COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

LABOR DISPUTE - 470.2
Unemployment prior to labor dispute or stoppage of work -- Lack of work

DECISION OF COMMISSION

In the Matter of

Ronnie Carter, et al

T. M. Coal Company
Pennington Gap, Va. 24277

Employer

Date of Appeal To Commission: February 9, 1978

Date of Hearing: N/A

Decision No.: 10493-C

Date of Decision: June 23, 1978

Place: Richmond, Virginia

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This is a matter before the Commission on appeal by the claimants from the decision of the Appeals Examiner (No. UI-78-242), dated January 18, 1978.

ISSUE

Were the claimants unemployed due to a labor dispute in active progress within the meaning of § 60.1-52 (b) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT AND OPINION

The claimants Carter, Earley, Crider, and Woodward were all last employed by T. M. Coal Company, P. O., Box 190, Pennington Gap, Virginia. Claimant Neely appears to be strickened from the Notice of Claims Filed During Labor Dispute (Form VEC-AE-15) with respect to T. M. Coal Company (hereinafter referred to as T. M.). Although Neely apparently worked for T. M. Coal Company in the third quarter of 1977, it appears that he was subsequently employed by C & C Coal Company (hereinafter referred to as C. & C.) during the fourth quarter of that year.

Since Neeley was not employed by T. M., his claim is remanded to the Deputy with instructions to ascertain his last thirty day employing unit, and appropriately determine his claim for benefits.

Claimants Earley, Woodward, and Crider were separated from T. M. on November 18, 1977 for lack of work. Although Earley has testified that he was hired by, received checks from, and was laid off by C. & C.,

and indeed he has presented a separation slip from that employer, the Commission takes judicial notice of the employer contribution reports filed with this Commission by both C & C and T. M. and finds as fact that the claimant was last employed by T. M.[1] All of these claimants received recalls to work which were sent out by T. M. on December 8, 1977.

The claimant Carter was laid off on September 16, 1977 for not being qualified for his position. This lay off was taken to arbitration and was decided in favor of Carter on November 22, 1977. On November 23, 1977 Carter reported to T. M. and was informed there was no work. By letter dated December 1, 1977 Carter was informed that he would be reinstated as soon as work was available and that recall would be based upon seniority. Subsequently, Carter received his lay off slip dated September 16, 1977 and his recall notice dated December 8, 1977 at the same time.

United Mine Workers of America, of which all claimants were members, went on strike on December 6, 1978.

Section 60.1-52 (b) of the Virginia Unemployment Compensation Act provides in part that an individual shall be eligible to receive benefits only if his unemployment is not due to a labor dispute in active progress. The question that this Commission must therefore answer is whether the unemployment of the claimants, who were laid off prior to the labor dispute for lack of work, was due to a labor dispute in active progress pursuant to § 60.1-52 (b) of the Act. Since the eligibility criteria of the Virginia Unemployment Compensation Act are dynamic, we must insure that the claimants meet eligibility requirements during each and every week of their claim for benefits.

Since claimants Earley, Crider, and Woodward were all laid off effective November 18, 1977 and respectively initiated their claims effective November 20, November 20, and November 27, 1977, it is beyond contravention that for the claim weeks preceding the initiation of the labor dispute on December 6, 1977 their unemployment was caused by lack of work rather than a labor dispute in active progress. Furthermore, since the recalls to work were sent by the employer on Friday, December 8, 1977 and instructed the claimants to report to work on the next scheduled shift, it is apparent that the unemployment of those claimants during the claim week ending December 9, 1977 was also due to lack of work. Hence those claimants cannot be rendered ineligible from the effective date of their claims to December 9, 1977, by virtue of § 60.1-52 (b) of the Act.

Having decided that the claimants' unemployment prior to the recalls was due to lack of work, the Commission's scope of inquiry then narrows to whether the claimants' unemployment subsequent to the recall by the employer was due to a labor dispute in active progress. The well enunciated general rule is that if unemployment is

[1]That finding in no way affect the facts concerning separation, but merely which employer will receive any benefit wage charge which might occur as a result of this claim.

originally due to lack of work and a labor dispute develops during the unavailability of work, the dispute does not disqualify until work becomes available and the claimant refuses such work because of the labor dispute. See, Clapp v. App. Bd., 325 Mich. 212, 38 N. W. 2d 325 (1949); Abbott v. App. Bd., 323 Mich. 32, 34 N. W. 2d 542 (1948).

