

1986

Mike K. Lund, Steve M. Rodriquez, Richard Barry Hurley, Mike D. Poulsen v. Board of Review of the Industrial Commission of Utah and Department of Employment Security : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MIKE K. LUND,
STEVE M. RODRIGUEZ,
RICHARD BARRY HURLEY,
MIKE D. POULSEN,

Claimants/Petitioners

vs.

BOARD OF REVIEW OF THE
INDUSTRIAL COMMISSION OF
UTAH and DEPARTMENT OF
EMPLOYMENT SECURITY,

Respondents.

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Case No. 20892
Case No. 20931
Case No. 20828
Case No. 21045

CONSOLIDATED CASES

Category 6

REPLY BRIEF OF CLAIMANTS/PETITIONERS

PETITION FOR REVIEW OF FINAL DECISIONS OF THE BOARD
OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,
~~GOVERNMENT~~ DEPARTMENT OF EMPLOYMENT SECURITY
BRIEF

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DEPARTMENT OF EMPLOYMENT SECURITY

FILED
JUL 7 1986

Clerk, Supreme Court, Utah

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| Respondents. | * | |
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LIST OF PARTIES

Claimants/Petitioners

Mike K. Lund,
Steve M. Rodriguez,
Richard Barry Hurley,
Mike D. Poulsen.

Respondents

Board of Review of the
Industrial Commission
of Utah,

Utah Department of
Employment Security

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| S. Rep. No. 97-139, 97th Cong., 1st Sess. 532 <u>reprinted</u> <u>in</u> 1981 U.S. Code Cong. and Admin. News 799 | 5,6 |
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ARGUMENT

I. THE BOARD OF REVIEW INCORRECTLY DENIED BENEFITS TO CLAIMANTS ON THE BASIS OF A MEMORANDUM FROM THE SECRETARY OF LABOR

Although the Trade Adjustment Assistance Program is federally funded, the Trade Act of 1974 authorizes the Secretary of Labor to make agreements with cooperating state agencies for the administration of the program. 19 U.S.C. §2311(a). In Utah, the Board of Review of the Industrial Commission and the Utah Department of Employment Security have agreed to administer the program in accordance with this statute.

Review of a decision by a cooperating agency is available only under applicable state law:

A determination by a cooperating state agency with respect to entitlement to program benefits under an agreement is subject to review in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent.

19 U.S.C. §2311(d) (emphasis added).

In the instant case, the Board of Review contradicted a previous grant of TRA benefits to workers in the same position as that of the present claimants. (Lund R 21, 30, Rodriguez R 33, Poulsen R 47) The Board's stated reason for this change of position was that it had received a letter from the Secretary of Labor directing that it use Claimants' first separation dates to determine the timing of TRA benefits. (See Exhibits E and G attached to Claimant's initial Brief).

The Board of Review erred in deferring to the Secretary of Labor in this instance. Under 19 U.S.C. §2311(d) the Utah Department of Employment Security and the Industrial Commission possess the sole authority to determine the question of entitlement to TRA benefits, with review only by the Utah Supreme Court. The Department of Labor has no authority, statutory or otherwise, to act outside of the appellate process set up by Utah statute for review of unemployment compensation cases. In the cases of previous TRA claimants, the Utah Department of Employment Security decided that the initial 1982 layoff would not result in a denial of TRA benefits. The U.S. Department of Labor is notified of all state administrative law judge (ALJ) decisions concerning TRA benefits. (See Exhibits A, B, C and D attached to Claimant's initial Brief). If the Department wanted to argue against an award of benefits it should have appealed those previous ALJ decisions. It did not.

In light of 19 U.S.C. §2311(d), the Secretary of Labor has no authority whatsoever to alter the precedent set by Utah's Department of Employment Security through the mere issuance of a memorandum. The Utah Department of Employment Security erred in considering itself bound to follow the dictates of that memorandum which contradict the controlling federal statute and Utah's statutory review process for unemployment compensation benefits.

