

1951

Ous P. Lexes, Ralph M. Garner, Peter John Kanon
and Thomas L. Anderson v. The Industrial
Commission of Utah and American Smelting and
Refining Company : Brief of Petitioners

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Rawlings, Wallace, Black, Roberts & Black; Dwight L. King; Attorneys for Petitioners

Recommended Citation

Brief of Appellant, *Lexes v. Industrial Comm. Of Utah*, No. 7623 (Utah Supreme Court, 1951).
https://digitalcommons.law.byu.edu/uofu_sc1/1384

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

In the Matter of:

GUS P. LEXES, RALPH M. GARNER, PETER JOHN KANON and THOMAS L. ANDERSON, Employees of the American Smelting & Refining Company,

Petitioners,

and

THE INDUSTRIAL COMMISSION OF UTAH, Department of Employment Security and AMERICAN SMELTING & REFINING COMPANY,

Defendants.

BRIEF OF PETITIONERS

FILED RAWLINGS, WALLACE, BLACK,
ROBERTS & BLACK,
DWIGHT L. KING,
Attorneys for Petitioners

MAR 20 1951

530 Judge Building,
Salt Lake City, Utah
Clerk, Supreme Court

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF THE FACTS	1
STATEMENT OF POINTS	9
ARGUMENT	9
POINT I. PETITIONERS DID NOT LEAVE WORK VOL- UNTARILY WITHOUT GOOD CAUSE	9
POINT II. PETITIONERS WERE AT ALL TIMES AVAIL- ABLE FOR WORK	19
POINT III. THE INABILITY OF PETITIONERS TO GAIN ACCESS TO THEIR PLACE OF WORK WAS ATTRIBUTABLE TO THEIR EMPLOYER.....	24
CONCLUSION	26

AUTHORITIES CITED

Barclay White Co. v. Unemployment Compensation Board of Review (Pa. Super. Ct. 1946), 46 A. 2d 598	13
Bliley Electric Co. v. Unemployment Compensation Board of Review, 158 Pa. Super. 548, 45 A. 2d 898	16, 21
Department of Industrial Relations v. Drummond, Ala., 1 So. 2d 395	22
Hagadone v. Kirkpatrick et al., 66 Idaho 55, 154 P. 2d 181.....	23
Industrial Commission et al. v. Lazar, 111 Colo. 69, 137 P. 2d 405..	24
Kieckhefer Container Company v. Unemployment Compensation Commission, 125 N.J.L. 52, 13 A. 2d 646.....	22

STATUTES CITED

Section 42-2a-4, Utah Code Annotated 1943, as amended Laws of 1949	8
Section 42-2a-5, Utah Code Annotated 1943, as amended Laws of 1949	8
Section 42-2a-5, Subsection (c), Utah Code Annotated, 1943, as amended Laws of 1949	10

TABLE OF CONTENTS—(*Continued*)

	Page
Section 402 (b), 43 P. S.	16
Section 42-2a-4 (c), Utah Code Annotated 1943, as amended, Laws of 1949	19
Section 49-1-10, Utah Code Annotated 1943, as amended Laws of 1947	24
Section 49-1-16 (2) (e), Utah Code Annotated 1943, as amended Laws of 1947	24

TEXTS CITED

Lesser, Eligibility and Disqualification, 55 Yale L. J. 115, 158.....	11, 19
Unemployment Compensation and Labor Disputes, 49 Yale L. J. 461, 469	11, 19
Schindler—Collective Bargaining and Unemployment Insurance Legislation, 38 Col. L. Rev. 858	11, 19

IN THE SUPREME COURT of the STATE OF UTAH

In the Matter of:

GUS P. LEXES, RALPH M. GARNER, PETER JOHN KANON and THOMAS L. ANDERSON, Employees of the American Smelting & Refining Company,

Petitioners,

and

THE INDUSTRIAL COMMISSION OF UTAH, Department of Employment Security and AMERICAN SMELTING & REFINING COMPANY,

Defendants.

