. 204-05, 544 P. 2d 1067-68,* quoting with approval from 76 Am. Jur. 2d supra at 945-47.

In the same opinion, this Court adopted the criterion for simple misconduct forfeiting unemployment compensation: "Whether, considering all of the circumstances and the nature of the misconduct, the employee knew or should have known that the particular conduct would result in dismissal."

In Gaston v. Bible, Tenn. App., unpublished, middle section 8/20/82 this Court held that shoddy performance by a motel maid was sufficient to disqualify her for unemployment benefits where she received two written warnings, the second being a "final warning" before the final misconduct and discharge. Under the circumstances, this Court held that failure to perform specific acts of housekeeping after written warnings was sufficient to evidence "wrongful intent". In the cited case, the use of records in evidence was approved where their introduction conformed to TCA § 24-7-111, the Uniform Business Records in Evidence Act. However, other evidence, such as an unsigned "write up" were held inadmissible except by waiver in failure to object. Under the unusual procedure heretofore outlined, the claimant made sufficient objection to the bundle of unidentified papers which were evidently transmitted informally some time after the hearing.

In Grantham v. Commissioner, unpublished, Tenn. App. m.s. 3/10/83, this Court reversed a decision denying unemployment compensation and said:

The record is clear that the persons who observed the activity which became the basis for claimant's dismissal were still at work for the employer and were available to testify at the hearing before the Appeals Tribunal. Therefore, the facts were reasonably susceptible to proof under the rules of court, and the agency was not allowed to admit the documents under the statutory exception to the normal rules of evidence.

Although it is uncontroverted that the disciplinary reports are hearsay, the appellee asserts the documents were properly admitted under the Uniform Business Records as Evidence Act. Tennessee Code Annotated, Section 24-7-111 (c) provides:

A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness, testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

We do not think that the reports in this case were properly qualified as business records. There is no testimony in the record that they were kept in the ordinary course of business; it is not clear who made the entries or whose duty it was to observe Mr. Grantham's movements; the records are signed by two company men, a foreman and a supervisor, but it is impossible to tell who actually observed the events recorded in the records; there is no testimony as to when the documents were prepared in relation to the events recorded therein.

Although there is no room for argument that disciplinary reports such as the ones in this record are not admissible at all under the Business Records act since the business of the company is not to keep records that are primarily for use in future labor disputes or litigation, see Palmer v. Hoffman, 318 U.S. L (1943), we have taken a more liberal view in previous cases and admitted such records if the proper foundation is laid. Gaston v. Bible, Tenn. App. (filed August 20, 1982 at Nashville). We think a modern business with all the complications imposed by law and by collective bargaining agreements must keep adequate personnel records and that such records qualify as being in the regular course of business. But that is only one element in the Business Records act and the other elements are equally important. Since the record does not contain proof that the other elements were met in this case, we hold that the disciplinary reports and the letter containing allegations of misconduct by Mr. Grantham were not admissible.

There is another element of this case which we would like to address. Since the unemployment compensation statutes can be penal in nature and work a disqualification, the statutes have been construed liberally. See *Weaver v. Wallace, 565 S.W. 2d 867, 869-70 (Tenn. 1978)*. As such depriving the claimant of an opportunity to cross-examine the witnesses against him works a severe hardship. The right of cross-examination is recognized as foremost among the safeguards to a fair hearing. See McCormick on the Law of Evidence § 245 (2d ed. 1972).

Some states have adopted a rule either by legislation or by administrative action, that in cases such as this the hearsay testimony in the documents may be used, if properly qualified for admission, to corroborate other testimony of the wrongful acts of a claimant, but not as the sole evidence of his or her wrongful acts. See *Lee v. Brown, 148 So. 2d 321, 325* (la. Ct. App. 1962). We think such a rule has merit and adopt it for cases involving unemployment compensation claims which are filed after the date of this decision. This is similar to the rule adopted by the criminal courts in similar cases. See *State v. Henderson, 554 S.W. 2d 117, 119-20 (Tenn. 1977)*.

In particular the two memoranda dated January 25, 1982 and two other memoranda dated January 26, 1982 and February 2, 1982, upon which the employer relies so heavily, should not be considered. There was no semblance of an attempt to comply with TCA § 24-7-111 in terms of authentication, method of making or keeping the records. Moreover, it appears that what is in this record constituted "copies of copies", that is, the notes were apparently made and filed in the plant office and copies were sent to the Louisville office from which copies of its copies were apparently sent to the hearing officer. See McCormick on Evidence, 2nd Ed. § 352, pp. 846 et. seq.

In Simpson v. Bible, Tenn. App. unreported middle section 7/23/82, this Court held that an employee was not disqualified for unemployment benefits by six days of unauthorized absence from work in a 9 month period, where the policy of the employer stated that an employee had 6 days sick leave, and that after 7 days absence the employee would be verbally warned, after the 8th day of absence there would be a written warning, and after the 9th day the employee would be discharged.