II. THE 1981 AMENDMENTS TO THE TRADE ACT OF 1974 DO NOT CHANGE THE EFFECT OF CLAIM OF WALTER, WHICH REQUIRES USE OF A WORKER'S MOST RECENT SEPARATION DATE

In the cases of Claim of Walter, 103 A.D.2d 265, 479 N.Y. Supp.2d 918 (1984) and Skrundz v. Review Board of Indiana Employment Security, 444 N.E.2d 1217 (Ind.App. 1983), the Trade Act of 1974 has been construed to require payment of TRA benefits based on a worker's most recent separation date. Respondents contend that these cases are not controlling because they were decided before the 1981 amendments took effect. However, as discussed above, the 1981 amendments had no effect on which separation date should be used as a base from which to calculate benefits. As specifically stated in the Walter case:

Because the TRA program did not function as Congress had anticipated, the Act was amended, effective September 30, 1981. However, these amendments evidenced no intention by Congress to abandon the "most recent" separation date as the date for ascertaining the commencement of a worker's TRA eligibility period (see U.S. Code Cong. & Admin. News, 1981, vol. 2, p. 801).

* * *

Reading sections 2291 and 2293, as the commissioner urges, so that the TRA eligibility period commences on expiration of the worker's first claim to unemployment benefits not only clashes with the regulations, but is also assailable for being at odds with the remedial purpose of the Act.

479 N.Y.S.2d 919. As stated above, the passage of the 1981 amendments can in no way be construed to change the effect of the Walter case or of the 1974 act itself on use of the "most recent" separation date.

III. LEGISLATIVE HISTORY SHOWS CONGRESS' INTENT THAT A WORKER'S MOST RECENT SEPARATION DATE CONTROL TRA ELIGIBILITY

The original Trade Act of 1974 (19 U.S.C. §2101 et seq.) prescribed a worker's TRA benefits over a period beginning with an "appropriate week" (19 U.S.C. former §2293(b)(1), defined as "the week of his most recent total separation." 19 U.S.C. former §2293(b)(4)(A) (emphasis added).

Regulations issued by the Secretary of Labor in conjunction with the Act similarly specify that the beginning date for calculation of benefits is "the week in the individual's most recent total separation occurred." (29 C.F.R. 91.3(a)(5)(i) (emphasis added).

Respondents do not deny that the effect of the statute and regulations as initially written was to award TRA benefits based on a worker's most recent separation date. They assert, however, that the 1981 amendments to this statute changed this basic system for calculating benefits. However, the 1981 amendments contain no language to this effect.

The statutory reference upon which respondents base their entire argument refers to the "first week . . . with respect to which the worker has exhausted (as determined for purposes of Section 2291(a)(3)(B) . . . unemployment insurance . . .)" 19 U.S.C. §2293(a)(2). Section 2291(a)(3)(B) sets forth the parameters for payment of TRA benefits, not for eligibility, and it is in context of this determination that the words "first week" are used. The 1981 amendments contain no reference to an applicant's "first layoff" or "first separation".

The declaration accompanying the 1981 amendments makes no reference to any change in the base date from which TRA benefits are to be calculated. The committee states its intention to delay payment of benefits until after exhaustion of unemployment benefits as referred to in §2291(a)(3)(B); it gives no indication of any intention to discontinue use of the "most recent" separation date in favor of the date of first separation. In fact, the report lists and elaborates upon seven intended effects of the amendments, none of which relates to the change in base separation date alleged by respondents. Moreover, the report contains three separate references to the use of a worker's "last" or "most recent" separation date in calculating benefits:

Payments of TRA are required . . . if . . . (1) the worker's last separation took place on or after the trade impact date but not after the termination date . . .

No. 97-139, 97th Cong. 1st Sess. 533 reprinted in 1981 U.S. Code Cong. & Admin. News 800 (emphasis added).

. . . TRA may not be paid . . . more than 2 years after the most recent separation date.

Ibid. (emphasis added).

Further, a job search allowance...may be granted if...the worker has filed an application for the allowance no later than 1 year after the date of his last separation before his application . . .

Id. at 534 (emphasis added).

These statements preclude any possible construction of the 1981 amendments to require that the date of first separation be used.

According to the same report, the purpose of the 1981 amendments is to encourage workers to seek employment. Respondents' proposed construction of the amendments would defeat this purpose by penalizing workers who choose to return to work after an initial period of unemployment rather than collecting TRA benefits at the first possible opportunity. Such an interpretation contradicts common sense as well as the intent behind the 1981 amendments and the Trade Act of 1974 itself.

CONCLUSION

The claimants request that the Court correct this misinterpretation and allow TRA payments based on their most recent exhaustion of unemployment benefits.

DATED this 30 day of June, 1986.