Case No. 7623

BRIEF OF PETITIONERS

PRELIMINARY STATEMENT

The parties will be designated as follows: petitioners and defendants.

All italics are ours.

STATEMENT OF THE FACTS

Petitioners, Gus P. Lexes, Ralph M. Garner, Peter John Kanon and Thomas L. Anderson, were employees

of the American Smelting & Refining Company, working at their Garfield, Utah, smelter. All of the petitioners were unemployed from the 28th day of June, 1950, to and including the 8th day of July, 1950. The unemployment resulted from a closing of the A. S. & R. Company Smelter at Garfield on June 28th when the 7:45 A. M. shift of employees was unable to enter the smelter because there was at the gates to the smelter a picket line of the Switchmen's Union of North America.

The Switchmen's Union is affiliated with the American Federation of Labor. All of the petitioners are members of the Garfield Smelter Local Union No. 4347 of the United Steel Workers of America, affiliated with the C.I.O.

Petitioner Kanon reported for work on the morning of the 28th of June at approximately 7:30. When he arrived at the east gate there was a lot of commotion, automobiles parked on the highway, busses lined up along the highway in front of the gate. Traffic was stopped by a picket line at the east gate. There was a large group of men at the gate. Mr. Kanon was quite sure that if he had attempted to cross through the picket line he would have been stopped. He did not attempt to cross the picket line (R. 52). When pressed for an estimate of the number of persons at the east gate Mr. Kanon stated that in his opinion there were a couple of hundred. At that time Mr. Kanon did not see any sheriff or other law enforcement personnel at the gate (R. 53).

Petitioner Garner belonged to that group of employees who did not report for work on the 7:45 shift. He was on a ten-day leave because of illness on the 28th of June. He was to report back for duty on the 1st of July. On the 30th of June he called the Garfield plant and was informed by Mr. Romney, the Employment Director, that there was no work available for him.

Petitioner Lexes likewise was not to report for work on the 28th of June and heard an announcement over the radio at approximately 11:00 Wednesday night that the picket line was at the gate and employees were not going through it (R. 57, 58).

There was no dispute about the basic facts of the picket line and the orders for the men not to report for work after the 28th of June. When it became known that the employees of the A. S. & R. plant at Garfield could not go through the switchmen's picket line the company and union officials agreed that in order to save inconvenience an announcement should be made over the radio that the plant was closed down. Such announcements were periodically broadcast by local radio stations in their news broadcasts (R. 36).

For a long time prior to the 28th of June the switching operations at the A. S. & R. plant at Garfield had been carried on by members of the Switchmen's Union of North America. Several days prior to the 28th that Union struck against The Denver and Rio Grande Western Railroad Company. The switchmen running the

switching equipment at A. S. & R., who were members of the Switchmen's Union, struck. None of the members of the Switchmen's Union were employees of A. S. & R. They were all employed by The Denver and Rio Grande Western Railroad Company.

It was stipulated that there was no labor dispute between the A. S. & R. and any of its employees. After the switchmen went out on strike the members of the Steel Workers' Union took over the switchmen's switching jobs at A. S. & R.'s plant at Garfield.

About the 23rd of June the union leadership informed the management that if a picket line was formed at the plant that its members would not pass through the picket line (R. 17). The Company Manager, Mr. Rouillard, on the morning of the 28th informed Mr. Keith, the Chairman of the Union, that the picket line would be enjoined and he requested that the union employees of the plant remain around for several hours so that this could be accomplished. The management did not have the pickets enjoined or removed from their picketing of the gates to the smelter (R. 35). Mr. Rouillard was very sure that the picket line was an illegal picket line and would be removed within at least a day (R. 16).

Mr. Keith and Mr. Matthews, members of the Executive Board of the Union, were of the opinion that had their membership attempted to cross the switchmen's picket line there would have been disturbances and violence and probably a "nice" riot (R. 21).

