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SUPREME COURT OF UTAH

STATE OF UTAH

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CLAIMANTS WHO ARE MEMBERS OF TEAMSTERS, CHAUFFEURS and HELPERS OF AMERICA LOCAL 222 and 976, Appellant, v. BOARD OF REVIEW, THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, and the INTERMOUNTAIN OPERATORS LEAGUE, Respondents.	)	Case Number: 16690

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PETITIONERS BRIEF ON JUDICIAL REVIEW

Petition for Judicial Review from the Decision of the Board of Review of the Industrial Commission

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FILED

DEC 11 1979

Clerk, Supreme Court, Utah

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NATURE OF CASE

This is a judicial review of the Decision of the Board of Review of the Industrial Commission of Utah denying unemployment compensation benefits to approximately 1,300 claimants for the period of April 1, 1979, through April 14, 1979.

DISPOSITION OF BOARD OF REVIEW

By a 2-1 vote the Board of Review of the Industrial Commission denied unemployment compensation to all categories of the approximate 1,300 claimants.

RELIEF SOUGHT ON APPEAL

Petitioners seek to reverse the devision of the Board of Review to allow unemployment compensation benefits to all categories of claimants.

STATEMENT OF FACTS

The Petitioners are approximately 1,300 claimants who are represented in Utah by the Teamsters, Chauffeurs, and Helpers of America, Locals 222 and 976. The claimants are employees of Interstate Motor Lines ("IML"), Consolidated Freightways ("CF"), Garrett Freightlines (Garrett), Illinois-California

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Express, Inc. ("ICX"), and Pacific Intermountain Express ("PIE"). (R.000111 to 00024). These employers, with East Texas Motor Freight ("ETMF"), Rio Grande Motorway ("RG"), and Sundance Transportation, Inc. ("Sundance"), are represente in Utah by the Intermountain Operators League, an employer's union.

For a number of years the Teamsters and the Intermountain Operators League have been parties in their respective representative capacities to a collective bargaining agreement called the 1976-1979 National Master Freight Agreement. (R.00027). This national agreement generally regulates the terms and conditions of all phases of employment between the employers signatory to the agreement and their respective employees. The 1976-1979 National Master Freight Agreement expired by its own terms at midnight, March 31, 1979.

On December 11, 1978, in accordance with the provisions of the 1976-1979 National Master Freight Agreement, the Teamsters notified the Intermountain Operators League that it desired to revise or change certain terms and conditions of the National Master Freight Agreement effective April 1, 1979. (R.00027 and R.00068). Then, Teamsters Locals 222 and 976, as well as other teamsters locals in the United States authorized the National Freight Industry Negotiating Committee of the International Brotherhood of Teamsters ("IBT") in

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Washington, D.C., to act as their collective bargaining agent (R.00027). Likewise, the Intermountain Operators League consisting of the employers here involved, and approximately 11,000 other trucking firms in the United States, authorized Trucking Management, Inc. ("TMI") to act as their collective bargaining agent. (R.00063 to R.00067).

Collective bargaining proceedings between IBT and TMI for a new 1979-1982 National Master Freight Agreement began on January 23, 1979, in Washington, D.C. (R.00027). One purpose the IBT engaged in early collective bargaining proceedings was to avoid a strike or lockout. (T.00141) The United States Government through the President's economic advisor Alfred Kahn, Federal Mediation and Conciliation Service, and the Interstate Commerce Commission, actively particpated in the collective bargaining proceedings. (T.00141) According to the testimony of Grant Scott Haslam, who participated in the collective bargaining proceedings, the United States Government threatened deregulation and denial of rate increases unless IBT acceded to TMI's economic demands. (T.00142). Frank Fitzsimmons, told a press conference on April 2, 1979, that Alfred Kahn and Barry Bosworth of the Council of Wage and Price Stability "played a major role in causing our strike." R.00076) As March 31, 1979, approached, the IBT determined that TMI was negotiating in bad faith and had no intention of reaching an agreement by or on March 31, 1979. (R.00101).

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For example, TMI proposed during the late evening hours on March 31, an economic counter proposal that failed to even provide employees an opportunity to recoup losses suffered by inflation and that failed to allow owner operators cost increases to recover the costs of operating their own equipment. (R.00102).

