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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 : Reply Brief of Appellants

Utah Supreme Court

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7633

Case No. 7633

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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

*Petitioners & Appellants,*

—vs.—

**FILE**  
MAY 11 1951

Clerk, Supreme Court,

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

*Respondents & Appellees*

*Employe*

REPLY BRIEF OF APPELLANTS

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## REPLY BRIEF OF APPELLANTS

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### ARGUMENT

Respondents avoid reference to Paragraph (d) fol-  
lowing Paragraph (1) of 42 -2a-5 U.C.A. Paragraphs  
(1) and (d) should be construed together and were con-  
strued by this court in Ironworkers Union v. The In-  
ustrial Commission, 104 Utah 242 . . . . "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 Claimants were unemployed because of a stoppage of work which existed as a result of a strike involving their grade, class or group of workers at the *establishments at which they were last employed, and the strike was fomented by Claimants through their duly authorized union representatives, and the Claimants are workers of the grade, class or group of workers and parties to the plan or agreement to foment the strike.*

Respondents contend on page 7 of their Brief, “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 . . .”

Respondents statement aforesaid is correct. The entire construction industry was affected by the negotiations between the two groups. There was a perceptible slow-down on all construction jobs just prior to the strike and immediately subsequent to the strike. It is an obvious reaction of all workmen to apply any strategy at their command including a slow-down in work if necessary to support the objective of their union. This is exactly what was done in this case, and the record is clear

on that point. The whole industry was influenced as the negotiation developed and this influence was felt before and after the strike. To hold that the two picket lines was strike action against the two construction projects only would be contrary to the evidence that said two pickets effected the entire construction industry.

Page 23 and 24 of the Record

MR. GEORGE PUTNAM,  
UTAH CONSTRUCTION COMPANY

“Q. Now, if you know, will you tell us what, if any, effect, the strike of the Earl S. Paul job and the strike at the Professional Building on June 2nd, what effect that those two strikes had on the other members signatory to the contract that continued working until the shut-down?

“A. I can answer that by giving our experience on our own work and give an opinion as to what effect it had on the others.

“Q. Do that, please.

“A. On our own work, we definitely experienced a slow down. We attempted to measure that at the refinery job where we had some six or seven hundred men.

“Q. By that, you mean a decrease in production?

“A. That's correct. Groups of men were standing around gabbing, they didn't care if they worked or not.”

On Page 51 of the Record, Ellis W. Barker stated as follows:

“Q. What effect, if any, as far as you can ascertain did the strike at the Professional Building have on the other operations prior to the time the work was closed down?

“A. Well, during the day of the 2nd, when it became known around town mainly that our job was struck, we didn't know until the day wore on what other jobs would be struck. I expected momentarily to have my foreman call up to say that pickets had appeared. We were in touch with each other constantly. As far as I could tell, the men were doing the same as George (Putnam) reported, talking, hesitating, discussing the situation among themselves with the effect of a perceptible slow-down in production.”

On Page 52 of the Record

“MR. MECHAM: I am trying to show that until the carpenters ratified the agreement, there was a digression in the workmen's production. Until the contract was ratified, there was some feeling on the job.

Mr. Barker:

“Q. Is that a substantially correct statement?

“A. Yes, the fact is that on the day that the men were supposed to be ordered back to work, the carpenters did not show. The pickets appeared on job following the agreement of the negotiating parties.”

Only two picket lines were employed by the unions to accomplish their strike. The union strategy was quite obvious. The strike was against the entire bargaining unit. This fact is concluded because: (a) The labor agreement of 1949 was still in force at the time of the strike; (b) The unions and the Association had established a long practice of bargaining as a unit; (c) No demands for separate negotiations were made against the Barker and Paul firms (the two firms picketed), and if such demands had been made, these two firms could not have bargained individually with the unions because of the fact that they were contractually bound to the bargaining unit under the terms of the Labor Agreement dated August 12, 1949; (d) The entire operations of the two companies were not picketed, which brings us to the conclusion that the unions intended not to strike the two companies as a company unit, but rather to take a "nibble" at only a small portion of the bargaining unit. The unions apparently were not striking the company as such. If we accept the reasoning of the Respondents we must conclude that the unions were not striking the company nor the bargaining unit of A.G.C. Who and what, then were they striking? (e) The facts are undisputed that at all times the bargaining was done through and by the established bargaining unit even though as Respondents contend, the unions could have bargained with the individual members of the Associated General Contractors. Had the unions elected to bargain with



the individual members of the Associated General Contractors they would have elected to breach their contract with the bargaining unit.

