

1961

United Steelworkers of America et al v. Board of Review of 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

FILED
FEB 7 - 1961

Case No. 9322

Clerk, Supreme Court, Utah

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 5486,
for and on behalf of its members employed by Utah Copper Division,
Kennecott Copper Corporation, 60-BR-230;
INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS 485 and 392, for and on behalf of its members
employed by Utah Copper Division, Kennecott Copper Corporation,
and OFFICE EMPLOYEES INTERNATIONAL UNION LOCAL
286, for and on behalf of its members employed by Utah Copper
Division, Kennecott Copper Corporation, 60-BR-237;
ELVERE R. DAVIS, on his own behalf, employed by Utah Copper
Division, Kennecott Copper Corporation, 60-BR-231;
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORK-
ERS (Local 1438), for and on behalf of its members employed by
Utah Copper Division, Kennecott Copper Corporation, and DEON
L. WIMMER and LEONARD HUSSEY, 60-BR-235;
UNITED STEELWORKERS OF AMERICA, LOCALS 4347, 4413,
5120 and 4329, for and on behalf of its members employed by Utah
Copper Division, Kennecott Copper Corporation, 60-BR-236,

Appellants

vs.

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF
UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, and the
UTAH COPPER DIVISION OF KENNECOTT COPPER CORPO-
RATION,

Respondents

BRIEF OF RESPONDENTS

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IN THE SUPREME COURT of the STATE OF UTAH

UNITED STEELWORKERS OF AMER-
ICA, LOCAL NO. 5486, et al,

Appellants,

vs.

BOARD OF REVIEW OF THE INDUS-
TRIAL COMMISSION OF UTAH,
et al,

Respondents.

Case No.
9322

BRIEF OF RESPONDENTS

NATURE OF THE CASE

Respondents agree with the statement of appellant as to the nature of the case insofar as it goes and supplement it as follows:

There are five categories of claims for unemployment compensation benefits involved in this appeal. They are as follows:
(1) Claims filed for waiting weeks or weeks of unemployment

during periods when picketing was being maintained at the entrances used by the claimants; (2) claims filed for weeks of unemployment for periods which occurred after a labor-management contract had been reached when no pickets were maintained at the entrances used by the claimants; (3) claims filed by workers who were normally employed at the smelter after the completion of the processing of the stockpile at the smelter; (4) claims filed by refinery workers after the date of the contract settlement who were not called back to work due to the deterioration at the refinery which necessitated repair work prior to the resumption of normal operations; (5) claims filed by refinery workers for weeks of unemployment following the January shutdown of refinery furnaces. We set these out for the information of the Court. All classes are in our opinion subject to disqualification for the same reasons.

Basically the issue is this: May the members of one union who participated in a simultaneous strike with members of several other unions escape from the disqualifying provisions of Section 35-4-5(d) of the Employment Security Act by reason of the fact that through the union they reached a contract settlement prior to the time when all other unions reached contract settlements which would permit the resumption of normal operations and an end of the work stoppage? Put another way: Can striking members who are responsible for a work stoppage become eligible for unemployment compensation benefits prior to the end of the work stoppage when such work stoppage continues by reason of the fact that other unions are still on strike in one or more other segments of the establishment?

The weeks for which unemployment benefits are claimed are for weeks of unemployment which occurred subsequent to

respective contract settlements and prior to the resumption of normal or substantial operations. In the case of the members of the International Brotherhood of Electrical Workers, Local No. 1438, the claims include some claims which were for periods prior to the date of the contract settlement of that local but during periods when active picketing was in progress at the entrance to the plant which was used by those claimants.

Elvere R. Davis was employed as a carpenter at the company's mill and was a member of Local 392, Mine, Mill and Smelter Workers' Union. He originally appealed to the Referee on the issue of whether or not intervening employment after the date of the strike would relieve him from the strike disqualification. Upon receiving an adverse decision, Davis filed a written appeal to the Board of Review on the sole issue of whether or not members of Local 392, Mine, Mill and Smelter Workers' Union including himself were eligible for benefits. He did not appeal on the issue of the intervening employment.

STATEMENT OF FACTS

The Appeals Referee in his decisions and particularly in those involving steelworker locals and mine mill locals made very comprehensive Findings of Fact. BR-230 (R. 011, 012), BR-231 (R. 008, 009), BR-235 (R. 027, 028), BR-236 (R 102-108), BR-237 (R. 82-86). His Findings appear to be accepted by all parties to this appeal with perhaps only minor differences which are of little consequence. Nowhere in appellant's brief do they point out where any of these Findings of Fact are not supported by the evidence.

Under the heading, "Statement of the Case," appellants

in their brief set forth certain facts. Respondents agree generally with the statement of facts therein set forth but call attention to what appears to be statements made in error and not supported by the record and direct attention to additional facts.

While the Electrical Workers Local 1438, as set forth on page 5 of appellants' brief, advised the Company on October 31, 1959, that it was not on strike and in turn ordered the Unity Council not to list that local as one of the striking unions in either their advertisements, publicity or demands to the Company. This same union had, by press release dated August 12, 1959, two days after the commencement of the strike, identified itself as one of the unions in Utah Unity Council which had that day "established a joint strike committee for the purpose of uniting the efforts of all striking local unions in the Utah Division in a combined effort to win this strike and effectuate a substantial contract from the Company***." BR-235 (R. 004). The union, prior to the commencement of the strike on August 10, 1959, had been requested by the Company to furnish men to maintain the power plant during the strike and supply switchboard operators. These men did not show up for work on the day of the strike and thereafter until November 12, 1959. The members of the union refused to cross the picket lines to go to work. BR-235 (R. 071).

The Central Power Station was not operated during the strike not only for the reason that it was not economically feasible to operate the plant for the production of the relatively small amount of power which was needed by the Company in its strike-curtailed operation, but also because it was unsafe to do so for such a small output. BR-236 (R. 070, 183, 184).

While it is true that as stated on page 9 of appellants' brief that when pickets appeared at the smelter on the afternoon shift of December 1, 1959, the smelter employees did not leave their jobs, the production workers merely finished the shift they were then working and refused thereafter to cross the picket line to return to work on subsequent shifts and did not return to work until the picket lines were withdrawn. The clerical workers returned after only one day of absence and refusal to cross the picket line.

