

1962

# Kennecott Copper Corporation Employees et al v. Department of Employment Security of the Industrial Commission of Utah : Brief of Appellant

Utah Supreme Court

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# In the Supreme Court of the State of Utah

MAY 2

1962

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KENNECOTT COPPER CORPORATION EMPLOYEES who were members of, or represented by, OFFICE EMPLOYEES INTERNATIONAL UNION, LOCAL 286; BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL 844; INTERNATIONAL ASSOCIATION OF MINE, MILL AND SMELTER WORKERS, LOCAL 485,

No. 9607

Petitioners and Appellants,

vs.

MAR 29 1962

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

Defendants and Respondents.

## APPELLANT'S BRIEF

### APPEAL FROM THE DECISION OF THE INDUSTRIAL COMMISSION OF UTAH

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# In the Supreme Court of the State of Utah

KENNECOTT COPPER CORPORATION EMPLOYEES who were members of, or represented by, OFFICE EMPLOYEES INTERNATIONAL UNION, LOCAL 286; BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL 844; INTERNATIONAL ASSOCIATION OF MINE, MILL AND SMELTER WORKERS, LOCAL 485,

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## APPELLANTS BRIEF

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APPEAL FROM THE DECISION OF THE  
INDUSTRIAL COMMISSION OF UTAH

### I.

#### A. STATEMENT OF THE CASE

The Claimant Appellant union members who worked at Kennecott Copper Corporation made timely requests for unemployment compensation during the period the Electrical Union was on strike at their employer, Kennecott Copper Corporation, commencing on August 13, 1961; these requests were denied.

## B. DISPOSITION OF THE CASE BEFORE THE INDUSTRIAL COMMISSION OF UTAH

The Unemployment Compensation Division issued a determination to the appellants above denying unemployment benefits for an indefinite period beginning August 13, 1961. That denial of benefits was affirmed after timely notices of appeal and subsequent hearing before the Unemployment Appeals Section of the Industrial Commission of Utah, and before the Board of Review of the Department of Employment Security of the Industrial Commission of Utah.

## C. RELIEF SOUGHT ON APPEAL

The Appellant Claimant herein seeks to have the Order of the Industrial Commission of Utah affirming the appeals Referee in the above-entitled case reversed, and the appellant claimant union members be ordered eligible to receive unemployment compensation for the period of the Electrical Strike beginning August 13, 1961, and ending September 8, 1961.

## D. STATEMENT OF FACTS

The following portion of the facts of this case were stipulated to by the parties hereto: (ROO46)

On the morning of Thursday, August 17, 1961, at approximately 6:00 o'clock A.M., the International Brotherhood of Electrical Workers commenced a strike against the Kennecott Copper Corporation, Utah Copper Division. Prior to that time, production operations at the mine had been on a full-scale basis. The claimants were employed by Kennecott Copper Corporation and are represented, for bargaining purposes, by the follow-

ing labor unions who, at the time of the strike, had reached a contract settlement with the employer as follows:

1. Office Employees International Union, Local 286, had reached a contract settlement.
2. International Association of Machinists, Lodge 568, had reached a contract settlement.
3. International Union of Mine, Mill and Smelter Workers, Local 485, had reached a contract settlement.
4. Brotherhood of Locomotive Firemen and Enginemen Local 844, had not reached a contract settlement, but negotiations continued.

Generally, workers in the Claimant Unions did not work on the 7:00 o'clock A.M. shift the morning of the strike and immediately subsequent to 7:00 o'clock A.M., there was a stoppage of work in Kennecott Copper Corporation mine which became a complete stoppage on the next day, August 18, 1961. During the period of the strike, the one striking union had pickets at all the main entrances to the company's mine.

It was stipulated "The operations of all segments of the Utah Copper Division are so integrated as to make the continuous flow of production dependent upon each other. A stoppage of the flow of ore from the mine to the mill, or a stoppage in the ore haulage operations would, within a short time, shut down the entire operations." (R0047)

On September 8, 1961, the strike ended. The Electrical Union withdrew its pickets, returned to work with

the other unions, the stoppage was ended and full scale operations at the mine were resumed.