Possible violence was only one of the deterring factors that prevented the employees of A. S. & R. from going through the picket line. Union members generally take an oath that they will not violate picket lines. This oath is seriously and universally accepted by members of organized labor (R. 21). The A. S. & R. plant was a union plant and all of the day-pay workers were members of the Steel Workers' Union. The town of Garfield, in which many of the employees reside, provides the social atmosphere in which the men must live. The violation of a picket line by a union member places a stigma on the violator. He becomes known as a "rat" or a "scab" or a person who will not abide by his oath. Mr. Keith testified that it was regarded as an unforgiveable thing to do in the ranks of labor (R. 22).

Clarence Palmer, Executive Secretary of the Utah Industrial Union Council, testified that every union man on joining a union pledges that he will, in effect, respect picket lines and work for the betterment of all laboring men; that a union man who crossed a picket line would be termed a "scab," a man devoid of honor, one that could not be trusted and was not acceptable for the society of other union men. Mr. Palmer related how the crossing of picket lines often leads to violence and acts of violence. The union members on strike have a great deal at stake. They are emotionally affected by workmen crossing their picket line.

Mr. Matthews, one of the Executive Board of the Garfield Local, stated that when he arrived at the picket

line at the east gate the pickets were there; that they, in protecting their jobs, would have stopped him in one way or another had he tried to cross through the picket line. All the men of the 7:45 A.M. shift were there at the gate. He further testified that Garfield was a union community, union minded, and anyone who would attempt to cross a picket line would be termed a "scab" and people wouldn't take to such a person. He would be more or less ostracized (R. 45). Mr. Matthews further testified that even though the pickets were outnumbered they were always ready to get reinforcements and they would use violence even though outnumbered, resulting in a brawl (R. 50).

The Appeals Referee found the facts substantially as set forth in the Statement of Facts and that the closing of the plant was made necessary by the refusal of the plant employees to pass the picket line. They further found in number 7 of their Findings that if the workers involved had attempted to cross the picket line to go to work they would have been in dispute with their fellow workers and the union. They would have been considered as "scabs" and their position in the community would have become socially undesirable.

The Appeals Referee then concluded that the claimants were not available for work for the weeks ending July 1, 1950, and July 8, 1950, and as a consequence were not qualified for unemployment compensation. The Board of Review of the Industrial Commission concluded

that none of the company workers was available for work from June 28th through July 7th, thus affirming the decision of the Appeals Referee. From the decision of the Board of Review petitioners prosecute this appeal to the Supreme Court.

The Industrial Commission Claims Supervisor, Far-rald Christensen, in denying petitioners' application for unemployment compensation stated as follows:

“You were unemployed because in accordance with your union principles you did not choose to cross the picket line which had been established by the Switchmen's Union. This choice is one which members of organized labor are frequently called upon to make and in the eyes of the Utah act, this kind of choice has never been deemed involuntary. You are, therefore, ineligible to receive benefits from June 25 through July 8, 1950.”

At the hearing before the Appeals Referee the evidence which petitioners presented was directed toward the proposition of showing that their conduct was not voluntary but that they were involuntarily, and with good cause, off their jobs on the days in which they seek unemployment compensation. As a consequence, the record before the Court is not primarily directed toward illuminating the availability of the petitioners for employment. There has been a shift of the Department of Employment Security's position from the supervisors early ground to the stated ground in the Department's decision.

Petitioners feel that the question of their availability for work is adequately demonstrated by the evidence presented to the Appeals Referee and transcribed for this Court. The statutes under which the Department of Employment Security acted are *Section 42-2a-4, Utah Code Annotated 1943, as amended Laws of 1949*, the salient portions of which read as follows:

“An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found by the commission that:

* * * * *

“(c) He is able to work and is available for work.”

and *Section 42-2a-5, Utah Code Annotated 1943, as amended Laws of 1949*, which reads as follows:

“An individual shall [not] be ineligible for benefits or for purposes of establishing a waiting period:

“(a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for not less than one or more than the five next following weeks, as determined by the commission according to the circumstances in each case, provided that when such individual has had no bona fide employment between the week in which he voluntarily left such work without good cause and the week in which he filed for benefits he shall be so disqualified for the week in which he filed for benefits and for not less than one or more than the five next following weeks.”

