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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 Respondents

Utah Supreme Court

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# In the Supreme Court of the State of Utah

OLOF NELSON CONSTRUCTION  
COMPANY, VINCENT - PETER-  
SON CONSTRUCTION COM-  
PANY, GRONEMAN & COM-  
PANY, YOUNG & SMITH CON-  
STRUCTION COMPANY, UTAH  
CONSTRUCTION COMPANY,  
*Petitioners & Appellants*

vs.

THE INDUSTRIAL COMMISSION  
OF UTAH, and THE BOARD OF  
REVIEW, APPEALS REFEREE and  
CLAIMS SUPERVISOR of its DE-  
PARTMENT OF EMPLOYMENT  
SECURITY, and JOSEPH B. ALL-  
MAN ET AL,  
*Respondents & Appellees*

Case No. 7633

## RESPONDENTS' BRIEF FILED

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## RESPONDENTS' BRIEF

### STATEMENT OF CASE

On June 27, 1950, a representative of the Utah Depart-  
ment of Employment Security of the Industrial Commission  
of Utah, issued a determination that Joseph B. Allman and

others were not disqualified for unemployment compensation benefits by reason of Section 42-2a-5(d) of the Utah Act. The representative found that the claimants' unemployment was not due to a stoppage of work which existed because of a strike involving his grade, class, or group at the establishment at which he was last employed.

On July 5, 1950, by counsel, the employers of the claimants involved filed an appeal. The matter was referred directly to the Appeals Referee who conducted a hearing on August 3, 1950. On the 22nd day of August, 1950, the Referee affirmed the decision of the representative, and on the 28th day of August, the employers appealed to the Board of Review of the Industrial Commission. At the request of the parties the decision of the Board of Review was delayed until the 18th day of December, 1950. At that time the Board of Review affirmed the decision of the representative and the Referee, and the matter is now before this court on Petition for Writ of Review.

## STATEMENT OF FACTS

The individual claimants involved filed claims for unemployment compensation benefits for the calendar week which ended June 10, 1950.

The Labor Committee of the Associated General Contractors was authorized to negotiate on behalf of the members of the Associated General Contractors regarding the wage clause of the contract (currently in effect between the members and the 6 basic crafts, which were: The International Hod Car-

riers, Building and Common Laborers Union; the United Brotherhood of Carpenters and Joiners of America; the International Union of Operating Engineers; the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; the Operative Plasterers and Cement Finishers Association; and the International Association of Bridge, Structural, and Ornamental Iron Workers, all affiliated with the American Federation of Labor and representing the local unions of the state). The wage clause of the contract was opened effective March 1, 1950, by 90 day notice submitted by the authorized representatives of the unions under the date of February 27, 1950.

The negotiations between the Labor Committee of the Associated General Contractors and the representatives of the 6 basic crafts were not successful, and on the morning of June 2, 1950, the union, pursuant to a strike vote duly taken, instituted strikes (and picket lines) against two jobs; one job was that of Earl S. Paul, an A. G. C. member, and the other was that of Ellis W. Barker, an A. G. C. member. On the afternoon of June 2, the Utah Construction Company, an A. G. C. member, shut down its operations. The balance of the A. G. C. members shut down their operations on or about June 5, 1950. The shut downs which followed the strike of June 2 were in accordance with a previous agreement between the members of the A. G. C. The unions had been notified on several occasions that the Associated General Contractors considered that a strike against one of the members during a negotiating period would be considered as a strike against all of the members. (Tr. 23).

The Associated General Contractors, under its organizational authority, was authorized to negotiate on behalf of all of the members. Any negotiated agreement became binding on the members when signed by the members themselves or by individuals vested with the power of attorney for those members (Tr. 27, 31).