The Utah Copper Division of Kennecott Copper Corporation is engaged in Salt Lake County in the mining, milling, smelting and refining business. It operates a mine and precipitation plant at Bingham, two concentration plants (mills at Magna and Arthur), a smelter, a refinery, a Central Power Station all near Magna and a vast railroad system; at the mine, from the mine to the waste dumps, from the mine to assembly yards, from the assembly yards to the mills and connecting the mills, smelter and refinery. BR-236 (R. 119).

The basis or foundation of all activity in the Utah Copper Division is its open-cut mine at Bingham Canyon.

Before ore can be removed from the mine, waste or overburden of about twice the amount of ore removed must first be removed and hauled to waste dumps. BR-236 (R. 025, Page 10, Exhibit B), BR-237 (R. 137). Over these waste dumps water is distributed and permitted to percolate through them, in the process picking up copper from the waste in the dumps. At the base of the dumps the water is recaptured and taken to the precipitation plant at the mouth of Bingham Canyon where the copper is removed therefrom. BR-237 (R. 137).

Ore from the mine is loaded by electric shovels into railroad cars and taken by train from the mine to the assembly yard and at the assembly yard a larger number of cars are assembled together for transporting by railroad to the mills. The ore is processed at the mills and the concentrates taken from there to the smelter by railroad, and after smelting, the product is then taken by railroad to the refinery for refining. BR-236 (R. 127), BR-237 (R. 137).

Each process or operation is dependent upon all of the others. For example, without the removal of ore from the mine, the train crews cannot operate. Likewise, without the train crews operating in any one of the areas in which they operate, i.e., removal of waste, moving of ore from the mine to the assembly yard and from the assembly yard to the mills, the mills, smelter and refinery cannot operate. Another example is that if the mine, railroads, mills and refinery are not in operation, the Central Power Station will not operate because its sole purpose is to supply power used at the mine, railroads and other plants mentioned.

The last of the unions to reach contract settlements with the Company were International Association of Machinists, Local 568, System Federation No. 155 and Brotherhood of Locomotive Firemen and Enginemen, Lodge 844. Settlements were reached on January 27, 1960. BR-236 (R. 029).

The employees represented by the International Association of Machinists, Local 568, are the maintenance group at the mine who maintain the equipment which is used by the various units throughout the open-pit mine. They maintain the shovels, locomotives, track shifters, angle dozers, trucks and other equipment used in the operation of the mine. Without

the services of the men represented by this union, there could be operation only for a short time before breakdowns would stop the operation. BR-237 (R. 138).

The System Federation No. 155 comprises a group of labor unions, members of which are machinists, blacksmiths, boiler makers and the car repairmen located in the shops of the ore haulage at the Magna mills. These men service and maintain the railroad operating equipment, including the electric locomotives which haul the ore and service the dumping of the ore and the diesel locomotives which haul the concentrates from the mills to the smelter and the delivery of supplies. Without the services of these men, it would be impossible to operate the mills. BR-237 (R. 148, 149).

The men represented by the Brotherhood of Locomotive Firemen and Enginemen operate the trains in the Bingham open-pit mine. They travel to the shovels and haul waste to the dumps and ore to the Copperton assembly yard. Without the services of these men, there would be no movement of waste or ore. BR-237 (R. 137, 138).

The management, operation, direction and control of all departments is on a Utah Copper Division basis with headquarters in Salt Lake City in most instances and generally in the Kearns Building. There is a general manager with offices in the Kearns Building, Salt Lake City. BR-236 (R. 120). Under him there are the superintendents of the mine, mills, refinery and smelter with offices at the respective plants. There is a central accounting office in Salt Lake City which handles the accounting for all the plants. BR-236 (R. 121). Payroll checks are made up in the central accounting office for all employees

of Utah Copper Division. The Comptroller's Department, Industrial and Union Relations Department, Purchasing Department, Engineering Department, Industrial Engineering Department, Quality Control Department, Safety Department and Security Force are all on a Utah Copper Division basis. BR-236 (R. 121, 138, 139).

The important fact concerning the stoppage of production at the smelter after it had resumed production upon the settlement reached with the steelworkers on November 21, 1959, which stoppage commenced during the week ending January 10, 1960, was that there were no more concentrates at the smelter to process and none was being received from the mills, which lack of concentrates was the result of the strike which had commenced on August 10, 1959. There had been about 34,000 tons of concentrates stockpiled at the smelter prior to the strike. When these concentrates were smelted, operations were forced to cease on January 17, 1960. BR-236 (R. 162). This was not only the reason given, as stated by appellants on page 10 of their brief, but was the fact and there was no evidence to the contrary.

The resumption of operations at the refinery, following the contract settlements with the United Steelworkers of America on November 21, 1959, first consisted of preliminary heating of furnaces, clearing up fallen cathodes and general cleanup in the tank house. Operations were planned to resume as rapidly as possible with fine casting being scheduled to begin on December 7, 1959. Picket lines of Brotherhood of Locomotive Firemen and Enginemen and Order of Railroad Carmen and Brakemen were established on December 1, 1959. This interrupted operations again until December 25, 1959, when the

pickets were withdrawn. There was a limited supply of materials on hand for refining and this was depleted on January 15, 1960. BR-236 (R. 144). The failure of Systems Federation and the Company to reach agreement prior to January 27, 1960, prevented the product of the smelter from being delivered to the refinery, which product was necessary before the refinery could operate.

STATEMENT OF POINTS

THE BOARD OF REVIEW DID NOT ERR AS A MATTER OF LAW AND FACT IN DENYING THE CLAIMANTS BENEFITS IN HOLDING:

1. THAT UTAH COPPER DIVISION, KENNECOTT COPPER CORPORATION, OPERATION IN UTAH CONSTITUTES A SINGLE FACTORY OR ESTABLISHMENT WITHIN THE MEANING OF THE ACT, SECTION 5(d).

