SENATE COMMITTEE ON LABOR

March 11, 1991 Hearing Room 50 03:00 p.m. Tapes 32 - 33
MEMBERS PRESENT:SEN. GRATTAN KERANS, CHAIR SEN. LARRY HILL, VICE-CHAIR · SEN. PETER BROCKMAN SEN. BOB KINTIGH SEN. BOB SHOEMAKER VISITING MEMBER: REP. SAM DOMINY

STAFF PRESENT: ANNETTE TALBOTT, COMMITTEE COUNSEL ROBERTA WHITE, COMMITTEE ASSISTANT MEASURES CONSIDERED: SB 741 - DUTIES AND SCOPE OF REVIEW BY EMPLOYMENT APPEALS BOARD (PUBLIC HEARING) SB 556 - DISPLACED WORKERS ELIGIBLE FOR UN1 :MPLOYMENT BENEFITS (PUBLIC HEARING)

These n11nutes contain materials which paraphrase and/or summanze statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. -

TAPE 32, SIDE A

WITNESSES: RENEE MASON REPRESENTATIVE SAM DOMINY MARGE BYERLEY, INSURANCE BENEFIT SECTION, EMPLOYMENT DIVISION DEAN BARR, HEARINGS REFEREE, EMPLOYMENT DIVISION REPRESENTATIVE SAM DOMINY GREG TEPOL, IBEW DIANE ROSENBAUM, OREGON LABOR UNION COUNCIL.

001 CHAIR KERANS called the meeting to order at 3:16 p.m.

SB 741- DUTIES AND SCOPE OF REVIEW BY EMPLOYMENT APPEALS BOARD (PUBLIC HEARING)

WITNESSES: RENEE MASON, CHAIR, EMPLOYMENT APPEALS BOARD Senate Committee on Labor March 11, 1991Page 2

DEAN BARR, HEARINGS REFEREE, EMPLOYMENT DIVISION

003 RENEE MASON, CHAIR, EMPLOYMENT APPEALS BOARD (EXHIBIT A) > Details Exhibit A 054 SENATOR HILL: Currently, your hearings are "de novo", is that correct? MASON: Supposedly, that's correct. It depends on what application of that language the court has given to us. There is no statutory standard that we review "de novo". The court has said that we review "de novo", but it interprets for our purposes a different standard of "de novo" than it does for other agencies. 060 CHAIR KERANS: The court said in Lewis vs. Employment Division that it was "de novo", but they held in that case it was "de novo" unlike or separate from or it was a different standard or process than we might think of as straightforward "de novo" review. MASON: I believe that initially in Lewis it was the first time they addressed our standard of review, and they said it was "de novo" and they said we need to give weight to credibility findings made by the referee. In fact, in Lewis vs. the Employment Division those were implied credibility findings again. 072 SENATOR HILL: What is the difference between the "de novo" standard given you by the court and any other "de novo" standard? MASON: The difference is that on "de novo" review, an agency should be able to look at a record with "fresh eyes", giving weight only to the explicit findings of credibility that a referee finds. And, to that extent, the memo from the Department of Justice (EXEIIBIT B), which supports this bill says that in recent case law, the Court of Appeals has said in fact that when a referee makes an explicit finding of credibility, that

weight need only be given when it is based on demeanor. And that in fact, if it's merely based on the substance of the testimony, the "de novo" reviewing agency is just as good a place to make that evaluation of credibility as the referee. CHAIR KERANS: That is, in effect, when the referee says in his or her written findings that the referee found the person to be untrustworthy because they had shifty eyes. MASON: It's hard to imply that, and that's part of our problem. CHAIR KERANS: In effect that's what you're being asked to do. MASON: Exactly. CHAIR KERANS: You're being asked to stand on the shifty-eyed test as related to by the implication. 091 MASON: Well, we don't know, that's the problem. We're being asked to imply reasoning that the referee doesn't put on the record. It may be that the referee does not believe the testimony,

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it may be the referee found it not reliable.

CHAIR KERANS: That's what I mean. You can only infer that most of it is from a shiftyeyed, untrustworthy, dishonest witness or dishonest claimant.

MASON: The court hasn't gone that far yet. If we imply that in every case, we would not be able to find anything different than the referee.

SENATOR HILL: Is it correct that all "de novo" review occurs on the record? Or is there another kind of "de novo" review. Leave aside the credibility issue.

100 MASON: I have to beg ignorance on that one. I know of only "de novo" review on the record. But that's a term of arts that the courts use, and it's not to say there are other forms of "de novo" review, I'm just not aware of them.

SENATOR SHOEMAKER: I think "de novo" review might be on the record, but a "de novo" hearing can be a completely new hearing, including new witnesses or the same witnesses again. If you use the term "de novo" review probably connotes the record, because I don't know what else you can review.

ANNETTE TALBOTT, COMMITTEE COUNSEL: So, on the record, means you have no live bodies in front of you. SENATOR SHOEMAKER: Although sometimes they both take it on the record and permit additional testimony.

TALBOTT: In the EAB's case, you take it on the record solely, isn't that correct?

114 MASON: We have authority under our own rules that we can accept evidence under certain circumstances, but generally we only hear oral arguments on occasion. That's at our discretion.

152 DEAN BARR, ADMINISTRATOR, HEARINGS SECTION, EMPLOYMENT DIVISION ~ Employment Division is in support of this bill. MASON: There was one typographical error when the bill was drafted by Legislative Counsel. It is on Line 18, "or" should be "and" iess probable. 179 SENATOR HILL: What is the difference between an credibility item and an explicit

credibility item? MASON: If I knew the answer to that, maybe I wouldn't be here. That's part of the problem. The first thing we have to do as a board is guess right.