Any agreement negotiated by the representatives of the 6 basic crafts would become binding on the crafts only when ratified by the locals through their designated representatives. None of the claimants involved in this matter were employed by the two employers whose jobs were struck; they were employees of A. G. C. members who shut down their operations pursuant to the pre-arranged understanding. The facts show that the workers on all but the two struck jobs reported for work on the morning of June 2 and thereafter until their respective employer shut down his operation (Tr. 41).

Prior to and after the strike on June 2 the unions or their representatives had made no demands on Ellis W. Barker or Earl S. Paul, the two employer members involved. There was no strike called at the other jobs which Ellis W. Barker or Earl S. Paul had in progress at the time (Tr. 50).

## THE ISSUE

The issue involved in this matter is that of whether or not the claimants should be disqualified from receiving unemployment compensation benefits pursuant to the provisions of Section 42-2a-5(d), Utah Code Annotated 1943 (Utah Employment Security Act).

## ARGUMENT

THE CLAIMANTS WERE NOT UNEMPLOYED DUE TO A STOPPAGE OF WORK WHICH EXISTED BECAUSE OF A STRIKE INVOLVING THEIR GRADE, CLASS, OR GROUP OF WORKER AT THE FACTORY OR ESTABLISHMENT AT WHICH THEY WERE LAST EMPLOYED.

The Utah Employment Security Act provides in part, Section 42-2a-5(d), Utah Code Annotated 1943, that:

"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."

If the claimants are to be disqualified under this provision of the Act, it is necessary to adopt the theory that because the representatives of the six basic crafts were negotiating for the six crafts, no "pressure" action could be taken by the unions short of affecting the entire membership of the Associated General Contractors. Actually, of course, the unions took strike votes and struck only two jobs of A. G. C. members. All other workmen reported for work on the other jobs and continued to work until their respective employers shut the jobs down pursuant to the agreement between the membership of the Associated General Contractors.

From the record (Tr. 41) we think it may be assumed that the workmen on the jobs which were not struck would

have continued to report for work and would have continued working had the respective employers not closed their jobs.

There is little doubt but what the objective on the part of the union by striking the two jobs was to apply an economic pressure which would assist the bargaining representatives of the six basic crafts in arriving at a satisfactory settlement with the members of the A. G. C. The employer members of the A. G. C. had, through the Association, announced that they would consider a strike against one to be a strike against all of the membership. Consequently, when the two jobs were struck the employers, pursuant to their agreed strategy, applied economic pressure against the unions by closing down all construction operations of the members. Some of these operations were closed on the afternoon of June 2, the day of the strike, and the others were closed down on or before the afternoon of June 5.

The respondents contend that the facts make it clear that there was no strike at any of the operations other than the two at which pickets were established, and that since there was no strike at these other establishments, the claimants were not ineligible to receive unemployment compensation benefits.

The petitioners discuss at some length the laws of other jurisdictions which use instead of the word "strike" the term "labor dispute." There is no doubt but that a labor dispute existed in the construction industry between the A. G. C. members and the six basic crafts. It must be borne in mind, however, that the term "labor dispute" is much broader in its application than is the term "strike," which is contained in the Utah Act.

If claimants are otherwise eligible they will not be considered ineligible under the Utah Act unless they are involved in a strike at the establishment at which they were last employed. The term establishment cannot be interpreted as to include the entire operations of all of the A. G. C. members. It must be limited as including the operations of the employer by whom the worker was employed. In this case it was stipulated (Tr. 13) "That the individual employing unit is the respective employer of the individual claimant involved and that the individual claimant is represented by his respective craft union for the purpose of collective bargaining."

The Utah Employment Security Act was patterned after an act proposed by the Social Security Board, which act was patterned after the British National Insurance Act. Under the British acts disqualification is based upon a work stoppage due to a trade dispute (Utah limits the disqualification to strikes) at the factory, work shop, or other premises at which the claimant is employed. The British Umpire, which is the final arbiter under the British Act, has consistently held that the words "factory, work shop, or other premises" refer to single units of employment. In adapting the language for use in Utah, the word "establishment" was substituted for "work shop." It would not appear that this change was intended to broaden the scope of the employment area so as to encompass a whole industry rather than a single unit of employment.

