

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ADVANCE BOILER & TANK COMPANY

and

**INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS, AND HELPERS OF AMERICA, LOCAL 107**

Case 15

No. 68801

A-6365

(Termination Grievance)

Appearances:

Joel S. Aziere, Attorney, Davis & Kuelthau, S.C., 300 N. Corporate Drive, Suite 150, Brookfield, WI 53045, appeared on behalf of Advance Boiler & Tank Company.

Matthew R. Robbins, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 N. RiverCenter Drive, #202, P.O. Box 12993, Milwaukee, WI 53212, appeared on behalf of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers of America, Local 107, and Grievant Tom Falesnik.

ARBITRATION AWARD

Advance Boiler & Tank Company, herein the Company or Employer, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forger and Helpers of America, Local 107, herein the Union, are parties to a collective bargaining agreement in effect at all times relevant herein and which provides for the final and binding arbitration of certain disputes. The Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission to resolve a grievance filed on behalf of Union member Tom Falesnik, herein Falesnik or Grievant, concerning his termination from employment with the Company. The Commission designated Commissioner Paul Gordon to serve as arbitrator. Hearing on the matter was held in Milwaukee, Wisconsin on July 28, 2009. A transcript was prepared and made available to the parties. The parties filed written initial briefs and the Company filed a reply brief on September 18, 2009. The Union did not file a reply brief and the record was closed on September 21, 2009.

ISSUES

The parties did not stipulate to a statement of the issues. The Company states the issues as:

Whether the Company had cause for terminating Tom Falesnik after he fraudulently claimed UC benefits for a five week period during which he was working for and being paid by the Company?

The Union states the issues as:

Was the Grievant discharged for just cause?

If not, what is the remedy for that?

The undersigned frames the issues best reflecting the record as:

Was there just cause to terminate Grievant's employment after he claimed unemployment compensation benefits for five weeks while working for and being paid by the Company?

If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 12. Grievance and Arbitration Procedure

Section 1. A grievance, for the purpose of this article, shall be defined as a dispute between the Company and any of its employees or the Union with respect to the interpretation, application, or violation of any of the provisions of this Agreement. It is agreed that grievances will be reduced to writing, if requested, signed by the aggrieved employee or employees, and will be presented for the first step, and each successive step, in the grievance procedure within five (5) working days unless mutually waived by both the Company and the Union. The steps for handling grievances will be as follows:

* * *

Section 4. In the event the Arbitrator does not find just cause for the discipline or discharge, then the Arbitrator will determine the remedy.

* * *

ARTICLE 18. Matters Pertaining to Management

Section 1. The management of the Company and the direction of the working forces, including but not limited to, the work to be performed, the locations of the operation, the schedules of operation, the methods, processes and means of operating, the establishment of reasonable Company rules of conduct and rules of safety practice, the authorization of leaves of absence, the scheduling of hours and shifts and the right to hire, promote, demote, transfer, discharge or discipline for just cause and lay off employees are the sole and exclusive responsibility of the Company.

The functions of Management shall also include but not be limited to the right of the Company in its discretion, in whole or in part, to increase or diminish operations, increase or change productive equipment, establish reasonable shop rules and subcontract work, provided the Union is informed prior to such subcontracting.

The Company shall retain the above and all other rights and privileges except as specifically modified or abridged by this Agreement.

Section 2. Nothing contained herein, however, shall be construed as granting the right to discriminate against any employee. All employees shall have the right to register complaints, submit grievances, and to testify in any way without jeopardizing their employment.

ARTICLE 19. Company Rules

The Company agrees to supply each employee with a copy of the rules and regulations of the Company, or amendments thereof, concerning management, safety, fire protection, etc. These rules and regulations shall not be so devised as to abridge the rights of employees guaranteed by this Agreement. Any Company rule when enforced shall be subject to the grievance procedure.

BACKGROUND AND FACTS

Grievant had been employed with the Company for approximately nine years before his employment was terminated by the Company on November 6, 2008 for filing false unemployment compensation (UC) claims while working for and receiving wages from the Company. He was a member of the bargaining unit and was the Union Steward for about four and one-half years before his termination. In early 2008 his Steward activities began to accelerate, and in the two or three months before his termination he had filed five or six grievances with the Company for bargaining unit members. There are about 30 employees at the Company. About a month before his discharge when he was filing a grievance with a plant manager, the manager told Grievant that the President of the Company was going to shove the grievance up his, Grievant's, back side.