TAPE 32, SIDE A SB 556 - PERMANENTLY DISPLACED WORKERS WOULD BE ELIGIBLE FOR UNEMPLOYMENT BENEFITS - PUBLIC HEARING , . . These minutes contain materials which paraphrase and/or summarize statemente made during thie seeeion. ODIY text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedinga, please refer to the tapes. .. Senate Committee on Labor March 11, 1991 - Page 4

WITNESSES: REPRESENTATIVE SAM DOMINY, COTTAGE GROVE MARGE BYERLEY, INSURANCE BENEFIT SECTION, EMPLOYMENT DIVISION (EXHIBIT E) GREG TEPOL, IBEW DIANE ROSENBAUM, OREGON LABOR UNION COUNCIL.

259 REPRESENTATIVE SAM DOMINY, COTTAGE GROVE > The intent of the bill is to make qualification for unemployment easier. > Testifies in favor of SB 556-1 (EXHIBITS C AND D). 328 CHAIR KERANS: There is a letter from Pamela Mattson, Administrator, Employment Division (EXHIBIT D) to the effect that the bill as drafted would make it more difficult to collect unemployment benefits. She is addressing the printed bill, and not the "-1" bill. 351 DIANE ROSENBAUM, OREGON STATE INDUSTRIAL UNION COUNCIL: > Testifies in favor of SB 556-1. GREG TEPOL, IBEW, LOCAL 48 > Testifies in favor of SB 556-1

TAPE 33, SIDE A

057 TALBOTT: Under federal labor law, striking employees are considered employees even if they take another job. They are still considered employees because they are taking the interim position only out of economic necessity. They have to make a clear and objective break with that employer and declare that they have another job and will not work for that firm again. People who have been permanently replaced in economic strikes still have the right to vote in bargaining unit certification or decertification positions, so they still have some rights under labor law.

104 MARGE BYERLEY, UNEMPLOYMENT INSURANCE BENEFIT SECTION, EMPLOYMENT DIVISION (EXHIBIT E) > Details Exhibit E. 137 SENATOR HILL: When someone becomes eligible by virtue of termination of a labor dispute, is there a requalification period or can they be immediately eligible for unemployment insurance benefits if they worked during the labor dispute? BYERLEY: Yes, because they are then not covered by 657.200. SENATOR HILL: What if a worker is otherwise qualified but there is an outstanding labor practice complaint which the worker may be the baneficiary of if the decision is favorable to the employee? Would that disqualify the worker who would otherwise qualify? BYERLEY: No, that would have no impact on the person's eligibility under .200.
164 TALBOTT: Can you describe how the Division interprets the section that talks about participating in, or financing or directly interested in a labor dispute which is currently one of the requirements for permanent replacement? - Thesc minutes contain materials which paraphrase and/or summarize atatements made durir~ this session. Only text enclosed in quotation marks report a speaker'fi exact wordfi. Por complete contents of the proccedingr, please refer to the tepee. - Senate Committee on Labor March 11,1991- Page 5

BYERLEY: We don't look at individual payments by the person, but we look at the collective action of the trade organization to whom the funds are sent. If an individual is in some way financing a labor dispute, then

they would be under that disqualification. TALBOTT: But the payment of the dues alone is not considered financing, so it has to be something other than that. BYERLEY: Yes, that's right. TALBOTT: Are you comfortable with the "-1" amendments? 180 BYERLEY: Actually, there are a couple of problems that we have. If the employer and the individual worker both agree the worker has been permanently replaced, we will have no problem. In a situation where an employer has 20 openings and fills 10 of them, with 20 who are no longer working, the question would be which of those 20 are considered permanently replaced. TALBOTT: And that would be a problem regardless of where we put the language in the bill. Do you need language to say that should be done as it would normally be done in the course of how union employees would be replaced, based on seniority or rules to that effect? BYERLEY: I'm not sure. CHAIR KERANS: How would it be if we wrote language that says that all workers are considered replaced if even one is replaced? BYERLEY: That would work well. Another question that has not been answered as it is currently written is whether or not the person is becoming eligible at the point or the week they are permanently replaced. Do we wait until we end the labor dispute to determine whether or not they have been permanently replaced and pay them for back weeks drawn or claimed, or do we go back to the beginning of the labor dispute? Where does eligibility begin? 230 TALBOTT:I think actually there is some language which has been suggested earlier which says that the individual would requalify at the time they are actually replaced, so they would have their one week waiting period and then they would go. You would prefer that be actually spelled out. BYERLEY: It would make it very easy to administer if it is spelled out. ~ The Division is in a neutral position on this legislation. 333 The meeting was adjourned at 4:07 p.m.

Submitted by: Reviewed by: Roberta White Annette Talbott Assistant Committee Counsel - Senate Committee on Labor March 11, 1991- Page 6

EXHIBIT LOG:

A - Testimony on SB 741 - Renee Mason - 5 pages B - Testimony on SB 741 - Jerome Lidz, Assistant Attorney General - 4 pages C - Testimony on SB 556 - Pamela Mattson - 2 pages D - Testimony on SB 556 - Irv Fletcher - 1 page E - Amendments to SB 556 - Staff- 1 page F - Hand-engrossed version of SB 556-1 - Staff - 2 page G - "Labor Management Relations" - General Accounting Office - 22 pages H - Staff Measure Summaries - Staff - 2 pages I - Fiscal Analysis of SB 556 - Legislative Fiscal Office - 1 page

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