STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

#118-218
JANESVILLE AUTO TRANSPORT COMPANY, a foreign corporation,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF WISCONSIN and ARTHUR I. RASTALL,

Defendants.

DIRECTIONS FOR JUDGMENT

Before Hon. Richard W. Bardwell, Judge.

This is an action to review a decision of the Industrial Commission dated July 2, 1965, which affirmed a decision of its appeal tribunal finding that the defendant, Arthur I. Rastall, hereinafter sometimes referred to as the applicant, was not discharged by his employer, The Janesville Auto Transport Company for misconduct connected with his employment within the meaning of Section 108.04(5), Wis. Stats., and that he was therefore eligible for unemployment compensation benefits based upon his employment with the plaintiff-employer.

Applicant had worked for plaintiff for approximately five years during the last six months of which he was manager of the plaintiff's rail head operation in Chicago. Applicant's responsibility was to expedite the removal of new General Motors automobiles from the rail head unloading dock in Chicago and to see that these automobiles were delivered to General Motors dealers in the Chicago area within the terms of plaintiff's contract with General Motors Corporation.

The testimony indicates that applicant had, prior to the instance in question, performed his job quite satisfactorily and had received no complaints whatever from his employer with respect to his work.

The facts in this matter are quite adequately set forth in the findings of fact made by Commission Examiner Max J. Peltin who acted as an appeal tribunal in this case and whose findings of fact and decision were adopted without change by the Commission. Examiner Peltin's findings of fact were as follows:

"FINDINGS OF FACT

"The employer is engaged in the business of transporting automobiles by tractor-trailer units. Its main office is located in Janesville, Wisconsin, and it has a railhead in Chicago, Illinois, to which automobiles are transported by railroad and are there picked up by the employer for delivery to their destinations. The employe had worked for the employer for about five years and was manager of the Chicago railhead during the last seven months of his employment.

"The railhead does the unloading of the automobiles from the railroad cars and provides the necessary men for this purpose. As manager of the railhead the employe had no jurisdiction or supervisory authority over these men, although as a practical matter he attempted to expedite the unloading of the automobiles. Until the occurrence of the incident which led to his discharge, the employe's work had been satisfactory and no other instance of improper conduct on his part was alleged.

"Christmas Day fell on Friday in 1964. During that week the employe and the drivers worked overtime in order to make all deliveries because the employe was considering the possibility of not having the unloading crew or himself work on the day after Christmas (Saturday). During the course of that week he informed the assistant to the director of personnel about not unloading or delivering on Saturday. The assistant did not make any commitment in this regard, but stated that it would depend upon how things went during the week.

"On Thursday the unloading ramp was damaged and was not repaired until 3:30 p. m., and no unloading of automobiles could be done until that time. Since the unloading crew worked only during daytime hours, it was not practical to start unloading at that time and no unloading was done that day. Meanwhile, the employe had arranged with the unloading crew and officials of the railroad that no unloading would be done on Saturday so that the unloading crew would have a long holiday weekend. The employe arranged with the unloading crew to report for work at 6:30 a. m. on Monday,

which was two hours earlier than its usual starting time, so that sufficient automobiles could be unloaded for the employer's drivers who were scheduled to start arriving at 8:30 a. m. On that Thursday the employe informed the personnel assistant that there would be no unloading on Saturday. He was not told that this decision was improper and was not told that unloading had to be performed on Saturday.

"The unloading crew did not report for work at 6:30 a. m. on Monday, but reported at its usual time of 8:30 a. m. The employer's drivers started to arrive at 8:30 a. m. and were delayed in making deliveries until automobiles were unloaded. All deliveries were made in accordance with the time limit provided by the agreement with the railroad and the automobile manufacturer. The employer's director of personnel learned of the delay in the delivery of the automobiles, telephoned the employe as to the reason therefor, and discharged the employe two days later (in week 1 of 1965).

"Although the employer considered that the employe exceeded his authority in making arrangements that no unloading be done on Saturday, this was not alleged as the reason for his discharge. The employer contended that the real reason for his discharge was that he had given false information to the personnel assistant as to the reason for the failure to unload on Saturday, namely, that the railroad refused to unload that day.

"The employe did not wilfully and deliberately give false information to the personnel assistant as to the reason for not unloading on Saturday. He informed the personnel assistant on Thursday that there would be no unloading on Saturday, and he had discussed this with the personnel assistant earlier in the week. The only thing he did not do was to inform the employer that he had suggested that there would be no unloading on Saturday.

