Maryland
Department of Economic & Employment Development

William Donald Schaefer, Governor
J. Randall Evans, Secretary

Board of Appeals
1100 North Eutaw Street
Baltimore, Maryland 21201
Telephone: (301) 333-5032

—DECISION—

Decision No.: 735 -BR-89

August 31, 1989

Claimant: Robert Maggio

Appeal No.: 8813926

S. S. No.:

Employer: American Automatic Sprinkler
c/o ADP
ATTN: Gabrielle Allen

L. O. No.: 40

Appellant: EMPLOYER

Issue:

Whether the claimant was discharged for gross misconduct or misconduct, connected with his work, within the meaning of Section 6(b) or 6(c) of the law.

— NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THEAPPEAL MAYBETAKENIN PERSON OR THROUGH AN AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, IF YOU RESIDE IN BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON September 30, 1989

—APPEARANCES—

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD

Upon review of the record in this case, the Board of Appeals reverses the decision of the Hearing Examiner. The Board concludes that the claimant was discharged for gross misconduct, connected with his work, within the meaning of Section 6(b) of the law.

The claimant was a truck driver for American Automatic Sprinkler Systems, Inc. He was paid $8.00 an hour for full-time work. He was terminated from this employment on November 15, 1988.

On his last day of work, the claimant was directed to pick up some material in his truck from a company named Grinnell. Both the employer and the claimant were aware that the workers at Grinnell Company were on strike. They also believed that there was probably a picket line set up at the warehouse at which the claimant was to pick up the supplies. The claimant did not follow the instructions but instead returned to the office. At the office, the claimant was again instructed to pick up the materials at Grinnell. The claimant explicitly refused to do so. The claimant also used some improper language which aggravated the manager, and he was fired.

The facts above, found by the Board, are not substantially in dispute. There was some dispute in the testimony. Under the employer's version of events, the claimant's language was much more vulgar and profane than under the claimant's version. More importantly, the employer and the claimant's testimony differed concerning the exact instructions given by the employer. The employer's testimony was that the claimant was told to drive the truck to the Grinnell warehouse and evaluate the situation, reporting back to the employer if it appeared that there was any danger involved in making the pickup. The claimant's testimony was that the employer ordered him to drive the truck across any picket line, regardless of the danger or the consequences. Were it necessary to make a decision on credibility, the Board would find the employer's testimony more credible, since it is difficult to believe that the employer would wish to risk its own equipment and its own driver's safety to pick up a load of materials. The Board decision, however, is based on the bare findings of fact made in the above paragraph, as that is all that is necessary to decide the case.

It is clear that the claimant never actually even saw a picket line. His refusal to make the pickup was based on his hearing that a picket line was present and his blanket refusal to make any pickup in the presence of a picket line. Where an employee alleges that an order by the employer would endanger his health and safety, the burden is on the employee to show this danger. In this case, the claimant, not having even seen any picket lines, has not shown that the employer's order involved any danger or was unreasonable. The Board does not agree with the Hearing Examiner's conclusion that the delivering of goods in situations where a picket line exists

is by definition dangerous to the driver's physical health and safety. The claimant's flat refusal to make the pickup without having even seen a picket line shows that he has not met his burden of proving that there was any unreasonable risk to himself in following the employer's order. Since the claimant has not shown that the employer's order was unreasonable, his failure to abide by it is a deliberate violation of a standard the employer had a right to expect, showing a gross indifference to the employer's interest.

The claimant's failure to even observe a picket line renders immaterial the exact instructions given him by the employer. If the picket line proved to present a real danger, and if the employer nevertheless insisted on the claimant's crossing of the picket line to make the pickup, the refusal would not be misconduct.

The Hearing Examiner's determination of credibility was based on a factual assumption which is not shared by the Board. The Board concludes that it would have made sense for the employer to have asked the claimant to go back and evaluate the situation, since it is not self evident that the existence of a picket line automatically entails physical danger to a delivery driver. Since the Board does not share the assumption that the existence of a picket line is synonymous with physical danger, the Board believes that it would have made perfect sense for the employer to have asked the claimant to physically observe and evaluate the situation.