The exact reason for the shift in the department's position is hard to discover. Petitioners believe that there is no material reason for the shift, but for the sake of presenting this case in all of its ramifications they will show not only that they were not voluntarily unemployed without good cause but also that they were available for work.

STATEMENT OF POINTS

POINT I.

PETITIONERS DID NOT LEAVE WORK VOLUNTARILY WITHOUT GOOD CAUSE.

POINT II.

PETITIONERS WERE AT ALL TIMES AVAILABLE FOR WORK.

POINT III.

THE INABILITY OF PETITIONERS TO GAIN ACCESS TO THEIR PLACE OF WORK WAS ATTRIBUTABLE TO THEIR EMPLOYER.

ARGUMENT

POINT I.

PETITIONERS DID NOT LEAVE WORK VOLUNTARILY WITHOUT GOOD CAUSE.

The salient, beneficial and essential benefits of unemployment compensation statutes have now been established beyond any possible doubt. The beneficial effects

of unionization of employees has also ceased to be controverted by any intelligent segment of our population. Maintenance of unions has been protected by statutory enactment so that there could be no possible doubt on this matter. *Utah Code Annotated*, 1943, *Section 42-2a-5, Subsection (c)* as amended *Laws of 1949*, contains the following provision concerning ineligibility of employees for workmen's compensation:

“(2) Notwithstanding any other provisions of this act, no work shall be deemed suitable, and benefits shall not be denied under this act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) if the position offered is vacant due directly to a strike, lockout or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.”

In his findings of fact the Appeals Referee failed to make any finding as to whether or not the actions of the employees in failing to go through the switchmen's union picket line was a voluntary or involuntary act on their part or was with or without good cause. His only finding looking to such question was Finding of Fact No. 7, which reads as follows (R. 95):

“That if the workers involved in this matter had attempted to cross the picket line to go to work, they would have been in disrepute with their

fellow workers and with their union. They would have been considered as 'scabs' and their position in the community would have become socially undesirable."

Finding of Fact No. 7 indicates that in the opinion of the referee the actions of the petitioners were probably involuntary. At least his finding will sustain a belief that the petitioners had good cause for failing to cross through the picket line under the circumstances surrounding them at the gates of the A. S. & R. plant on the morning of June 28th. The evidence is undisputed and, as a matter of law petitioners submit, shows their conduct involuntary and with good cause.

What is "good cause" has been discussed at great length in a very learned article, *Lesser*, Eligibility and Disqualification, 55 *Yale L. J.* 115, 158. Lesser, after discussing a number of the positions that administrative bodies have taken in interpreting unemployment compensation acts, comes to the conclusion that "good cause" as used in such acts means only cause that would justify a reasonable person in leaving his work. For similar conclusions see Unemployment Compensation and Labor Disputes, 49 *Yale L. J.* 461, and *Schindler*—Collective Bargaining and Unemployment Insurance Legislation, 38 *Col. L. Rev.* 858. No reasonable interpretation of our statute would require an unemployed workman to take unreasonable risks either to his social or physical well-being to qualify for unemployment compensation.

The proposition to be resolved then simply stated is: Did the petitioners act as reasonable men on the morning of June 28th when they did not cross the switchmen's picket line? Having a bearing on their decision are the following undisputed facts:

1. The picket line was in place and appeared in all respects regular and bona fide.

2. A large group of union personnel had collected in front of the picket line. The drivers on the busses carrying the men into the plant had stopped at the picket line. The men at the gate became uneasy and angry when they learned of some union personnel in the plant working. They indicated that a riot might commence unless such violation of union rules and regulations was stopped.

3. The community in which petitioners reside is a thoroughly unionized town in which loyalty to union causes is a primary social mainspring. "Scabs" are there held socially unacceptable and unfit for the association of good union workers. Ostracization would be a means of showing the disfavor into which union men fall when they are disloyal to the oath which they take as a union man.