The Company has a policy manual which contains work rules. When Grievant started his employment with the Company he signed a receipt that he had received the manual and understood the rules. The manual states, among other things:

PART II. WORK RULES

To promote the welfare and safety of all employees, to maintain order, discipline and efficiency, and to protect the employees' and the Company's interest, Management considers the enforcement of certain rules of conduct essential. The Company has adopted and will enforce the following rules. The purpose of these rules is to encourage and require co-operation toward mutual objectives – orderly, lawful and responsible standards of conduct among all Company employees and safe work practices.

The following outlines are not intended to cover every situation in which the Company may impose disciplinary action. The rules are intended to be used as guidelines so that employees may be aware of the general limits of acceptable conduct.

Penalties set forth are also intended as guidelines. Individual cases may require more severe or less severe penalties depending upon the circumstances.

MAJOR WORK RULES

A violation of these rules will result in serious disciplinary action up to and including discharge:

* * *

8. ATTEMPTED or ACTUAL THEFT or MISAPPROPRIATION or REMOVAL FROM THE PREMISES of any Company property or similar actions involving any other person's property or other property in the Company's care and custody.

* * *

The manual also contains a section for Minor Work Rules, whose violation will result in a written warning. Any combination of six (6) written warnings in a year result in termination pursuant to the Minor Work Rules.

From very late 2003 into very early 2004 Grievant had been laid off and then called back to work. While laid off he filed for and received unemployment benefits through the State on the Company account. After he was back working and receiving wages he continued to file for and receive unemployment benefits. After a few weeks the Company became aware of that and management told him that now he was back to work and needed to stop filing for unemployment. He was told by the Company that he was not entitled to those benefits. He

stopped filing. He was not disciplined by the Company for that. At the end of the year the unemployment benefits he had received while working were eventually repaid by him by deduction from his taxes.

In mid September of 2008 Grievant took a voluntary lay off for one week. For that week he was entitled to and filed for unemployment compensation benefits, which he received. He was recalled to work and began working again for the Company on or about September 22, 2008. He continued to be employed by the Company thereafter and earned wages at all relevant times until his termination. After Grievant returned to work on September 22nd he continued to file each week, by telephone, with the State for unemployment compensation benefits, and received unemployment benefits for that period of time. He falsely and intentionally indicated to the State agency that he continued to be laid off from the Company. He did this for five consecutive weeks through the week ending October 25, 2008, receiving \$355 for four of those weeks and \$352 for one week.

Other than for the initial week he was actually on layoff, Grievant knew that he was not entitled to the continued unemployment compensation benefits that he was filing for. He testified at the hearing that he needed quite a lot of dental work. His dental insurance runs from year to year. He got an estimate from his dentist between \$5,600.00 and \$6,000.00. He took the voluntary layoff, and during that time he had two teeth pulled and then came back to work. He got an infection in his mouth that he had to go to the emergency room for and got an IV. He contacted his dentist and was told it was very good that he had gone to the emergency room because the infection could have reached his brain and possibly killed him. He kept filing for unemployment in order to get his dental work taken care of. That was to have teeth pulled. He would have had to go back the beginning of the following year to get plates because his dental insurance only covers up to \$1,500 per year. He testified that was why he decided to steal from UC.

The Company receives, approximately weekly, unemployment insurance reserve fund balance statements from the Department of Workforce Development Division of Unemployment Insurance. These statements show, among other things, transactions descriptions showing the Company's reserve fund balances at the start of a period, benefit charges, benefit adjustments, and reserve fund balances at the end of the period. The statement shows which employees were paid what amounts in specific weeks. For the weeks relevant in this case, Grievant's name, social security number, wages reported, amount charged for each week, week number and ending week are set out. This is consistent with Grievant's testimony and that of the Company President, Ken Griffioen. Payments made by the UI Division to each listed employee are then debited against the Company's reserve balance. The statements for each week relevant here show at least four to six different employees of the Company receiving UC benefits.¹

¹ The relevant exhibit, C-2, does not indicate if these are all such employees or if there are more shown on unattached pages.

The Company contributes to its reserve balance through the unemployment compensation payroll tax that the Company pays. The tax rate is based essentially upon the Company's layoff or unemployment history. The Company's tax rate is the highest tax rate available and the tax rate has remained constant for a number of years. The statement shows a negative balance of over \$200,000.00.

