BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

RICHARD VENEGAS
(Claimant)

LAMINATING CORPORATION OF AMERICA
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-399
Case No. 78-1693

Office of Appeals No. LB-13853

The employer appealed from the decision of the administrative law judge which affirmed the Department's determination and ruling, which held that the claimant was not disqualified from receiving unemployment insurance benefits under the provisions of section 1256 of the Unemployment Insurance Code and that the employer's reserve account was not relieved of benefit charges under section 1032 of the code, on the ground that the claimant's discharge was for reasons other than misconduct in connection with his work. Oral argument was heard.

STATEMENT OF FACTS

The claimant was employed by the appellant employer as a saw operator from October 18, 1976 until October 17, 1977. His last day of work was October 14, 1977.

The employer employs 30 persons; approximately 22 work in the shop area. The employees, who are not organized or represented by any union, worked from 7 a.m. to 5:30 p.m., averaging 60 hours of work per week. The employer's policy regarding complaints required an employee to seek adjustment through an immediate supervisor. If there was no satisfaction of that grievance within a reasonable period, the employee could contact the president of the firm. In August the employees had complained to the president about the manufacturing manager. There were meetings, and ultimately that manager was discharged.

Many of the employees had expressed their dissatisfaction with overtime and unsafe working conditions with the foreman. The foreman had told the vice president that the employees were "uneasy" and objecting to the amount of overtime required. The vice president verified that he had a discussion regarding overtime with the foreman, and that he had been told on several occasions that the employees were unhappy with the amount of overtime.

The president had been on a business trip beginning October 1. He returned on October 13. The following day he had reprimanded employees as to production and inferior workmanship. The employees had spoken amongst themselves of their general dissatisfaction with working conditions at the morning break and at lunch time. After lunch some employees had approached the foreman and had spoken of a walkout. Machines had broken down and the employees knew they would have to work more overtime.

At about 2:15 p.m. on October 14, just after the afternoon break, 20 employees had punched their time cards and left the employer's premises. There was no advance notice to management. The president was told that a representative would return with the employees' demands. There was no picket line set up.

The president and two vice presidents remained at the plant late Friday, October 14, just in case an employee representative contacted the employer with the employees' demands. Management was also at the plant on Saturday. There was no communication from the employees. Management decided what they would do under certain conditions. One solution was termination of the employees. The president was at the plant on Sunday in the event the employees wished to speak to him. The president requested the sheriff's department to have an officer stand by to protect employees who reported for work on Monday.

On Monday morning when the employees who had walked out returned to the employer's premises the building was locked. At 8 a.m. management arrived. The president unlocked the door to permit entry for management and immediately locked the door. Management was unsure of the employees' intentions concerning going to work. An officer told the claimant the employer did not want the employees to report for work. An employee who acted as spokesman told the president that their representative had not appeared,

there would be no violence,but the employees would not return to work until their demands were met. Employees were not in agreement as to why they had walked out, but there was agreement that management was harassing them and that they were discontent with the amount of overtime. The president told the spokesman that the employees were to put their demands in writing and send a representative to speak to management.

One employee was permitted to return to work after the employee signed a petition that the employee had not participated in the walkout. At 9:30 a.m. the employees sent a message to the president that they would like to speak to him as a group. At this point the decision was made to terminate the employees. Later that day each employee was given a final paycheck.

The president testified as follows:

The officer from the sheriff's office was there to keep order, but there was no disorder; the claimant did not attempt to return to work; the claimant would not have been permitted to talk to him unless the claimant was the group representative; there had been many discussions as to overtime and the employees had agreed to work overtime; he would have permitted the employees to return to work on October 17 if they had reported for work; it had taken 120 days to regain full production; the employees had been replaced; the claimant had never been warned about participating in a walkout.

The claimant stated he had no intent to quit. xHe had returned to the employer's premises at 7:00 a.m. on October 17, ready to report for work. He had previously been injured on the job and had told his foreman that there were unsafe conditions at work.