The IBT believed that TMI was forcing and precipitating a national strike. (R.00102) The IBT further believed that TMI desired a national strike because such would cause President Carter to invoke a Taft-Hartley injunction, which would end the strike for the statutory 80 days and maintain the lower 1976-1979 agreement rates. (Ibid).

Therefore, in the early morning hourse of April 1, 1979, the IBT called a "selective strike" against a few employers and not a national strike. (T.00147). This is the first occasion where a selective strike had been called by the IBT in its history. (T.00149) Only 73 out of 11,000 trucking firms were struck. (T.00147) Nothwithstanding this selective strike, the IBT remained willing to continue collective bargaining. (R.00071) In addition, the IBT offered "interim agreements" to all employers represented by TMI (T.00145).

Despite IBT's efforts to limit the effect of the strike, TMI decided at 1:00 P.M. on April 1, 1979, to engage in an industry-wide national lockout of employees (R.00077, R.00059 and T.00147), and threatened legal action if IBT pursued interim agreements with individual trucking concerns. (R.00060)

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The selective strike, national lockout, and interim agreement and TMI's threat will be discussed in more detail.

Selective Strike. Only 73 out of 11,000 trucking firms were struck. The 73 employers struck were determined by IBT (R.00123). In Utah, CF, Garrett, ICX and PIE were struck. (R.00172). IML was not struck, nationally or in Utah. (T.00144). Approximately 600 of the claimants were employed by IML. (R.00013 to 00018). The IBT issued strict instructions governing the selective strike. (R.00126). One instruction was not to interupt the operations of any employer not struck. CF, Garrett and PIE were struck in Utah by normal peaceful strike activities in the early morning on April 1, 1979. (T.00136). ICX was struck on April 2, 1979. (T.00146).

National Lockout. As stated supra, TMI ordered an industry-wide national lockout of all employees at 1:00 P.M. on April 1, 1979, from Washington, D.C. In Utah, IML, who was not struck, locked out its 600 employees at 1:00 P.M. on April 1, 1979, in accordance with TMI's order. (T.00167). IML immediately notified its employees not to report to work. (Ibid.) CF also locked out its employees and instructed its people not to come to work. (T.00164). RD, UP and Sundance did not lock out their employees. (T.00147). The Petitioners had no control over the decision to lock out or the lock out itself. (T.00149).

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Interim Agreement and Threat. As described supra, the IBT offered all employers under the National Master Freight Agreement, including those struck, "interim agreements." The interim agreement is set forth in full at R.00105. The purpose of the interim agreements was to allow employers to continue operations during the strike. If signed the individual employer would not be struck and all strike activity would cease. (T.00145). The interim agreement would terminate and be superceded upon an agreement between TMI and IBT on the terms of the National Master Freight Agreement. (R.0011) This allowed employees to work while negotiations continued. No employer in Utah signed the interim agreement. (T.00145). However, hundreds of trucking firms did sign the interim agreement (R.0078 to 00100), allowing their employees to continue working. In return, TMI threatened the IBT with legal action if the IBT continued with its attempts to soften the effects of the strike by offering interim agreements. (R.00061).

The differences between TMI and IBT were settled on April 11, 1979, and all strike activity by the Teamsters ceased. However, work did not resume until April 14, 1979, because of strike activity in progress by the International Association of Machinists, Automotive Lodge 1020. (R.00028). The IBT or Locals 976 and 222 had no control over this strike activity of the Machinists. (T.00156).

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ARGUMENT

POINT ONE

THE RESPONDENTS ERRED IN FINDING THAT THE CONDUCT OF LABOR WAS THE REAL AND FUNDAMENTAL CAUSE OF THE WORK STOPPAGE RESULTING IN DENIAL OF BENEFITS TO ALL CLAIMANTS

The statute governing an award of unemployment compensation benefits is Section 35-4-5(d) of the Utah Code Annotated (1953), which reads in pertinent part as follows:

> An individual shall be inelegible for benefits . . .
>
> (d) For any week in which it is found by the commission that his unemployment is due to a stoppage of work which exists because of a strike involving his grade, class, or group of workers at the factory or establishment at which he is or was last employed.
>
> (1) If the commission, upon investigation shall find that a strike has been fomented by a worker of any employer, none of the workers of the grade, class or group of workers of the individual who is found to be a party to such plan, or agreement to foment a strike, shall be eligible for benefits..."