We submit that there was no strike at the respective establishments at which the claimants were employed and that the ultimate and final act which caused their unemployment was not the strike and the establishing of pickets at the Paul and

Barker jobs, but was the action of the other members in closing down their operations.

An examination of the cases involving a similar situation reveals none involving the exact language which is included in the Utah Act. However, we would like to summarize the cases which do involve substantially the same factual situation.

In the matter of Steve C. Bucko, Respondent vs. J. F. Quest Foundry Company, Relator (Minnesota Supreme Court), reported at 38 N. W. 2d 223, which dealt with unemployment compensation, a similar situation existed. Twelve foundry operators whose employees were members of the International Moulders and Foundry Workers Union of North America, associated themselves together for the purpose of more effective bargaining with the union. The association in that case appears to have been more loosely formed than is the Association of General Contractors. Any member of that association could withdraw during negotiations simply by notifying the other members that it wished to withdraw. In that case the union served notice on the employers through their bargaining agent that it desired to negotiate changes in the contract then in force. Two days later the employers through the association notified the union that they in turn desired to negotiate changes in the contract. After some fruitless negotiations between the association and the union, a vote was taken by the union among all its members present at a particular meeting, which vote resulted in a general authorization being granted to the strike committee to call a strike at any of the foundry plants involved. Employees of each of the twelve foundries participated in this vote.

The union duly filed a notice to strike, and the negotiations continued for a while. The union was then advised by the association that the members of the association would consider a strike against any one of its twelve members to be a strike against all of its members. The twelve employers, through their association, notified the labor conciliator as follows:

“As the representative of the foundry employers listed below, I am herewith, at their instruction, filing with you a notice under the Minnesota Labor Relations Act of their intention to institute a lockout in connection with a current labor dispute.

“This lockout notice is only for the purpose of protecting this employer group against an attempt on the part of the union to strike less than all of the twelve companies negotiating as a unit with the union. It will be used only if the union strikes less than all twelve companies in the event any strike should take place as a result of the existing dispute.”

On April 14 the strike committee called a strike against two of the twelve employers, and two days later struck against a third employer. On April 22 the remaining nine employers notified their workers that there would be no further work until the dispute was settled, and on April 26 these nine foundries shut down.

The court found that the employees of the nine plants against which no strike had been called were willing to continue working at the time the nine plants were closed. The Minnesota Act provides:

“An individual shall be disqualified for benefits:  
(d) For any week with respect to which the Com-

mission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; provided that this subsection shall not apply if it is shown to the satisfaction of the Commission that (1) he is not participating in or financing a labor dispute which caused the stoppage of work; and (2) that he does not belong to the grade, group or class of workers of which immediately before the commencement of the stoppage there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing the dispute . . . ”

In addition the Minnesota Act provided that benefits would not be denied to an employee who becomes unemployed because of a lockout or by dismissal during the period of negotiation of any labor dispute and prior to the commencement of a strike.

The court in discussing the eligibility of the claimants who were employees of the nine employers stated:

“When a lockout is instituted, the employee does not sever his relationship with his employer, but the employee is out of work due to an act of the employer over which he has no control.

“It can hardly be said that respondent and the others similarly situated were out of work due to a strike against the three establishments in which they were not employed. It is no doubt true that had it not been for the exception pertaining to a lockout, it could be said that a labor dispute existed at the other nine places as well, but in view of the fact that there was no strike called against the nine employers here involved and a lockout is excepted from the disqualifying labor dis-

pute, the term 'strike' cannot be extended to encompass those nine employers whose employees were willing to continue working under the terms of the former contract.

"In the second place, the employers, themselves, have recognized the fact that the employees of the nine establishments were unemployed as a result of the lockout. They served their notice of intention to lockout required by our State Labor Relations Act."

