

1951

Olof Nelson Construction Company, Vincent-Peterson Construction Company, Groneman & Company, Young & Smith Construction Company, Utah Construction Company v. The Industrial Commission of Utah et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

OLOF NELSON CONSTRUCTION COM-
PANY, VINCENT-PETERSON CON-
STRUCTION COMPANY, GRONE-
MAN & COMPANY, YOUNG & SMITH
CONSTRUCTION COMPANY, UTAH
CONSTRUCTION COMPANY,

Petitioners & Appellants,

— vs. —

THE INDUSTRIAL COMMISSION OF
UTAH, and THE BOARD OF RE-
VIEW, APPEALS REFEREE and
CLAIMS SUPERVISOR of its DE-
PARTMENT OF EMPLOYMENT
SECURITY,

Respondents & Appellees.

BRIEF OF APPELLANTS

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U. S. Court, Utah

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BRIEF OF APPELLANTS

NATURE OF CASE

The Petitioners filed an appeal with the Industrial Commission of Utah, Unemployment Compensation Appeals Referee contesting the payment of unemployment compensation to eight claimants covering a period from June 2, 1950 to June 8, 1950. The Claimants were employees of the Petitioners during this period.

The Petitioners contended that the Claimants were on strike within the meaning of Chapter 42-2a-5 (d) (1) Utah Code Annotated 1943, as amended, the Employment Security Act.

The Appeals Referee ruled that the eight claimants were not on strike, that the stoppage of work was not due to a strike at the factory or establishment where claimants were last employed, and that benefit payments would be allowed for the period in question.

In accordance with 42-2a-10 Utah Code Annotated 1943 as amended, the decision of the Appeals Referee was appealed to the Board of Review of the Industrial Commission of Utah. Without granting oral arguments or allowing the submission of brief on appeal said Board of Review ruled: "In view of the fact that there have been two previous decisions, it is the decision of this Board of Review that any further hearing on appeal be and is hereby denied."

Petitioners, as employer contributors under the Employment Security Act then petitioned the Supreme Court of Utah to compel respondent Commission et. al. to show cause why its decision awarding benefits to claimants herein, should not be vacated and to remove from the Petitioners accounts maintained by the Respondents herein all charges made against the said accounts on account of benefits paid to any of said claimants during the period of the strike herein involved to wit June 2, 1950 to June 8, 1950 inclusive.

THE FACTS

Each of the Petitioners is a General Contractor, engaged in General Building, Highway or Heavy construction business in the State of Utah. Each of said Petitioners employ construction workers who are members of local American Federation of Labor unions.

All of the eight claimants (Joseph B. Allman, Cornell B. Cameron, Owen E. Cameron, George E. Cloward, Harold L. Garrard, Charlie Martinez, Reed H. Nielson and Ronald Murray Ross) are members of one of the six basic craft local unions, namely (1) International Hod Carriers, Building and Common Laborers Union, (2) United Brotherhood of Carpenters and Joiners of America, (3) International Union of Operating Engineers, (4) International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, (5) International Association of Bridge, Structural and Ornamental Iron Workers, and (6) Operative Plasterers and Cement Finishers International Association, hereinafter referred to as the Unions, (R-2)*. The Unions are the recognized bargaining representatives of the Claimants (R-13) and each of said Claimants were at the times herein mentioned employees of one of the petitioners — (R-7 Department's Exhibit No. 1, Paragraph #7) (R-10 Appellant's Exhibit No. 3, Labor Agreement, See Article II thereof).

* R-Refers to Reporters Transcript.

The Petitioners are members of the Associated General Contractors of America, Intermountain Branch, (R-2) a legally organized Trade Association composed of approximately seventy-five members and having as its territory the State of Utah, hereinafter referred to as the Association. The Petitioners are signators and legally bound under the terms of a labor agreement dated August 12, 1949 and negotiated by the Association as the designated collective bargaining representative of Petitioners. (R-7 Department's Exhibit No. 1 Paragraph #7) (See R-10 Appellant's Exhibit No. 3 Labor Agreement, Article II thereof quoted as follows)—

“ARTICLE II BARGAINING RECOGNITION

“A. The Contractors recognize the Unions signatory hereto as the collective bargaining representatives of their employees over whom the Unions have jurisdiction.