"The employe's position was one that required the exercise of judgment and he exercised his judgment in suggesting that no unloading be done on Saturday. The railroad and unloading crew were agreeable to this suggestion and, if they had not been, he would have proceeded with the regular unloading operations

on Saturday. Since it appeared to him that no delay in deliveries would result from this exercise of judgment, this was not an abuse of his discretion. Although he may not have made a full disclosure as to the reason for not unloading on Saturday and may have given the impression to the personnel assistant that it was the railroad's decision, he had not actually said it was the railroad's decision, and the personnel assistant testified that he had not been given false information.

"The employe's conduct regarding this incident may have been unsatisfactory. This was, however, the only instance of alleged unsatisfactory conduct on the part of the employe during the five years of his employment. His conduct in this instance was not of such severity as to evince a wilful, wanton, and substantial disregard of the employer's interests, and did not constitute misconduct connected with his employment.

"The appeal tribunal therefore finds that the employe was not discharged for misconduct connected with his employment, within the meaning of Section 108.04(5) of the statutes."

As indicated, the Commission on July 2, 1965, issued its decision wherein it adopted and affirmed the appeal tribunal's findings and decision allowing the applicant unemployment compensation benefits. This review to the Dane County Circuit Court then followed.

As we view this matter on review, there is only one basic issue confronting the court which may be stated as follows: Did the Commission commit an error in law in concluding that applicant's conduct which precipitated his discharge was not of such severity as to evince a wilful, wanton and substantial disregard of his employer's interests so as to constitute misconduct within the meaning of Section 108.04(5) of the statutes?

The classic definition of the term "misconduct" as used in the statute was set down in 1941 in Boynton Cab Co. vs. Neubeck, 237 Wis. 249, in which our high court defined the term "misconduct" as follows:

"...the intended meaning of the term 'misconduct' as used in sec. 108.04(a), Stats., is limited to conduct evincing such wilful 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. If mere mistakes, errors in judgment or in the exercise of discretion, minor and but occasional or unintentional carelessness or negligence, and similar minor peccadilloes must be considered to be within the term 'misconduct,' and no such element as wantonness, culpability or wilfulness with wrongful intent or evil design is to be included as an essential element in order to constitute misconduct within the intended meaning of the term as used in the statutes, then there will be defeated, as to many of the great mass of less capable industrial workers, who are in the lower income brackets and for whose benefit the act was largely designed, the principal purpose and object under the act of alleviating the evils of unemployment by cushioning the shock of a layoff, which is apt to be most serious to such workers." (Emphasis supplied.)

The foregoing definition of "misconduct" has been reaffirmed by our high court in the recent cases of Gregory vs. Anderson, 14 Wis. (2d) 130; Milwaukee Transformer Co. vs. Industrial Comm.; and Lorraine E. St. John, 22 Wis. (2d) 502. See also Roosevelt D. Tate vs. Briggs & Stratton Corp. and Industrial Comm., 23 Wis. (2d) 1.

It is undisputed that applicant as manager of the Chicago railhead operation for his employer was vested with a good deal of discretion and authority as to just how the unloading job was to be performed. Thus, it is somewhat difficult for this court to see how it can be argued that applicant's conduct amounted to a wilful, wanton and substantial disregard of his employer's interests when he suggested and arranged for no unloading on the day after Christmas.

There is nothing in the record to indicate that the employer at any time had specifically instructed applicant as to the precise extent of his authority and the amount of discretion he was entitled to employ in getting the job done of unloading and reloading the automobiles at the railhead. As a matter of fact, at page 42 of the record Mr. Fuller,

the employer's director of personnel, testified that applicant was in charge of the operations at the Chicago railhead and in such capacity he was entitled to use his own judgment in various situations which might arise.

Actually, if the railroad employees had arrived at the railhead at 6:30 a. m. on Monday morning and had been able to unload all the cars by 8:30 a. m., the subject incident probably never would have been brought to the attention of the employer. Once the employer learned that applicant had arranged with the railroad that there would be no unloading on Saturday, then the employer felt that applicant was wrongfully withholding essential facts from his employer which could have resulted in a serious situation had a severe snow storm developed over the weekend. Certainly we do not think that the applicant should be held responsible for acts of God which might have occurred and prejudiced his employer. Also it should be pointed out that applicant did take rather careful precautionary measures to insure against any adverse effect the agreement not to unload cars on Saturday might have had with respect to the plaintiff. First, he arranged for the drivers to work late Christmas Eve so that they would not have to work on the day following Christmas. Unfortunately, an accident occurred at the railhead which prevented these employees from working beyond 3:30 p. m., but certainly this was no fault of the applicant.