In the instant case, the members of the Associated General Contractors, through the Association Labor Committee, notified the six basic crafts that a strike against one would be deemed to be a strike against all. The employers did not specifically state what action they would take in case less than all of the members were struck.

The Minnesota court continued:

"Here the employees of the nine establishments involved were willing to continue working under the old contract. Relator seeks to convert the lockout into a strike. It argues that the labor dispute produced the strike; that the lockout was not the result of the labor dispute, but, instead, the result of the strike. That being true, it argues that there was no lockout within the meaning of the term as used in the Employment and Security Law.

"The weakness of this argument is that the Relator assumes that the association of twelve employers was a bargaining unit and that the strike against three members forced the employers at the other nine establishments to discontinue operation. There is no evidence that would sustain such a finding. The fact that a strike was called against three did not compel the other nine to close their shops. They did so in order

to make use of an economic weapon which they held in their hands and for the sole purpose of forcing the union to accept terms less favorable than those which the union demanded. The evidence is conclusive that at the time the nine establishments closed their doors, the employees of those nine were willing to continue to work at the existing rates of pay and according to terms of the pre-existing contract. As such it cannot be said that the unemployment was due to a strike. To be sure, there was a labor dispute existing in all twelve establishments, but the Legislature has seen fit to remove from the disqualification unemployment due to a lockout, and it cannot be said that unemployment in the nine establishments was due to anything but the lockout."

This court's attention is again called to the fact that the disqualification provision in the Utah Act is much more limited in its scope by the use of the word "strike" than it would be had the words "labor dispute" been used as a basis for the disqualification. With this difference in mind, it would appear that what the Minnesota court said with reference to the underlying reason for the unemployment would apply equally well in the instant case. While there was no determination in the instant case that a lockout existed, the actual shutdown of operations by those employers who were not "struck" must be construed as having the same force and effect.

In the case of *Rhea Manufacturing Company vs. Industrial Commission*, 231 Wis. 643, 651, 285 N. W. 749, the court said, in discussing the aspects of the lockout:

"Viewed in its social and economic aspects, the lockout is a weapon in the hands of the employers which is a counterpart to the weapon of strike held by the

workers. . . . Like the use of any other weapon, the consequences to the one against whom it is directed, as well as to the one who directs its use, must be weighed before it is used, and if its use results in more harm to the holder of the weapon than to the one against whom it is directed, he who has control of its use should not be heard to complain that it has resulted in harm to himself."

In the case of McKinley, et al, vs. California Employment Stabilization Commission, 209 P. 2d 602, which case dealt with unemployment compensation claims, the facts were as follows: (This case was cited briefly by the petitioners in this matter, and we think it merits a somewhat exhaustive discussion).

The Sacramento Wholesale Bakers Association, comprising all of the Sacramento "machine shop baking industry," was organized in 1935 for the purpose of representing its members in labor relations. Prior to the formation of the association, either individually or jointly, the employers had entered into contracts with the Bakery and Confectionery Workers' International Union of America, Local 85. Since 1935 a master contract upon an industry-wide basis was negotiated, and on behalf of the employers, executed by the executive secretary of the association. (It will be remembered that in the instant case the members either signed the master contract individually or through an individual given written power of attorney to sign).

While the collective bargaining agreement in force in California contained no such provision, the members of the association understood among themselves that they would act as

a unit in collective bargaining matters and that a strike against any one or more members would be treated by them as a strike against all. As in the instant case, the union members were well aware of this declaration.

Early in 1947, and prior to the expiration date of the master contract, the union advised the executive secretary of the association that it desired to amend the contract generally as to wages, hours, and working conditions. During the negotiations which followed, the members of the union employed at the petitioners' plants authorized the negotiating committee in its discretion to call a strike against any one or more of the employers. When negotiations broke down, the union declared a strike against the Butter Cream Baking Company, one of the members of the association. Within the next few days the other employer members of the association closed their plants. The employees in these bakeries continued to work until these plants were closed. As in our case, the union did not, prior to the strike against the one association member, make any demands upon the individual employers. After the bakeries ceased operations, the picket line included employees from bakeries other than the struck plant. (This fact differs from the instant case, in which there was no participation by the other employees in the picketing).