“B. The Unions hereby recognize and acknowledge that the Associated General Contractors of America, Intermountain Branch, include in its membership a majority of the individual Contractors in the general, highway, building and heavy construction industry and said contractors are performing the greater percentage of work therein, and by reason of such facts, the Unions hereby recognize the Associated General Contractors of America, Intermountain Branch, as the collective bargaining representative for its membership in the general, highway, building and heavy construction industry in the territory subject to this Agreement.

“C. This Agreement shall not apply to executives, civil engineers, and their helpers, superintendents, assistant superintendents, master mechanics, timekeepers, messenger boys, office workers, confidential employees or any employees of the Contractors above the rank of craft foreman.

“D. The wage rates, working conditions, and hours of employment, herein provided have been negotiated by the Unions exclusively with the representatives of the Contractors. The Unions agree that in the event that during the life of this agreement it should make any agreement with any person, firm, association or corporation providing wage rates, working conditions and hours of employment more favorable to said other person, firm, association, or corporation than is provided in this agreement for Contractors, then and in that event any member of Associated General Contractors of America, Intermountain Branch, engaging in work of the type covered by any such agreement shall have the benefits of any such more favorable wage rates, working conditions, and hours of employment when performing such work.”

The said Contractors Association was organized in 1922 and since that time has represented its members in collective bargaining matters with the said unions (R-11 Appellants exhibit No. 4 “Constitution and By Laws, Page 13 & 14) (R-7 Department’s Exhibit No. 1 Stipulation of Fact). The collective bargaining representatives of the contractors and workmen, respectively, have for the past several years negotiated a so-called “master” or “industry-wide” contract covering the hours, wages

and working conditions for construction workers in the State of Utah. All of the labor negotiations leading to the labor contracts negotiated over the past several years were conducted exclusively by the Association and the Unions, and the said labor contracts, when executed, imposed identical conditions of wages, hours and working conditions upon each of the petitioners and were applicable to all members of the aforesaid six basic craft A.F.L. Unions. (R-7 Department's Exhibit No. 1, Stipulation of Fact) (R-22)

On August 12, 1949 the current labor agreement was executed by and between the Unions and the Association. The term of this labor agreement was two years, from August 12, 1949 to June 1, 1951. This agreement contained a clause to permit opening for negotiation of wages only on June 1, 1950. (R-10 Appellant's Exhibit No. 3) On February 27, 1950, the Secretary of the Building Trades Council of Utah representing the Unions advised the Association that in accordance with Article IX Section A of the Labor Agreement, notices were given on behalf of the Unions of their desire to negotiate an increase in wages only. (R-7 Department's Exhibit No. 1) The labor agreement by its terms had not expired, (R-10, 21) (R-45) and the Unions did not demand a change in any of the provisions of the agreement other than wages. Thereafter, on March 9, the Association requested a collective bargaining meeting with the Unions. By an exchange of correspondence between the Association and the Unions, the first collective bargaining

meeting was set for April 4, 1950. The second such meeting occurred April 26, 1950. A third such meeting occurred May 26, 1950. The bargaining reached an impasse but notwithstanding two further meetings were held, one on May 29 and the other on May 31. No agreement as to wages was reached by May 31, 1950, and thereafter on June 1, the Unions notified the Association that pickets would be placed at the Ellis W. Barker Company Professional Building job in Salt Lake City and the Earl S. Paul Company job in Ogden. Thereafter, on June 2, 1950, such picketing (strike action) did commence on these two specific jobs, and by this action all work stopped and all workmen refused to work. The Unions had been notified during the course of the negotiations both by letter (R-7 Department's Exhibit No. 1) and by newspaper articles that a strike or a picket line appearing on any construction project of any member of the Association who was a signator to the labor agreement would be regarded as a picket and a strike against the entire Association as the recognized bargaining unit. (R-11, 16, 17, 18 & 19) (R-35 & 36) (R-38, 39) The picket lines appeared on only two of the members of the bargaining unit and between June 2, 1950, and June 5, 1950, all other members of the Association who were signators to the Labor Agreement numbering approximately seventy signator members closed down their construction projects and laid the workmen off their jobs. The strike was regarded as a strike against the bargaining unit. (R-7 Department's

