BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 5842 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

LAWRENCE F. CONVERSE
(Claimant)

TRANS WORLD AIRLINES, INC.
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-193

FORMERLY
BENEFIT DECISION
No. 5842

The above-named employer appealed from the decision of a Referee (LA-43899) which held that the claimant was not subject to disqualification under Section 58(a)(2) of the Unemployment Insurance Act (now section 1256 of the Unemployment Insurance Code). In order to obtain additional evidence, the California Unemployment Insurance Appeals Board remanded this case to a Referee for further hearing. Such hearing was held on November 8, 1951, at Monrovia, and a transcript of the evidence obtained by the Referee at the hearing has been referred to this Appeals Board for consideration.

Based on the record before us, our statement of fact, reason for decision, and decision are as follows:

STATEMENT OF FACT

The claimant was last employed by an airline company as a captain-pilot for approximately five and one-half years at a termination wage of $1,200 per month. He was previously employed by the company as a first officer-co-pilot. The claimant was discharged by the employer on April 15, 1951, under circumstances hereinafter set forth and was paid termination pay through May 3, 1951.

On May 25, 1951, the claimant registered for work and filed a claim for benefits in the Monrovia office of the Department of Employment. On June 11, 1951, the Department issued a determination which held that the claimant had been discharged for misconduct within the meaning of Section 58(a)(2) of the Act (now section 1256 of the code). The claimant appealed from the determination and a Referee reversed the Department's determination.

The claimant was in charge of a commercial airplane carrying twenty-nine passengers and a crew of five from Albuquerque, New Mexico, to Phoenix, Arizona. The first officer was piloting the plane as it approached Phoenix for a landing shortly after midnight on March 19, 1951. The plane had received a clearance from the landing tower to land. The first officer ordered the landing gear lowered and the claimant complied with the order. The claimant was in radio contact with the tower and heard the tower give another plane authority to land ahead of the claimant's plane. The claimant then suggested to the tower and the first officer a 360 degree turn be made to the left. Approval was given by the tower. The turn was initiated by the first officer and the claimant retracted the landing gear. Upon completing the turn and approaching the landing field for the second time the control tower cleared the plane to land. The first officer called for "gear down" and later for "approach flaps" and "landing flaps" which orders the claimant testified he executed. The plane was equipped with safety features consisting of signal lights and a horn which indicated the position of the landing gear. When the landing gear control handles were pushed to the "down" position the lights would go on. When the throttles are pulled back preparatory to landing a horn would blow if the gear was not down. As the plane touched the runway the crew observed a sudden thud. The propellers hit the ground and the plane slid a considerable distance to a stop. There was extensive damage to the plane estimated at $250,000 but no injuries were sustained by either the passengers or the crew. During the second approach and the landing of the plane the landing gear was fully retracted and locked in that position.

The claimant testified that he observed the signal lights indicating the landing gear was down and that he checked the landing gear levers while the plane was still in motion and noticed that the same was in the "down" position. He further testified that none of the crew members heard the warning horn although it should have sounded under such circumstances. The claimant attributed the accident to "the fact that the lights were not on. I thought the gear was down. Whether the throttles, which also on this type aircraft are rather hard to pull back, were completely back or not, which causes no horn, I don't know."

As a result of the accident an intensive investigation was conducted by the Civil Aeronautics Board and a report of their findings was released by said board on July 19, 1951. It was found that the probable cause of the accident was the claimant's failure "to place the landing gear operating lever in a full gear 'down' position and to make the necessary checks to determine its position before the landing was made." All warning devices and the landing gear mechanism operated normally when tested after the accident. The claimant testified before the Civil Aeronautics Board that he did not check the position of the landing gear lever after pushing it toward the "down" position and that "it could have been half way down or all the way down."

An adjustment board composed of two representatives of the claimant's union and two company representatives found that preceding the accident the claimant failed to follow established operating procedures in the following respects:

"a. Failure to use check list after his 360° turn prior to landing.

"b. Failure to place landing gear lever in full down position prior to landing.

"c. Failure to make necessary checks to ascertain position of landing gear prior to landing."

REASON FOR DECISION

The statutory provision applicable in determining the issue involved in this appeal reads as follows:

"Sec. 58. (a) An individual shall be disqualified for benefits if:"

* * *

"(a) He has been discharged for misconduct connected with his most recent work, if so found by the commission; . . ."