UTAH LEGAL SERVICES, INC.
ATTORNEYS FOR
CLAIMANT/PETITIONER


BY: WAINE RICHES

ADDENDUM

S. Rep. No. 97-139, 97th Cong, 1st Sess. 532 reprinted
in 1981 U.S. Code Cong. and Admin. News 799..... N
Former §19 U.S.C. §2293.....O

J. TRADE ADJUSTMENT ASSISTANCE

(Section J of the Bill)

Present Law.—Under present law a group of workers, their certified or recognized union, or other authorized representative may petition the Secretary of Labor for a certification of eligibility for worker adjustment assistance.

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Workers are certified as eligible for worker adjustment assistance if they meet the following conditions: (1) a significant number or proportion of the workers in the workers' firm or appropriate subdivision of the firm have been threatened with or have experienced total or partial separation; (2) the sales or production of the firm or subdivision has decreased absolutely; and (3) increases in imports of "articles like or directly competitive" with articles produced by the workers' firm or appropriate subdivision of their firm "contributed importantly" to threatened or actual total or partial job separation and to a decline in sales or production.

The Secretary of Labor is required to determine whether a group of workers is eligible for adjustment assistance and to issue a certification of eligibility to apply for assistance within 60 days after the petition is filed. The Department has not, however, met this requirement in the last year.

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The basic program benefit for workers under the TAA program is the payment of a trade readjustment allowance (TRA). TRA is payable to an adversely affected worker for a week of unemployment and is required to be 70 percent of his previous average weekly wage, not to exceed the average weekly manufacturing wage (now \$289 per week). The weekly TRA payable is reduced by: (1) 50 percent of earnings during the week; (2) any training allowance except that the TRA is required to be paid in an amount at least equal to—and in lieu of—any Federal training allowance; and (3) unemployment compensation for which the individual is eligible. The combined value of any wages, TRA, training allowances and unemployment compensation may not exceed 80 percent of his previous average weekly wage and 130 percent of the average weekly manufacturing wage.

Payments of TRA are required to be made to a certified and eligible adversely affected worker who files an application for any week of unemployment after the “trade-impact date” (the date on which threatened or actual total or partial separation began in the firm or appropriate subdivision of the firm) if the following two conditions are met: (1) the worker’s last separation took place on or after the trade impact date but not after the termination date (if any) and not after the expiration date. (The termination date is the date as of which the Secretary of Labor determines the group eligibility conditions are no longer met; the expiration date is two years from the certification date.) (2) the worker had at least 26 weeks of employment at wages of at least \$30 per week in adversely affected employment with a single firm or subdivision of a firm in the 1-year period preceding unemployment.

The maximum number of weeks that TRA can be paid is 78, or one and a half years. The maximum for most workers is 52 weeks. Two sets of workers are eligible for an additional 26 weeks: (1) workers enrolled in training approved by the Secretary of Labor; and (2) workers who are at least 60 years old on or before their date of separation. Except for the additional 26 weeks, TRA may not be paid for a week of unemployment beginning more than 2 years after the most recent separation date. The availability for work and disqualification provisions of State unemployment compensation laws apply to workers filing claims for TRA.

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In addition to the TRA benefit, the Secretary of Labor is directed to make “every reasonable effort” to secure counseling, testing, placement, supportive, and other services under any other Federal law. If the Secretary of Labor determines that there is no suitable employment available and suitable employment would be available if the adversely affected worker received the appropriate training, the Secretary may approve such training. Further, a job search allowance providing a reimbursement of 80 percent of the cost of necessary job search expenses not to exceed \$500 may be granted to certified, adversely affected workers for securing a job in the United States if: (1) the Secretary of Labor determines that the worker cannot reasonably be expected to secure suitable employment in his commuting area; (2) the worker has filed an application for the allowance no later than 1 year after the date of his last separation before his application or within a reasonable period of time after a training period. Also, a

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relocation allowance of 80 percent of reasonable and necessary expenses incurred in transporting a worker, his family, and household effects and an amount equal to three times the worker's average weekly wage up to \$500 may be granted to not more than one member per family.

The program clearly has not functioned as intended. In a study released in January 1980 the General Accounting Office found that the weekly TRA cash payments have helped very few unemployed workers adjust to their changed circumstances. Of the TRA recipients interviewed, 85 percent had returned to work, 67 percent for the same employer who laid them off. Most had received their TRA payments in the form of a lump sum after they had returned to work but had not experienced economic hardship as a result of their lay-off since they were able to rely on their unemployment benefit and other resources to meet their financial needs. Among the causes of the delays in TRA payments is the complicated formula for calculating weekly benefit amounts. Many labor regional, State and local employment security agency and firm officials believe the trade benefits, which in many cases are well above State unemployment insurance levels, create a disincentive for some to seek a job. Seventy-three percent of those surveyed used none of the employment services, job search and relocation allowances because they were not aware the services were available to them, they had little need for the services, and they were not willing to move to take advantage of a job in another community.