Although the Company receives the statements weekly, it does not review them immediately. They sometimes accumulate for several weeks. In this matter the Company reviewed its statements received October 3rd through October 29th towards the end of October. It received the final relevant statements on or about October 29th and November 7th, that covered claims made by Grievant for the weeks ending October 18th and 25th, 2008. When the three statements it did have were reviewed by the Company the last week of October, Grievant's claims were noticed for weeks he was already back at work and being paid through the Company payroll.

Griffioen considered Grievant's actions as grounds for discharge and considered major work rule #8 violated as the UC fund balance was Company property and Grievant therefore was stealing from the Company. Griffioen contacted the Union Business agent, Blane Thom, to indicate to him what had happened and to tell him he was going to terminate Grievant unless there was a reasonable explanation for Grievant receiving the benefits. Thom did not think termination was warranted. The next day Griffioen confronted Grievant about the UC claims and asked him if there was a valid reason or he would be terminated. Grievant said words to the effect that: I'm not taking anything, or stealing, from you, I'm taking, or stealing, from the state. He had no other explanation for receiving the UC benefits. He also may have mentioned something about his dental work, but the record is not clear on that. Prior to this he had mentioned that he had dental problems.

The Company then terminated Grievant's employment. A letter to him of November 6, 2008 stated in pertinent part:

It has come to my attention that you were filing false unemployment claims from the week ending 9/28/08 thru the week ending 10/19/08. As a result of this action on your part, your employment with Advance Boiler & Tank Co., LLC has been terminated effective 11/6/08.

After Grievant was terminated the Union Steward position was filled by Barry Hallett. As to a discussion with a manager about the use of a truck and what the union contract states, Hallett testified that he was told that all stewards try to go over and beyond what the contract states and get fired. He also testified when asked: Do you think it's wrong to make a fraudulent claim to unemployment comp? "No". He further testified when asked: So he can commit fraud against the state and that is acceptable? "No".

Grievant grieved his termination contending he was unfairly terminated for theft, that he in no way attempted to steal from the Company and did not violate a major rule violation policy. Noting some of his employment history, including working with people stealing from

the Company, he stated his filing for unemployment in no way in his mind was considered stealing from the Company, and he would never knowingly do or condone that. The Company denied the grievance and this arbitration followed.

Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

The Company

In summary, the Company argues that the Grievant engaged in conduct in which the Company had a disciplinary interest. For five weeks Grievant knowingly collected unemployment benefits he knew he was not entitled to, and lied about it each week as he made his claims with the State Agency Division. He had done this before, in 2003/2004, and was told then by the Company that he was not entitled to continue to request UC benefits. The Company has a disciplinary interest in this misconduct. Under Wisconsin's unemployment law, an account balance is maintained for each employer which increases with employer tax payments and decreases with UC benefit payments. The account balance is a factor in computing the employers UC tax rate. Fraudulent claims, like Grievant's, either increases or prevents a decrease in the employer's tax rate. This constitutes stealing from the employer, citing arbitral authority. Here, Grievant stole from the Company when he repeatedly lied to the Division regarding his employment status and knowingly collecting UC benefits to which he was not entitled. An employer is to expect honesty from employees, who have a responsibility not to steal from the employer. Theft of such a nature gives rise to a presumption that the employer's business is adversely affected, citing arbitral authority.

The Company argues that the discipline imposed reasonably reflects the Company's disciplinary interest. Discharge was appropriate for the misconduct of stealing from the Company. Grievant knew this was a violation of major work rules which could result in discharge. He had engaged in this conduct in the past and been warned such behavior was unacceptable. Yet time after time for five weeks he lied about his employment status to illegally collect UC benefits at the Company's expense. Grievant had a Union leadership position, and only stopped stealing after he was caught by the Company. He astonishingly refuses to admit the wrongfulness of his action, and both he and the current union steward maintain stealing from the UC system is acceptable. Discharge was for just cause. Theft is a violation of major work rules; the consequence is serious discipline up to and including discharge. Grievant had these rules, read and understood them. He was on notice his actions could result in his discharge. Moreover, he had filed fraudulent claims for UC benefits in the past and when the Company found out he was told he was back to work now, you need to stop filing for unemployment. Rather than merely show he had not received discipline for this past incident, it shows he had been directly told by the Company that this precise conduct is unacceptable. And he was on notice of that while committing the instant conduct. This is similar to another arbitration case, *Advance Cast Stone*, where filing fraudulent UC claims put employees on notice that the conduct was prohibited.