This statute has been interpreted principally by three Utah Supreme Court opinions: Olof Nelson Construction Co. v. Industrial Commission, 121 Utah 525, 243 P.2d 951 (1952); Teamsters, Chauffers, and Helpers of America, Locals 222 and 976 of International Brotherhood v. Orange Transportation Co., et al., 5 Utah 2d 45, 296 P.2d 291 (1956); and Teamsters etc. v. Board of Review, etc., 10 Utah 2d 63, 348 P2d 558 (1960). The latter two were decided principally upon the

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authority of Olof Nelson case which is clearly the seminal opinion. Generally these opinions interpret the statute broadly. They define the relevant group or class of workers by the bargaining unit of which the employee or employer is a member, and apply a "volitional test" which disqualifies a worker from benefits if his bargaining unit is principally responsible for the work stoppage involved. As stated in Teamsters etc. v. Board of Review, supra 348 P.2d at 563; "In a controversy of this character, the critical issue is whether the conduct of labor or of management is the real and fundamental cause of the work stoppage."

The Respondents denied benefits to all categories of claimants in the instant action. The denial was based upon ten Findings of Fact made by the Appeal Referee (R.00028) which were adopted without qualification by the Board of Review. (R.00007). There is no factual finding by the Respondents concerning who was the real and fundamental cause of the work stoppage. The Respondents did, however, make a legal conclusion, based upon the Olof Nelson and Orange Transportation cases that labor was the volitional cause of the work stoppage. (R.00030, 00031).

The petitioners assert that the real and fundamental factual cause of the work stoppage and resulting unemployment for all claimants was the conduct of management and the government, not labor.

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The intent of the I.B.T. was to avoid any cessation of work. Negotiations for the new 1979-1982 National Master Freight Agreement commenced nearly three months prior to the expiration of the old contract. One purpose of early negotiations was to avoid a strike or a lockout. (T.00141). Also, the I.B.T. called a selective strike rather than a national industry wide strike. (T.00147). Moreover, the I.B.T. offered "interim agreements" to all employers represented by T.M.I, who desired to continue operations. (T.00145). While no employer in this case signed the interim agreement, hundreds of trucking firms did sign and continued operations. (R.00061). One purpose of this interim agreement was to avoid a work cessation. (T.00145). There was no intent of the I.B.T. to strike prior to the late evening hours of March 31, 1979. (T.00148). Accordingly, it should be clear that the intent of the I.B.T. was to avoid any work cessation.

The cause of the selective strike is clear. The Petitioners were the sole party producing any evidence on this issue. The cause of the selective strike was the bad faith bargaining by T.M.I (in violation of 29USC 158d) and government interference in the collective bargaining processes. According to the Affidavit of Robert Babtiste, attorney for the I.B.T. and negotiator, which was admitted into evidence:

> "3. The union negotiators were forced to call a strike during the early morning hours of April 1, 1979, against only 73 employers out of the approximately 11,000 employers who were signatory

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to this Agreement. The Union Negotiating Committee also directed all of our members employed by carriers not selected for strike action to continue to work and not participate in any strike activity. To the best of our knowledge, our members complied with these instructions and continued to work.

4. It was obvious to the union negotiators and the undersigned that the industry was bargaining in bad faith and had no intention of reaching an agreement on March 31 in order to avoid a strike. The industry negotiators presented to the union negotiators at the last possible moment during the late evening hours of March 31, an economic counter-proposal that failed to allow our members to recoup their losses suffered during the inflationary spiral since their last increase which occurred one year before, a refusal to agree to proposals to improve safety on the job and a refusal to agree to increase the economic situation of the owner-operators to a point to which they could at least recover the cost of operating their equipment..

5. It was obvious to the union negotiators that the industry negotiators were attempting by their obviously inadequate counter-proposal to precipitate a strike by the unions. They assumed that such a strike would be nation-wide in scope, as it was in 1976 at the expiration of the prior Agreement. In the event of a nation-wide strike, the industry negotiators assumed, based upon President Carter's earlier statements to this effect, that the federal government would immediately seek and secure a Taft-Hartley injunction ending the strike for the statutorily prescribed 80 days. However, the federal government did not move to enjoin our limited, selective strike.