## STATEMENT OF POINTS

1. THE BOARD OF REVIEW ERRED AS A MATTER OF LAW AND FACT IN DENYING THE CLAIMANTS BENEFITS BY HOLDING:

A. "THE STRIKE ACCOMPANIED BY THE WITHHOLDING OF SERVICES BY THE APPELLANTS WAS THE DIRECT AND IMPELLING CAUSE OF THE WORK STOPPAGE..."

B. "THE PREPONDERANCES OF THE TESTIMONY INDICATES THAT REGULARLY SCHEDULED WORK WAS AVAILABLE TO THE APPELLANTS".

II. THE OPERATION OF KENNECOTT COPPER CORPORATION IN UTAH IS AN INTEGRATED OPERATION SO THAT A CONTINUOUS FLOW OF PRODUCTION IS DEPENDENT UPON EACH OTHER OPERATION.

III. THERE WAS NO WORK AVAILABLE FOR CLAIMANTS AND APPELLANTS DURING THE PERIOD OF THE STRIKE SINCE KENNECOTT COPPER CORPORATION WAS UNABLE TO CONTINUE ITS OPERATIONS DURING THE PERIOD THE ELECTRICAL UNIONS WERE ON STRIKE.

IV. THE CLAIMANTS REPRESENTED BY THE SUBJECT LOCAL UNIONS DID NOT PARTICIPATE IN THE STRIKE OF THE ELECTRICAL WORKERS UNION OF AUGUST 17, 1961.

V. THE UNEMPLOYMENT OF THE CLAIMANTS WAS NOT A MATTER OF LAW DUE TO A WORK STOPPAGE WHICH EXISTED BECAUSE OF A STRIKE INVOLVING HIS GRADE, CLASS OR GROUP OF WORKERS, AT THE KENNECOTT COPPER CORPORATION MINE.

## ARGUMENT

THE BOARD OF REVIEW ERRED AS A MATTER OF LAW AND FACT IN DENYING THE CLAIMANTS BENEFITS BY HOLDING:

A. "THE STRIKE ACCOMPANIED BY THE WITHHOLDING OF SERVICES BY THE APPELLANTS WAS THE DIRECT AND IMPELLING CAUSE OF THE WORK STOPPAGE..."

The record indicates only one direct and impelling cause of the work stoppage. That cause was the strike of the Electrical Union. At no place does the record indicate that Kennecott Copper Corporation could operate without the services of the striking union.

The only substantiation for the necessary premise that the mine could operate without the striking union is the statement of Mine Superintendent Kerr wherein he testified that the instructions he had were to operate as usual.

His testimony indicates as follows from direct and cross-examination:

Direct: Work schedules were posted (R0100) for the men.

Cross-Examination: The work schedules were the

last places up and would have had to be modified or drastically changed. (R0115)

Direct: There had been no announcement that the company did not intend to operate. (R0100)

Mr. Nick A. Yengich and Chris Goris both testified to a meeting by a Mr. Goff of the Company who told the representatives of the other non-striking crafts that there would be a stoppage Monday or Tuesday. (R0111)

Direct: Mr. Kerr testified that there were employees who were given assignments, turned them down and left the job and their reasons for leaving were unknown to him. (R0101)

Cross-Examination: Mr. Kerr admitted that he had no personal knowledge of the men that reported for work, but rather the supervisors had checked for him. (R0103) Further, that he had no knowledge of what was said to the employees or who they were. (R0104)

Direct: Mr. Kerr testified that during the strike the company contracted outside the mine for electrical work and quite a bit of the work was done by supervisors. (R0103)

Cross-Examination: Mr. Kerr testified that he had no knowledge of the amount of outside contracting done by the mine or what arrangements were made . . . (R0111)

In light of the applicable statutes, it is difficult to find basis for a denial of benefits in the testimony of Mr. Kerr.