The Company also argues that Grievant, as a union steward, was charged by the union to act in a leadership capacity to guide others on employment matters. His conduct, and refusal to recognize its wrongfulness, is particularly disturbing. The notion that stealing from the Employer or the state is somehow justifiable is perpetuated by the testimony of the current union steward who did not think it wrong to make a fraudulent claim to unemployment comp. The Company argues that Grievant's theft alone justifies discharge. His refusal to recognize that his actions were wrong, and the Union's support in this regard, is contemptible and should not be legitimized.

The Company maintains that Grievant's using the money he stole to pay for dental treatment is irrelevant, and he failed to explore other options to pay for dental treatments. He didn't ask the Company for financial assistance. He simply decided to steal. And to merely recoup the UC benefits through his income taxes is akin to a stealing bank teller having the intent to pay the money back later. The money Grievant obtained would only be paid back if he were caught. And his argument that the Company tax rate did not go up is irrelevant and baseless. The rate may decrease if, among other factors, there are fewer claims made. Discharge is not disproportionate to the offense, but is reasonably related to the misconduct, citing arbitral authority.

The Union

In summary, the Union argues that where, as here, the allegation is theft, the highest burden of proof is applicable to cases where the alleged grounds for the discharge of an employee involves social stigma, citing arbitral authority. The leading case for improperly collecting unemployment compensation benefits is *Hygrade Food Products Corp.* There, it was required a showing that there was an effect upon the Employer's contribution rate. Also, there was no showing there was theft from the Employer which had violated the Employer's rules, and no property of the Employer was taken. Arbitral authority establishes four elements to sustain a discharge for improperly obtaining UC benefits: 1) a specific rule that prohibits the improper collection of UC benefits; 2) the individual acted in a fraudulent manner; 3) if undetected, the conduct would have a detrimental or potential of a detrimental effect on the employer's contribution rate; and 4) the employer is experiencing a current or near current problem involving fraudulent collection of UC benefits of a substantial and significant nature. The Employer in this case has not proven the elements necessary to justify discipline much less economic capital punishment.

The Union argues that the Employer relied solely on major work rule 8. That rule would not put an employee on notice that improperly obtaining UC benefits from the State would lead to discipline or discharge. That rule applies to the taking of the Employer's property or other property on the Employer's premise, and is the type of rule found inadequate in other arbitral decisions. The Employer here has been at the highest rate for years and it provided no evidence that the four or five weeks here would have any effect upon its rate – it is highly unlikely that it would do so. There is no evidence of a substantial and current problem of UC fraud. As to intent, the Employer's failure to take any action previously can justifiably lead an employee to believe that this was not a matter of particular concern to the Employer, which was at the highest rate anyway.

The Union also argues that the failure to discipline Grievant when he was not a steward suggests that the motive for the discharge was his activity as a steward. In 2008 Grievant became more active in his steward duties, filing several grievances in the three months before discharge. The advice that the CEO would shove it up his back side was a clear threat of retaliation for filing a grievance. This intent to retaliate for steward activity is reflected in comments after the discharge of Grievant. Hallett became the new steward and was told by management that stewards always get fired. The timing of the discharge and the fact that the Employer had not disciplined in the past for the same activity leads to the inference that the discharge was in retaliation for protected activity.

The Union further argues that Grievant was a nine-year employee with no past discipline. He obtained the UC benefits because of a medical emergency, as he could have died. While it may not have been proper, Grievant's conduct was understandable and the Employer lost nothing. Grievant believed he was not taking anything from the Employer and stated as much in his meeting with Mr. Griffioen and in his grievance.

The Union contends that the Employer has failed to meet its burden with the four elements of a disciplinary case for improperly obtaining UC benefits and the clear inference that the discharge was in retaliation for steward activity, as well as Grievant's clean work record and emergency circumstances, the discharge cannot be sustained. The Union asks that Grievant be reinstated and made whole for all losses.

Company Reply

In summary, the Company replies that the four part test used in the *Hygrade Food Products Corp.* cases cited by the Union are Michigan cases which are different than the standards used in Wisconsin, such as *Advance Cast Stone*, as well as in other states, citing arbitral authorities. In some of those cases the Grievant was clearly discharged for just cause even if his fraudulent claims for UC benefits did not actually raise the Employer's tax rate. When an employee fraudulently claims UC benefits he is stealing from the Employer. The fact that the Employer already pays the highest tax rate does not mean there is no harm suffered by the Employer because the fraud deprives the Employer the opportunity to lower its tax rate. Work rule 8 prohibits attempted or actual theft of property. Fraudulent claims for UC benefits constitute theft from the Company. Grievant violated a major work rule for which the rules state he may be discharged. Grievant would have been discharged for just cause even if there were no written rules against theft, citing arbitral authority.