6. During the afternoon of April 1, the Executive Committee of Trucking Management, Inc., the main bargaining association for the industry, met and voted to lock out all of our members. The association took this action in order to precipitate a nation-wide stoppage of truck transportation which would create a crisis situation that would force the federal government to seek a Taft-Hartley injunction to restore trucking services to the nation. Another

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> major trucking industry association (Motor Carrier Labor Advisory Council) refused to join in this lockout of our members. Fortunately, the federal government correctly assessed the motive behind the lockout and deferred its decision to seek a Taft-Hartley injunction." (R.00101 to (R.00103).

Mr. Babtiste's testimony is confirmed by the press conference verbatim report by Frank E. Fitzsimmons dated April 2, 1979, (R.00076). Mr. Fitzsimmons, commenting on the right to free collective bargaining under the Wagner Act, stated at this press conference, "Alfred Kahn and Barry Bosworth of the Council on Wage and Price Stability have totally disrupted these negotiations and it can be fairly said that they played a major role in causing our strike." (Ibid). In these negotiations of course, management and government asserted that labor abide by President Carter's Voluntary Wage and Price Guidelines of 7%. (R.00059). Labor was unwilling, in light of the reports on corporate profits and a 13.4% annual inflation rate.

The Respondents produced no evidence on the cause of the selective strike. There is no evidence that the selective strike was a strike against all employers. In fact, the interim agreements offered by the I.B.T. is inconsistent with that concept.

As a result of the I.B.T.'s calling of a selective strike, Teamster Locals 222 and 976 struck P.I.E, Garrett and C.F. in Utah on April 1. C.F., as discussed infra,

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also engaged in a lockout. On April 2, 1979, Teamster Locals 222 and 976 struck I.C.X. and E.T.M.F. I.M.L. was not struck.

The employer union, represented by T.M.I,, retaliated strongly. At 1:00 P.M. on April 1, 1979, T.M.I. instructed all employers to shut down their operations and lock out its employees. (R.00077, R.00059, and T.00147). This was not a selective lockout which could have occurred; rather it was an unwarranted escalation of work cessation by calling for a national industry-wide lockout. Further, T.M.I. threatened legal action if I.B.T. pursued interim agreements with employers. (R.00060). The Appeal Referee, in Finding No. 9, specifically found that I.M.L. ceased its operations in response to directives from T.M.I. So did C.F., although C.F. had been struck earlier.

In conclusion on this point, the facts are clear that the real and fundamental cause of the selective strike and lockout was management and government. All categories of of claimants should be awarded unemployment compensation benefits.

POINT TWO

THE RESPONDENTS ERRED BY DENYING UNEMPLOYMENT COMPENSATION BENEFITS TO THOSE EMPLOYEES LOCKED OUT BY THEIR EMPLOYERS AND ESPECIALLY THOSE LOCKED OUT BY I.M.L.

As set forth supra, T.M.I. strongly reacted to I.B.T.'s announcement of a selective strike. It denounced the interim

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agreements and ordered a national industry-wide lockout. The Petitioners assert that the calling for a national lockout, rather than a selective lockout, was an unwarranted escalation of economic warfare resulting in the cessation of work for thousands of employees nationwide. In Utah both I.M.L. and C.F. locked out their employees. I.M.L. shut out approximately 600 employees immediately by calling them personally by telephone and instructing them not to report to work. (T.00167). C.F. also called its employees and told them not to report to work. (T.00164). There are approximately 600 I.M.L. claimants and 400 C.F. claimants in this proceeding.

I.M.L. was not struck. C.F. was struck on April 1, but hours later management locked out its employees.

As to those two categories of claimants, and especially the I.M.L. claimants, the real and fundamental cause of their cessation of work was management, not labor. Olof Nelson Construction Co. v. Industrial Commission, supra; and Teamsters v. Board of Review, supra.

