

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

EDDIE JONES
(Claimant)

OCEANIC STEAMSHIP COMPANY
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-106
Case No. 70-1606

The employer appealed from Referee's Decision No. SF-15032 which held the claimant was not disqualified for benefits under section 1256 of the Unemployment Insurance Code and the employer's reserve account was subject to charges under section 1032 of the code. The employer submitted written argument.

STATEMENT OF FACTS

The claimant was employed from August 24, 1969 until October 23, 1969 as a janitor aboard a ship owned by the Oceanic Steamship Company. The claimant holds a Class "C" union permit card. In accordance with terms of a collective bargaining agreement between the employer and the union, he could not continuously be employed by one employer longer than 60 days.

On October 17, 1969 the ship on which the claimant was employed was docked in Honolulu. On that date the claimant was involved in an altercation with his superior, the Third Steward. The Third Steward had requested the claimant to do some particular work to which the claimant objected. The Third Steward was going to call the Chief Steward when the claimant grabbed the telephone out of his hand and a short scuffle resulted.

On October 18, 1969 the claimant appeared before the Master and Chief Steward. He was logged for the incident and informed he would not be put off the ship in Honolulu but he would be discharged at the end of the voyage in San Francisco. Such action was in accordance with the discretion vested in the Master.

When the ship docked in San Francisco on October 23, 1969 the claimant was informed he was discharged. The claimant had logged 61 days on October 23, 1969. He would have been required to leave the vessel on termination of voyage since he had completed 60 days of employment.

Charges were filed against the claimant and he appeared at a Coast Guard hearing. He entered a plea of guilty to the charge of assaulting a superior officer and was granted probation.

REASONS FOR DECISION

Section 1256 of the California Unemployment Insurance Code provides that an individual is disqualified for benefits and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges if the claimant has been discharged for misconduct connected with his most recent work.

In the past we have held that where a claimant leaves a vessel in accordance with the terms of a collective bargaining agreement, such leaving of work is involuntary and a claimant is not disqualified for benefits under section 1256 of the code. (Benefit Decisions Nos. 6613 and 6720) In the two cases cited the claimants had not been logged for any incidents which might have involved misconduct. However, a different factual issue is presented herein. The question which we must decide is whether the claimant's employment ended in compliance with a collective bargaining agreement by which the claimant could not serve more than 60 days or whether he was discharged.

In Appeals Board Decision No. P-B-8 we held that the efficient or real cause of leaving employment is a determining factor in deciding the reason why a claimant's employment terminates.

We believe the principles in Appeals Board Decision No. P-B-8 apply to the matter herein. The facts show the claimant could have been removed from his ship in Honolulu but the employer allowed him to return to San Francisco aboard the ship. He had been informed at the time he would be discharged due to his actions aboard ship and was so discharged on October 23, 1969.

The mere fact that because of circumstances the claimant's actual date of discharge occurred several days after he was told he would be discharged does not change the primary or effective reason for his termination of employment. Further, we do not believe that by failing to immediately remove the claimant from the ship on October 17 the employer thereby condoned the claimant's actions. Consequently, we hold that the claimant was discharged by the employer and his employment did not terminate as a result of the collective bargaining agreement.

The next issue is whether the claimant's discharge was for misconduct.

In Appeals Board Decision No. P-B-3 we found that the four elements necessary to establish misconduct are:

- (1) a material duty owed by the claimant to the employer under the contract of employment;
- (2) a substantial breach of that duty;
- (3) a breach which is a wilful or wanton disregard of that duty;
and
- (4) a disregard of the employer's interests, which tends to injure the employer.

In the instant case the claimant without provocation engaged in an altercation with his superior officer. It was the claimant's duty to obey the orders of his superior and his actions show he breached that duty. Fighting with another employee or, as in this case, with a superior officer, could result in serious harm to other persons. Such actions constitute misconduct within the meaning of section 1256 of the code. We therefore hold that the claimant was discharged for misconduct.

DECISION

The decision of the referee is reversed. The claimant was discharged for misconduct connected with his work under section 1256 of the code. The employer's reserve account is relieved of charges under section 1032 of the code.

Sacramento, California, March 16, 1971.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

DISSENTING OPINION

Our colleagues have concluded the claimant's termination of employment resulted from a discharge by the employer which took place approximately one week prior to the date the claimant was released by the employer. It is our opinion the majority members of this board have committed gross error in reaching such a conclusion.