4. The A. S. & R. plant was fully unionized and there was a union shop which covered all day-pay workers. Even though the employer would be willing to employ persons who cross picket lines, union workers

would not be willing to work with such employees and it would probably be impossible for those workers who crossed the picket line to remain employed at the A. S. & R. Garfield plant.

No reasonable union workman under the following set of facts would have crossed the switchmen's picket line and entered the A. S. & R. plant on the morning of June 28, 1950. Even the plant superintendent himself stated for the record at the hearing before the Appellate Referee that the plant itself did not encourage union employees to cross picket lines. His exact statement as made through his attorney was as follows (R. 76) :

“* * * I also would like the record to show that if Mr. Rouillard were sworn as a witness, he would state that it isn't a policy of the American Smelting and Refining Company to encourage employees to go through the picket lines if it involved the A. S. & R. and their employees.”

We then have a unanimity of opinion. The employees did not think it would be in their best interest to cross the picket line. The company would not encourage them to cross the picket line.

The proposition before the Court has not been squarely discussed by any decision that petitioners have been able to discover. However, there is one good decision which covers all of the basic propositions which petitioners here advance. It is *Barclay White Co. v. Unemployment Compensation Board of Review* (Pa. Super. Ct. 1946), 46 A. 2d 598. In the Barclay case the employee refused to accept employment at \$1.01½ per hour, which

was a rate of pay which was below the wage scale established by his union. The basis of his refusal was not that he was unwilling to work for the rate of pay provided but that if he did work for that rate he would have been suspended from his union with consequent loss of all membership advantages including sick, old age and death benefits. Compensation was denied by the appeal referee. The Board of Appeals reversed the referee and ordered the claimant paid. The question before the court was whether or not claimant had refused to accept suitable work without good cause within the intent of the Pennsylvania Unemployment Compensation Law. There was no claim that the rate of pay was not adequate or the hours or other conditions of work were less favorable to claimant than those prevailing in the locality. No condition was attached requiring claimant to join a company union or to resign from a union of which he was a member, and claimant was fully qualified to do the work which he was referred to. The Board found that if the claimant had accepted the proffered employment he would have subjected himself to expulsion from the union of which he was a member and would have lost accumulated death benefits. The Pennsylvania court pointed out that the power to punish members for activities which the union considers detrimental to labor generally was the veritable sine qua non of the labor movement, lying very near the heart and of the essence of labor's legal structure. Without the ability to punish members for such

activity a union would be a pallid, impotent entity and its objectives unrealizable. The court stated the proposition in the following language at page 602:

“This case comes to this: The claimant was obliged to decide between the referred employment and the loss of his union membership. Is an unemployed workman obliged to accept suitable employment when its acceptance subjects him to the loss of membership in an organization which is sanctioned and encouraged by the law, and thereby sacrifice valuable property rights? Is an employee who refuses referred suitable work in such circumstances ‘without good cause’?

“Unions are now under the protection of the police power of the commonwealth, and the legislature has solemnly declared that ‘the public policy of the state (is) to encourage the practice and procedure of collective bargaining and *to protect the exercise by workers of full freedom of association*, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection free from interference, restraint or coercion of their employers.’ * * * It is thus the settled policy of the state to encourage unions, to throw around them the protection of the law, and the maintenance of their membership has become a matter of direct concern to the public welfare. The law now sustains labor unions not alone because of the inestimable advantages which they bring to their members but for the larger purpose they serve, of promoting the public welfare. So, an employee who joins a union and abides by its

internal polity is within his legal rights; and he acquires a status for the preservation of which the police power of the state is pledged.

* * * * *

“* * * We have ‘the pressure of real, not imaginary, substantial, not trifling, reasonable, not whimsical circumstances,’ and these compel claimant’s decision to refuse the referred employment. The threat of expulsion was real, not imaginary: it was contained in the by laws; it was communicated by a responsible union official to the claimant; and other members had been suspended or expelled for the same cause. It was substantial, not trifling: loss of membership in the union would deprive claimant of valuable property rights, the accumulated death benefits, and the opportunity to obtain and retain work at union rates. It was reasonable, not whimsical: * * *. Claimant’s refusal contains all the elements of good cause.”