The actions of T.M.I. in engaging in an industry-wide lockout, rather than a selective lockout, constituted an unwarranted escalation of economic warfare - - - the responsibility of which cannot be placed upon the I.M.L. claimants by denying unemployment compensation benefits. The cause of these claimants unemployment was T.M.I.'s decision to lockout. The responsibility for the cessation of work must rest with management. Many employees, such as R.G., U.P. and Sundance refused to lock out their employees. (T.00147)

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POINT THREE

THE RESPONDENTS VIOLATED PETITIONERS EQUAL PROTECTION AND DUE PROCESS RIGHTS IN DENYING UNEMPLOYMENT COMPENSATION BENEFITS

The Petitioners respectfully submit that the disqualification provisions of Section 35-4-5(d) U.C.A. (1953), as amended, and the particular "volitional test" employed by the Appeal Referee and the Board of Review violates the Equal Protection and Due Process Clauses of the Utah and United States Constitutions. The Appeal Referee and the Board of Review declined to address the constitutional issues raised by the Petitioners. (R.00026 and R.00007). These issues were reserved as " . . . a matter for the courts to decide." (R.00030).

The type of hearing required by the Equal Protection and Due Process Clauses of the Utah and United States Constitutions must be "meaningful," Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed. 2d 62, 66 85 S.Ct. 1187 (1965), and "appropriate to the nature of the case." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 94 L.Ed 865, 70S.Ct. 652 (1950). Furthermore, the Fourteenth Amendment requires there be some rational basis for any presumptions concerning qualification or disqualification for unemployment benefits. Turner v. Department of Employment Security U.2d , 531 P.2d 870, vac., 96 S.Ct. 249, 423 U.S. 44,

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46 L.Ed. 2d 181, 184 (1975). Lastly, the Equal Protection Clause does not allow statutory differentation of classes based on criteria wholly unrelated to the objective of that statute. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225 (1971). "A classification must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (Ibid.)

The objectives of the Social Security Act, 42 U.S.C.S. Section 503(a)(1) and Utah's corresponding Utah Employment Security Act. 35-4-1 et. seq. U.C.A. (1953), as amended, must accordingly be considered. In respect to the Social Security Act, "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." California Human Resources Dept. v. Java, 402 U.S. 121, 130, 28 L.Ed 2d. 666, 91 S.Ct. 1347 (1971). The objectives of Utah's Act is also unambiguous. "It is clear from this language that the primary purpose of such an act is to provide protection for employees; it is not the direct or primary purpose of such legislation to control or regulate the relationship of employer and employee." Abramsen v. Board of Review, 3 U.2d 389, 284 P.2d 213, 216 (1955). "Its purpose is remedial to protect the health, morals and welfare of the people by providing a cushion against the shocks and rigors of unemployment." Singer Sewing

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Machine Co. v. Industrial Commission, 104 U. 175, 134 P.2d 479, 485 (1943).

The public policy of the State of Utah vis-a-vis labor is also important to consider. Illustrative of this policy is Section 34-20-1 U.C.A. (1953), as amended. In pertinent part, this section provides:

> " . . .
>
> (1) It recognizes that there are three major interests involved, namely: that of the public, the employee, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.
>
> (2) Industrial peace, regular and adequate income for employee, and uninterrupted production of goods and services are promotive of all of these interests.. . .
>
> (3) Negotiation of terms and conditions of work should result from voluntary agreement between employer and employee. . . ."

The decisions of the Appeal Referee and the Board of Review violated the above constitutional principles and statutory objectives in a number of direct and indirect ways.

First, the Respondents based their decision to deny benefits on an improper conclusion or presumption by using the volitional test. By doing so, benefits were denied to employees out of work through no fault of their own.

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It should be noted that the volitional test is a judicial invention expoused in the Olof Nelson case and not found in Utah's disqualification statute, Section 35-4-5(d). There are several factors for this creation. One was that the Court in Olof Nelson confronted multi-employer-union disputes for the first time. Also, Utah's disqualification statute does not provide for eligibility during a lockout; yet, benefits should be provided when the unemployment is not the fault of the employee. The Court in Olof Nelson then discarded any geographical criteria (as called for distinctly by the Statute) and focused on "involvement." The Court then adopted the volitional test to determine qualification: responsibility for the work stoppage is allocated to the party who created its actual and directly impelling cause. Utah Courts have continued this test until today.