In order for the eligibility provision contained in § 60.1-52 (b) to apply, it must be shown that there is a causal connection between the unemployment of the claimants and the labor dispute. The mere existence of a labor dispute subsequent to unemployment caused by lack of work will not, ipso facto, terminate the claimants eligibility to receive unemployment compensation. The vital factual question is therefore whether there is work available at the employer's place of business during the time of the dispute (or in the present case, from the time of recall on December 8, 1977). Muncie Foundry Division v. Review Board, 114 Ind. App. 475, 51 N. E. 2d 891 (1943). The facts regarding availability of work at any given period of time are generally matters peculiarly within the knowledge of the employer. Therefore in attempting to bring otherwise eligible claimants within the scope of the labor dispute denial, the burden of proof that work was available but the claimants were unemployed due to a labor dispute in active progress should logically rest upon the employer. BeMac Transport Company, Inc. v. Grabiec, 20 Ill. App. 3d 345, 314 N. E. 2d 242 (1974). (Underscoring supplied)

In the present case all claimants were originally unemployed because of lack of work. The employer, by letter dated two days after the initiation of the nationwide coal strike by the UMWA, recalled all employees to work. The pivotal questions to be decided by this Commission are whether such a recall was bona fide and whether work was actually available. The Commission concludes that such questions must be answered in the negative.

The employer, who has the best knowledge as to the facts regarding availability of work, failed to appear and offer testimony to demonstrate that work was indeed available. The only scintilla of evidence which would lead to such a conclusion is the self serving letter of recall which was sent to the claimants, who had previously been laid off, two days after the initiation of the labor dispute. On the other hand testimony by claimants who had appeared before the Appeals Examiner revealed that three employees who had responded to the recall were told to go home because there was no work for them. Also, since the condition of lack of work is indisputedly evident until at least December 8, 1977, the prior existence of this condition is in human experience some indication of its probable persistence or continuance at a later period. See, BeMac, supra; 2 Wigmore on Evidence § 437. Finally, the probability that work, for an employer who had been closed for some three weeks and who had laid off some employees with no expectation of recall[2] became immediately available just two days after the initiation of a nationwide coal strike strains credulity.

[2]See Appeals Examiner's transcript, Exhibit 2.

Therefore the Commission is of the opinion that the employer ha failed to carry his burden of demonstrating that work was actually available on the date of the recall issued on December 8, 1977. Moreover, based on the testimony offered by the claimants and the reasonable inferences which can be drawn from the circumstantial evidence of the date of recall, we conclude that work was not available at the time of the recall and that the unemployment of the claimants was due to lack of work rather than a labor dispute in active progress.

Having found that the claimants were not unemployed due to a labor dispute in active progress, we wish to address one unarticulated issue which might possibly be raised. Our finding that there was no available work precludes disqualification of the claimants pursuant to § 60.1-58 (c) of the Act for having failed without good cause to accept suitable work when offered since there was never a bona fide offer of work.

Our decision in this matter does not do violence to the general rule stated above, but in reality is consistent therewith. This matter has simply turned upon the weight of evidence and the employer's failure to carry his burden of demonstrating the availability of work. To decide otherwise would, in our opinion, frustrate the legislative intent of the neutrality of the labor dispute provisions. If the employer need not establish the availability of work by a preponderance of the evidence, such intended neutrality would be esmasculated and instead the labor dispute provisions of our Act could be used to frustrate the payment of benefits to those who were in fact unemploye through no fault of their own because of lack of work.

DECISION

The decision of the Appeals Examiner with respect to Leonard Neeley is hereby vacated. The claim of Leonard Neely is hereby remanded to the Deputy with instructions to ascertain the claimant's correct last thirty day employing unit and to appropriately determine his claim for benefits.

The decision of the Appeals Examiner with respect to Carter, Crider, Earley, and Woodward is hereby reversed. It is held that those claimants were not unemployed due to a labor dispute in active progress. The Deputy is directed to determine the eligibility of those claimants in accord with the principles enunciated in this decision.

W. Thomas Hudson

W. Thomas Hudson
Director of Appeals