2. THAT THE WORK STOPPAGE DID NOT END UNTIL FEBRUARY 6, 1960, WHEN THE PLANT RESUMED "NORMAL OPERATIONS" FOR:

- (a) THE WORKERS REPRESENTED BY UNITED STEELWORKERS OF AMERICA, LOCAL 5486;
- (b) THE WORKERS REPRESENTED BY INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1438;
- (c) THE WORKERS REPRESENTED BY INTER-

NATIONAL UNION OF MINE, MILL AND
SMELTER WORKERS, LOCALS 485 AND 392;

(d) THE WORKERS REPRESENTED BY INTER-
NATIONAL UNION OF OFFICE EMPLOYEES,
LOCAL 286;

(e) THE WORKERS REPRESENTED BY UNITED
STEELWORKERS OF AMERICA, LOCALS 4329,
4347, 4413 AND 5120; AND

(f) ELVERE R. DAVIS, INDIVIDUALLY, AND AS
A MEMBER OF HIS LOCAL UNION.

3. THAT THE UNEMPLOYMENT OF THE CLAIM-
ANTS REPRESENTED BY THE LOCAL UNIONS SET
FORTH IN 2. (a through f above) WAS DUE TO A
WORK STOPPAGE WHICH EXISTED BECAUSE OF A
STRIKE INVOLVING HIS GRADE, CLASS, OR GROUP
OF WORKERS AT THE FACTORY OR ESTABLISH-
MENT AT WHICH HE IS OR WAS LAST EMPLOYED.

ARGUMENT

POINT ONE

THE BOARD OF REVIEW DID NOT ERR AS A
MATTER OF LAW AND FACT IN DENYING THE
CLAIMANTS BENEFITS IN HOLDING:

1. THAT UTAH COPPER DIVISION, KENNECOTT
COPPER CORPORATION, OPERATION IN UTAH
CONSTITUTES A SINGLE FACTORY OR ESTABLISH-

MENT WITHIN THE MEANING OF THE ACT,
SECTION 5(d).

SECTION 35-4-5(d) of the Utah Employment Security Act provides:

"5. An individual shall be ineligible for benefits or for purposes of establishing a waiting period:

"(d) For any week in which it is found by the commission that his unemployment is due to a stoppage of work which exists because of a strike involving his grade, class, or group of workers at the factory or establishment at which he is or was last employed.

"(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 of such plan or agreement to foment a strike, shall be eligible for benefits; provided, however, that if the commission, upon investigation, shall find that such strike is caused by the failure or refusal of any employer to conform to the provisions of any law of the State of Utah, or the United States, pertaining to hours, wages or other conditions of work, such strike shall not render the workers ineligible for benefits.

"(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 representatives, to foment a strike, such strike shall not render the workers ineligible for benefits."

The question of whether or not the Utah Copper Division, Kennecott Copper Corporation, operations in Utah constitute a single factory or establishment within the meaning of the Act appears to us to be of secondary importance except as to the

effect such interpretation has on the matter or resumption of normal or substantial operations at the smelter or refinery.

The matter of what constitutes a single factory or establishment has never been decided by this Court under a similar factual situation. This Court did say in the case of *Olof Nelson Construction Company et al vs. Industrial Commission of Utah*, 121 Utah 525, 243 P 2d 951, in a case which involved multiple bargaining units:

“The strike was called for and on behalf of every employee covered by the agreement. It, therefore, directly involved all these claimants at each particular place of employment at which they were last employed. The strike was fomented by claimants through their duly authorized union representatives.”

Although the facts show that at times each of the local unions presented certain common bargaining demands in the field of health and welfare benefits through a “Unity Council,” the Referee and the Board of Review did not make specific findings that the various strike actions were taken to enforce the specific health and welfare demands of the Unity Council. It was recognized that except in the area of health and welfare benefits the designated unions were the sole bargaining agents for the respective units. It is significant that the respective local unions all effected a strike simultaneously on August 10.

We have reviewed numerous cases involving the definitions of single factory or establishment and in none of these cases are the facts parallel to the situation in the instant case. Had the facts in the other cases paralleled those in the instant case, the matter of whether or not a certain plant was part of the factory or establishment would not have been the salient factor

in the appeal. In the other cases there were no formal strikes at the premises where the benefit claimants were employed. In the instant case there were simultaneous strikes at each and every segment of the company operations. In the other cases the claims dated from the original work stoppage which came about by reason of the lack of materials flowing from the struck premises which were located at some distance from the struck operation. In the instant case the claims for benefits are made for weeks either during which time strikes were in active progress and picketing was being maintained or for weeks which followed a settlement of the particular local's contract.

As we pointed out, in the other cases the work stoppage resulted from a lack of materials and in the instant case the work stoppage was a direct result of the strike of August 10. Generally speaking, in the other cases the appeals involved out-of-state plants or plants which were forty or more miles distant. In the instant case the operation constitutes one industrial community—it is all within the state and within a limited integrated area. In the cases to be reviewed there was no voluntary act on the part of the employees who were appealing, and in the instant case all of the appellants or benefit claimants were either actively on strike on August 10 or were honoring picket lines and thereby involved in the strike. In the other cases there was no showing that there was a direct interest or direct participation by the appellants. In the instant case each of the appellants was a participating and interested party.

The foregoing factual analysis applies in almost all respects to the case of *Park vs. Appeal Board of Michigan*, decided on January 12, 1959, 359 Michigan 103, 94 N.W. 2d 407, which case is relied on to a substantial extent by Counsel for the Appel-

lants in his brief. That case held in substance that the "functional integration" of an employer's plants that are located in more than one state does not make the plant per se a "single establishment" within the meaning of the Law and that, therefore, the employees who were out of work in Michigan as a result of a strike against their employer in Ohio were not disqualified under the labor dispute provisions of the Law where such employees did not strike or picket but were laid off. The Court stated in discussing the question at issue:

" . . . We conclude that they turn upon the answer to a relatively simple legal question—does the term 'the establishment' as used in the Michigan Employment Security Act encompass both Ford plants in the vicinity of Detroit, Michigan, and the Ford Forge plant at Canton, Ohio, for the reason that the former cannot operate long without the latter."