In the Olof Nelson case, the A.F. of L. was bargaining on behalf of member craft unions with the Association of General Contractors (A.G.C.) when a deadlock in negotiations occurred and the A.F. of L. selectively struck two of the A.G.C. employers, and the entire membership of the A.G.C. responded by shutting down all projects. The Industrial Commission initially granted an award of benefits to those employees who were not involved geographically in the original two strikes. The Supreme Court reversed the holding:

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> . . . There is no dispute that the economic sanction of the A.F. of L. in this case was directed against the entire employer association. The strike was called for and on behalf of every employee covered by the agreement. It therefore involved all these claimants, at each particular place of employment at which they were last employed . . . id at 243 P.2d 959.

The fact that the selective strike "involved" the employers not struck was a determining factor.

The same result occurred in Teamsters , etc. v. Orange Transportation, etc., supra, when the union selectively struck members of the employer bargaining unit which responded by effecting a general shutdown of all operations. The Court found this economic sanction was directed against the entire employer group and the purpose of the selective strike was to force acceptance of union demands.

In the Teamsters etc. v. Board of Review, supra, case the claimant workers were allowed benefits but only upon a finding that the work stoppage began with a strike by workers who were not members of the claimants bargaining group.

As a result of these and other cases, the prevailing law in Utah allows a worker benefits who becomes unemployed because of a labor dispute if he was locked out by his employer through no fault of his own. However, no benefits are allowed if the lockout was induced by a selective strike which may be fairly considered as a strike againstall. Even then, a worker can qualify for benefits if the work stoppage is a strike that was compelled by the employers'

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bad faith bargaining. In the Olof Nelson opinion, for instance, the court discussed the California case of Bunny's Waffle Shop v. California Employment Comm., 24 Cal. 2d 735, 151 P.2d 224, 227. The employers there did not commence a lockout but instead cut wages and imposed longer and split shifts in response to a trade dispute. The employees responded by calling a general strike. They were determined by the court to be qualified for unemployment benefits since the work stoppage was not truly voluntary on the worker's part. The Olof Nelson opinion, also quotes the case of McKinley v. California Employment Stabilization Comm., 34 Cal. 2d 239, 209 P.2d 602, as follows:

> . . . in reality, the form of the cessation of employment is not controlling and the determinative factor is the volitional cause of the work stoppage. In other words, 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. This is the only sound and fair way to apply the subjective volitional test . . . id at 243 P.2d 957.

This "subjective volitional test" is not part of any statute but was created by the California courts in the cases cited above and adopted by the Utah Supreme Court for application to our statute in the Olof Nelson case.

The respondents utilized this volitional test in denying the claimants benefits in this case. There was no factual finding of fault or actual cause of unemployment. Thus an assumption or presumption is permitted that has no rational basis in fact. The assumption or presumption inherent in the

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volitional test is that a party against whom any economic action is directed has the absolute right to retaliate in full economically by creating a complete work stoppage, either by an employer's lockout or a union's strike. This assumption or presumption gives legal credence to the principle that "a strike against one is a strike against all." No doubt this principle has merit in the context of collective bargaining strategy. However, this principle has no merit in the context of determining eligibility for unemployment compensation benefits. The assumption applies regardless of the degree of economic action the first party inflicts. The assumption allows a party against whom any economic action is directed to escalate the economic war, disturb the industrial peace, destroy regular and adequate income for employees without any fault, and interrupts the production of goods and services. Moreover, the direct cause of the cessation of work, which causes unemployment, becomes irrelevant after any party commences any economic action. Under the volitional test there can be only one culpable cause of cessation of work. In reality there may be several causes for cessation of work at various places of employment, some disqualifying, others not. This is especially true in a multi-employer bargaining unit involving numerous unions.

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Collective bargaining processes of today, which involves general and selective strikes and lockouts, requires more individualized treatment. Turner v. Department of Employment Security, supra. The volitional test is based upon an assumption or presumption having no rational basis in fact, and as such violates due process of law, Bell v. Burson, 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586 (1971); Stanley v. Illinois, 92 S.Ct. 1208, 405 U.S. 645, 31 L.Ed. 2d 551 (1972); and Sherbert v. Verner, 374 U.S. 398, 10 L.Ed. 2d 965, 83 S.Ct. 1790 (1963), and does not allow a meaningful hearing. Armstrong v. Manzo, supra. A more rational approach may be to shift the burden of proof to an employer to justify any general lockout called in response to a selective strike.