In the United Steelworkers v. Board of Review of Ind. Comm., 383 P2 116 (Utah 1962), Talking about the same statutes as is question here, UCA 1953, 35-4-5:

35-4-5: "*Ineligibility for benefits.* - -An individual shall not be ineligible for benefits or for purposes of establishing a waiting period."

35-4-5 (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 formented 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; provided, however, that if the commission, upon investigation of any employer to conform to the provisions of any law of the State of Utah or of 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."

This Court said:

"It was the intent of the legislature to deny unemployment compensation to members of striking groups."

Insofar as ascertainable, we have found no case creating a presumption that if a member of a non-striking union does not work during a strike, it is because he has refused to cross a picket line and is participating. If there is such a presumption, certainly the appeals system is a nullity and we have an irrefutable cause and effect sequence judicially established, which says, if there are picket lines and the employer who is the subject of the strike shuts down, all employees who work for that plant are irrevocably denied benefits because they are participating.

This is contrary to the pronouncement of this Court in *Olof N. Nelson Construction Co. v. Industrial Commission*, 243 P2 951, Utah, 1942, when in construing the subject statute the Court says:

“As we pointed out in the *Lexes* case, the declared policy of the Unemployment Reserve Law, as it was called in 1953, is to establish financial reserves for the benefit of persons unemployed through no fault of their own. The provisions of the statute disqualifying employees from unemployment compensations is to prevent workers from obtaining benefits when there is work available which they decline to accept.”

It is, therefore, incumbent in any appeal on this subject that the question to be answered is simply why were the men out of work? Were they participating in the strike or was there no work available because of the strike?

As previously stated, the record indicates only one direct and impelling cause of the work stoppage, that of

the electrical strike. The volumptuous testimony in that respect is discussed in the following:

THE BOARD OF REVIEW ERRED AS A MATTER OF LAW AND FACT IN DENYING THE CLAIMANTS BENEFITS BY HOLDING:

B. "THE PREPONDERANCES OF THE TESTIMONY INDICATES THAT REGULARLY SCHEDULED WORK WAS AVAILABLE TO THE APPELLANTS."

The record indicates a multitude of reasons why the employees belonging to the claimant unions could not work on the day in question because of the Electrical Unions' strike. While there is a complete void on the question of picket lines as a cause for the failure of the men to report to work as hereinafter discussed, the record also indicates no work was available to appellants.

Arthur D. Bently, Business Manager of the International Brotherhood of Electrical Workers, Local 1081, the striking union (R0053) on direct and cross-examination disclosed that the electrical union had no jurisdiction over the other unions. (R0056) The twenty-six supervisory personnel (R0057) in the electrical field that were available to Kennecott Copper Corporation could not do the work of the 200 electricians out on strike. (R0043) That position was substantiated by the following examples: To do the work of the 200 electricians, twenty-six supervisory personnel were available, only sixteen of the twenty-six were classified as journeymen electricians (R0059) and of the sixteen supervisors available, only thirteen had the physical qualifications for the duties of electricians. Further, many of the remaining thirteen

would not be qualified to perform all facets of the operation. Only nine of the supervisors would qualify for the duties of linemen and of the nine, only five (R0060) could climb with hooks as required by that job. (R0061)

In the central traffic system which was necessary for the safety of the operations at all times (R0094) only *one* supervisor was qualified to handle that job which was necessary on a three-shift, 24-hour basis. (R0090)

There was no electrical supervisor who was qualified to do all the parts of the armature winding operation for engines; (R0062) while in one month, two hundred engines went through the machine shop for electrical and mechanical repairs; but there was only a total of seventy-three to keep the mine operating so that these repairs were an absolute necessity.