The California Act provides, Section 56:

"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 was employed."

Again, it must be borne in mind that the Utah disqualification applies only where the individual claimant's unemployment is a direct result of a *strike* involving his grade, group, or class at the establishment at which he is employed.

There is no doubt but that there was a labor dispute in the instant case as there was in the California case. It must be noted that the decision in the California case turns upon the fact that the court found that the claimants in the plants which were not struck did in effect suffer unemployment by reason of their own voluntary acts. The employers contend that it is the union action of striking the Butter Cream Plant which caused the shutdown. The respondents argued that the employees were willing to work in the petitioners' plants and did so until they were locked out. The court held that the employees of the Sacramento bakeries left their work voluntarily and therefore should be excluded from receiving unemployment benefits. The court stated:

"The selection of a certain plant or plants for a shutdown by strike at a particular time was a mere matter of strategy in the conduct of the trade dispute which equally involved all of the bakeries and their employees. This in effect applied the union's economic sanctions against each employer and brought about the unemployment of all of its members. Had the association acted first by closing down one of the member plants and the union followed with a strike against all of the remaining plants, it would be equally clear

that the volitional act causing unemployment was the initial shutdown.

"Either the union or the 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 the other plants of the association which were subject to the labor negotiations for the purpose of obtaining a master contract, is wholly unrealistic. Industry-wide negotiations had been established by these employers and consistently carried on for over 10 years."

The court stated:

"The volitional test established in *Bodinson Manufacturing Company vs. California Employment Commission*, 17 Cal. 2d 321, was based upon the principle that innocent victims of a trade dispute should not suffer loss of their unemployment insurance rights. But the unemployment of the bakery workers was caused by their own action taken with full knowledge of its consequences. In the *Waffle Shop* case, the unemployment was due to a lockout; here the lockout of the bakeries was due to a strike."

In the *Bunny's Waffle Shop vs. California Employment Commission*, 24 Cal. 2d 735, certain restaurant owners sought to compel their employees, through their union, to deal with a newly organized San Francisco Employers' Council in obtaining a collective bargaining agreement. The union refused

to bargain except with the individual employers as had been the custom. To compel the joint negotiations, the restaurant owners made a reduction of 25 per cent in wages, and a 6-day week with split shifts was established instead of the existing 5-day week and the straight shift. When the employees were paid at the lower rate, they left their jobs. Subsequently, the restaurants were closed down. Later, the employers presented the question as to whether or not the employees should be disqualified from receiving benefits under the Unemployment Insurance Act because they had left their work.

The court held that the claimants left their work because of the economic weapon used by the employers (that of reducing wages and changing shifts) and not because of the trade dispute which was then in existence. The court concluded that in reality the form of cessation of employment is not controlling and that the determinative factor is the volitional cause of the work stoppage. The court held that although the employees left work of their own choice, that choice was not freely made but was compelled by the economic weapon which the employers used. The California court's decision in the McKinley case, therefore, was influenced by its previous decision in the Bunny's Waffle Shop case.

Three justices dissented from the opinion in the McKinley case, *supra*. Justice Gibson in his dissent says:

"It is conceded that the right to benefits depends upon whether the worker left his job of his own free will or was forced to do so because of the acts of others and that under the Bodinson case, Section 56 disqualifies only those workers who voluntarily leave their work

. . . Thus, although the section clearly precludes the payment of benefits to employees who go out on strike . . . , it has been treated as more generally disqualifying workers who were locked out by their employers. (See *Bunny's Waffle Shop vs. California Employment Commission*, 24 Cal. 2d 735; *Bodinson Manufacturing Company vs. California Employment Commission*, *supra*, at p. 327). It would be a contradiction in terms to hold that a locked out employee had *voluntarily* left his work.