The Company argues the Union's brief resorts to emotional appeals and outrageous claims of anti-union animus. Necessary dental treatment does not justify his conduct and is irrelevant. While Grievant may have informed the Company president he needed dental treatment, Grievant never indicated to the Company that he was in need of money for such treatment, ask for a loan, financial assistance or seek any state aid. He failed to explore these options. His emotional appeal is less convincing because he committed the same offense in the past when he assumedly did not have such treatments to pay for. Rather than being discharged

in retaliation for his activities as a union steward, Grievant's conduct and his refusal to recognize the wrongfulness of his actions make it even more reprehensible. He was in a leadership position responsible for guiding other workers on employment matters. Allegations that Grievant and the current steward were warned against union activity do not change the fact that Grievant stole from the company. Given Grievant's admittedly defrauding the unemployment system and the current steward's statement that it is acceptable to defraud the system, their testimony can be awarded absolutely no credibility. If the Union believed the argument that the Company retaliated because he was a union steward, why it did not file an unfair labor practice charge is because it knows this argument is absurd and without merit.

The Company requests the grievance be denied.

DISCUSSION

The issue in the case is whether there was just cause to terminate Grievant's employment after he claimed unemployment compensation benefits for five weeks while working for and being paid by the Company. There is no question that he made false and fraudulent unemployment claims for five weeks and received UC benefits while he was working for and being paid by the Company. The payment of those claims is reflected on the Reserve Fund Balance Statements as charges against the Company's balance.

The collective bargaining agreement between the parties contains a just cause standard for discipline or discharge. The agreement does not further define just cause. Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, *Elkouri & Elkouri*, HOW ARBITRATION WORKS, Sixth Edition, p. 948. In essence, two elements define just cause. The first is that the Employer must establish conduct by the Grievant in which it had a disciplinary interest. The second is that the Employer must establish that the discipline imposed reasonably reflects its disciplinary interest. See, *BIG BUCK BUILDING CENTER*, A-6354 (Gordon, July, 2007). See also, *AMERIGAS PROPANE*, A-6129 (Gordon, April, 2006). That is the standard that will be used here. The parties argue differing sets of standards to determine whether filing fraudulent UC claims is just cause to impose discipline or discharge. These differing standards will be addressed in determining whether the Employer has established conduct in which it has a disciplinary interest.

There is a dispute between the parties as to the significance of the Company being at the highest tax rate and the resultant effect of Grievant's false UC claims. To the extent that the Grievant has argued that the Company was at the highest UC tax rate and his fraudulent claims would not affect that, the undersigned rejects such argument. The Employer pays into the UC fund through its UC tax rate which is based in part on claims made against the fund by

the Company's employees. Filing false UC claims has an effect on keeping the tax rate high and, as argued by the Company and recognized by arbitrators,² deprives the Company of the future ability to get a lower rate or get that lower rate sooner. Filing false and fraudulent claims has the effect of the Company paying out more than it need have in UC taxes. The Company pays a tax rate that goes into a fund. It has an account balance impacted by draws against that fund by laid off employees, among other things. By this connection between Grievant's employment, the Company's payment of UC tax, and fraudulent claims made for UC benefits, Grievant has used the UC system in actions similar to attempted or actual theft or misappropriation of Company property.

Article 19 of the agreement recognizes the Company's right to make and enforce rules and regulations. The Company has established work rules. As to those rules, the Company policy manual states in pertinent part:

The following outlines are not intended to cover every situation in which the Company may impose disciplinary action. The rules are intended to be used as guidelines so that employees may be aware of the general limits of acceptable conduct.

Penalties set forth are also intended as guidelines. Individual cases may require more severe or less severe penalties depending upon the circumstances.

MAJOR WORK RULES

A violation of these rules will result in serious disciplinary action up to and including discharge:

* * *

8. ATTEMPTED or ACTUAL THEFT or MISAPPROPRIATION or REMOVAL FROM THE PREMISES of any Company property or similar actions involving any other person's property or other property in the Company's care and custody.

* * *

Grievant had received the policy manual and the above referenced preamble and rule prior to the events involved in this case and was familiar with them.

² As cited by the Company, NATIONAL UNION ELECTRIC CORP., 77 LA 815 (Traynor, 1981). See also, *Brand*, DISCIPLINE AND DISCHARGE IN ARBITRATION, p. 240 (False unemployment claims may also effect the company's premium).