The record indicates that some members of the subject unions did go to work and were turned away by the company because there was no work available; (R0072, R0078), that others did not report at all because of television broadcasts advising no work available; (R0080) because the custom and policy of Kennecott Copper Corporation had always been in the event of a strike in some of the unions, no work would be available for the remaining unions; (R0086, R0091) because of the traffic jam resulting from the electrician's strike (R0078, R0080, R0090) and finally and predominantly because the Kennecott Copper Corporation mine could not operate without the electrical union members on the job so that *no work was available* to the members of the non-striking crafts. (R0068, R0070, R0075, R0082, R0088, R0094, R0097)

The company maintained that it intended to have the mine operations as close to normal as possible, (R0100) but admittedly did not know if it could or not (R0111); work schedules were posted but again admittedly, they were not applicable to the conditions as they existed after the electrical strike (R0114) and finally the company admitted that the 200 electricians were necessary for normal operations. (R0110)

Although Kennecott Copper Corporation had authority to discipline employees in the event of failure to report for work as scheduled, (R0112) at no time did Kennecott Copper Corporation take action against any of the claimant union members for not reporting to work as scheduled and, excepting two isolated cases, at no time were the employees advised or requested to come to work; rather, the claimant employees were advised by television, letters and the newspaper as shown in Respondent's Exhibit "A" (R0014) and Appellant's Exhibits No. 3 (R0017) and No. 4 (R0018) that the electrical union had caused the stoppage and no work was available. The work stoppage was the direct result of the electrical strike.

## II. THE OPERATION OF KENNECOTT COPPER CORPORATION IN UTAH IS AN INTEGRATED OPERATION SO THAT A CONTINUOUS FLOW OF PRODUCTION IS DEPENDENT UPON EACH OTHER OPERATION.

This case before the Court represents an interesting paradox. In the prior case before this Court, *United Steelworkers v. Board of Review of Ind. Comm.* 383 P2 116, the respondent argued and this Court held:

“With ample justification, the Appeals Referee found that the operations of all segments of the Utah Copper Division are so integrated as to make the continuous flow of production dependent upon each 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 operation.

... Furthermore, it was apparent, because of the integrated nature of the operations that resumption of normal operations could not be effected until all the striking unions reached a settlement with the company.”

Since all portions of the mine were integrated and interdependent, one upon the other, if all were not working, the mine could not work and in effect each union was an absolute necessity for mine operation. There was no work available if one union was on strike.

Now, in the instant case, the opposite situation presents itself. One union is on strike, the others are not, but now, in spite of the integrated nature of the operations which is stipulated (R0109, R0047), in spite of the fact that the operation at the Kennecott Copper Corporation Mine was unchanged (R0109) and in spite of the holding of this Court, this year, in the Steelworkers case above, now the contention is presented that the mine could operate without one union group. The only inference to be drawn from the above is that if necessary, to deny benefits in the present case, the Industrial Commission is ready to reverse its prior contention and

find the facts as most beneficial to its point of view at any given time. That last year each union was necessary to the Kennecott Copper Corporation operation and so benefits were to be denied if one union remained on strike after the remaining settle, because there was no work available for the others. Now a year or so later, we find the exact opposite conclusion from the same fact situation, that each union is not necessary so benefits will be denied if one union strikes since there was work available for the other units. This premise is refuted by the record and prior holding of this Court.

It is submitted that the above represents a classic dilemma situation for the Kennecott Copper Corporation Unions who, on one hand, are denied benefits by the Industrial Commission of Utah and affirmed by this Court because each union is necessary in the integrated operation, and the next year have a denial of benefits for the exact opposite reason that the mine could run without one of the integrated groups, the Electrical Union, because each union is not essential.

If the record is resplendent in any one fact, it is the unanimity of opinion of the correctness of the decision in the United Steelworkers case from this Court.