The Claimants would have continued their work had not they been of the grade, class or group of workers fomenting the strike. Subcontractors on the construction jobs operated by the Petitioners and all material suppliers and their workmen continued their employment notwithstanding the strike. Materials were delivered to Petitioners jobs. It was only those employees who were financially interested in the strike and who benefited thereby whose employment was affected.

Respondents contend that the strike was not at the establishment where Claimants were last employed (Respondents Brief, page 9). The strike was actually at the establishments as a group of firms. The legislature did not use the plural of the term "establishment," and it does not stretch the legislative intent to conceive that a strike at more than one establishment could, as in this case, occur concurrently.

Actually the unions struck the bargaining unit with the hope of accomplishing a wage increase for all workmen including the Claimants. In promoting this strike covering the whole construction industry, the union strategy was to employ only two small picket lines. Their strike could have been just as effective had they not employed any pickets, or perhaps only one picket. It is a recognized fact that a strike may be a "slow-down," a "sit-down," "internal agitation," "walk out"

or any form of labor unrest with or without pickets. In the instant case the unions elected to use only two pickets to accomplish their strike. All parties agree that the union's strategy was attended by success and the Claimants received their increase in wage and the wages of workmen in the entire construction industry of Utah from Kanab on the south, to Richmond, on the north were increased as a result of the union's efforts.

The unions well knew that the employment of pickets on all jobs would render unbearable their unemployment problem among their members and would result in their own treasury financing the strike of approximately ten thousand men. To accomplish their strike against the bargaining unit the union ferreted out only two construction jobs on which to employ their pickets.

On page 82 of the record Mr. R. S. Roberts, Secretary of The Building Trades Council, is asked on direct examination the following question: "Did any of the business agents of any of the crafts, to your knowledge, advise the workers—other than Barker and Paul workers—not to report to work after June 1?" Answer: "On the contrary. *They were definitely instructed to keep the men working—outside of these two jobs—until the Strategy Committee recommended further action.*"

It appears from the aforesaid answer that the union definitely had a Strategy Committee employed and that it was just a matter of time until other jobs would be picketed in keeping with the strike against the bargaining unit.

On page 85 on direct examination counsel asks the following question of Mr. Roberts: "Do you have anything else to offer Mr. Roberts that you would like to offer to assist the Referee in making his findings on this case?" Answer: "No, the only thing that might help—that I would have to offer—is that in striking and placing a picket line on these particular jobs—is that the building trades organization, of course, are bound to certain conditions by certain laws, state laws and federal laws, that we have to comply with, *and it was possibly through trying to comply with those laws that the picket lines were only established on the jobs that we were able to get a strike vote on before they were picketed. I think it was their intention to go on through and picket other jobs if they thought the occasion would warrant it to get the contractors lined up.*"

The only logical interpretation of the above answer is that the strike was against the bargaining unit, and all jobs would be picketed as it became necessary to accomplish the union's objective. The Barker Company did not have any grievance with its employees. Likewise the Paul Company and all other signators to the labor contract did not have grievances with their employees. So the pickets were not employed to settle a grievance with Barker and Paul but to settle the wage problem for the entire industry. Barker and Paul did not learn of the pickets until the night before they appeared.

If, as we believe, under the terms of the said labor agreement of August 12, 1949, the unions were bargaining with a legally recognized bargaining unit, can we logically hold by any stretch of the imagination that our legislature in establishing the Employment Security Law enacted a device to permit the labor unions to finance their strike with state funds contributed by employers, thereby saving the union's treasury from paying strike benefits.

It is a stipulated fact (T.R. 13, page 9 of Respondent's Brief . . . . "That the individual Claimant is represented by his respective craft unit for purposes of collective bargaining.")