The Company certainly has an interest in protecting its property. That property may be in any of several forms, including its financial accounts and financial obligations. As set forth above, this also includes its unemployment compensation tax obligations and its reserve balance in the system, be that a debit or credit balance. It has an interest in its tax rates. Thus, the Company has a financial interest in preventing its employees from filing false and fraudulent unemployment compensation claims on the Company account.

There is no dispute that Grievant knowingly filed five false and fraudulent unemployment compensation claims for five consecutive weeks. Grievant admits he did this, though he denies he violated major work rule 8. Filing a false and fraudulent unemployment compensation claim is an action which is similar to attempted or actual theft or misappropriation of Company property. Major work rule 8 covers Grievant's actions. And, as noted in the preamble, the rules are not intended to cover every situation, but to be used as guidelines. Indeed, as a practical matter not every action that might result in discipline is expected to be codified by a specific rule of an Employer. But here, as noted, major work rule 8 gives Grievant notice of the type of conduct to be avoided and covers the facts of this case even if there is no specific rule against filing a false and fraudulent unemployment compensation claim. Grievant argues that he had previously drawn two weeks of unemployment compensation several years ago when he returned from a layoff, the Employer knew about this and took no disciplinary action. The Employer's failure to take an action previously, argues the Grievant, can justifiably lead an employee to believe that this was not a matter of particular concern to the Employer. This argument fails. In the prior incident Grievant was told by the Company that now he was back to work and needed to stop filing for unemployment. He was told by the Company that he was not entitled to those benefits. Thus, Grievant knew, or should have known, that he was not to file false unemployment claims on the Company's account. Rather than being given a reason to believe he could make such claims in the future without serious consequence, he was being warned not to do so. Grievant deludes himself to think otherwise. The record amply demonstrates that the Company has established conduct on the part of Grievant in which it had a disciplinary interest.

Grievant argues that the standard to be applied in determining if filing false unemployment compensation claims constitutes just cause for discipline or discharge is controlled by two cases that involved employees of the Hygrade Food Products Corporation allegedly improperly drawing unemployment compensation benefits from the State of Michigan. HYGRADE FOOD PRODUCTS CORP., 66 LA 216 (Roumell), HYGRADE FOOD PRODUCTS CORP., 73 LA 755 (Chiesa). Grievant argues that the Roumell award establishes a requirement for discipline is a showing that there was an effect upon the employer's contribution rate. In that case there was no showing on that record that the amounts received by the grievants there had any effect on the company's contribution rate. As pointed out by the Union, in that case the arbitrator then further held there was no showing that there was any theft from the Employer which had violated the Employer's rules against theft, and no property of the Employer was taken. Grievant's reasoning and use of the Roumell award is unpersuasive for several reasons. Initially, that award is not binding in this proceeding the parties here have not stipulated to the use of it. It is based on a detailed examination of certain

aspects on Michigan unemployment compensation law, and there is nothing in that case to indicate the grievants there had been previously told not to file for unemployment compensation while they were at work for the company. The undersigned is not persuaded that there must be shown an actual effect or change on the UC rate paid by the Employer or that the filing of false claims affects that rate at some point. Moreover, arbitrator Roumell found that fraud had not been established so as to support a violation of any company rules against theft. In this case, however, Grievant had previously been specifically told not to file for unemployment compensation benefits while working for the Company. Importantly, there is no question of the establishment of fraud here. Grievant's own testimony established this:

Q: I'll make it simple. You lied every week, didn't you?

A: I claimed unemployment every week.

Q: And you lied about working at Advance Boiler those five weeks, didn't you?

A: Yes.

Q: You did this once before in, you said, late 2003, early 2004 when you were called back to work and continued to request UC benefits, correct?

A: Correct.

Q: And you were told that you were not entitled to those benefits by Rick Burns, correct?

A: Correct.

Q: So you knew that you weren't entitled to claim UC in 2008 when you came back to work, correct?

A: Correct.

Q: But you did it anyway, didn't you?

A: Was that a question?

Q: Yes.

A: Correct.

(Transcript, pp. 39-40)

Q: Did you ever file for Medical assistance for any of this?

A: No.

Q: Instead you decided to steal from UC?

A: Yes.

(Transcript, p.41)

Without fraud established in the Roumell award there was no finding of a rule violation. Here that is different, and as explained above, this fraud did violate a Company rule.

In the second Hygrade Food Products case arbitrator Chiesa determined to apply a four part test argued for by Grievant here, which he contends was not met by the Company. Arbitrator Chiesa identified four elements an employer must prove to sustain a discharge for improperly obtaining unemployment compensation benefits.