Exhibit No. 1) (R-16-19, 22, 23) (R-50, 51) (R-56) The Claimants became unemployed because of this action. The picket line around the two aforesaid construction projects was composed of members of the Unions.

At no time during any of the negotiations did the Unions make any separate proposals to any individual member of the Association (R-20, 48) and at all times all the said proposals were made to the Association only and for the purpose of securing increased wages for each and all of the members of the Unions including the Claimants. (R-23)

Subsequent to said strike action, meetings were held under the auspices of the United States Labor Conciliation Service and the Industrial Commission of Utah between the Association and the Unions and during none of the said meetings or negotiations were any individual proposals made to any individual member of the Association or was any indication given by the Unions that the said wage controversy could be settled by a separate wage settlement with either of the two struck companies, the Ellis W. Barker Company or the Earl S. Paul Company. (R-21) As a matter of fact there was a slow down on some jobs during the period of negotiations and just prior to the shutdown. (R-23, 24, 25) (R-57, 58) The said strike was ended on or about June 7, 1950, as a result of an agreement to increase wages only in the said Master Labor Agreement of August 12, 1949. This wage increase affected all construction workers and included the Claimants herein. (R-23, 64, 66, 97)

THE ISSUE

Are the Claimants entitled to unemployment compensation when they became unemployed because of their strike against the bargaining unit?

Claimants were members of the Unions.

Claimants appointed the Unions to represent them for purposes of bargaining.

Claimants received an increase in wage as a result of their strike action.

ARGUMENT

POINT I—THE LABOR AGREEMENT DATED AUGUST 12, 1949, WAS BINDING UPON THE ASSOCIATION (PETITIONERS) AND UNIONS AT ALL TIMES HEREIN AND DURING THE PERIOD OF THE STRIKE.

By the terms of the Labor Agreement of August 12, 1949 the parties were legally bound to recognize the bargaining unit until the expiration of the agreement in June 1951. This bargaining unit could not be dissolved short of breach of contract. (See Article II of Labor Agreement, *supra*.) Respondents contend that the strike dissolved the bargaining unit and because of this fact recognition by the respective parties under Article II of the agreement was of no legal effect. The parties regarded the Labor Agreement enforceable in every respect but wages. By the terms of the agreement the recognition clause was not voided by the strike and it

logically follows that a strike against this legally recognized bargaining unit during June of 1950 was economic action against the entire unit.

The Unions during the strike did not deny recognition of the Association as the bargaining unit. This same legal status would perhaps not obtain were the two parties renegotiating all of the terms of the agreement at the expiration of said Agreement.

The Respondents take the position that the entire contract was being renegotiated at the time of the strike and, therefore, the bargaining unit was dissolved at the time said strike occurred.

The two struck companies were by contract legally bound to recognize the bargaining unit and could only legally negotiate through the recognized unit. This same condition existed for all signators to the Agreement both contractors and Unions and involved Claimants as members of the Unions.

A strike against one member of the bargaining unit was therefore a strike against the entire unit. The claimants held membership in this unit and were accordingly ineligible to receive unemployment benefits because the strike involved their grade, class or group at the establishments where they were last employed and the strike was fomented by workers of an employer who were parties to such plan to foment the strike. (See 42-2a-5 (d) (1) U.C.A. 1943 as amended *infra*.)