"The majority opinion, however, concludes that the employees 'left their work voluntarily and therefore should have been excluded from receiving unemployment benefits.' The theory seems to be that because the union and the employers' association were negotiating with regard to proposed changes in the master contract and because the union had been informed of an understanding or agreement solely among the employers that a strike against one of them would be treated as a strike against all, the members of the union by permitting a strike against one employer, thereby 'placed themselves outside the class of persons who are properly protected by the subjective volitional exception to Section 56 which was stated and applied in the *Bodinson* case.' In my opinion, this theory is unsound and does not warrant the conclusion that petitioners' employees voluntarily left their work."

Gibson points out that in the *Bunny's* case the court actually held that the employees left work because of the economic weapon (the act of the employers in reducing wages and changing shifts) and not because of the trade dispute then in existence. He points out:

"The opinion in the *Bunny's* case indicates that the court really treated the employees as having voluntarily

left work. At pp. 742-743 of 24 Cal. 2d, the court found it necessary to determine whether '*if they left their work voluntarily* they are subject to the temporary disqualification imposed by Section 58(A) of the act upon one who left his most recent work voluntarily without good cause . . . ' and it was held that there was 'good cause' within the meaning of Section 58(A). (Italics added.) It is obvious that Section 58(A) would not have required any discussion at all if, as the majority opinion now states, the ruling with respect to Section 56 had been based upon the theory that the leaving was not voluntary."

He continues:

"These employers were in no way compelled or forced to lock their doors to protect their plants or jobs, and the purpose of the lockout was simply to give them an added advantage in bargaining with the union. The strike was directed only against the Butter Cream Baking Company, and the petitioners were not subjected to strike or threat to strike or any other activity which would have forced them to close down. The most that can be claimed is that petitioners were subjected to indirect pressure resulting from a strike against a *different* employer at a *different* establishment, which might place them at some disadvantage in negotiations."

As Gibson points out, the California law is unique since the labor dispute disqualification found in Section 56, based solely on the voluntary leaving of work, does not appear in the unemployment insurance acts of any other jurisdiction today.

Justice Carter also dissented. He said:

"Neither do I believe that anything said in *Bodinson Manufacturing Company vs. California Employment Commission*, 17 Cal. 2d 321, or in *Bunny's Waffle Shop vs. California Employment Commission*, 24 Cal. 2d 735,

requires such an interpretation of the Unemployment Insurance Act. It strikes me that the interpretation placed on this act by the majority in this case is just a step toward the ultimate holding that an overall employers' association which unites industry of the community or state for the purpose of dealing with labor problems could make it impossible for any employee who belongs to a union to obtain unemployment insurance benefits by closing all industry in the event of a strike against any member of the group comprising the overall employer organization. In other words, in order for an organizational employer group to exert economic pressure to prevent a strike against one of their group, a complete shutdown or lockout could be inaugurated with the result that none of the employees locked out, and thereby involuntarily unemployed, could receive unemployment compensation benefits."

It appears to us, the respondents in the instant case, that actually the decision in the Bunny's Waffle case to allow benefits to the claimants involved was based simply on the proposition that the individual claimants voluntarily quit their work because of the economic move of the employers to reduce wages and change shifts and that they had good cause for quitting. The majority opinion in the McKinley case appears to misinterpret the holding in the Bunny's Waffle case and to go a long way in order to uphold what the majority thought was its decision in the Bunny's Waffle case.

In the McKinley case, as in the instant case, the proximate cause of the unemployment of the claimants who were not directly involved in the strike was the shutting down of operations by the balance of the employers. It is merely a case of the unions using one economic weapon to strike, and the em-

ployers retaliating with another economic weapon—that of shutting down operations. It further appears to the respondents that unless the petitioners can establish that the several jobs of the various members of the Association constitute one establishment, the petitioners must fail in their arguments.

