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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
CO., VINCENT-PETERSON CON-
STRUCTION COMPANY, GRONE-
MAN & COMPANY, YOUNG &
SMITH CONSTRUCTION COM-
PANY, 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, CORNELL B. CAMERON,
GEORGE E. CLOWARD, HAROLD
L. GARRARD, CHARLIE MAR-
TINEZ, REED H. NIELSEN and
RONALD MURRAY ROSS,

Respondents & Appellees.

Case No. 7633

BRIEF OF RESPONDENTS
FILED

APR 24 1951

Clerk, Supreme Court, Utah

A. W. SANDACK,
Attorney for Respondents
Joseph B. Allman, et al.

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Respondents Joseph B. Allman and seven other claimants were each respectively employed by certain of the appellants above. They are trade unionists affiliated with one of the Six Basic Crafts (A. F. of L.), employed in Utah's heavy construction industry.

Respondents were each awarded unemployment compensation by virtue of 42-2a, Utah Code Annotated, 1943, for the week ending June 10, 1950. While the responsibility to sustain these awards falls upon the Unemployment Compensation Division of the State Industrial Commission, the significance and novelty of the proposition now before the court impels this Brief to present the position of the respondents as members of organized labor.

The question before the Court has lately obtained the attention of several State Supreme and Appellate Courts due mainly to labor disputes involving employment in the highly integrated automotive industry.

To the recital of facts supplied by counsel for the appellants and the Industrial Commission, these respondents detail the following statement of facts in their view of the evidence in the record:

FACTS

In excess of 5,000 Utah workmen were laid off as a result of the Associated General Contractors (hereinafter called A. G. C.) shutdown and lockout of their plants commencing June

2, 1950, after the incidence of the Paul (Ogden) and Barker (Salt Lake City) job strikes. (See Stipulation of facts, Paragraph 10, Department's Exhibit 1, (T-7)).

After the notification of February 27, 1950, reopening the contract for wage negotiations, the Six Basic Crafts, through its authorized agent, R. S. Roberts, advised thirty to forty of the A. G. C. members individually the Unions' intention to bargain with the contractors (T-80). This statement of facts is at variance with appellants' recital of the same fact. (See their Brief, paragraph 2, page 8.)

The unions, according to Mr. Roberts, considered themselves open at all times to bargain individually with the contractors after the notification of February 27, 1950 (T. 81).

Neither the Six Basic Crafts, nor its membership, acquiesced in the proposition that the contractors considered a "strike against one, a strike against all" (T-79).

The contractors association, through its general counsel, published in Salt Lake City newspapers their lockout strategy, (appellants' exhibit No. 8 (T-19) and by implication threatened their workers with a reprisal lockout if a strike occurred at a single A. G. C. construction.

Previously in 1948, (T-78) under a similar A. G. C.-union agreement, when the Six Basic Crafts took action against less than all of the members to the contract, other A. G. C. members did not treat such action a "strike against all" and retaliate by shutting down their plants (T-79). This policy was true also in 1947 with the cement finishers union, one of the

Six Basic Crafts (T-91, 92). The iron workers union, one of the Six Basic Crafts, notwithstanding their inclusion in the present so-called master agreement, continued to bargain annually individually with A. G. C. (T-83) and in such cases A. G. C. did not take mass action, shut-down, against the iron workers or others of the Six Basic Crafts on such individual demands (T-83).

Only on the Paul and Barker jobs were picket lines established. No other A. G. C. plants were picketed. Only two pickets, employees of Barker and not a claimant herein, were engaged in picketing (T-82).

The strike vote at the Paul and Barker jobs was supervised by the Industrial Commission of Utah and no strike vote was taken against any other A. G. C. job (T-86 and 87).

The collective bargaining agreement in effect, provides:
"Article IX.