It is the employer's contention that the claimant's discharge was for misconduct in connection with his work; that there was no true trade dispute for there was no uniformity of thought existing between the participating employees as to their reasons for leaving work; if there were grievances, they were not communicated to the employer; and it was essential to examine the merits of the walkout. The employer cites N.L.R.B. v. Ford Radio & Mica Corp., (1958), 42 L.R.R.M. 2620; Rowe v. Hansen (1974), 41 C.A. 3d 512, 520; Maywood Glass Company v. Stewart (1959), 170 C.A. 2d 719, 724;

and Drysdale v. California Department of Human Resources Development (1978), 77 C.A. 3d 345, 142 Cal. Rptr. 495, to support its position that the claimant's participation in a walkout was disruptive of the employer's best interests, and thus an act of misconduct warranting disqualification under section 1256 of the Unemployment Insurance Code.

REASONS FOR DECISION

In pertinent part, section 1256 of the Unemployment Insurance Code provides:

> "An individual is disqualified for unemployment compensation benefits if the director finds that he left his most recent work voluntarily without good cause or that he has been discharged for misconduct connected with his most recent work."

Section 1262 of the code provides:

> "An individual is not eligible for unemployment compensation benefits, and no such benefit shall be payable to him, if he left his work because of a trade dispute. Such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

A trade dispute suspends, but does not terminate, the employment relationship (Mark Hopkins, Inc., v. California Employment Commission (1944), 24 Cal. 2d 744, 151 P. 2d 229). Thus, if the claimant in this case was involved in a trade dispute he was terminated by the employer for such involvement on October 17, 1977. On the other hand, if the claimant, acting individually, walked off his job on October 14, 1977 because he was dissatisfied with working conditions without bringing his discontent to the employer's attention and seeking to remedy the situation, the claimant voluntarily quit without good cause and would be disqualified from benefits under section 1256 of the code (see Appeals Board Decisions Nos. P-B-126 and P-B-8).

In this posture it is essential to determine if there was a trade dispute.

The term "trade dispute" is not defined in the Unemployment Insurance Code or in regulations of the Employment Development Department. We find instructive, however, the National Labor Relations Act and the cases decided thereunder in analyzing what constitutes a trade dispute. Under that Act the term "labor dispute" includes any controversey concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee (29 USC 152(9)).

In Appeals Board Decision No. P-B-24 the Board considered the question of what constituted a trade dispute. Therein it was stated:

> "This board in years past has had many occasions to consider the nature of a trade dispute, and in Benefit Decision No. 6566 we set out the following:
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> " 'The term "trade dispute" is a broad one and may be properly applied to any controversey which is reasonably related to employment and to the purpose of collective bargaining (Benefit Decisions Nos. 5527 and 5719). It is broader than "strike" or "lockout" (Benefit Decision No. 4838), and the existence of a trade dispute is not dependent upon the stoppage of work. . . .'
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> "This board has held in Benefit Decisions Nos. 1020 and 5799 that rejection of an offer made during the course of negotiations, taking of a strike vote, a walkout or a lockout are all actions which would constitute or are indicative of a trade dispute."

Numerous National Labor Relations Board cases have addressed and resolved the question of when employees were engaged in a trade dispute. Of particular interest are the following holdings:

The concerted activity of employees who stage a walkout must be directed toward a dispute concerning conditions of employment (N.L.R.B. v. Okla-Inn (1973), 488 F 2d 498); concerted activity must involve work-related complaint or grievance, further some group interest, seek specific remedy or result, and be not unlawful or otherwise improper (Shelly & Anderson Furniture Manufacturing Co. v. N.L.R.B. (1974), 497 F 2d 1200); employees have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved or collective bargaining be contemplated (N.L.R.B. v. Phoenix Mutual Life Insurance Co. (1948), 167 F 2d 983, 6 ALR 2d 408, cert. den. 335 U.S. 845, 93 L Ed 395, 69 S. Ct. 68); it is sufficient to constitute concertive action if from all facts and circumstances in the case a reasonable inference can be drawn that the men involved considered that they had a grievance and decided, among themselves, that they would take it up with management (N.L.R.B. v. Guernsey-Muskingum Electric Cooperative Inc. (1960), 285 F 2d 8); employees had legitimate interest in acting concertedly in making known their views to management without being discharged for that interest (N.L.R.B. v. Phoenix Mutual Life Insurance Co.)(supra); when griping coalesces with expression inclined to produce group or representative action, concerted activity is present; each statement or act of the employees in isolation is not the test, but totality of conduct which reflects a general dissatisfaction manifesting itself in the desire to do something about the grievance is the test (Hugh H. Wilson Corp. v. N.L.R.B. (1969), 414 F 2d 1345, cert. den. 397 U.S. 935, 25 L Ed 2d 115, 90 S.Ct. 943); the term "concerted activity" as used in the National Labor Relations Act applies to any group action by several or more employees for the legitimate furtherance of their common interests as such, and the express direction of it to the purpose, among others, of collective bargaining seems to extend the right of recalcitrance to any form of legitimate pressure upon the employer calculated to obtain favorable results, including strikes, and all lawful coercive measures to make them effective (N.L.R.B. v. Phoenix Mutual Life Insurance Company, (supra); N.L.R.B. v. Schwartz (1945), 146 F 2d 773; N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co. (1942), 130 F 2d 503; Bethlehem Ship Building Corp. v. N.L.R.B. (1940), 114 F 2d 930 cert. dismd. 312 U.S. 7 110, 61 S. Ct. 448; spontaneous temporary walkouts and work stoppages by employees in protest against excessive heat in building constituted concerted activity for mutual protection (N.L.R.B. v. Southern Silk Mills, Inc. (1953), 209 G 2d 155, reh. den. 210 F 2d 824, cert. den. 347 U.S. 976, 98 L. Ed. 115, 74 S. Ct. 787); discharging of four employees of unorganized group for conducting a temporary work stoppage violated the employees' right to engage in concerted activities (N.L.R.B. v. Kennametal, Inc. (1950), 182 F 2d 817, 19 ALR 2d 562); employees who left plant shortly before quitting time in protest over working conditions were engaged in a protective activity (N.L.R.B. v. Plastilite Corp. (1967), 375 F 2d 343.

These cases set forth the meaning of trade dispute and concerted activity. Thus, if an employee acts with or on behalf of other employees, and not solely by and on behalf of the employee alone, in an activity for mutual aid or protection, which includes everything in which the employees could be said to have a legitimate interest, then the employee engaged in a concerted activity. The cited cases indicate that a trade dispute does exist when there is concerted action, that is, a walkout by the employees.

Spontaneous work stoppages by employees to protest grievances concerning working conditions are protected concerted activities within the scope of the National Labor Relations Act (Elam v. N.L.R.B. (1968), 395 F. 2d 611, 67 LRRM 2929; Morrison-Knudsen Co. v. N.L.R.B. (1966), 358 F. 2d 411, 61 LRRM 2625; N.L.R.B. v. Phaostron Inst. & Elect. Co. (1965), 344 F. 2d 855, 59 LRRM 2175). In N.L.R.B. v. Washington Aluminum Co. (1962), 370 US 9, 50 LRRM 2235) the Supreme Court of the United States held that the language of section 7 of the Act (29 USC section 157) is broad enough to protect concerted activities whether they take place before, after, or at the same time a demand is made. The U.S. Court of Appeals, Ninth Circuit, in Electromec Design Co. v. N.L.R.B. (1969), 70 LRRM 3257) held that employees who fail to present a specific demand at the time they walk out do not cause their walkout to lose its protected status, and, that the decision to walk out does not have to be the most reasonable choice of action available in order for the employees to be protected under section 7 of the Act.

In the case under appeal, the employer gave little consideration to the employees' unrest. There had been no threat of concerted protest. The employees had been working overtime with faulty equipment. The morning of the walkout they were confronted by the president who "chewed them out." The employees had no representative by which they could take advantage in negotiations with the employer; they took the most direct course to let the company know they were dissatisfied with working conditions. They walked out. The claimant's alignment with the employees who walked out indicated his participation in the trade dispute.

