STATE OF MARYLAND
HARRY HUGHES
Governor
KALMAN R. HETTLEMAN
Secretary

DEPARTMENT OF HUMAN RESOURCES

EMPLOYMENT SECURITY ADMINISTRATION

1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201
383-5032

– DECISION –

DECISION NO.: 942-BR-81

DATE: October 15, 1981

CLAIMANT: Sheldon L. Weaver

APPEAL NO.: 14129

S. S. NO.:

EMPLOYER: Roadway Express

L. O NO.: 4

APPELLANT: CLAIMANT

ISSUE Whether the Claimant was able to work, available for work and actively seeking work within the meaning of Section 4(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. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE SUPERIOR COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT November 14, 1981

– APPEARANCES –

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD

The Board of Appeals, having reviewed the entire record in this case, disagrees with the conclusions reached by the Appeals Referee.

The Claimant was a dockworker for Roadway Express, Inc. for approximately four years. He was laid off from his full-time employment on December 30, 1980.

The Employer sometimes has intermittent employment available for laid off employees. This employment consists of one day's employment at a time. The laid off employees are notified in the order of their seniority of the availability of this employment. The notification of the availability of each day's employment is given over the telephone to the employee's house. The notification generally is given only within a few hours of the time when the work shift is supposed to start. Sometimes, the notification is given within a half hour of the time when the work shift is due to begin.

During the week in question in this case, the Employer called the Claimant a number of times.

On Sunday, March 8, 1981, the Employer called the Claimant at approximately 6:00 p.m. for the purpose of offering work available at approximately 8:00 p.m. that night. There was no answer at the telephone when Employer attempted to call. On Tuesday, March 10, Employer called at approximately 1:30 p.m. No one answered the telephone.

On Thursday, March 12, the Employer called the Claimant's home at approximately 6:00 p.m. The Claimant's wife answered the phone and responded that he was not home. On Friday, March 13, the Employer called the Claimant at approximately 9:00 p.m. The Claimant's wife answered the phone and responded that he was not at home. On Saturday, March 14, the Employer called the Claimant. The Claimant answered the phone and, when he was informed of the availability of employment, he reported to work. On the next day, March 15, the Employer called the Claimant again. Once again, the Claimant was at home, and he agreed to work the available intermittent work.

The Claimant worked, during the week in question, all the available hours of work of which he was actually aware. The Claimant did not call the Employer every day in order to check out the availability of work on that day, but the Claimant did call the Employer often. When the Claimant did make these calls, the response from the Employer would usually be ambiguous.

CONCLUSIONS OF LAW

The Board of Appeals concludes that the Claimant was able and available for work during the period in question. The Claimant made himself available for all intermittent work with his former Employer of which he was actually aware.

There is no requirement in the contract of employment that the laid off employee be available twenty four hours a day, seven days a week to answer any possible phone calls from the Employer concerning intermittent employment. Even if there were such a provision in the contract, the Board would not find a contract containing such an onerous provision to define the rights and responsibilities of the parties within the meaning of the Maryland Unemployment Insurance Law.

Although an agreement between an Employer and an employee, or an Employer and the employee's union, can be important evidence in cases where the crucial issues are the agreement, breach of the agreement, the duties of either party, the procedures that should be followed regarding personnel actions, or the gravity to "be given to various personnel offenses, the agreement itself can nevertheless not bind the Board of Appeals when the Board is interpreting the unemployment insurance law. The final interpretation to be given actions of Employers and employees as they relate to the provisions of the Maryland Unemployment Insurance Law is to be independent of any interpretations placed on such actions by any agreement of the parties.

It must be remembered that this case arises under Section 4(c) of the Unemployment Insurance Law. That section requires a Claimant for unemployment insurance to actively seek work. That law has been consistently interpreted to mean that a Claimant must actively seek full-time work. In addition, in the great majority of cases (although there are some exceptions not relevant to this case) the Appeals Division has interpreted 4(c) of the Law to require personal contacts by claimants with prospective employers in order for the claimants to be eligible for benefits under Section 4(c). If the Employer's contention, which in reality amounts to a contention that an employee must be available at the telephone, twenty four hours a day, seven days a week, in order to be available for work under Section 4(c) of the Law, is upheld, a Claimant would be placed in the impossible position of being unavailable for work under Section 4(c) of the Law if he stayed home by the telephone and also unavailable for work under Section 4(c) of the Law if he went out looking for work. The Board of Appeals does not agree that the provisions of the law should be interpreted in such an absurd and onerous way.

The Appeals Referee has erroneously relied on the Board's decision in Poland v. Roadway Motor Express, Decision No. 121-BH-81. That decision should not be read to mean that an employee who may be called by the Employer for intermittent work must remain constantly in a position to receive the employer's phone calls in order to be available for work. The Claimant in that case had not called the employer to inquire about work and had, in fact, refused work offered by the employer. The Poland decision was based on a finding that the claimant was not, in fact, actually seeking work, and was based in part upon a negative evaluation of the Claimant's credibility.

Since the Poland decision was issued, the Board has continued to evaluate the issues raised by this situation. in Evans v. Roadway Express, Decision No. 828-BR-21, the Board upheld an Appeals Referee's determination that a claimant was unavailable for work under similar circumstances. The Board, however, by limiting the disqualification to the one week for which the facts showed that the Claimant was not available for work, established a preferred method for dealing with a case such as this. That method is for each claim to be evaluated on the facts brought to light concerning each individual week. In two other cases, Pryor V. Roadway Express and Smith v. Roadway Express, Appeal Nos. 16126 and 16127, the Board remanded the cases to the Appeals Referees for specific findings regarding the specific weeks in question. In each of these remands, the Board noted:

> the fact that a claimant may be in violation of his Union contract, by not always answering the phone calls of the Employer, doesn't necessarily, in and of itself, mean that the Claimant is in violation of Section 4(c).

Such decisions reflect the Board's agreement with the Referee's decisions in some cases regarding the Claimants' actual availability for work during specific weeks, but these cases do net establish the policy read into the Poland case by the Referee in this case because some employees of Roadway Express, Incorporated, who are laid off and who are working intermittently under the same policies, have been found to be unavailable for work during certain weeks, there should be no inference that there is a general policy established disqualifying anyone who is not home to answer the telephone.

The crucial question in each case is whether or not the Claimant was actually available for work during the week in question. There is no doubt that there may be some instances in which the pattern of phone calls, or the pattern of Claimant activity, is such that the Board will conclude that the Claimant was not actually seeking work. The Board, however, does net find that the failure to answer the telephone on any specific can disqualify a Claimant when that Claimant is required by Section 4(c) of the Law to be actively seeking other employment during that same week in question.

In summation, each individual case has to be determined on its own merits. There is no requirement that a Claimant be available to answer every phone call, since the Claimant is actually required in most cases to be out of the home looking for work. An Employer offering part time, intermittent work cannot, by practice, contract or otherwise, define for its laid off employees the requirements of Section 4(c) of the Law.

DECISION

The Claimant was able, available and actively seeking work within the meaning of Section 4(c) of the Maryland Unemployment Insurance Law for the claim week beginning March 8, 1981.

The decision of the Appeals Referee is reversed.

Thomas W. Keech
Chairman

Hazel A. Warnick
Associate Member

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CLAIMANT

EMPLOYER

Robert L. Mills,

UNEMPLOYMENT INSURANCE - HAGERSTOWN