POINT II—A STRIKE AGAINST TWO MEMBERS OF A BARGAINING UNIT IS A STRIKE AGAINST THE ENTIRE BARGAINING UNIT AND CLAIMANTS WHO ARE INTERESTED AND BENEFIT BY THE STRIKE ARE OF THE GRADE, CLASS OR GROUP AND INELIGIBLE FOR COMPENSATION WITHIN THE MEANING OF 42-2a-5 (d) (1), UTAH CODE ANNOTATED, 1943, EMPLOYMENT SECURITY ACT.

42-2a-5 Provides:

“An individual shall be ineligible for benefits or for purposes of establishing a waiting period:

“(d) For any week in which it is found by the commission that his unemployment is due to a stoppage of work which exists because of a strike involving his grade, class, or group of workers at the factory or establishment at which he is or was last employed.

“(1) If the commission, upon investigation, shall find that a strike has been fomented by a *worker of any employer*, none of the workers of the grade, class, or group of workers of the individual who is found to be a party to such plan, or agreement to foment a strike, shall be eligible for benefits; provided, however, that if the Commission, upon investigation, shall find that such strike is caused by the failure or refusal of any employer to conform to the provisions of any law of the State of Utah or of the United States pertaining to hours, wages, or other conditions of work, such strike shall not render the workers ineligible for benefits.”

The unemployment compensation statutes of all 48 states contain provisions disqualifying claimants whose

unemployment is the result of a labor dispute. While most labor dispute disqualification clauses are made applicable to labor disputes, several use different phraseology:

California—"('trade dispute)'"

Colorado—"('strike)'"

Kentucky—"('strike or other bona fide labor dispute)'"

New York—"('strike, lockout or industrial controversy)'"

Rhode Island—"('strike or industrial controversy)'"

Utah—"('strike involving grade, class or group of workers)'"

These differences, however, have not proven significant even where disqualification is limited by statute to strike. *Sandoval v. Industrial Commission*, (Colorado) 130 P (2d) 930; *Block Coal Company v. U.M.W.*, (Tennessee) 148 S.W. (2d) 364; *Miners v. Hix*, (West Virginia) 17 S.E. (2d) 810.

A strike is defined as follows by the Labor Management Relations Act of 1947:

"The term strike includes any strike or other concerted stoppage of work by employees (including the stoppage by reason of the expiration of a collective bargaining agreement) and a concerted slowdown or other concerted interruption of operations by employees."

A labor dispute is defined by the National Labor Relations Act as amended as follows :

“The term labor dispute includes a controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.”

A strike is the outgrowth of a labor dispute and in a sense the terms “strike” and “labor dispute” are similar. A strike only occurs after the existence of a labor dispute.

In recent years the increased frequency of large scale industrial controversies has sharply accentuated the problem of the applicability of disqualification provisions to claimants whose unemployment, while resulting from a labor dispute or strike is wholly involuntary. Claimants in the instant case received the benefit of the wage increase resulting from their strike, their duly appointed representatives called the strike against the two members of the bargaining unit, and for that reason their unemployment was, perhaps, not involuntary.

The most commonly advanced justification of the labor dispute disqualification is that no person should be allowed to receive benefits while unemployed as a result of his own voluntary acts. *Department of Indus-*

trial Relations v. Pesnell, (Alabama) 199 Southern 726; *Saunders v. Maryland Unemployment Compensation Board*, 53 Atl. (2nd) 579; *Deshler Broom Factory v. Kinney*, (Nebraska) 2 N.W. (2d) 332 and 336.

The Unions in this case ordered a strike of only two construction firms hoping to be secure in the knowledge that such a course would as effectively induce a complete work stoppage as would a strike against all members of the bargaining unit and that state benefit payments of all non-striking members would appreciably lessen the drain upon the union's treasury by requiring the union to finance only a small scale strike. As a matter of fact, the Unions knew and had been notified several times during negotiations that a strike against one would be considered a strike against all. This matter is discussed in *Chrysler v. Smith*, 298 N.W. 87. In re *St. Paul & Tacoma Lumber Company* 110 P. (2d) 877; *Spielman v. Industrial Commission of Wisconsin*, 295 N.W. 1.