The same issue that is under consideration in this case was considered extensively by the Court of Appeal in Pacific Maritime Association v. California Unemployment Insurance Appeals Board, 236 C.A. 2d 325, 45 Cal. Rptr. 892. The court concluded that a seaman who terminated his employment, as required by provisions of a collective bargaining agreement fixing limited tenure of employment under a system of job rotation, was not disqualified for unemployment compensation benefits within the meaning of Unemployment Insurance Code section 1256 where at the time of separation he did not in reality choose to quit. The court based their decision in part on the case of Douglas Aircraft Company v. California Unemployment Insurance Appeals Board (1960), 180 C.A. 2d 636, 4 Cal. Rptr. 723. The court in the Douglas case found that whether an employee leaves work voluntarily depends on whether he ceased working voluntarily as a matter of fact at the time he quit. The court, in commenting on the collective bargaining agreement which required the claimant quit work, stated: "The agreement does not control; 'rather the factual matrix at the time of separation should govern.'" In essence the court looked only to the employee's desire to continue working when she was forced to leave. In the Pacific Maritime case cited above the court read the Douglas Aircraft case as establishing a precedent that in all cases of unemployment due to a collective bargaining agreement the most relevant factor is whether the employee wanted to continue working.

With the holding of the court in the Pacific Maritime case in mind, we examine the facts in this case to see whether the claimant, at the time his employment terminated, wished to continue working. The terms of the collective bargaining agreement required that the claimant leave the ship at the end of the voyage when docked in San Francisco. Under the ruling of the Pacific Maritime case the claimant would not have been disqualified for benefits under section 1256 of the code except that the employer claimed that prior to the end of the voyage the claimant had been discharged for misconduct. The alleged act of misconduct occurred while the ship on which the claimant was employed was docked in Honolulu. According to the employer, the claimant's actions were detrimental to the employer's interest, and he was immediately informed that he would be discharged at the end of

the voyage. The employer has offered no reason why it did not immediately replace the claimant and obtain another crew member while it was in Honolulu. If they had done so, we would agree that the claimant was discharged by the employer and that such discharge was for misconduct.

In the usual case of discharge, the employee is not allowed to work and is immediately paid any wages due him. In our opinion an employer who allows an employee to continue working when he feels the claimant's actions are detrimental to the employer's interest condones the acts of the claimant. We realize in certain situations that the employer may not immediately be able to dispense with the services of an employee. Where the ship is on the high seas, the employer cannot very well toss an employee out in a lifeboat. However, in such cases the employee could and should be replaced at the next port of call.

The employer allowed the claimant herein to continue rendering services for it from Honolulu to San Francisco. Therefore, the actual time the claimant ceased to render services should be the controlling factor in deciding whether the claimant was discharged or his employment ended in compliance with the collective bargaining agreement.

The majority members of the board have relied heavily on Appeals Board Decision No. P-B-8 wherein we stated "that the efficient or real cause for leaving employment is a determining factor in deciding the reason why a claimant's employment terminates." It does not seem to us that our colleagues have followed the reasoning on which they rely. We reach this conclusion as the claimant continued to work for several days after he was supposedly discharged. It is conceivable that the employer could have retained the claimant's services after the ship docked in San Francisco by reviewing the claimant's actions and deciding that overall he was a good crew member and retained him for the next voyage. However, the employer could not even give the claimant this consideration as it had to replace the claimant as per the terms of the collective bargaining agreement. Consequently, even though the claimant might have wished to continue working, the employer could not have retained his services.

It is therefore quite clear to us that the claimant's termination of employment on the date his work ceased was in compliance with the collective bargaining agreement and that the claimant should not be disqualified under section 1256 of the code. We do not believe the majority members of this board have followed the law as expressed by the courts in the Pacific Maritime case cited above. As an administrative body we cannot

ignore the law of the courts, especially when the issue in a case which we have under consideration has been decided by the courts.

Furthermore, it is our considered opinion that the majority's holding in this matter presents employers with a method by which they can legitimately circumvent true layoff situations by using a threat of discharge on an ex-post facto basis.

For the above reasons we would affirm the referee and find that the claimant is not disqualified under section 1256 of the code and the employer's account is subject to charges under section 1032 of the code.

LOWELL NELSON

DON BLEWETT