- A. The term of this Agreement shall commence on the date first before set forth and shall continue until the first day of June, 1951, and for additional periods of one year thereafter; *provided, however, either party to the Agreement may by the following conditions open this Agreement June 1st, 1950 for wages only.* Should either party desire to modify any portion or any of the terms hereof, it shall notify the other party in writing of such desire, specifying therein the terms or provisions which it desires to modify, the modifications requested and the new sections, if any, it desires included. Such notice shall be given on or before the first day of March, 1951, or on or before the first day of March prior

to the end of any subsequent yearly extension hereof. If such notice be not given within such period of time, then this agreement shall automatically renew itself for an additional period of one year as herein provided. *Should the wage reopening clause be exercised by either party for the year of 1950, it shall automatically render inoperative Article IV, Section F, if no agreement is reached by June 1, 1950."*

Article IV of the agreement provides:

"F. It is the purpose and intent of the parties hereto that all grievances and disputes arising under this Agreement be settled in accordance with the procedure hereinabove set forth and that during the term of this Agreement, the Unions signatory hereto or in whose behalf this Agreement is made, shall not during the term hereof call or engage in, sanction or assist in, a strike against or slow down or stoppage of work of the Contractor, and that there shall be no stoppage of work by any party hereto for any reason. Unions will require its members to perform their services for the Contractors on all work described herein when requested by contractors to do so; and *Contractors will not cause or permit any lockout of members of signatory Unions during the term of this Agreement."*

The collective bargaining agreement became effective as to the contractors only if the *individual members* of the association became signators to the agreement and any modification as to wages required the signature and agreement of the individual members. (See Stipulation of facts, Paragraph 6, Defendants' Exhibit 1, (T-7).

THE ISSUE

Did the Industrial Commission act in accordance with law in granting respondents unemployment compensation award for the week of June 10, 1950?

ARGUMENT

Answer to appellants' Point 1.

The fact that the Six Basic Crafts recognized A. G. C. as an appropriate bargaining unit for its membership did not prevent the unions from taking legal concerted action against single members after the association-wide negotiations reached an impasse.

Answer to appellants' Point 2.

The respondents were not engaged in a "strike" such as to disqualify them from benefits within the meaning of the act.

Point 3.

Assuming for argument's sake that respondents were engaged in disqualifying activities, the Utah Unemployment Compensation Act eliminates such disqualification where the unemployment is caused by an employer-created strike or lockout.

All three propositions above are inter-related and will be argued as one.

Appellants' Point 1 that all parties were legally bound to

recognize the bargaining unit until the expiration of the agreement in June, 1951, is not persuasive. These respondents do not contend that the Paul and Barker strikes dissolved the bargaining unit and because of such fact barred recognition of the A. G. C. unit. The respondents contend that after the impasse of June 1st on the wage question, the A. G. C. unit had broken down. Nothing in the contract precluded the employers from withdrawing from the unit, hence the unions were permitted to bargain with the individual employers separately. From the facts recited earlier in this Brief (Pages 5, 6, and 7) there was ample precedent for individual employer bargaining. Each of thirty to forty individual contractors received notification of the reopening for wage talks February 27, 1950, and in the past, (See pages 5, 6, and 7, this Brief) whenever mass bargaining had broken down and individual bargaining occurred never did A. G. C. treat such incidents with lockout reprisal. Furthermore, before any member of the association was bound to the contract or any modification to it he would have to sign the agreement individually. The Labor Committee of A. G. C. required either power of attorney or individual signature of its members.

The point we make is this: Granted that A. G. C. was an appropriate bargaining unit for association-wide negotiations, it was not the *only* appropriate unit.

After the impasse separate negotiations were not only permitted, but in the logic of the times, desirable. The authority of A. G. C. must be limited to *association-wide negotiations*. If separate negotiations are not permitted, the impasse would

almost always either widen and prolong industrial strife or necessarily deprive the unions of their right to take legal concerted action against all but the entire industry.

It is conceded that rulings of the National Labor Relations Board, a federal quasi-judicial administrative agency, do not constitute judicial authority. They are, however, entitled to be given some weight because that Board is charged with the administration of a national labor relations act and has, undoubtedly, developed some familiarity with the legislative history of both national and state labor policy.