Again, we admit that there was a labor dispute existing between the unions and the several employers. That fact, however, is immaterial since strike is much narrower in scope than labor dispute.

In the case of Morand Brothers Beverage Company, et al, Distillery, Rectifying and Wine Workers International Union of America (AFL), 91 NLRB 58, Case No. 13-CA-250, September 25, 1950, CCH 10, 314, Labor Law Reporter, Vol. II, the facts and ruling were as follows:

Bargaining between 35 Chicago wholesale liquor distributors and the union representing the salesmen of the distributors had been conducted on an association-wide basis since 1943. When negotiations for a new contract reached a stalemate, the union struck Old Rose Distributing Company but did not strike the remaining employer members of the association. On the following day each of the 35 employer members sent a letter to its respective salesmen asking them to "turn over to us immediately any records, papers, credentials, or monies that you have belonging to us and come and see us immediately so that we may settle the financial differences that exist to date between us." Upon receipt of this letter, some salesmen considered it a notice of discharge, while others reported to work and were told that they were no longer employed or that their employment had ceased.

The Board held that the act did not permit a discharge to reduce, by anticipatory action, the effectiveness of an expected strike by a labor organization. Reynolds dissented, arguing that the complaint should be dismissed and that:

“Such an economic lockout, not unlawfully motivated, is not rendered illegal simply because it had the effect of neutralizing the economic pressure exerted by a union to resolve in its favor an impasse arising out of good faith bargaining negotiations.”

Reynolds found in the union action in striking only one of the 35 members of the multi-employer association a “divide and conquer” strategy designed to force the employers to abandon their association-wide bargaining. He thought that the:

“Employers’ decision that all or none should continue operations was a proper exercise of defensive economic power under the present statutory scheme of collective bargaining.”

The Board said that the minority view would amount to the sanctioning of the vicarious or constructive strike, thus giving an “incongruous construction” to the act. Under this view if the union struck less than all of the employers, the union members would be deprived of the protection of the act; if it struck all employers, the union would be protected—a result not in accordance with the idea of minimizing industrial strife.

We have quoted from the above case merely for the information of the court, and not because we rely on the decision therein.

Several cases involving the definition of the term “estab-

lishment" and the existence of a strike or labor dispute at the establishment arose as a result of a strike at the Rouge Plant of the Ford Motor Company. In the case of Donald L. Nordling, et al, Respondents, vs. Ford Motor Company, Relator, Minnesota Supreme Court, April 28, 1950, 42 N. W. 2d 576, the court said in speaking of the term "establishment":

"We believe that the question involved in this case is very narrow. A determination of what is meant in our statute by the term 'establishment' will be decisive of the issues now before us, regardless of whether the employees will share in the benefits of the strike if the union wins or not, and regardless of whether the same international union represents all Ford employees.

"It is true that our act contemplates compensation for those who are unemployed because of no fault of their own. However, where there is an express provision for disqualification, the facts must come within the meaning of the words used by the majority if the disqualification is to be effective. The disqualification which we have under consideration relates to unemployment due to a labor dispute, and it is clear that before such labor dispute can effectively disqualify, it must be in progress at the *establishment at which the claimant is or was employed*. The mere fact that the employees are represented by the same agent will not suffice to disqualify if the strike or labor dispute causing the unemployment is not in progress at the establishment at which the claimant was, or is, employed.

"Where there are disqualifying provisions, the exception should be narrowly construed. But these rules of construction do not mean that we are at liberty to put something into the statute which is not there. Our function, guided by ordinary rules of construction, is

to ascertain if we can what the legislative intent was and to give effect to it."

The court called attention to the fact that the term establishment was not legislatively defined. The court, in discussing the meaning of the word "establishment," distinguished the Spielman case cited by petitioners, commenting that in that case the two plants constituted an "establishment" within the meaning of the Wisconsin statute "because of the physical proximity, functional integrality and general unit of these plants." It called attention to the fact that the facts and the ruling in the case of Chrysler Corporation vs. Smith, 298 N.W. 87, were similar to the Spielman case.