To further point out that the Court recognized differences in factual situations in its rationalization of other cases, we quote:

"While the dictionary, the statute, and common sense all argue otherwise, we are urged that this Court in *Chrysler Corporation vs. Smith*, 297 Michigan 438, so defined 'establishment' as to require our holding as did the Circuit Judge and the Appeal Board that the Ford Detroit area plants in Michigan and the Ford Canton Forge plant in Ohio were all one 'establishment'.

"It might be noted at the outset that no such factual situation was involved in *Chrysler vs. Smith* as confronts us here. The plants there involved were all in one industrial community—the Detroit area; they were all located within eleven miles of one another; and they were all located in the State of Michigan. We deal

here with a disqualification argument applicable to nonstriking employees in three Detroit area plants all in Michigan where the strike inducing the unemployment occurred in another community 150 miles away and in another state."

The Court discussed the case of *Spielmann vs. Industrial Commission*, 236 Wisconsin 240, 295 N.W. 1, and said in answer to the Ford Motor Company's argument:

"Factually the Wisconsin case was even more remote from our present facts since the two plants there held to be one 'establishment' within the meaning of the Wisconsin statute were both in the same state though forty miles apart, were both under one general works manager, and were operated on one production schedule maintained by trucks scheduled between the two plants with deliveries so synchronized that a body built for one order at Milwaukee would meet the chassis for the same order built at Kanosha on the assembly line without intermediate storage.

"On the other hand, the record in the cases considered herewith indicates for all plants concerned entirely separate and distinct plant managers and plant production schedules as well as separate and distinct industrial relations and employment offices, employment seniority lists, local unions and local labor management agreements."

In the instant case we have one industrial community, i.e., the Utah Copper Division where the administration of the production operations is carried on under the General Manager of the Division with a Superintendent of Mines, Superintendent of Mills, Refinery Supervisor, Smelter Supervisor and Superintendent of the auxiliary units including the power station, precipitation plant and ore haulage system reporting directly

to the General Manager. The Utah Division consists of the open-pit mine separated only by a few miles from the two mills, refinery, precipitation plant, central power stations with a general company-owned haulage system operating between all segments of the operations. The Utah Division maintains a central accounting office in Salt Lake City, and all of the various plant operations and all payroll records and checks for all employees of the Utah Division are made up in this central accounting section in Salt Lake City. The purchasing, industrial and union relations, employment and employee training, engineering, quality control, safety, security, and production schedules all emanate from a central point in the division headquarters in Salt Lake City. As in the Spielmann case referred to in the Park case *supra*, the operations at all of the segments of the establishment are so integrated as to make the continuous flow of production each dependent upon the other. A stoppage of the flow of ore from the mine to the mills or a stoppage in the ore haulage operation would immediately shut down the entire establishment including the mine, the mills, the smelter and the refinery.

The appellants in their brief, pages 16 through 18, point out how in their opinion certain factors governing contracts, wages, etc., show the separateness of the segments of the operations of the Utah Division. In relating the argument to the situation at hand, we find that the facts are neither black nor white. The United Steelworkers of America negotiates contracts for Local 4413, production and maintenance workers at the refinery; Local 5120, clerical workers at the company's refinery; Local 4347, production and maintenance workers at the company smelter; Local 4329, clerical workers at the smelter; and

Local 5486, technical workers at the company's Arthur Mills. The International Union of Mine, Mill and Smelter Workers negotiates for Local 392, production and maintenance employees at the company's Arthur and Magna Mills, and Local 485, production and maintenance workers at the company's Bingham Mine. The facts show that the Unity Council presented demands dealing with health and welfare, and these demands included more than one segment of the company's operations. General hiring practices were dictated from the company's office in Salt Lake City even though the actual hiring of individuals may have been done at the several work locations. Labor contract negotiations were carried out not between the administrative personnel of the smelter or the refinery, etc., and the unions but between the unions and the company representatives located in Salt Lake City. The negotiations were done with the same general personnel for all of the segments of the operation. Safety and security measures in all of the operational segments were directed and controlled from the Salt Lake City office. There was one central source of payroll records and payrolls. The integrated nature of operations was apparently recognized by the various union locals themselves when they organized the Unity Council whose main purpose seems to have been to bring about some general uniformity in the provisions dealing with health and welfare.

As we pointed out in the beginning, the question of whether or not the Utah Division operations constituted one factory or establishment is a rather academic one in view of the fact that all the claimants herein were directly involved and participated in the strikes of August 10, which strikes were in effect at each and every segment of the company operations.

Had there been no strike at some of the work locations, then it would have been imperative that we determine first whether or not this was one establishment, and then second that we determine whether or not the claimants were involved in the strike.

However, even taking the most liberal interpretation of the cases defining the word, "establishment," we do not see where a substantial case can be made which would support the conclusion that the Utah Division was anything other than a single establishment. Its administration and operations and employee matters were so functionally integrated that we fail to see wherein the Appeals Referee or the Board of Review could have reached a different conclusion other than that within the meaning of the Law that this was a single "establishment."

ARGUMENT

POINT TWO

THE BOARD OF REVIEW DID NOT ERR AS A MATTER OF LAW AND FACT IN DENYING THE CLAIMANTS BENEFITS IN HOLDING:

2. THAT THE WORK STOPPAGE DID NOT END UNTIL FEBRUARY 6, 1960, WHEN THE PLANT RESUMED "NORMAL OPERATIONS" FOR:

- (a) THE WORKERS REPRESENTED BY UNITED STEELWORKERS OF AMERICA, LOCAL 5486;
- (b) THE WORKERS REPRESENTED BY INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1438;

- (c) THE WORKERS REPRESENTED BY INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, LOCALS 485 AND 392;
- (d) THE WORKERS REPRESENTED BY INTERNATIONAL UNION OF OFFICE EMPLOYEES, LOCAL 286;
- (e) THE WORKERS REPRESENTED BY UNITED STEELWORKERS OF AMERICA, LOCALS 4329, 4347, 4413 AND 5120; AND
- (f) ELVERE R. DAVIS, INDIVIDUALLY, AND AS A MEMBER OF HIS LOCAL UNION.