The recent decision of the National Labor Relations Board in the case of *Morand Brothers Beverage Co.*, September 25, 1950, 91 NLRB 58, applies the correct rationale to the issue now before the court.

In that case, the employer was charged with an unfair labor practice under the National Labor Relations Board Act interfering with union activity. The facts were, since 1943 a local union had bargained with the employers' association on behalf of the salesmen. In March 1949, after unsuccessful negotiations for a new contract, the local sent directly to each employer for signature the same contract that had been proposed to the joint committee which represented all the employers. No employer accepted the contract, and joint negotiations were resumed. After another impasse was reached, the union called a strike limited to one employer. On the following day, the other employers in the association sent their salesmen a letter stating that it was the union's intent eventually to call a strike against every employer in the association.

The letter then requested the salesmen to turn over their records and settle their accounts. This was construed as a discharge.

The Board found that the employees had been discharged, not just laid off pending settlement of the contract. It expressly refused to decide whether a layoff would have been proper. It held that the discharge of the striking employees was illegal, as an attempt to penalize them for striking and thus discourage future concerted activity. Discharge of non-striking employees was also held to be discriminatory, in that it was a reprisal either against a possible future strike or against a strike by other members of the same union against one employer.

The argument that the discharges were defensive measure to protect the association members from strikes by the union against the employers, one by one, was rejected. The Board held that *an employer's economic interest in preventing a successful strike did not justify conduct proscribed by the act*. It pointed out that a contrary view, if applied, would permit the widening of industrial strife, while the purpose of the act was to prevent it. If the policy defended by the association were permitted, *a one-employer strike could be converted into an industry-wide dispute*; and since discharge of strikers for strike activity is illegal, a union, in its turn, would be encouraged to strike all or none of the employers.

Member Reynolds dissented from this conclusion. He stated that the employers' action constituted a lockout or lay-off rather than a discharge, as shown by their failure to resume

operations or replace the employees; and that there was no background of anti-union activity on the part of the employers.

The Board also ruled that the union's strike against one employer and its attempt to enter into separate negotiations with that employer did not constitute restraint or coercion in the selection of bargaining representatives under Section 8 (b) (1) and (B), of the National Labor Relations Act. There was insufficient evidence, the Board held, *that this employer had designated the joint committee as its bargaining agent for separate negotiations*, as well as for association-wide negotiations. Neither was there evidence, it held, that the union would have rejected the joint committee as the employer's representative in separate negotiations. The strike was not an attempt to coerce the employer to resign from the association, the Board held; nor were the union's proposals to the various employers for separate negotiations a refusal to bargain.

It was pointed out that, since an employer could withdraw from a multi-employer unit, a union should also be permitted to bargain with individual employers separately after negotiations with the larger unit had broken down. Furthermore, the Board held, *even if the association were the only appropriate unit*, the union was not required to bargain with all employers simultaneously or to negotiate the same contract with all.

While admitting that *in the first instance*, the union was obliged to bargain with the association rather than with separate employer members, the Board stated that, *after an impasse had been reached, separate negotiations were permissible*. Such separate negotiations, it pointed out, were not shown to pre-

clude simultaneous association-wide negotiations. At any rate, it held the authority of the association was apparently limited to association-wide negotiations. The association, while *an* appropriate bargaining unit, was held to be not the *only* appropriate unit.

Counsel for these respondents is aware that a contrary opinion was rendered in June, 1950, by Robert N. Denham, general counsel for the National Labor Relations Board. (See 26 LRR 153). Mr. Denham refused to issue a complaint against employers who had ellegedly locked out their employees. The teamsters union struck only three dairies in a nine-member association in Washington, D.C., with which it had contracted in the past. When the other six dairies in the association closed down their operations, the union filed charges of discriminatory lockout with the general counsel and requested the general counsel to issue an unfair labor practice complaint. Mr. Denham's reasons for rejecting the union's charge were "the employees of the nine dairies constitute a single unit for the purpose of collective bargaining and that a strike against any one or more of the dairies who collectively make up the employer group, becomes a strike against the entire organization and justifies all of the members of the employer group in exercising their full economic force to counteract the economic force of the union represented by its strike call."