Committee bill.—The bill approved by the committee would make the following changes to the present law:

1. Require a worker to exhaust all unemployment insurance (UI) before receiving TRA allowances;
2. Limit the amount of TRA allowances and UI payments for most workers to 52 times the UI weekly benefit, except that an additional 26 weeks of allowances may be paid to an individual engaged in training;
3. Limit the amount of TRA payments to the level of State UI payments for which the individual is eligible;
4. Require increased efforts by beneficiaries to obtain appropriate work;

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5. Incorporate certain provisions of State unemployment insurance laws for the purpose of facilitating the administration of the program;

6. Change the present "contribute importantly" standard for trade impact certifications to require that increased imports of like or directly competitive articles be a "substantial cause" of the adverse impact and add to the group eligibility requirements that there is a substantial probability that the resulting lower level of employment will be permanent; and

7. Broaden the present authority to recover overpayments and deny benefits in the case of fraudulent statements or intentional withholding of information.

In addition to integrating the TAA program with the State unemployment compensation system, the committee has proposed changes which would strengthen the training, job search, and relocation aspects of the program proposals. There is no change under the bill in the Secretary's training authorities under section 236 of the Trade Act but

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the Administration in presenting the bill to the Congress announced that it intends to spend approximately \$100 million more on training for adversely affected workers in fiscal year 1982 than in fiscal year 1981.

Section 1 of the bill would change the "contribute importantly" standard for adverse trade impact certification and require that instead increased imports of like or directly competitive articles be a "substantial cause" of the adverse impact on employment and production. Substantial cause would be defined as a cause which is important and not less than any other cause. This would be the same causation standard as that used by the International Trade Commission (ITC) under section 201 of the Trade Act. This standard would increase the impact of foreign trade required for petition certifications. This provision would assure that the trade-impact is sufficient to warrant such additional benefits provided by the TAA program. The bill also requires that the Secretary before making a certification must find that there is a "substantial probability" that the resulting lower level of employment at the firm or subdivision will be permanent. Because the substantial cause test would be applied to the impact of imports on the *firm*, the Secretary of Labor would be able to certify workers from injured firms in industries even where the ITC did not find injury to the industry as a whole under section 201.

Section 2 of the bill would substantially eliminate retroactive payments by limiting payments to weeks of unemployment which begin more than 60 days after the date an approved petition for certification was filed. The provision would also require adversely affected workers to exhaust all rights to unemployment compensation, and additional compensation and any extended benefits if applicable. Third, workers would not be paid TRA for any waiting week period as provided by any State law.

The provision would also adopt the work test of the Federal-State Extended Unemployment Compensation Act of 1970, as amended, (EB). The EB work test requires that claimants whose prospects of returning to their line of work are not good will be disqualified if they

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fail or refuse to accept offers of "suitable work" as defined in that act, or to seek and apply for such work. The EB work test will apply to all claimants for UI after the end of the regular UI period. Therefore, applying the EB work test to all TRA claimants would be an equitable extension of the test which is already applicable to those TRA claimants in States which have triggered "on" an extended benefit period.

The section also provides that the Secretary by regulation may require appropriate categories of workers, who have been eligible for TRA for eight weeks, to extend their job search or to accept approved training.

Section 3 of the bill would limit the amount of TRA payable to a worker to the same amount as the UI weekly amount payable to that worker for a week of unemployment. From the TRA there would be deducted any training allowance provided under any Federal law as well as any income that is deducted from UI under the applicable State UI law. The proposed change will achieve a greater equity between those who are unemployed as a result of trade impact and those unemployed for other reasons.

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Section 4 of the bill would limit TRA payable to an adversely affected worker to the amount which is 52 times the UI weekly benefit amount reduced by any UI payable to the worker. Thus, an adversely affected worker could only collect the weekly benefit amount of UI and TRA combined for 52 weeks of total unemployment. An adversely affected worker would also be required to exhaust TRA within 52 weeks after the worker had exhausted all rights to regular unemployment compensation. Payments as TRA would continue to be made to a worker in approved training for up to 26 additional weeks in the 26-week period following the worker's last entitlement to TRA in order to assist the worker to complete approved training. Finally, the worker would be required to have made an application for training within 210 days after the date of the worker's first certification, or, if later, within 210 days after the worker's first total or partial separation.