Respondents cite the Minnesota case of Bucko v. Quest Foundry, 38 N. W. 2nd 223—See page 10 of Respondent's Brief. This case is distinguished from the case at bar in at least two particulars: (1) In the Minnesota case the labor agreement had apparently expired at the time of the strike and/or lockout. In the instant case the labor agreement with its recognized bargaining unit was contractually in force and continuing during the negotiations and during the strike. (2) In the Minnesota case the appeals tribunal held that the lock-out occurred during negotiations. See page 231 of the reports quoted as follows: "In any event the appeal tribunal found that the lock-out occurred during negotiations. This finding is amply supported by the evidence, so we are bound by it regardless of what construction is placed upon the term 'lock-out.'" At page 223 it is quoted: "In the second place the employers themselves

have recognized the fact that the employees of the nine establishments were unemployed as the result of a lock-out." In the case at Bar the volitional act was the picket lines on the two construction jobs. The Petitioners and other members of the contractors association did not close their construction projects until the Association was first notified by the Building Trades Council that the strike was on and pickets would appear on the two jobs. In the instant case the Petitioners did not close down their construction projects until the happening of the overt act of picketing by the unions.

The Minnesota statute contains a special lock-out clause. The Utah statute contains no such clause.

The Minnesota Supreme Court stated at page 229 of the Decision, "Prior to the 1943 amendment the lock-out was held to be a labor dispute within the meaning of the act so as to disqualify employees affected." The applicable section of the Minnesota statute prior to 1943 apparently was similar to the Utah statute excepting the Minnesota statute used the words "labor dispute" instead of "strike." Viewed in the light of the above reasoning the Supreme Court of Minnesota by strong inference states that a contrary opinion might have been rendered under a statute similar to the Utah statute.

Respondents cite the case of Rhea Manufacturing Company v. Industrial Commission, a Wisconsin case cited at 285 N. W. 749. See page 14 of Respondent's Brief. The Petitioners concur in the statement quoted

by Respondents from the Rhea case. However, viewed in the light of the volitional test applied in *McKinley v. California Employment Stabilization Commission* 209 Pac. 2nd 602 the closing of the construction projects merely resulted from strike action placed in motion by the unions. Had the Petitioners closed down their construction projects prior to the strike of course they would have no standing in this court. The dissenting judge in the Rhea case makes a very erudite statement of the subject: "We should not lose sight of the fact that the most important weapon in the hands of the collective bargaining representative is the threat of strike if the employer refuses to come to terms. The individual authorizes his collective bargaining representative to use this threat; in effect he authorizes the representatives to refuse work if the terms are not satisfactory. Collective bargaining is a stronger term than negotiation. An employer cannot afford to enter into a contract which binds him but does not bind individual workers."

The Respondents attempt to rationalize the case of *McKinley v. California Employment Stabilization Commission*, 209 Pac. 2nd 602. The factual situation present in the California case is similar to the factual situation in the instant case and, of course, the California case ruled that a strike against one member of a bargaining

unit was a strike against all and that claimants were not eligible for unemployment benefits within the meaning of the Employment Security Law.

*held  
lawful* The Morand Beverage Case cited in Respondent's Brief at page 22 is an N.L.R.B. administrative tribunal decision and carries little, if any, weight in this court.

The case of Nordling v. Ford Motor Company 42 N. W. 2nd 576 cited at page 24 of Respondent's Brief is distinguished from the instant case. The Minnesota statute is dissimilar to the Utah Statute and the Ford Motor case did not involve a bargaining unit as in the instant case.

At page 13 of the record, Mr. Dremann, attorney for the Industrial Commission made the following admission: "Carrying that out, it seems to me that is a fact, isn't it?" In other words, to get all the facts before any higher appeals body—and this appeals referee, we have always taken the position regarding that that any bargaining representative designated automatically becomes the bargaining representative of all the individuals in the grade, class or group. There is no dispute that all the individuals in the six basic crafts fall within the grade, class or group which is being bargained for in the subject matter in this case."

In conclusion we respectfully submit, that the unemployment of the Claimants resulted from action taken by their union agents, that Claimants helped finance the strike, and that Claimants benefited by increased wages resulting therefrom.

Respectfully submitted,

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