In Benefit Decision No. 5819 in defining the term misconduct we stated as follows:

"The Appeals Board has consistently applied the definition of misconduct laid down by the Supreme Court of Wisconsin in Boynton Cab Company v. Neubeck, 296 N.W. 636:

> '. . . The term "misconduct" as used in (the disqualification provision) is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which an 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 interest 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 judgement or discretion are not to be deemed "misconduct" within the meaning of the statute.'"

In 27 Words and Phrases (Perm. Ed.) at page 315, in defining the term misconduct and distinguishing it from negligence or carelessness, it is stated as follows:

> "The term 'misconduct' means a transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior; its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness. Mandella v. Mariano, R.I., 200 A. 478, 479.
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> "In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand; and carelessness, negligence, and unskillfulness are transgressions of some established but definite rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness, an abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Citizens' Ins. Co. v. Marsh, 41 Pa. (5 Wright) 386, 394." (Underscoring added)

The term misconduct does not necessarily imply an evil or corrupt motive or an actual intent to injure or damage an employer's interests. It is sufficient if the act, or the failure to act, on the part of the employee be committed or omitted under such circumstances as would justify the reasonable inference that the employee should have known that injury or damage to his employer's interests was a probable result.

In Benefit Decision No. 1777 this Appeals Board considered a matter which presented a factual situation analogous to the instant case. In that case the claimant was employed as an aircraft inspector by an aircraft manufacturing concern. The position was one of responsibility and his duty was to make the final inspection of aircraft prior to its being flight tested. He was provided with an inspection sheet on which were listed numerous individual items which were checked in the course of the inspection, provided the particular part was in place and satisfactorily installed. On one occasion it was discovered that a lock ring had been omitted from the propeller assembly of a completed airplane which had been inspected and passed by the claimant in the course of his duties as final inspector as completely and properly assembled. The claimant contended that although the omitted part was important it was not vital to the successful operation of a plane. The employer maintained that the omitted part was essential to the operation of the plane. The claimant had indicated on the inspection sheet that the item was properly in place. He testified that he was careless at the time, which he attributed to the fact that he was rushed in his work because of a shortage of inspectors. In holding that the claimant was discharged for reasons constituting misconduct, this Appeals Board reasoned as follows:

> "We agree with the Referee that, generally speaking, unintentional mistakes, inefficiency, or failure in good performance as a result of inability or lack of capability would not be considered misconduct as we have interpreted that term. However, the acts which lead to the claimant's discharge in this case far transcend mere inadvertence or incompetence. He was employed as a final inspector and invested with the responsibilities of the position, and he well knew, as did the employer, that any omission on his part to perform the work properly could well result in substantial loss of life and property. In failing to ascertain that an important part of the aircraft assembly had not been installed, the claimant admittedly was careless; further, the undisputed facts show that he proceeded to check and sign his inspection sheet indicating that he had inspected the missing part and that it was in fact properly installed. Considering this last circumstance, and bearing in mind the responsible position held by the claimant together with

> the possible consequences of his act, we are of the opinion that the claimant materially breached a duty owed the employer under his contract of employment as an inspector; that the breach tended substantially to injure the employer's interest; that such breach was misconduct in connection with his most recent work; and that by reason of his discharge as a result thereof, he is subject to the disqualification provided in Section 58(b) of the Act [now section 1260 of the code]."

Considering all of the evidence in the present case, it is our opinion that the preponderance thereof establishes that the claimant failed to follow established operating procedures of his employer in that he failed to place the landing gear lever in full down position and failed to make the necessary checks to ascertain the position of the landing gear prior to the landing of the plane at Phoenix. As the officer in charge of the plane the claimant was charged with the responsibilities of the position, and he knew, as did the employer, that any failure to properly perform his duties could result in substantial loss of life and property. Bearing in mind the responsible position held by the claimant, together with the consequences of his omission, we conclude that the claimant materially breached a duty owed the employer under his contract of employment as a captain-pilot; that the breach tended to substantially injure the employer's interest; that such breach was misconduct in connection with his most recent work; and that by reason of his discharge as a result thereof he is subject to disqualification under Section 58(a)(2) of the Act (now section 1256 of the code).

DECISION

The decision of the Referee is reversed. The claimant is disqualified under Section 58(a)(2) of the Act (now section 1256 of the code) for a five-week period as provided in Section 58(b) of the Act (now section 1260 of the code).

Sacramento, California, January 4, 1952.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

MICHAEL B. KUNZ, Chairman

GLENN V. WALLS

EDWARD CAIN

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 5842 is hereby designated as Precedent Decision No. P-B-193.

Sacramento, California, January 27, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

HARRY K. GRAFE

RICHARD H. MARRIOTT