We are concerned in this point of argument primarily with what did happen between August 10, 1959, and February 6, 1960, with reference to resumption of operations in the Utah Copper Division. We reserve any argument as to cause and effect of the unemployment during that period to our number 3 point of argument. The findings of the Board that the work stoppage did not end until February 6, 1960, can best be supported by a brief review of the facts regarding the resumption of work.

Anticipating a vacation shutdown schedule which was to commence August 10 and end August 23, 1959, for all employees except those employed at the smelter and refinery, the company had stockpiled concentrates at the smelter which would have enabled the smelter and refinery to operate on a steady basis for that two-week period. When the unions' intention to strike effective August 10 was announced, the company canceled the vacation schedule. On November 21, 1959, follow-

ing ratification of their new contract agreements, steelworkers Locals 4347 and 4329 commenced a return to work at the smelter to process the two-week supply of ore. Between November 22 and November 24, 1959, 708 smelter employees were back to work while 167 smelter employees were scheduled off. All but 96 of the 1,170 of the smelter workers had returned to work by November 30—BR-236 (R. 059). The smelter clerical employees were called back according to seniority qualifications as work became available.

On the afternoon shift of December 1, 1959, pickets were established by the Brotherhood of Locomotive Firemen and Enginemen and Order of Railroad Carmen and Brakemen at the entrance to the smelter. The smelter employees who were working at that time remained through the work shift. They did not, however, return to work on subsequent shifts because of the picket line until December 25, 1959, when the pickets were withdrawn by the railroad brotherhoods who had by then signed new contract agreements. On November 25 a general recall of the production and maintenance and clerical workers began at the smelter to complete the job of processing the stockpile. During the week ending January 10, 1960, the company began laying off the smelter workers because of the exhaustion of the stockpile ore. The layoffs continued according to plant seniority so that on January 18, 1960, there were only 242 employees working at the smelter and these were engaged in the work of maintenance, cleanup, and material inventory. Some of the clerical and technical employees at the smelter were told on January 20 not to report for work until further notice because there was no work available for them. Those who were laid off because of the exhaustion of the ore supply and lack of work

were subject to recall on February 1 and shortly thereafter. By February 4, 1960, all but 114 workers out of the 1,153 had returned to work at the smelter. We are concerned here with the unemployment of those workers who were not kept on to do available maintenance, cleanup, and material inventory. There was no ore available at the smelter commencing with the week ending January 10. These facts appear in the record—BR-236 (R. 058-061) and Company Exhibits K and L.

The situation at the refinery was somewhat different, BR-236 (R. 040-042). The new labor agreement for the refinery workers was ratified on November 21, 1959. During the week of November 23 four hundred employees of the steelworkers Local 4413 were called back to work at the refinery. The remaining three hundred workers were not called back. When the company attempted to operate the refinery after November 21, they found that extensive repair and maintenance work was necessary before any production work could be commenced. The cathodes and anodes at the refinery which were in place at the end of the strike called on August 10 had frozen in to such an extent that production was not possible. Those workers who were not called back to work remained unemployed due to the condition of the refinery. The others primarily did maintenance and repair work.

On December 1, 1959, the picket lines established by the Brotherhood of Locomotive Firemen and Enginemen and Order of Railroad Carmen and Brakemen prevented the refinery workers from entering the refinery. When those picket lines were withdrawn on December 25, the recall of the refinery workers commenced, BR-236 (R. 105-106). Two of the three refinery

furnaces were closed January 4 to January 15, 1960, with one continuing until January 29, 1960. Thereafter production and maintenance work was not resumed at the refinery until February 8, 1960. The last of the contract settlements was dated January 27, 1960, and by February 6 substantial operations had been resumed throughout the establishment. Reserving our argument for Point 3 as to cause in effect in the unemployment, it appears clear that there was a work stoppage existing in the plant which caused the unemployment of the majority of the workers during the period in question and the Board of Review could not have found otherwise. In fact, these claims for benefits involved herein are based on that very work stoppage. There could be no resumption of normal or substantial operations until all of the contract negotiations had been completed since a holdout by one or more of the unions at any particular point in the production would necessarily prevent such resumption.

ARGUMENT

POINT THREE

THE BOARD OF REVIEW DID NOT ERR AS A MATTER OF LAW AND FACT IN DENYING THE CLAIMANTS BENEFITS IN HOLDING:

3. THAT THE UNEMPLOYMENT OF THE CLAIMANTS REPRESENTED BY THE LOCAL UNIONS SET FORTH IN 2. (a through f in point of argument No. 2) WAS DUE TO A STOPPAGE OF WORK WHICH EXISTED 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.

Here we come to the crux of the problem. Can claimants who participated in a simultaneous strike with members of other unions escape from the disqualification of the Act (Sections 5(d)), by reason of the fact that their union has reached a contract settlement prior to the time when all union members of all unions reached settlements which will permit the resumption of normal operations. In other words, can individuals who create a work stoppage through the medium of a strike escape the responsibility for the work stoppage. In this and other states the principle of relating the responsibility for the work stoppage to the party who caused the stoppage is well settled.

This Court in the case of *Employees of Utah Fuel Company of Clear Creek, Utah, vs. Industrial Commission of Utah*, 99 Utah 88, 104 P 2d 197, briefly considered a question of whether or not the stoppage of work was due to a strike or due to company action. We quote briefly from that decision:

"Petitioners assert that the Utah Fuel Company started to repair its tipple and do other construction work during this period in question and that the portion of the mine wherein work was being prosecuted was practically out; that therefore the company was not in a position to mine coal and did not have work for petitioners. From this they reason that the stoppage was not due to a strike. Whatever the facts be, we think them immaterial. After the company was notified and the men left work, it matters not what the company did at its mine until the dispute was settled and the strike over. There is no evidence that the company caused the stoppage of work (other than the May 4th

night shift already discussed). The strike caused the stoppage.

“There was a conflict on whether or not the company had orders for coal and therefore would have mined coal, had the strike not been called. This, too, is immaterial. If workers walk out on a strike and refuse to return, except on a certain contingency, their unemployment is due to a strike regardless of any speculation or proof as to whether they would have been totally or partially unemployed had they not struck . . . ”

The reference in the above to the May 4 night shift deals with the fact that the company when notified that work would stop at midnight May 4 relied on that notice and notified the night shift not to come to work on May 4.