Secondly, Mr. Rastall arranged to have the railroad "spot" the railroad cars before 6:30 a. m. on Monday, and then he made arrangements for the railroad employees to report for work at 6:30 a. m. on Monday (about two hours prior to their usual starting time) so that the cars would be unloaded and waiting for the Janesville truck drivers when they arrived on the scene. Again, it was no fault of the applicant that the railroad employees failed to live up to the letter of their agreement.

Of greater significance, we view the fact that the arrangements made by the applicant not to unload any cars on Sunday did not result in any significant prejudice or damage to the employer. (1) There was no delay in delivery of the unloaded automobiles to the General Motors dealers in the Chicago area. (2) The arrangement not to unload any cars on the Saturday after Christmas did not result in any additional expense to the employer. Actually, it permitted employer to man the Chicago office with only one employee on the day after Christmas rather than the customary office staff of three full time employees. Coincidentally, it was the applicant himself who worked on the Saturday after Christmas so obviously he derived no personal benefit from the rather beneficient arrangement he made for his co-workers. (3) It is conceded that there was no contract violation

with respect to the contract which the employer had with the General Motors Corporation. All of the deliveries involved were made within the letter of the contractual obligations which the employer had undertaken. (4) The Commission found, and we think it is supported in the record, that the applicant did not intentionally give false information to his employer concerning the Saturday unloading arrangements.

At the outset of the hearing employer took the position that applicant was discharged for misconduct, to-wit, failure to follow instructions and established procedures set up by the company. In the course of the hearing it developed that these initial charges were rather unsubstantial and therefore the employer contended that the real reason for applicant's discharge was that he gave his employer false information. We do not think this contention is supported in the record. On the basis of the entire record we feel that the Commission was entitled to infer that Mr. Rastall felt he had the authority and discretion to make the suggestion and arrangement that there be no unloading on the Saturday after Christmas. He may have been in error in assuming that he had this authority but that certainly falls far short of proving the assertion that he deliberately misled and misinformed his immediate supervisor, Mr. Christenson, the only individual to whom applicant allegedly furnished false information. It can be logically argued that applicant gave Mr. Christenson the impression that it was the railroad's decision not to unload on Saturday rather than the suggestion and decision of Mr. Rastall. However, that problem could have been put to rest by the asking of a simple question on the part of Mr. Christenson, i. e., "Won't the railroad unload any cars on Saturday?" The record indicates that applicant and Mr. Christenson discussed the matter of not working on Saturday on a number of occasions during the period immediately preceding Christmas and at no time did Mr. Rastall ever make the statement that the railroad refused to do any unloading on Saturday.

At most what we have here is a single, isolated instance of what might be called unsatisfactory conduct and the exercise on the part of the applicant of bad judgment. When you couple that fact with the conceded admission that applicant's prior record of service for approximately five years was completely satisfactory, you fall far short of establishing the type of misconduct defined in the Neubeck case, supra.

Admittedly, the determination of whether or not applicant's conduct amounts to misconduct within the meaning of Section 108.04 (5) constitutes a question of law and the reviewing court is not bound by the Commission's determination on questions of law if they are incorrect. However, it is clear that a reviewing court will not

independently redetermine each and every legal conclusion of an administrative nature made by the Commission and if the decision or conclusion reached by the Commission is reasonable and supported by the record, the reviewing court will not substitute its judgment for that of the Commission.

We have a situation here of a man working for five years for his employer without criticism or reprimand. He then apparently makes a mistake in judgment by attempting to give his co-workers the day after Christmas off (something which in most other fields of work is becoming quite automatic), as the result of which he is summarily fired just five days before his pension rights in the company vest. We do not disagree with the employer's right to discharge an employee for what the company felt was a breach of faith; however, we must agree with the Commission that the applicant's conduct in the instant situation was not an unreasonable interference with his employer's interests and clearly was devoid of wrongful intent or wanton design, which is synonymous with the term "misconduct" as used in Section 108.04(5).

Counsel for the Commission may prepare the requisite form of judgment confirming in all respects the findings and decision here under review. Copy of said judgment should be furnished counsel for the plaintiff-employer and counsel for the applicant before submission to the Court for signature.

Dated, February 28, 1966.

RICHARD W. BARDWELL
Circuit Judge