- 1) The employer must have a specific rule which clearly and correctly prohibits the improper collection of unemployment compensation benefits.
- 2) The employer must establish that an individual acted in a fraudulent manner.
- 3) The employer must establish that if the conduct had gone undetected, it would have a detrimental effect on the employer's contribution rate or at least would have had the potential of a detrimental effect.
- 4) The employer must show that it is experiencing a current or near current problem involving the fraudulent collection of unemployment benefits and that the problem is of a substantial and not insignificant nature.

Again, the Chiesa award is not binding in this proceeding, the parties have not stipulated to the use of it, and the undersigned is not persuaded that the four part test has any reason to be adopted here. The need, or not, for a specific rule concerning false or fraudulent unemployment compensation claims filed on an employer's account has been discussed above. The next two elements, by implication, are dealt with in the traditional two part just cause analysis. And, no persuasive reason has been advanced here why any employer must have a substantial problem involving fraud before it can take disciplinary action against an employee who has demonstrated fraudulent conduct in connection with his employment and violated a work rule in the process. Here, the Company established that Grievant violated a Company rule by knowingly committing fraud, and that violation has a negative financial consequence to the Company. The just cause analysis requires that the Employer establish conduct on the part of the employee in which it has a disciplinary interest. That generally accepted standard of just cause has been met. As argued by the Company, that is the standard applied in a very similar Wisconsin case of ADVANCE CAST STONE COMPANY, A-4946 (Jones, December, 1992). In that case there had been a prior notice to employees that failing to report earned wages to the Unemployment Compensation Division while on layoff would subject them to discharge. The grievant there then filed false claims for unemployment benefits and was discharged. Arbitrator Jones recognized the premise that if an employee drawing unemployment compensation benefits earns wages but does not report it, such conduct amounts to stealing from the company that paid taxes into the unemployment compensation fund. There, the employee was drawing unemployment benefits on the employer's account while working "under the table" for someone else and did not report that income. The premise recognized by arbitrator Jones applies equally well here, where Grievant was drawing unemployment compensation on the Company's account while at the same time working and receiving wages (from the employer) and not reporting that income to the Division.

Even more widely accepted arbitral considerations in falsification cases frequently consider a combination of factors rather than one particular factor in determining if falsification has been proven (or a reasonable penalty imposed). Some of the more frequently considered factors are intent, motivation, effect of the falsification, and clarity and consistency of the company policy. See, *Brand*, DISCIPLINE AND DISCHARGE IN ARBITRATION, pp. 233-240. There is no dispute that Grievant filed false claims. These factors do, though, aid in assessing the significance of what he did. Applied here, Grievant's conduct was intentional, not merely an error or mistake. He was motivated by personal gain as he had a personal dental need to meet. The effect of his falsification has a negative financial consequence to the Company in prolonging its high UC tax rate and eliminating the possibility of a sooner reduction in that rate. It also involves the funding from the state of Wisconsin and uses the employment nexus to more broadly impact financial interests of the Division. Also, as considered by some arbitrators, *Id.* p. 235, the effect of falsification can have a negative affect on fellow workers. That is the case here, where the succeeding union steward testified to the effect that he did not think it wrong to make a fraudulent claim to unemployment compensation. (Transcript, p. 44). Grievant had clearly been told in 2004 not to file unemployment compensation claims after returning to work and he clearly understood that he was not to do this. While no specific contract language addresses filing false unemployment compensation claims, there is major work rule 8 which Grievant knew existed. In Grievant's nine years of employment he has not been disciplined, but was clearly told not to do exactly what he has now done again so that he cannot feign ignorance or error. His candor does not help him much, if at all. While he admitted to doing what he did when confronted by Griffioen, his response was to the effect that he was not stealing from the Company, but stealing from the state. (Transcript, pp. 19, 37). He admits he decided to steal from UC. (Transcript, p. 41). The record amply demonstrates that the Company has established conduct on the part of Grievant in which it has a strong disciplinary interest.