This Court in the case of Olof Nelson Construction Company et al vs. Industrial Commission of Utah *supra* stated:

“It cannot be doubted that the Legislature wanted to prevent strikes in every possible way. Undoubtedly one of the considerations prompted the prohibition against labor receiving benefits for unemployment resulting from a strike it was responsible for, is the fact that it would be unfair to use funds built up by labor and management jointly to support labor in a contest wherein it was exerting economic pressure against management by striking. Even more basic is the fact that if such were not the rule, the existence of the system would be hazarded. To permit an employee to become voluntarily unemployed and draw benefits would have these bad effects: It would tend to encourage work stoppage and thus bring about economic waste; it would put it within his power to voluntarily drain off the unemployment compensation fund and thus hazard its soundness and the accomplishment of its purposes. If

it is bad for one worker to be able to voluntarily become unemployed and draw benefits a fortiori, it is proportionately worse for greater numbers of groups to be able to do so. Accordingly the Legislature has expressed its intent that when conflicts arise in connection with negotiations between labor and management, unemployment compensation should not be available to support labor when it is a work stoppage, the responsibility for which is chargeable to a strike initiated by labor.”

Under the provisions of the Utah Employment Security Act, the unemployment compensation funds are accumulated through *employer* contributions only. Although the Olof Nelson case was dealing with multi-unit bargaining organizations, we think the following quote from the Olof Nelson case is pertinent to this issue:

“In these controversies where we have workers represented by their unions arrayed on one side against management in multi-unit bargaining organizations on the other, if we are to give effect to the Legislative purpose and intent, the problem simmers down to: Whose conduct is really responsible for the work stoppage? Answering this question may have its difficulties but it seems to be the only logical means of getting at the heart of the matter and resolving the conflict.”

The Court further states:

“Thus, the critical fact to be determined is whether the conduct of labor or management is the primary and initiating cause of the work stoppage, or as phrased by Mr. Justice Schauer in the McKinley case: ‘ . . . It was proper to relate the responsibility for the work stoppage to the party who created its actual and directly impelling cause.’ ”

We respectfully call the Court's attention to the following cases which have dealt at some length with the problem of disqualification during the existence of a work stoppage.

Chrysler Corporation vs. Review Board of Indiana Employment Security Division et al, 120 Ind. App. 425, 92 W.E. 2d 565 (1950). This was an appeal from a decision of the appellate court that employees involved in a labor dispute were ineligible for unemployment insurance benefits during the work week following settlement of the strike, at least part of which was reasonably required to prepare the plant for normal production.

The Court said at 568:

"Where, as here, a labor dispute causes a work stoppage and as a result of such stoppage it is necessary to make repairs before the plant can resume operations on a normal basis, employees involved in the labor dispute are not eligible for the benefits of the Act for unemployment during the time reasonably necessary to prepare the plant for normal operations. However, as stated by Judge Bowen of the Court in the case of *Carnegie-Illinois Steel Corporation v. Review Board of Indiana Employment Security Division* 1947, 117 Ind. App. 379, 72 N.E. 2d 662, 667: 'The test is not the resumption of operations by reason of the control or decision of the employer or conditions and speculative factors allegedly asserted by the employer. It must be limited to the delay directly and proximately caused by the labor dispute and the physical factors and conditions created as the direct and natural consequences of the labor dispute.' "

"Where the unemployment is originally caused by a labor dispute, before an employee will be entitled to the benefits of the Act, he has the burden of proving

his continued unemployment is not the result of the labor dispute but is caused by some other condition beyond his control. *Frank Foundries Corporation v. Board of Review, etc., supra*; *Auker v. Review Board, Indiana Employment Security Division*, 1947, 117 Indiana Appellate 486, 494, 70 N.E. 2d 29, 71 N.E. 2d 629 (transfer denied); *Employees of Utah Fuel Company v. Industrial Commission of Utah*, 1940, 99 Utah 88, 104 P 2d 197.

“On the record before us in this case, the conclusion is inescapable that the employer did everything that was reasonably possible to promptly restore its plant to a normal production basis.”

Carnegie-Illinois Steel Corporation v. The Review Board of the Indiana Employment Security Division et al, 117 Ind. App. 379, 72 N.E. 2d 662.

The Court held that where all production ceased on January 21, because of a strike, which terminated on February 18, and work was partially resumed on February 23, but was not fully resumed until March 16, employees were not entitled to unemployment benefits until March 16, since, until then, stoppage of work was “because,” which means “by reason of” of a labor dispute within the Employment Security Act and concurrence of labor dispute and stoppage of work was unnecessary.

The Court cited from the brief of the union as follows:

“The question before the court is whether a stoppage of work immediately subsequent to a labor dispute which stoppage of work would not have occurred *except* (our italics) for the labor dispute disqualifies employees involved in the labor dispute during the subsequent stoppage.”

In substance the instant case involves an identical issue.

The Court quoted the Indiana Act:

“(3) An individual shall be ineligible for waiting period or benefit rights: . . . for any week with respect to which the board finds that his total or partial or part-total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he was last employed . . . ”

Deleted are certain escape provisions.

The Court in discussing the matter as to whether the labor dispute and the stoppage must be both considered in the present tense stated:

“There are two types of statutes in the states and territories of this country dealing with disqualifications for unemployment benefits. The one type such as the Wisconsin statute, which provides for disqualification for benefits, ‘for any week in which such strike or other bona fide labor dispute is in *active progress* (our italics) in the establishment in which he is or was last employed,’ is in effect in a number of states. The other type is the one as is in effect in this state, and does not contain the words or requirement that a strike be in *active progress* in order to disqualify a worker for benefits. Considering the legislative history of such enactments it is not unreasonable to assume that if the legislature of this state had intended to require that a strike be in *active progress* in order to disqualify a worker for benefits it would have enacted the *active progress* type of statute. Similarly we feel it is not unreasonable to assume that had the legislature intended that the stoppage of work and the labor dispute had to be coexistent it would have made its intent clear through some lan-

guage such as the insertion of the word 'existing' following the words 'labor dispute' in the section in question."