No fault should be attached to the employees who became unemployed due to the general lockout in the present controversy. They stood ready and willing to work and yet were deprived of their work and public assistance.

The locked out employee stands in no different position than an employee who is laid off. They both are unemployed because the employer ceased work through no fault of the employee. Yet the locked out employee is is denied benefits provided the similarly situated worker solely because of his membership in a union. This discrimination due to union membership violates the employee's tightly guarded "Section 7 Rights" as guaranteed by 29 U.S.C. Section 157 of the Wagner Act.

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In short, the disqualifying provision and the volitional test fails to be reasonable, is arbitrary, and rests upon some ground of difference not having a fair and substantial relation to the object of the legislation. Reed v. Reed, supra.

Second, the disqualifying section as applied by the volitional test offends the Equal Protection and Due Process Clauses by being totally insuseptable to definition or proof. To begin with, the opinions which created this test provide no guidelines to determine what the subjective intent of a multi-employer association or a labor organization might be. Furthermore, from a practical point of view, how can an individual worker who has the burden of proof, or even his union, acquire competent evidence for the courts in Utah of the events which transpired in the bargaining sessions in Washington, D.C. The sessions were not public and were conducted by a few industry leaders. Because of this lack of definition and impossibility of proof, the disqualifying provision imposes a burden that denies these claimants due process of law by not providing any meaningful hearing. Armstr v. Manzo, supra.

Third, this also violates the public policy of the State of Utah, i.e., promoting industrial peace, regular and adequate income, and uninterrupted production of goods and services. In the present action, the I.B.T. was forced to call a strike. It called a selective strike for rather

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benign reasons. Utah's disqualifying provision as applied under the volitional test, which gives irrebutable sanctity to the "strike against all" concept, encourages rather than discourages industry-wide strikes.

CONCLUSION

Each of the employee applicants, especially those who were locked out by their employers, should be eligible for unemployment compensation benefits. Utah's disqualification statute 35-4-5(d) U.C.A. (1953), the volitional test employed in this case operated to deprive the Petitioners' rights under the Equal Protection and Due Process Clauses to the Utah and United States Constitutions.

The disqualifying provision as applied under the volitional test denies benefits to employees out of work through no fault of their own. The Olof Nelson and Orange Transportation cases provide automatic sanction to an employer association's economic threat that "a strike against one is a strike against all." This strike against all reasoning permits an employer to escalate a labor dispute, create a stoppage of work, and unemployment without any fault on behalf of the employee. Yet, the employee is denied appropriate benefits.

A more rational and practical approach to the multi-employer bargaining situation has been adopted by the Courts, For example in MEMCO v. Maryland Employment Security Administration, 280 Md 536, 375 A.2d 1086 (1977), the Court

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of Appeals of Maryland considered the "strike against all" concept in a multi-employer bargaining setting. The Court noted that the Maryland Statute disqualified claimants only if the labor dispute existed at the plant or premises where he was last employed. In refusing to adopt the "strike against all" concept, the Court held that the individua place of employment, not a multi-employer association, was the relevant entity for purposes of determining whether a labor dispute was the cause of the particular employee's unemployment. 375 A.2d at 1092. The language of Utah's statute is very similar in this particular context. This approach would appear to alleviate the necessity of determining certain impossible issues such as who was justified in taking economic action, subjective intent, and so forth in awarding or denying benefits.

Respectfully Submitted:

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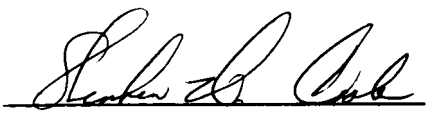
CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Petitioners Brief on Judicial Review to: K, Allen Zabel, Department of Employment Security, 1234 South Main, Salt Lake City, Utah 84115, attorney for Respondents Board of Review, the Industrial Commission, and Nathan J. Fullmer, 500 American Building, 61 South Main, Salt Lake City, Utah 84111, attorney for Respondent, Intermountain Operators League, postage prepaid, this 10 day of December, 1979.



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