The Pennsylvania Unemployment Compensation Act contains a provision similar to the Utah Workmen’s Compensation Law and states as follows: *Section 402 (b), 43 P.S.:*

“An employee shall be ineligible for compensation or waiting period credit for any action * * * (b) in which his unemployment is due to voluntarily leaving work without good cause:”

The basic decision interpreting the Pennsylvania law is *Bliley Electric Co. v. Unemployment Compensation Board of Review*, 158 Pa. Super. 548, 45 A. 2d 898, 903. The court, discussing good cause and involuntary, states as follows:

“Of course, ‘good cause’ and ‘personal reasons’ are flexible phrases capable of contraction and expansion, and by construction, all meaning can be compressed out of them or they may be expanded to cover almost any meaning. Reducing them to a fixed definite and rigid standard, if desirable, is necessarily difficult, if not impossible. However, in whatever context they appear they connote as minimum requirements, real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith.

“When related to the context of the statute ‘good cause’ takes on the hue of its surroundings, and it, and ‘personal reasons,’ must be construed in the light reflected by its text and objectives. The purpose of the act, declared by Section 3, 43 P.S. 752, is to relieve economic insecurity due to ‘involuntary unemployment.’ Yet selection of *involuntary* unemployed workers is accomplished by means of several eligibility and disqualification provisions, and the provision under review provides benefits for employees who *voluntarily* leave employment with good cause. Thus the legislature enacted, paradoxical as it may seem, that an employee who voluntarily leaves his work with good cause is involuntarily unemployed.

“‘Voluntary’ and ‘involuntary’ are antonyms and therefore irreconcilable words, but the words are merely symbols of ideas, and the ideas can be readily reconciled. Willingness, willfulness, volition, intention reside in ‘voluntary,’ but the mere fact that a worker wills and intends to leave a job does not necessarily and always mean

that the leaving is voluntary. Extraneous factors, the surrounding circumstances, must be taken into the account, and when they are examined it may be found that the seemingly voluntary, the apparently intentional, act was in fact involuntary. A worker's physical and mental condition, his personal and family problems, the authoritative demands of legal duties—these are circumstances that exert pressure upon him and imperiously call for decision and action.

“When therefore the pressure of real not imaginary, substantial not trifling, reasonable not whimsical, circumstances *compel* the decision to leave employment, the decision is voluntary in the sense that the worker has willed it, but involuntary because outward pressures have compelled it. Or to state it differently, if a worker leaves his employment when he is compelled to do so by necessitous circumstances or because of legal or family obligations, his leaving is voluntary with good cause, and under the act he is entitled to benefits. The pressure of necessity, of legal duty, or family obligations or other overpowering circumstances and his capitulation to them transform what is ostensibly voluntary unemployment into involuntary unemployment.”

We are all familiar with the legal principle that an ostensibly voluntary confession may be found to be in fact involuntary when the circumstances in which it was made are examined. The pressure of promises, threats, force, the third degree, etc., form the same voluntary act, and certainly an intentional act, into an involuntary act.

Petitioners submit that, as a matter of law under the undisputed facts set forth, their failure to cross the switchmen's picket line was an act which was involuntary within the meaning of the Unemployment Compensation Law of Utah, and there was good cause for such decision.

POINT II.

PETITIONERS WERE AT ALL TIMES AVAILABLE FOR WORK.

The findings of the referee that petitioners were unavailable for work refers to *Section 42-2a-4 (c), Utah Code Annotated 1943, as amended, Laws of 1949*. Subsection (c) states that to qualify for benefits a workman must be able to work and available for work. The referee did not find that petitioners were not able to work but only that they were not available for work. Since workmen's compensation was not intended as a sick or disability benefit act, those who are unable to work are not to receive benefits under the Unemployment Compensation Law. The meaning of the phrase "available for work" has been discussed at length by *Lesser* in 55 *Yale L.J.* 115, and at 49 *Yale L. J.* 469, as well as the *Schindler* article at 38 *Col. L. Rev.* 858.