"The word 'because' in the statute means 'by reason of.' The legislature intended to disqualify workers for benefits where the stoppage of work was caused by a labor dispute under the conditions set forth in Section 7(f)(3) of the Act even though such stoppage and dispute were not concurrent. The stoppage of work must exist during the week for which benefits are claimed, but not necessarily during the existence of the labor dispute.

"The only factors which could have caused the stoppage of work as shown by the record were the conditions in the plant which existed because of the shut-down of the plant by reason of the labor dispute, and the time necessary to repair coke ovens, the hearths of blast furnaces, and other repair items necessary before production could be resumed after the shut-down.

"We hold that the Review Board was in error, in its conclusion, that the unemployment following the settlement of the labor dispute and resulting from this fact was not due to a stoppage of work by a labor dispute. We further hold that . . . the Review Board was in error in concluding that a stoppage of work must exist at the same time, or concurrently, before a worker is disqualified."

In *Bako et al v. Unemployment Compensation Board of Review*, 171 Pa. Supr. 222, 90 A 2d 309, the Court held that disqualification of the statute providing that employees shall be ineligible for compensation during a period of unemployment due to work stoppage as a result of a labor dispute is not limited to the time of the strike, but includes the period preceding the strike during which the employer curtails opera-

tions to conserve property, and a reasonable period following the strike, until the plant can be returned to normal operations.

See also *American Steel Foundries v. Gordon et al*, 404 Ill. 174, 88 N.E. 2d 465; *Fort Pitt Manufacturing Company v. Unemployment Compensation Board of Review*, 176 Pa. Supr. 162, 106 A 2d 672.

The direct and impelling cause of the work stoppage which caused the unemployment for which benefits are claimed was the existence of the simultaneous strikes which involved all of the claimants who are appealing. While the members of Local 1438, International Brotherhood of Electrical Workers, failed to give timely notice of intention to strike to the state Labor Relations Board in time to "legalize" their strike they were "on strike" by reason of their withholding of their services by honoring the picket lines. This Court in the case of *Gus P. Lexes et al vs. The Industrial Commission of Utah*, 243 P. 2d 964, stated:

"Although the inquiry did not proceed upon the theory that claimants engaged in the strike, the undisputed facts show that this was the case. Neither the fact that they had no dispute with the employer, nor that their work stoppage was not called a strike, are controlling. A strike is generally defined to be a concerted action of employees in withholding services from their employer. Any such concerted action in refusing to perform services is a strike, no matter what the action may be called, nor for whatever purpose it may have been initiated."

In the case of *Pacific States Cast Iron Pipe Co. v. Industrial Commission of Utah*, 41 A 104, 139 P. 2d 208, this Court stated:

"In *Bodinson Mfg. Company vs. California Employment Commission*, 17 Cal. 2d 321, 109 P 2d 935, the question was whether the applicant 'left his work because of a trade dispute.' Striking welders established a picket line through which applicant and others declined to go. It appears there was only peaceful picketing and no threat of any kind. The Supreme Court of California held that as the applicant was not physically prevented from working, but he merely exercised the choice of following union principles by not going through the picket line, he was not out of work involuntarily and he was not eligible for unemployment compensation. In *Re Persons Employed, etc.* 7 Washington 2d 580, 110 P 2d 877, the Court held that inasmuch as members of the union which did not call a strike agreed not to go through a picket line established by another union, they were thereby participating in a labor dispute and there was no need for determining whether or not applicants were of the same 'class' of workers as the strikers or whether they were employed in a separate unit of the company."

The company determined that it was neither economically feasible nor safe to activate the company-owned power plant to supply power for the smelter and refinery in order to work off the stockpile of ore. Instead the company purchased the necessary power from public sources. The work stoppage at the establishment did not end until on or about February 6, 1960. The electrical workers continued to honor picket lines except for those who obtained permits to cross the picket lines in order to do maintenance work as was arranged with the company. The continued unemployment of the power plant employees was due to their continuing to honor the picket lines and the lack of resumption of such operations which would permit the economic and safe operation of the power plant.

With respect to the smelter workers, the stoppage of work, i.e. lack of normal or substantial operations, continued at the establishment even during the processing of the stockpile of ore. During the actual processing of the stockpile at the smelter the unemployment of the workers ceased. After the stockpile was processed the work stoppage which was due to the initial strike continued. The establishment could not resume operations until every local had settled and agreed to a resumption of work. If, as was pointed out in the Olof Nelson case, *supra*,

“It was proper to relate the responsibility for the work stoppage to the party who created its actual and directly impelling cause,”

then the claimants must be charged with the responsibility for the work stoppage both before and after the processing of the stockpile. There is no showing by the claimants that the continued work stoppage was due to anything other than the initial simultaneous strikes of the several unions. The company did not have the duty or the opportunity to resume operations on a normal or substantial basis until on or about February 6, 1960. When normal operations became possible, the company promptly recalled its workers. The evidence shows that the refinery could not operate in November when the recall began because of the deterioration which had taken place because of the strike-caused work stoppage. It was found that only a part of the refinery workers could be recalled due to such condition, and the major portion of these were used in repair and maintenance to put the refinery back into a condition suitable for production.

The work stoppage at the establishment ended for all

workers, including those represented by the International Union of Mine, Mill and Smelter Workers and Office Employees' International Union, on or about February 6, 1960; and, therefore, only workers not called back after that date can be considered eligible for benefits.

Because the factual situation in this case is unique due to the existence of many union bargaining groups, this is in part at least a case of first impression. We have a simultaneous strike or direct involvement in the strike by some eighteen different locals. After striking at the same time, the locals settled at different times. Because of the over-all unity of operations the failure of even the smallest local to reach a settlement prevented resumption of normal production and no general recall of workers could begin. The strike of no one local was any more the cause of the initial work stoppage than was the strike of any other or all other locals. Once the work stoppage commenced it could end only with a settlement by all.