This Court concludes that the decisions of the hearing examiners, the Board, the Commissioner and the Chancellor were rendered without competent evidence of misconduct and without any evidence of misconduct which the employee had reason to expect to produce his discharge, ergo without any evidence to support a finding of disentitlement.

The foregoing is dispositive of this appeal under the first issue. This over-long opinion will not be further lengthened to discuss the second issue which is deemed to have merit and to require remand for proper finding of fact if the first issues were not determinative.

The judgment of the Chancellor, and the decisions of the Commissioner, Board and referees are reversed. All costs in the Chancery Court and in this Court are taxed against defendants-appellees. The cause is remanded to the Department of Employment Security with instructions that a proper award of unemployment benefits be made to appellant.

Reversed and Remanded.

BEN. H. CANTRELL, JUDGE, LEWIS H. CONNER, JR., JUDGE

BEFORE THE TENNESSEE REGULATORY AUTHORITY

A Hearing in the Matter of:
Petition for Declaratory Order as to the Applicability of TCA 65-4-104, 65-4-114(1), 65-4-117(3), and 65-4-122(c), and Rule 1220-4-2-.15 to Telephone Directories Published and Distributed on Behalf of BST Containing the Names and Telephone Numbers of AT&T Customers

DOCKET NO. 96-01692

THURSDAY, JULY 17, 1997

BEFORE: CHAIRMAN LYNN GREER
DIRECTOR MELVIN MALONE
DIRECTOR SARA KYLE

APPEARANCES:

For AT&T: Mr. Val Sanford
Mr. James H. Benson

For ACSI and NEXTLINK: Mr. Henry Walker

For MCI: Mr. Jon E. Hastings

For BellSouth: Mr. Guy M. Hicks
Mr. Patrick Turner

For BAPCO: Mr. Guilford F. Thornton, Jr.
Mr. James F. Bogan, III
Mr. John F. Beasley
Mr. William Brewster

Reported by:
Patricia W. Smith, RPR

representing BAPCO. To my extreme left, Jack Beasley will be serving as lead counsel for BAPCO, with the Kilpatrick Stockton firm in Atlanta. Also, Jay Bogan will be assisting Mr. Beasley, along with Bill Brewster, who sits behind me.

And while I have the floor, may I introduce Daniel Thompson, who is vice president and general counsel of the BellSouth advertising and publishing group of companies in Atlanta.

CHAIRMAN GREER: I do not need -- back on the motion to strike, I don't need any testimony. I'm prepared to move too.

Do you have any --

DIRECTOR KYLE: (Inaudible comment.)

CHAIRMAN GREER: Without objection, then we'll go ahead and deliberate.

I'm sorry?

(Court reporter asks for comment to be repeated by Director Kyle.)

CHAIRMAN GREER: She just said I should check to make sure the parties do not have an objection to us moving it in.

DIRECTOR MALONE: Well, Mr. Chairman, I've reviewed the motion to strike Mr. Varner's testimony and the responses thereto, and I would move

that the motion be denied.

DIRECTOR KYLE: I'll vote with you.

CHAIRMAN GREER: Make it unanimous.

Next we have a motion of AT&T Communications of the South Central States for judicial notice.

Do the directors -- do the parties want to comment on the motion? This motion was received 11:00 a.m. -- 11:44 a.m. yesterday.

MR. BEASLEY: BAPCO has no comment about the motion.

MR. HICKS: BST would like to briefly comment, if that's acceptable.

As the Chairman has noted, this motion was filed by AT&T yesterday afternoon. And the first reaction that BellSouth Telecommunications had was that we did not object to the directors taking judicial notice of Items 1, 3 and 4, that is the tariff rules and discovery.

But as to Item 2, our initial thought was we had some concerns about the desire to introduce a complete record of the 1968 rulemaking docket, this No. G4557-68. The question, of course, is why it was filed so late. Why are we being presented with a stack of paper the afternoon before the hearing, when there

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Richard Collier, Esquire Tennessee Regulatory Authority 460 James Robertson Parkway Nashville, TN 37243-0500
[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Henry Walker, Esquire Boult, Cummings, et al. 414 Union Ave., #1600 P. O. Box 198062 Nashville, TN 39219-8062
[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Jon Hastings, Esquire Boult, Cummings, et al. 414 Union St., #1600 Nashville, TN 37219
[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Charles B. Welch, Esquire Farris, Mathews, et al. 511 Union St., #2400 Nashville, TN 37219
[ ] Hand [✓] Mail [ ] Facsimile [ ] Overnight	James Lamoureux, Esquire AT&T 1200 Peachtree St., NE Atlanta, GA 30309
[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Vance Broemel, Esquire Consumer Advocate Division 426 5th Avenue, N., 2nd Floor Nashville, TN 37243
[ ] Hand [ ] Mail [✓] Facsimile [ ] Overnight	Carolyn Tatum Roddy, Esquire Sprint Communications Co., L.P. 3100 Cumberland Circle, N0802 Atlanta, GA 30339

[✓] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight

Val Sanford, Esquire
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