Mr. Dean Kerr, Mine Operations Superintendent, admitted the electrical union was necessary to normal operations. (R100) Each of the other witnesses representing the Appellant Unions some of which had in excess of twenty and thirty years experience at the mine (R0087, R0074) all testified that the mine could not operate without the electricians (R0068, R0070, R0075, R0082, R0088, R0094, R0097). And to refute that precept the only evidence offered by the Respondent was the testimony of

the mine superintendent, Kerr. He did not know if the job could have been done but they intended operations as close to normal as possible. (R0111)

An interesting question presented itself if the following is considered: The Electrical Union was on strike; the testimony of Jesus Flores indicated that there was no work available for the machinists. (R0072) Mr. Raymond Larsen, another machinist, indicated that he had been advised by his foreman, John Edwards, that "There was nothing to do." (R0078)

In light of the Steelworkers case which says that the mine cannot function without one union group, it is difficult to reconcile that case with the present one where, without contravention, the record shows at least two groups, the electricians and the machinists, not in a position to work. The matter must, of necessity, compound itself further and further since each of the other groups would suffer an additional impairment without the machinists as well as the electricians. For example, machinists were an every-day necessity for the engineers to keep their engines running. (R0062) The electrical strike must, of necessity, result in the snow-balling effect just described resulting in a work stoppage caused by the strike.

The above testimony is refuted by one witness, Mr. Kerr, the mine superintendent, who says they would get along somehow.

III. THERE WAS NO WORK AVAILABLE FOR CLAIMANTS AND APPELLANTS DURING THE PERIOD KENNECOTT COPPER CORPORATION WAS UNABLE TO CONTINUE ITS OPERATION

## DURING THE PERIOD THE ELECTRICAL UNIONS WERE ON STIKE.

Each union in turn advised the Referee of the specific reasons why work was not available for his particular labor group without the services of the electricians at the mine.

Miles Gaythwait, an engineer and member of the Brotherhood of Locomotive Firemen and Enginemen, (R0088) testified that without the C T C System, the trains stand still. (R0089) After the strike there was one man available who was qualified to work in that system (R0061) which operates on three eight-hour shifts every day. Members of each claimant union testified in turn that there could be no work available with the electricians on strike. David Weidner of the Office Employees International Union, Local 286, testified that the electricians were on strike and so there would be no work available. (R0075) Mr. Raymond Larsen of the International Association of Machinists, Lodge 568, testified that he was advised by his foreman, John Edwards, that there was no work and nothing doing and so after working 4 hours, he was sent home. (R0078) Chris Goris of the same unions stated further that electricity was necessary to the operations of Kennecott Copper Corporation. (R0083) Mr. Joe Despenza of the International Union of Mine, Mill and Smelter Workers, Local 485, testified that the mine could not function more than a couple of days without the electricians. (R0097)

The only statement to the contrary in the whole proceeding was Mr. Kerr, whose bias was certainly in

favor of denial of benefits. If everytime one union strikes at Kennecott Copper Corporation, each other union member is denied benefits, that without doubt, will give management at Kennecott Copper Corporation an unfair advantage to compel settlement with striking unions.

In effect, the State of Utah, by withholding benefits from needy, non - striking union members, will aid management in the bargaining process. Rather than providing reserves for persons unemployed through no fault of their own as unemployment compensation was originally contemplated; now the act becomes a tool for management to use to bring indirect pressure to bear upon striking union members through non-striking employees who are without source of income.

In light of the above and the obvious relationship between Mr. Kerr and Kennecott Copper Corporation, the testimony of Mr. Kerr's opinion of the amount of work available and the amount of workers present on the morning of the strike are biased, only opinion (R0104) and that opinion is based upon hearsay. (R0104) As a matter of fact time records which would have been the best evidence of the men reporting for work were available but not presented by the respondent. (R0904-5)

The only basis of the decision of the Referral are a group of nebulous statements by mine Superintendent Kerr that somehow they would manage; they would operate. Referring to the electricians, he states, " We would have replaced their services some way." (R0110) The way the service would be replaced is found on pages 110 and 111 of the transcript:

“Mr. Patterson: In the first place you’ve already said you’d require 200 electricians to maintain a normal operation, so as long as they are out on strike, it would have been impossible to maintain a normal operation.

Mr. Kerr: No, it wouldn’t have been impossible.

Mr. Patterson: It wouldn’t have been impossible?

Mr. Kerr: No.