Whether or not an employee is available usually depends on whether or not he is still a part of the labor force and will accept suitable employment when offered

to him. As has been stated in the facts, at the hearing before the Appeals Referee petitioners' evidence was not directed primarily at showing their availability for work.

Petitioner Kanon stated that while he could not gain access to the A. S. & R. plant because of the switchmen's picket line, he reported to the office of the Department of Employment Security and applied for compensation; that in addition he made employer contacts seeking work at various jobs that he had theretofore held, stating in particular that he went to the City Fruit Market, to the Yellow Cab Company and Artistic Lighting Company seeking employment (R. 74, 75). Kanon specifically stated that he would have been able and available for work if any work had been offered him during the time that he could not gain access to his usual place of employment (R. 76).

Petitioners Lexes and Garner reported back for work at the A. S. & R. plant as soon as the switchmen's picket line was removed. During the time that the line was up they each sought other employment, filed claims and registered for work. Each stated that had work been offered they would have been available for work (R. 73-76). There was no showing of any kind that petitioners were ever offered employment which was suitable. The finding by the Referee and the Board of Review that petitioners were not available for work from June 28, 1950, through July 7, 1950, can only be founded on the fact that petitioners could not cross the switchmen's picket line and enter their usual place of employment. This finding

is based on a further assumption, upon which there is no evidence, which is that the A. S. & R. plant would have been able to operate had only petitioners crossed the switchmen's picket line. During all the time that the picket line was up the plant was closed. Petitioners did not act as a union group, there being no evidence of orders from their union not to cross the switchmen's picket line. In this particular, as far as the evidence shows, the refusal to cross was based on individual judgment and decision. It was not to the individual welfare and best interest of the worker confronted by the picket line and the general confused situation at the gate to cross the picket line.

Availability for work in the end must rest on the same considerations as discussed in Point I hereof. If work could only be obtained at the risk of violence, social ostracization or other detrimental social or physical dangers, then the work was not, as a practical matter, available. The men were always available whenever work was available.

Availability was discussed at length in the *Bliley* case, *supra*, page 16. The Supreme Court of Pennsylvania exhaustively examined their Unemployment Compensation Act and in defining "available for work" they arrived at the following conclusions, p. 905 :

"So long as the claimant is ready, willing, and able to accept some substantial and suitable work he has met the statutory requirements. By the same token, the availability rule does not necessarily require that a claimant be available

for his most recent work or a customary work. It is sufficient if he is able to do some type of work and there is reasonable opportunity for securing such work in the vicinity in which he lives. So, an unemployed worker is not justified in refusing part time work or temporary work, nor work for which he has not been trained but which he is able to perform. Conversely, a worker who is ready, willing, and able to accept part time or temporary employment or employment not in line with his prior work or training cannot be classified as unavailable. * * *

“The board’s findings of fact reveal a claimant who registered for work, was ready, willing and able to accept work within the circumstances in which she was placed, and had not *detached* herself from the labor force.”

In *Department of Industrial Relations v. Drummond*, Ala., 1 So. 2d 395, 399, the claimant was a member of the Captive Coal Miners’ Union, an affiliate of the American Federation of Labor. There was employed at his place of employment miners who were members of the United Mine Workers of America, a C.I.O. affiliate. The C.I.O. affiliates at the mine struck and as a consequence all of its employees were out of work. The Alabama court held that claimant was qualified for unemployment workmen’s compensation under the Alabama act. The court quoting from *Kieckhefer Container Company v. Unemployment Compensation Commission*, 125 N.J.L. 52, 13 A. 2d 646, stated as follows :