The statutes (including the Utah statute) uniformly provide that claimants will not come within the disqualification clause merely because a labor dispute or strike exists, but will be ineligible for benefits only if the dispute bears a causal relationship to their unemployment.

The question of disqualification of employees of a branch plant of a corporation located in another city but affiliated with an installation under separate labor agreement where a labor dispute occurred has been litigated only once, and in that case affiliates were regarded as a single employer and the claimants disquali-

fied, *Spielman v. Industrial Commission of Wisconsin*, 295 N.W. 1. All of the statutes in the United States, including Utah, which exempt claimants from the operation of labor dispute disqualification clauses universally contain exemption upon their non-participation in the dispute. See Utah Statute supra: "... group of workers of the individual who is found to be a party to such a plan ...". Even statutes which without any further qualification allow benefits to claimants who do not belong to a grade or class of employees any of whose members are participating in financing, or directly interested in a labor dispute, implicitly embody a requirement of non-participation, since a claimant who is himself participating in the labor dispute will necessarily be a member of such a grade or group. It is clear, for example, that disqualification as a participant may extend not only to persons refusing to work because of their own labor dispute, but also to those who perform some other voluntary act making the dispute of others their own. *Barnes v. U.C.B.* (Pennsylvania Superior Court) 33 Atl. (2d) 258, 1943.

Even in jurisdictions whose statutes embody exceptions to the labor dispute disqualifications, a claimant, although not participating in the dispute, cannot bring himself within these exceptions if he is directly interested in it. (See the Utah statute aforesaid). When the success of a labor dispute would have inured to the benefit of the claimant in the form of higher wages, whether claimant was Union or non-Union, the claimant is gener-

ally held to be directly interested in the dispute, *Huiet v. Boyd*, (Ga. 1941) 13 S.E. (2d) 863; Case 18222, 11 B.S. 10-57, Illinois, (Ill. R 1948); Case No. 12589, 11 B.S. 7-66, (Kansas R 1947). It is immaterial whether in fact the dispute has been attended by success or failure. *Nobes v. U.C.C.*, (Michigan) 1946, 21 N.W. (2d) 820.

It appears from unconflicting evidence taken by said Respondents, that the Claimants and each of them left their work for your Petitioners because of a wage dispute between your Petitioners and their Unions, and because their Unions picketed two construction firms who were signators to their labor agreement and who were parties to their collective bargaining unit, and said Claimants and each of them thereafter continued out of work until June 8, 1950, by reason of the fact that the said wage dispute which fomented the strike was still in active progress *in the establishments in which they were last employed*. The said Respondents, the Appeals Board and Board of Review thereof abused its discretion in that the decision to award benefits to the said Claimants was not supported by the findings, and the findings are not supported by the evidence, and upon legal conclusion which were and are wholly erroneous.

The Supreme Court of California in a case involving a similar factual situation ruled on September 14, 1949 that a strike against one member of a collective bargaining unit was a strike against all members of the unit and accordingly claimants for unemployment compensation

were ineligible to draw benefits during the period of the strike. *McKinley v. California Employment Stabilization Commission*, 209 Pac. (2d) 602.

Section 56 of the California Unemployment Insurance Act as amended provides: "An individual is not eligible for benefits for unemployment, and no such benefits shall be payable to him under any of the following conditions: (a) If he left his work because of a *trade dispute* and for the period during which he continues out of work by reason of the fact that the *trade dispute* is still in active progress *in the establishment in which he is employed.*"

Construing the terms "trade dispute" and "strike" to be similar in meaning then it follows the Utah statute and the California statute are closely related in meaning.

For construction of the term "establishment" see *Chrysler v. Smith*, 298 N.W. 89 at page 91.

In the California case, *supra*, the Union had been notified that a strike against one would be regarded as a strike against all. This same condition existed in the instant case. The Supreme Court of California stated as follows on page 304:

"Either the union or an individual employer, at any time, could have broken off joint negotiations and bargained with its employees on an individual basis. But that course was not taken. At no time did the union purport to be directing any action solely against the Butter Cream plant; instead, the union continued throughout to deal

directly with the association for the purpose of obtaining a new master contract. To say, therefore, that the act of striking the one plant did not shut down work in other plants of the association which were subject to the labor negotiations for the purpose of obtaining a master contract is wholly unrealistic . . .