The Minnesota court says:

"The difficulty with attempting to use as an absolute test the facts as laid down in the Spielman case comes in its application to the facts of a particular case. Many enterprises have functional integrality between factories which are separately owned. Some are so integrated in part with units or factories having the same ownership and in part with factories or plants which are independently owned. That is the situation which we have in the instant case. Out of some 3,800 or 4,000 parts, about 900 come from the Rouge plant. Some come from other plants owned by the Ford Motor Company, and still others come from plants independently owned. A shutdown caused by strike or other labor dispute at one of such independent vendors might conceivably cause a shutdown at the St. Paul Ford plant. This did actually happen in 1945 when a strike occurred at the Kelsey Hayes plant. We assume that it is not uncommon that the same international union would represent the employees of several independent plants or factories operating as the

Ford plant does with its independent vendors, but we do not believe that anyone would contend that a strike at the plant of such independent vendor would disqualify employees of the Ford plant if it was forced to shut down on account of the lack of parts furnished by such independent vendor."

The court, after pointing out that proximity of operations is not sufficient in and of itself as a test and that general unity is not of itself a test, states as follows:

"We believe the better rule to be that these factors, together with other facts, must be taken into consideration in determining whether the unit under consideration is in fact a separate establishment from the standpoint of employment. The St. Paul branch of Ford Motor Company is highly integrated with other units of the company for purposes of efficient management and operation, but is separate insofar as the employees are concerned for the purpose of employment. The employees are hired and discharged by the St. Paul manager. They are members of a local union which has no connection with the locals at Dearborn except that all locals are members of the same international as are many others not connected with the Ford Motor Company. The seniority rights of employees extend only to operations at the St. Paul plant. No showing has been made, nor do we believe that any can be made, that an employee at the St. Paul plant can 'bump' an employee at the Rouge plant.

"We believe that the solution of the problem lies in determining from all the facts available whether the unit under consideration is a separate establishment from the standpoint of employment, and not whether it is a single enterprise from the standpoint of management or for the more efficient production of goods."

In the instant case, it does not appear that the petitioners can establish, in even the minutest respect, that the word "establishment" as used in the Utah Act could possibly include the operations of the members who shut down after a strike had been called at the Barker and Paul jobs. Admittedly there is no unity of employment relationship, and certainly there is no unity of operation. The only unity which exists is that established for the purposes of bargaining negotiations.

There certainly was no strike at any but the two jobs. There is no showing in the record that any strike vote had been taken which would have made a strike at the other operations legal. In effect, the petitioners are arguing that the members of the Association whose operations were not struck could include their employees in the strike merely by shutting down operations.

The disqualification provisions of the Utah Act are restrictive in their very nature, and can be applied only in the event that there is a strike at the establishment at which the worker is employed. We are not concerned when applying the provisions of the Utah Act with the fact that a labor dispute might exist industry-wide or with the ultimate determination as to who caused the strike. If a claimant's unemployment is due to a stoppage of work which exists because of a strike at the establishment at which he is employed, he is not entitled to benefits. When he and his fellow employees have not taken a concerted action to withhold their services from their particular employer, there is, of course, no strike which affects them.

In almost every case there is a labor dispute which forms a basis for the resulting strike. It does not follow that there

necessarily will be a strike even though a labor dispute exists. We think that the legislature passing the Utah Employment Security Act was well aware of the distinction and that the legislature intended to make the disqualification provision restrictive in its application. If it had not so intended it would have used the words "labor dispute" instead of "strike."

We respectfully submit that the unemployment of the claimants involved in this matter was due to the fact that their respective employers shut down operations as a result of the labor dispute and that the unemployment was not due to a stoppage of work which existed because of a strike within the meaning of the Utah Act. The claimants, therefore, should be granted unemployment compensation benefits.

Respectfully submitted,

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