In The Ruberoid Co. v. California Unemployment Insurance Appeals Board (1963), 59 C. 2d 73, 27 Cal. Rptr. 878, 378 P. 2d 102, in reference to section 1262 of the code, the Supreme Court of the State of California stated:

"We have recognized that this section expresses the two-pronged and balanced purpose of the state to maintain its neutrality in trade disputes. As Justice Traynor states in Matson Terminals, Inc. v. Calif. Emp. Com. (1944), 24 Cal. 2d 695, 707 [151 T. 2nd 202]: 'The act establishes a policy of neutrality in trade disputes by provisions that the payment or withholding of benefits should not be used to aid either party to a trade dispute. Thus the provision disqualifying a worker who leaves his work because of a trade dispute § 56(a) [now section 1262] is balanced by the provision that other unemployed workers shall not be required to fill the vacated jobs or lose their right to unemployment insurance benefits (citation omitted). The payment of benefits to a claimant who leaves his work because of a trade dispute would conflict with this policy just as would the withholding of payments because a claimant refused to become a strikebreaker.' "

This decision rests on two elements: the first prerequisite involves a volitional test -- the worker must voluntarily leave his employment; and the second, a causational test -- the worker must leave his employment because of a trade dispute. The volitional test must result from the voluntary act of the employee and not from the act of others. (Bodinson Mfg Co. v. Cal. Emp. Comm. (1941), 17 C. 2d 321, 109 P. 2d 935. The causational test finds its origin in the language of the statute. Benefits are denied for the period an employee remains out of work by reason of the fact that the trade dispute is still in active progress. Mark Hopkins Inc. v. Cal. Emp. Comm. (1944), 24 C. 2d 744, 151 P. 2d 229, 154 ALR 1081 held that a claimant is ineligible for benefits if the trade dispute is the direct cause of his continuing out of work.

In The Ruberoid case the employer's discharge and replacement of the striking employees precluded the exercise of the employees' volition. The employees could no longer choose to return to a waiting job or remain on strike, for the employer foreclosed that option. After the employer permanently replaced the employees and severed relationship with them, the trade dispute no longer served as the proximate causation of the unemployment. The act of the employer became the direct cause of the unemployment. The replacement of the worker became the intervening event which cut off the dispute as the cause of the unemployment. By the replacement the employer completely terminated any relationship with the worker. From and after the advent of the replacement, it and not the dispute became the cause of the unemployment. The employer broke the chain of causation between the trade dispute and the unemployment and put in place of the dispute, as the proximate and direct cause of the unemployment, its own counter action, namely the discharge. We have repeatedly held

that a discharge which unequivocally severs the employer-employee relationship is an independent, intervening act which breaks the chain of causation between the claimant's unemployment and leaving of work because of a trade dispute.

The facts of the instant case fall within the holding of The Ruberoid Co. case (supra). The claimant participated in a walkout, a trade dispute, thereby expressing his dissatisfaction with working conditions. He was willing to return to work but was prevented from doing so when the employer terminated his employment. Consequently, we conclude that the claimant was discharged because of his participation in that trade dispute.

In Appeals Board Decision No. P-B-3, based on Maywood Glass Company v. Stewart (supra), we stated that "misconduct connected with the work" consists of four elements:

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.

On the other hand, mere inefficiency, unsatisfactory conduct, poor performance because of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion are not "misconduct."

In Maywood, the court held that the employer has the burden of establishing misconduct to protect its reserve account.

It is apparent in the instant case that the claimant was terminated on October 17, 1977 as a direct result of his participation in a labor dispute. His actions in this regard did not constitute misconduct. Accordingly, the claimant was discharged for nondisqualifying reasons. He may not be denied unemployment insurance benefits under section 1256 of the Unemployment Insurance Code.

DECISION

The decision of the administrative law judge is affirmed. The claimant is not disqualified from receiving unemployment insurance benefits and the employer's account is not relieved of benefit charges.

Sacramento, California, September 5, 1978.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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