The Morand case was decided after Denham's above opinion and since June, 1950 Mr. Denham has been replaced by a new general counsel.

Attention is now called to Articles IX and IV F. of the Labor agreement pursuant to which it was *legal* for the union to take concerted action after an impasse had occurred on the wage talks; it is submitted that the fact that a labor agreement was in effect did not preclude the unions from taking legal and concerted action against single members.

Answer to Appellants' Point 2.

It is submitted that counsel for the Industrial Commission has properly briefed the law on the direct issue of respondents' entitlement for their awards. These respondents join in the Industrial Commission Brief and cases and arguments cited therein.

Respondents contend that they were not unemployed due to a stoppage of work which existed because of a "strike" involving their grade, class or group of workers at the factory or establishment at which they were last employed.

To rule otherwise would ignore the fact that the A. G. C. association constituted between forty to seventy individual and separate employer units, with separate business structures and payrolls, engaged in every kind of industrial construction throughout the State of Utah. Merely because these contractors bargained as a unit through an industrial association (A. G. C.) does not relate their businesses or make their establishments synonymous within the meaning of the act so as to disqualify these respondents. The contrary must have been intended by our legislature. The public policy declared to apply to our unemployment act is:

“To prevent its (unemployment) spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family.”

If appellants' contention is accepted, real violence is done to this policy by the mere act of employers pyramiding into industrial associations, becoming related to other employers through a chain of verbal connection, so that ultimately wherever a trade dispute exists with any employer who is associated with other employers in such a pyramided structure, they could thus impair the full purpose of the act.

The weakness of appellants' position is apparent from the fact that no contractor became bound to the agreement merely by his membership in A. G. C. The contractors' signature was required to the labor agreement. The Labor Committee of A. G. C. could not take economic action nor bind any member to a modification of the agreement on behalf of any single member who failed to acquiesce in its strategy or its negotiations. A. G. C. is a mere association and not an employing or multi-employing unit within the meaning of this act. It is conceivable that a single construction company might own and operate ten to fifteen integrated yet separate establishments in their business structure throughout this State or several states and a “*strike*” at one might disqualify workers of the same class at other establishments of that company. But merely because that construction company is a member of a trade association with “X” company, who supplies it with products should not disqualify its employees if a strike were to occur at “X” company and eventually cause it to shut down because of short supplies. To make such separate companies and their

establishments synonymous merely because they belong to a similar trade association would defeat the purpose of our unemployment compensation act.

The following cases, some of which have been cited in the Industrial Commission's Brief, may be of assistance to the Court in this problem:

Nordling vs. Ford Motor Co., (1950) Minn., 42 NW 2d 576

Ford Motor Co. vs. Virginia Compensation Commission (1951), Virginia, 63 SE 2nd 28

Bucko vs. Quest Foundry Co., Minnesota, 38 NW 2nd 222

Rhea Mfg. Co. vs. Industrial Commission, Wisconsin, 285 NW 749

Thomas vs. California Employment Stab. Commission, (1950) California, (District Court of Appeals), 224 Pac. 2nd 411

Almada vs. Commission (1951) Connecticut, 77 A 2d 765

Assif vs. Commission, Connecticut (1951) 77 A 2d 772

Machcinski vs. Ford Motor Co., (1951) N.Y. 102 NYS 2d 208

Burger vs. Unemployment Comp. Bd. of Review (1951) Pa. Super. 77 A 2d 737

Point 3.

Assuming for argument's sake that respondents were engaged in disqualifying activities, the Utah Unemployment Compensation Act eliminates such disqualification where the employment is caused by an employer-created strike or lockout.

Section 42-2a-5 provides:

- (2) "If the Commission, upon investigation, shall find that the employer, his agent, or representative, has conspired, planned or agreed with any of his workers, their agents, or representative to foment a strike, such strike shall not render the workers ineligible for benefits."