DECISION

The claimant was discharged for gross misconduct, connected with the work, within the meaning of Section 6(b) of the Maryland Unemployment Insurance Law. He is disqualified from the receipt of benefits from the week beginninG November 13, 1988 and until he becomes re-employed, earns at least ten times his weekly benefit amount, and thereafter becomes unemployed through no fault of his own.

The decision of the Hearing Examiner is reversed.

Thomas W Keech
Chairman

Associate Member

K:HW
kbm

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Theodore S. Litwin, Esq.

UNEMPLOYMENT INSURANCE - EASTPOINT

William Donald Schaefer
Governor
J. Randall Evans
Secretary

1100 North Eutaw Street
Baltimore, Maryland
21201

Maryland
Department of Economic & Employment Development

— DECISION -

Date: Mailed: March 20, 1989

Claimant: Robert L. Maggio

Decision No.: 8813926

S.S. No.:

Employer: American Automatic Sprinkler Systems, Inc. c/o ADP

L.O. No.: 40

Appellant: Employer

Issue: Whether the unemployment of the claimant was due to leaving work voluntarily, without good cause, within the meaning of Section 6(a) of the Law.

— NOTICE OF RIGHT OF FURTHER APPEAL —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE, OR WITH THE APPEALS DIVISION, **ROOM 515,** 1100 NORTH EUTAW STREET, BALTIMORE. MARYLAND, 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON April 4, 1989

— APPEARANCES —

FOR THE CLAIMANT:

Robert L. Maggio - Claimant
Mary Maggio - Claimant's Wife

FOR THE EMPLOYER:

Ignacio Rain,
General Manager
Theodore S. Litwin,
Esq., ADP

FINDINGS OF FACT

The claimant's first day of work was June 9, 1986 and his last day was November 15, 1988. He was full-time, at the rate of $8 an hour, as a truck driver.

Presently, the claimant is employed by the Sun Paper, as a full-time paper handler. This job began February 17, 1989.

The weight of the credible evidence reveals that on November 15, 1988, the claimant was given a delivery schedule, which included the Grinnell Co., a supply house. The claimant was advised by the general manager, Mr. Rain, that the Grinnell warehouse personnel were on strike. The claimant, who had talked with other co-workers, was told that there was a picket line out side of the Grinnel premises, which would have made it difficult for him to have performed his job duties in a manner which would have been safe for him and for the company vehicle which he was driving. Nevertheless, the claimant was instructed by his superior to cross a picket line if indeed one existed. The claimant insisted that he was not going to cross any such picket line. He became excited and he did use inappropriate language towards his employer, but he did so due to the excitement and seriousness of the situation in which he found himself.

The claimant's refusal to return to the Grinnell site in order to pick up material was reasonable under the circumstances. It does not make any sense whatsoever that Mr. Rain would have asked the claimant to go back to Grinnell simply to evaluate the situation, when the claimant had already apprized his supervisor that to the best of his knowledge there was indeed a picket line and to cross it would be dangerous.

As a result of this confrontation, the claimant was terminated that day for insubordination.

CONCLUSIONS OF LAW

The case of Peterson vs. Browning-Ferris Industries [252-SE-86], states that a claimant, truck drivers refusal make a direct order to make a delivery constitutes gross misconduct, absence of findings that claimant's refusal of was due to saftey problems with his truck and that these concerns were communicated to the employer.

In the present case, the claimant communicated his concern to his supervisor, Mr. Rain, that crossing a picket line could be dangerous to both his physical well being, and the physical condition of the company vehicle in which he was driving. Therefore, the instant case falls into the exception outlined by the Peterson holding.

DECISION

It is held that the claimant was discharged, but not for misconduct or gross misconduct connected with the work, within the meaning of Section 6(c) of the Maryland Unemployment Insurance Law. No disqualification is imposed based upon his separation from his employment with American Automic. The claimant may contact his local office concerning his other eligibility requirement of the Law.

The determination of the Claims Examiner below is hereby modified accordingly.

Judy-Lynn Goldenberg
Hearing Examiner

Date of Hearing: February 1, 1989
bch/Specialist ID: 40303
Cassette No. : 0592, 0593
Copies mailed on March 20, 1989 to:

Claimant
Employer
Unemployment Insurance - Eastpoint (MABS)

Theodore S. Litwin, Esq.