“The volitional test established in *Bodison Mfg. Co., v. California Emp. Com.*, 17 Cal. 2d 321 (109 P. 2d 935), was based upon the principle that innocent victims of a trade dispute should not suffer loss of their unemployment insurance rights.”

However the instant case is even stronger because not only was multiple association wide bargaining continued and no demands made to the individual members of the association, but all parties were contractually bound to continue to recognize each other until the expiration date of the contract in 1951.

In the *McKinley* case, *supra*, the court stated that there must be a direct causal connection between the trade dispute and the leaving of work. The evidence of causal connection in the instant case is clear and undisputed.

This court has spoken on this subject and construed the applicable section of our employment security act in the case of *Iron Workers Union v. The Industrial Commission*, 104 Utah 242. This case involved two competing unions where one union placed a picket line around a plant in Provo and the members of the other union

refused to cross said line and thereby became unemployed. Justice McDonough in construing 42-2a-5 (d) (1) U.C.A. 1943 and ruling on eligibility of claimants for unemployment compensation in that case stated as follows:

“The members of the Iron Workers’ Union contend that they are entitled to benefits for the time they lost by reason of the strike, even if the members of the S.W.O.C. cannot collect any benefits. They point out that they were not permitted to vote on the strike; that they had nothing to do with calling it, but that they were prevented from entering the plant by an effective picket line. They further contend that they were not of the grade, class, or group of workers which was involved in the strike because they had no voice in negotiations and had no voice in determining whether or not there would be a strike. In fact they claim they were opposed to the strike and should not be penalized by the acts beyond their control.”

(In the case at bar the claimants were members of the Unions involved in the strike, were not opposed to the picket lines, were benefited by receiving a wage increase and were of the group of workers involved in the strike.)

Justice McDonough further states:

“However, it must be remembered that the S.W.O.C. by virtue of winning the consent election became the sole bargaining agent for all of the employees, including members of the Iron Workers’ Union.”

(By way of further comment the Unions in the case at bar were bound by contract as a unit for collective bargaining, and had a long experience of collective bargaining with the Association.)

Justice McDonough in construing the applicable Utah statute further stated:

“If a strike involves his ‘grade, class or group’ of workers, an employee is ineligible for unemployment benefits when stoppage of work is ‘caused’ by members thereof.”

(Note that the court refers to members.)

“... A strike involves the ‘grade, class or group,’ of an employee within the meaning of the statute if the dispute which results in the strike is with reference to wages, hours or conditions of employment of a group of which he is a member. True, a ‘class, grade or group’ may be coextensive with a particular union membership, but this is not necessarily so. In the instant case the members of the Iron Workers’ Union were dissident members of a ‘group’ involved in the strike; nevertheless they were members of the ‘group’ which was involved in the strike. The provisions of (d) (1) hereinabove quoted, providing that where a strike is fomented by an employee, the workers who are of his ‘grade, class, or group’ are ineligible for benefits serves to make clear that the construction here given of the quoted words voices the legislative intent. *It is not only those who foment the strike or bring it about who are ineligible, but the group to which such persons belong—however inclusive—the group for whose benefit the strike is called . . .* The statute grants

an exemption from the general disqualifying provisions applicable to persons out of employment by reason of a strike, to those who are not directly interested in or participating in or financing the strike, and who do not belong to a grade or class of workers, any of whom participate in, or finance, or are directly interested in the dispute. The Georgia Court of Appeals held that there was sufficient evidence to show that claimants were disqualified to receive benefits because they were interested in the outcome of the strike by reason of the bearing it had on wages of claimants. The court held it was immaterial whether they were members of any union.’’

We respectfully submit the Respondents erred in granting Unemployment Compensation to the Claimants herein and in charging the accounts of the Petitioners therefor.

Respectfully submitted,

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