Mr. Patterson: So that then you don’t need those 200 electricians?

Mr. Kerr: We would have replaced their services some way.

Mr. Patterson: Where were you going to get these replacements, these 200?

Mr. Kerr: Let me refer you to those three points again. First, we would have utilized our supervisors.

Mr. Patterson: That’s 26.

Mr. Kerr: Now, I don’t say that we would have had to replace the entire number to have been able to maintain normal operation for a given period of time either.

Mr. Patterson: What do you mean, a given period of time?

Mr. Kerr: I don’t know the extent of it. Time would have to tell. We would have used our supervisors, we would have contracted out, and we would have hired if necessary.

Mr. Patterson: How much contracting out did you do?

Mr. Kerr: What was that?

Mr. Patterson: How much contracting out did you do?

Mr. Kerr: As far as our actual contracting out, we sent some armature work into Salt Lake. What else went in, I don't know.

Mr. Patterson: How much else did you make arrangements for?

Mr. Kerr: I don't make those arrangements That's up to the maintenance superintendent.

Mr. Patterson: I see, so you didn't know if you had - - how many man hours you would have saved by contracting out.

Mr. Kerr: I'm not in a position to quote that.

Mr. Patterson: And you would have no means of knowing then, how many man hours you could replace by contracting out.

Mr. Kerr: Not at the present time, no. We would have crossed that bridge when we got to it.

Mr. Patterson: Where we actually are is, if you could have, meaning you would have, had the opportunity arisen.

Mr. Kerr: We know we could have.

Mr. Patterson: You know you could have?

Mr. Kerr: Surely.

Mr. Patterson: Where?

Mr. Kerr: You mean the establishment?

Mr. Patterson: Yes.

Mr. Kerr: I can't name those, but we know in fact that we could have because we did.

Mr. Patterson: Did what?

Mr. Kerr: Contract out.

Mr. Patterson: But you don't know how many man hours you contracted out?

Mr. Kerr: No, I can't give you that answer.

Mr. Patterson: That's all.

It is upon this testimony the referee found contrary to the expressed statements of a group of employees who had spent the larger part of their lives at the Kennecott Copper Corporation and who, under oath, gave an absolute statement that the mine could not operate without the Electrical Union.

IV THE CLAIMANTS REPRESENTED BY THE LOCAL UNIONS DID NOT PARTICIPATE IN THE STRIKE OF THE ELECTRICAL WORKERS UNION OF AUGUST 17, 1961.

Rather than participate in the strike in question, the record indicates a number of meetings with the striking union and management in an attempt to solve the problems causing the strike. (R0090)

V THE UNEMPLOYMENT OF THE CLAIMANTS WAS NOT AS A MATTER OF LAW DUE TO A WORK STOPPAGE WHICH EXISTED BECAUSE OF A STRIKE INVOLVING HIS GRADE, CLASS OR GROUP AT THE KENNECOTT COPPER CORPORATION MINE.

In the previous case, the fact that all unions went on

strike together was, of course, of considerable weight. All had joined and were a group with a common purpose. In the instant case, however, all had resolved the issues between themselves and Kennecott Copper Corporation without a strike except the one union.

Appellant's Exhibits No's 6 through 11 demonstrate different work contracts tend to establish that each union was a different grade, class or group of workers. Since the workers were not in the same grade or class as the Electrical Union and since had resolved their differences, the crucial question becomes, did the men in the claimant crafts work during the strike and if not, why were they not on their respective jobs? The record indicates that many did not work on the day the strike started. Were the other unions then supporting the strike? The record, as above discussed, indicates there was no work available because the Kennecott Copper Corporation could not operate without the Electrical Union.

## CONCLUSION

For the reasons cited in this brief, we submit this Court should reverse the decision of the Order of the Industrial Commission of Utah affirming the denial of benefits to qualified members of the claimant unions and those unions be determined eligible for unemployment compensation benefits commencing August 13, 1961, ending September 8, 1961.

Respectfully submitted,

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