“ ‘The clear meaning of the language is to confine disqualification to those who are creating the dispute or participating therein in order to enforce their demands. To accomplish the prosecutor’s construction would render every employee of a business, some of whose employees went on strike, ineligible for benefits, notwithstanding his nonparticipation therein and even though he might be opposed to the labor dispute and decline to have any part therein. The use of the words ‘directly interested in the labor dispute’ clearly limits their application to those employees directly interested in its furtherance by participation and activity therein.’ ”

It would appear that a party is available for work within the meaning of the Unemployment Compensation Law where work was available, but he had a good and sufficient cause for refusing a referral to such work. A discussion of such a situation is contained in *Hagadone v. Kirkpatrick et al.*, 66 Idaho 55, 154 P. 2d 181. The claimant and appellant in that case was sixty years of age. He had been employed as a band saw filer at Coeur d’Alene, Idaho, earning at such employment \$2.02½ per hour. His employer ceased business for the season and two jobs were offered him at Farragut, Idaho, one firing a boiler, paying 88 cents an hour, and one as a common laborer, paying 80 cents an hour. The appellant refused both offers of employment. He was denied compensation. The Idaho Supreme Court reversed the decision and remanded the case for further investigation, stating that the Unemployment Compensation Law must be liberally construed to the end that its purposes be accom-

plished. Availability for work requires no more than availability for suitable work which the claimant has no good cause for refusing. A similar conclusion was reached by the Colorado Supreme Court in *Industrial Commission et al. v. Lazar*, 111 Colo. 69, 137 P. 2d 405.

Petitioners submit that they were available even for their last employment. They remained in the labor group and available for suitable employment; that their unemployment was as a result of the unavailability of their usual work.

POINT III.

THE INABILITY OF PETITIONERS TO GAIN ACCESS TO THEIR PLACE OF WORK WAS ATTRIBUTABLE TO THEIR EMPLOYER.

The management of the A. S. & R. plant was of the opinion that the switchmen's picket line was a secondary boycott and was, therefore, illegal under the laws of the State of Utah and could be enjoined. Mr. Rouillard requested that the men wait at the gates of the plant until an injunction could be obtained (R. 16, 35).

In their Memorandum of Authorities counsel for the A. S. & R. cite *Section 49-1-10, Utah Code Annotated 1943, as amended Laws of 1947*, which defines secondary boycott, and then cite *Section 49-1-16 (2) (e), Utah Code Annotated 1943, as amended Laws of 1947*, which states that a secondary boycott is an unfair labor practice. Mr.

Rouillard's request to Mr. Keith that the men be held while an injunction was sought indicates that the employer believed it to be its duty to remove from its premises an illegal picket line.

From the appearance of the picket line no worker could discover whether or not it was an illegal picket line. Whether or not it was illegal depended on facts which no single individual facing the picket line would have available. If the picket line was an illegal picket line as contended, then it was the duty of the employer to remove it so that his employees could safely, without fear for their social and economic well-being, enter the place of their employment. The reasons why the picket line was not removed are unknown to these petitioners. They had no duty to remove it and while it existed they could not but assume that it was legal and regular and complied with all the laws of the United States and the State of Utah.

It is submitted that the employer admits that it allowed an illegal picket line to exist at its gates, which picket line it knew would prevent its employees from gaining access to their place of employment. The inability of the petitioners to reach their place of employment and engage in their usual occupation is attributable directly to their employer's failure to remove an obstacle over which the petitioners could not pass safely and without fear.

CONCLUSION

Petitioners respectfully submit that the decision of the Board of Review and the Appeals Referee of the Department of Employment Security of the Industrial Commission of the State of Utah should be reversed and the Court should order that petitioners be allowed their unemployment compensation for the period commencing June 28th and ending July 7th, 1950.

Respectfully submitted,

RAWLINGS, WALLACE, BLACK,
ROBERTS & BLACK,
DWIGHT L. KING,

Attorneys for Petitioners

530 Judge Building,
Salt Lake City, Utah

Received copies of the within brief of Petitioners this day of March, 1951.

.....

.....

.....

Attorneys for Defendants