It seems to these respondents the above sub-section can have one meaning, namely: That our legislature intended to eliminate the ineligibility disqualification based upon a work stoppage where the unemployment is proximately caused and due to an employer-created strike or lockout.

In this case the ultimate and final act causing the unemployment of the respondents and 5,000 other workers was the mass employer shut-down rather than any preliminary act which might have furnished a motive for the shut-down causing the unemployment.

A lockout has been defined as:

"To withhold employment from (a body of employees) as a means of bringing them to accept the employer terms." (See Webster's New International Dictionary, Second Edition, 1934).

Our Supreme Court has not yet ruled on this proposition. The statutes of a few states specifically recognize unemployment due to a lockout as an exception to the disqualifications:

Page's Ohio Gen. Code Ann. 1948 Supp. Section 1345-6 (d)

Kentucky Rev. St. 1948, Section 341.360 (1)

Arkansas St. 1947 Ann. Section 81-1106 (d) (2)
West Virginia 1947 Supp. to Code of 1943 Section
2366 (78) (4)
Connecticut—Gen. St. Rev. of 1949, Section 7508 (3)
Gen. Laws of Mississippi, 1944, C 288, Section 1
M. S. A. (Minn.) Section 268.09 Sub 1 (a) (b) (1)
U. S. 42 USCA, Section 1103 (a) (5)

The case of *McKinley vs. California Stab. Employment Commission*, 209 Pacific 2nd 602, cited by appellant is based upon a California statute that contains no provision whereby the lockout acts to eliminate the disqualifications; the Minnesota case, *Bucko vs. Quest Foundry Co.*, supra, is based upon a statute containing an express provision eliminating the disqualification where unemployment is due to a lockout. See *Almada vs. Commission* (1951) Conn. 77 A 2d 765; *Assif vs. Commission*, (1951) Conn., 77 A 2d 772, and *Burger vs. Unemployment Comp. Bd. of Review* (Pa. Super.) 77 A 2d, 737.

Once it is established that the unemployment is caused by the direct and proximate act of his employer's lockout, the exception to such disqualification should apply regardless of whether the employees are members of the same trade union which is engaged with other employers, members of the same trade association, in a labor dispute. The fact that these respondents might receive an increase in wages as a result of the action taken against other employers, or that the appellants believe their employer anti-strike strategy warranted the lockout, should have nothing to do with the eligibility of these respondents for their unemployment compensation benefits. These respondents have a vested interest in their entitlement

inasmuch as a portion of their weekly wage goes to pay the premium for which they receive this insurance.

The Utah statute admittedly is not as specific on this point as the Minnesota law, but certainly indicates the intention of our legislature not to bar a claimant when unemployment is due to a lockout in no way the fault of the employee.

CONCLUSION

The facts here are clear that immediately following the legal strike of June 1, 1950, at the Paul and Barker jobs, the majority of the A. G. C. contractors, by a pre-arranged plan of strategy agreed to on May 17, 1950, shut down and locked out in excess of 5,000 employees, of which these claimants were a class. The record is clear that these 5,000 claimants were willing to continue working at existing rates and there was work available. It cannot be said that their unemployment was due to a stoppage of work which exists because of a strike at the establishment at which they were last employed.

This employee lockout was used as a weapon by the employers as a counterpart of the strike at the two jobs; the employer appellants certainly weighed all its aspects before using this tactic.

If the lockout of these 5,000 workmen had continued, the economic and social well-being of the State could have been severely injured. The appellants created a mass unemployment situation and should not now be heard to complain, having

created it, that their unemployed workers were not entitled to minimum unemployment benefits.

The respondents, as members of organized labor, do not ask for preferred treatment. They merely ask for their entitlement under law. For the reasons cited herein and by the Industrial Commission, we contend that the decision of the Industrial Commission was proper and should be affirmed.

Respectfully submitted,

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STATE OF UTAH**

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**BRIEF OF UTAH STATE FEDERATION OF
LABOR IN SUPPORT OF APPELLEES**

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