The Utah Act provides that the worker shall be ineligible for benefits during each week when:

“ . . . his unemployment is due to a stoppage of work which exists because of a strike involving his grade, class, or group . . . ”

There can be no denying that a stoppage of work existed at the establishment until February 6, 1960. In fact, the benefit claims of these claimants are based on that stoppage. The direct and impelling cause of the stoppage was the initial strike. Each of the claimants herein was involved in that strike.

Being so involved, can he escape further disqualification

after his bargaining group has settled its issues and has ceased to be presently actively involved—keeping in mind that this was a concerted simultaneous strike action? While the evidence does not conclusively show that there was a multi-bargaining group identical to the Olof Nelson case, *supra*, there was a joint pre-strike presentation of demands and an after-strike publicity campaign—BR-235 (R. 004). The effect of these was to present a united front to create greater bargaining pressure.

In view of the decisions of this and other courts *supra*, it appears to be well settled that claimants are ineligible for benefits during the weeks when they are actively on strike; honoring picket lines; out of work because of repairs and maintenance made necessary by the strike; and when they are on vacation or are not available for work. Our principle concern then is with the claims which were filed after the respective contract settlement and for the weeks when none of these other disqualifying situations existed. The basic issue is whether or not the unemployment in these latter weeks was due to the action of the claimants themselves or whether it was, after contract settlement, existing only because of the failure of the other unions to reach settlements and whether or not the involvement of the claimants in the initial strike may be disregarded in order to allow benefits.

We think that the better rule is that when members of one local union participate in a simultaneous strike the purpose of which is to cause a complete stoppage of work at the establishment such members should be disqualified from receiving unemployment compensation benefits during the period or periods when the employer is powerless to resume

operations because the members of one or more of such other striking unions remain on strike.

There was a sufficient joining of forces by the unions.....
.....in presenting demands prior to
the strike and advertising a united position during the strike
.....to establish a joint
responsibility for the work stoppage. Their actions made them
a cohesive pressure group with all the claimants involved in
the action causing the stoppage. At the time of the joint strike,
the claimants were fully aware of the fact that normal opera-
tions could not be resumed at the establishment until all
bargaining units had settled and were willing to return to
work. In the face of this situation they joined with members
of the other unions in the strike with each local union taking
the proper strike vote and going on strike on August 10.

The fact that the bargaining subsequent to the strike was
continued by respective bargaining representatives does not
remove the joint responsibility for the work stoppage which
existed until February 6, 1960. Although the following quote
from the Olof Nelson case *supra* is not applicable in all
respects to the instant case, it succinctly sets out the Court's
view of the legislative intent of the statute in denying benefits
to members of striking units.

“ . . . The original provision passed in 1935 stated:
'An employee shall not be entitled to benefits: . . .
(3) If he has left or lost his employment due to a
trade dispute *involving* the employer by whom he
was employed, so long as such trade dispute con-
tinues, . . . ' Ch. 38, Section 8 (3), Limitation on
Payment of Benefits, Laws of Utah 1935. (Emphasis
added”.)

“The following year the statute was amended to read:

‘An individual shall be ineligible for benefits . . .
(d) For any week in which it is found by the commission that his total or partial [total or partial, now deleted] 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.’

“Subdivision (1) was then added, which provides:

‘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;’ Ch. 1, Sec. 5, Disqualification for Benefits; Laws of Utah, Special Session 1936.

“We do not believe that the amendment in 1936 was intended to change the fundamental theory of disqualification stated in the 1935 act. The amendment was designed to refine and clarify the disqualification provision. Expression of this theory of ineligibility was no easy matter. The emphasis in the original provision is that no benefits were to be paid where the unemployment was due to a trade dispute involving the employer of the claimant. The 1936 amendment substituted the words: ‘work stoppage caused by a strike’ for ‘trade dispute’ and ‘involving his grade, class or group of workers at the factory or establishment at which he is or was last employed’ for ‘involving the employer by whom he was last employed.’ It makes no difference whether the principle of disqualification is expressed in terms, relating to the employer or the employee. In order to have a trade dispute involving the employer, or a strike involving the grade, class or group of workers, there must exist an employment

relationship. In both the 1935 and 1936 versions of disqualification, it is the temporary termination of the employment relationship which is being described. The purpose of adding sub-division (1) was to make it clear that the meaning of the 1935 act was not to be changed. Benefits were not to be paid where a strike or trade dispute involved either the employer or the grade, class, or group of workers at their place of employment, in such a way as to cause the unemployment or work stoppage. 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 construction of these two provisions, 42-2a-5 (d) and (d) (1) is consistent with the interpretation given them in *Members Iron Workers Union of Provo v. Ind. Comm.*, 104 Utah 242, 139 P. 2d 208. In that case, the Iron Workers Union was defeated in an election which certified the rival Steel Workers Organizing Committee (S. W. O. C.) as the bargaining agent at the Pacific States Cast Iron Pipe Co. The S. W. O. C. called a strike. Although the members of the Iron Workers’ Union did not participate in the strike vote, they refused to cross the picket line and subsequently sought unemployment compensation benefits. Mr. Justice McDonough, speaking for this court, at page 252 of the Utah Reporter, stated:

‘If a strike involves his “grade, class or group” of workers, an employee is ineligible to unemployment benefits when stoppage of work is “caused” by members thereof. The words “grade” and “class” have reference generally to the type of work being performed, as to skills or as to expertness in those skills. The word “group” may be synonymous in a given instance with “class or grade”, but it may include several classes or grades or even involve the workers of an entire plant. A strike involves the

“grade, class, or group” of an employee within the meaning of the statute if the dispute which results in the strike is with reference to wages, hours or conditions of employment of a group of which he is a member . . . The provisions of (d) (1) hereinabove quoted, providing that where a strike is fomented by an employee, the workers who are of his “grade, class, or group” are ineligible for benefits serves to make clear that the construction here given of the quoted words voices the legislative intent. *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.’* (Italics added”.

CONCLUSION

We think that the legislative intent to disqualify claimants who go on a strike from receiving unemployment compensation benefits during the entire work stoppage or until there is a showing that after a certain date the work stoppage was in no way connected with the initial strike.

We respectfully submit, therefore, that the Commission and the Board of Review did not err in denying unemployment compensation benefits to the claimants herein.

Respectfully submitted,

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