The payment of TRA is intended to assist unemployed workers to readjust to existing economic circumstances. The bill would better accomplish this purpose by encouraging unemployed workers to seek other employment by appropriately limiting the duration, and the maximum amount of benefits.

Section 5 of the bill would increase the job search allowances for totally separated workers who are seeking suitable employment outside of their area of residence from the present payment of 80 percent of job search expenses up to a maximum of \$500 to a maximum of \$600.

Section 6 of the bill would increase the relocation allowances for totally separated workers who have obtained employment or a bona fide offer of such employment in an area to which they wish to relocate from the present current allowable payment of up to 80 percent of the expenses for relocation and a lump-sum payment in the maximum amount of \$500 to 90 percent of reasonable and necessary expenses and a lump sum payment to a maximum of \$600.

Section 7 of the bill broadens the present provisions relating to the recovery of overpayment made to claimants and provides for waivers where equitable. It provides for recovery of overpayment whether

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fraudulent or otherwise. Overpayments may be recovered from benefits under this Act, unemployment compensation or other unemployment assistance or allowances payable to the worker. It denies benefits in the case of fraudulent statements or the intentional withholding of information.

Section 8 of the bill would delete the present authorization section relating to a trust fund since such a fund has not been established. In place of that section the bill provides for an authorization of appropriations for each of fiscal years 1982, 1983 and 1984, such sums as may be necessary to carry out the purposes of the act.

Section 9 of the bill would make necessary definitional changes.

Section 10 of the bill extends the termination date of the worker trade adjustment assistance program from the present termination date of September 30, 1982 to September 30, 1984.

Section 11 of the bill sets forth the effective dates of the various provisions. The amendment with respect to authorization of appropriations would take effect on the date of enactment. The "substantial cause" standard would also take effect for all petitions filed on or after

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the date of enactment. The increases in job search and relocation allowances would take effect with regard to applications for allowances filed on or after October 1, 1981. The provision regarding recovery of overpayments and penalties for fraud would take effect on the date of enactment. The remaining provisions, which affect the time limitations on trade readjustment allowances, definitions, qualifying requirements and the weekly benefit amounts, would be effective with respect to trade readjustment allowances payable for all weeks of unemployment which begin after October 1, 1981. The section also provides transitional provisions to ensure that workers receiving TRA payments are not disqualified from receiving further payments to which they would otherwise be entitled by reason of the application of the changes made by the bill after September 30, 1981.

§ 2293. Time limitations on trade readjustment allowances

(a) Payment of trade readjustment allowances shall not be made to an adversely affected worker for more than 52 weeks, except that, in accordance with regulations prescribed by the Secretary—

(1) such payments may be made for not more than 26 additional weeks to an adversely affected worker to assist him to complete training approved by the Secretary, or

(2) such payments shall be made for not more than 26 additional weeks to an adversely affected worker who had reached his 60th birthday on or before the date of total or partial separation.

In no case may an adversely affected worker be paid trade readjustment allowances for more than 78 weeks.

(b)(1) Except for a payment made for an additional week under subsection (a)(1) or (a)(2) of this section, a trade readjustment allowance may not be paid for a week of unemployment beginning more than 2 years after the beginning of the appropriate week.

(2) A trade readjustment allowance may not be paid for an additional week specified in subsection (a)(1) of this section if the adversely affected worker who would receive such allowance did not make a bona fide application to a training program approved by the Secretary within 180 days after the end of the appropriate week or the date of his first certification of eligibility to apply for adjustment assistance issued by the Secretary, whichever is later.

(3) A trade readjustment allowance may not be paid for an additional week specified in subsection (a) of this section if such additional week begins more than 3 years after the beginning of the appropriate week.

(4) For purposes of this subsection, the appropriate week—

(A) for a totally separated worker is the week of his most recent total separation, and


(B) for a partially separated worker is the first week for which he receives a trade readjustment allowance following his most recent partial separation.

Pub.L. 93-618, Title II, § 233, Jan. 3, 1975, 88 Stat. 2022.

Historical Note

Legislative History. For legislative 1974 U.S.Code Cong. and Adm News, p. history and purpose of Pub.L. 93-618, see 7186.

Library References

Labor Relations 1290.

C.J.S. Labor Relations § 1161.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed four (4) true and correct
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DATED this 1st day of July, 1986.

Wm. A. Lund