Grievant presents several defenses and makes several arguments why he should not be discharged. He argues that as he was not disciplined for the prior conduct before he was a union steward, this suggests the motive for discharge was his activity as a steward. In 2008 he became more active as steward, filing several grievances in the three months before his discharge, in one instance being told by a manager that the CEO would shove it up his backside. Grievant argues his discharge is retaliatory. He argues the retaliation is also reflected in the comments by management to the new steward that stewards always get fired. The Company argues that the only relevance to Grievant being a union steward is that as a steward in a leadership position charged with the responsibility for guiding other workers on employment matters, his misconduct and refusal to recognize the wrongfulness of his actions is even more reprehensible. It also maintains that the credibility of the two union witnesses is compromised because Grievant admitted defrauding the Company and the current steward stated it is acceptable to defraud the system. The undersigned is not persuaded that the discipline was retaliatory due to union activity. It is not unusual that comments of the type Grievant testified to are made in labor relations. And there is no evidence in this record that,

other than Grievant, union stewards always get fired. The fact that Grievant was not disciplined before does not show a retaliatory intent now, but rather only that he was specifically told not to file such claims while back to work and that he now should have, and did, know better. There are no other instances in the record where an employee was treated less severely after having first been instructed not to do this, as Grievant was. Significantly, there is nothing in the record to credibly demonstrate that any other Company employees have filed false and fraudulent unemployment compensation claims on the Company account and not been discharged for it, especially those not involved in union activities. He is not being treated differently than anyone else due to his union status. The Grievant's status as a union steward, at the end of the day, has nothing to do with the fact that he filed false and fraudulent claims that had the same effect as theft and misappropriation from the company. Grievant's union status does not shield him from the consequences of such actions.

The second element of the just cause analysis is whether the discipline imposed reasonably reflects the Employer's disciplinary interest. Grievant argues that he was a nine year employee with no past discipline and he obtained the benefits because of a medical emergency. He argues that his conduct was understandable, the Employer lost nothing and he believed he was not taking anything from the Employer. The Company counters that why Grievant stole is irrelevant, that he never once indicated to the Company president he needed a loan or financial assistance, sought any state aide, and assumedly did not have dental treatments to pay for when he committed this offense in the past. Grievant's points in mitigation of discharge are not persuasive. In his nine years of employment he was specifically told, about half way through that employment, not to do what he has now intentionally done again. This is serious misconduct and some offenses are so serious they are grounds for discharge even for a first offense. The Company has lost something in the accounting of its UC balances and in its UC current and future tax rates. The Company is right; why he "stole" does not justify his conduct. The record shows he did not seek any other help from the Company, or from any other source, to address his dental needs rather than file fraudulent claims. Grievant's argument goes way too far. Having serious dental and medical needs simply does not justify fraud, theft, misappropriation, deceit or any such conduct. When he had his potentially life threatening infection he did seek medical attention and he was treated. He needed more dental work done, but his testimony is clear that he filed the false claims because his dental benefits didn't cover the need just then. He needed about \$5600 to \$6000 for dental work. He testified:

" . . . So I kept filing unemployment in order to get my dental work taken care of. That was to have teeth pulled. I would have had to go back the beginning of the following year to get the plates, because our dental insurance, I don't know if I mentioned it or not, only pays - - only covers up to 1500 per year."

(Transcript, p. 36).

The circumstances of Grievant's conduct do not excuse or mitigate the consequences of his actions.

The major work rules state: A violation of these rules will result in serious discipline up to and including discharge. Grievant violated a major work rule. He did so five times. He knew he was not supposed to file the claims. He has undermined the trust expected and needed in an employee. The fact that he has specifically been told previously not to file such claims and then calculatingly doing so again severely compromises future trust in him and his rehabilitative potential. He felt he was stealing - at least stealing from the state. The fact that he would proffer this in his defense when confronted by his Employer further undermines any confidence that he could be trusted by the Company in the future. Virtually all of the factors identified in DISCIPLINE AND DISCHARGE IN ARBITRATION cited above support the Company's disciplinary action. That treatise also summarizes how falsification is generally viewed:

When an employee intentionally falsifies company records, submits a false claim, or alters employment-related tests, employer employee trust is impaired. When the employee engages in these activities to gain some economic advantage or personal benefit from the employer, those acts are considered serious offenses akin to theft. When an employee is found to be willfully dishonest in this context, arbitrators uphold stiff penalties, including discharge, although some will consider mitigating circumstances. In contrast, where discipline relates to innocent or inadvertent misrepresentations that are not intended to deceive and cause no loss to the employer, arbitrators tend to view discharge or other severe discipline unfavorably.

Id. pp. 229, 230 (citations omitted).

Discharge in a case such as this is reasonably related to the Company's disciplinary interest. Grievant's mitigating arguments are to no avail. The Company therefore had just cause for discharging the Grievant.

Accordingly, based upon the evidence and arguments in this case I issue the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 29th day of December, 2009.

Paul Gordon /s/

Paul Gordon, Arbitrator