

1964

United Steelworkers of America v. Department of Employment Security of the Industrial Commission of Utah: Appellant's Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Recommended Citation

Brief of Appellant, *United Steelworkers of America v. Dept. Employment Security*, No. 10085 (Utah Supreme Court, 1964).
https://digitalcommons.law.byu.edu/uofu_sc1/4526

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

Case No. 10085

UNITED STEELWORKERS OF AMERICA,
LOCAL UNION NO. 5236, for an on behalf of its
members employed by Columbia - Geneva Division,
United States Steel Company, a corporation,

Appellant,

vs.

THE DEPARTMENT OF EMPLOYMENT
SECURITY OF THE INDUSTRIAL COMMIS-
SION OF UTAH AND THE BOARD OF RE-
VIEW and COLUMBIA-GENEVA DIVISION
OF UNITED STATES STEEL COMPANY, A
CORPORATION,

Respondents.

APPELLANT'S BRIEF

Appeal from Administrative Decision, Board of Review,
Department of Employment Security,
Industrial Commission of Utah

DRAPER, SANDACK & SAPERSTEIN
A. Wally Sandack
606 El Paso Natural Gas Building
Salt Lake City, Utah
Attorneys for Appellant

LAW LIBRARY

A. Pratt Kesler
Attorney General of Utah
State Capitol Building
Salt Lake City, Utah
Fred F. Dremann
Special Assistant Attorney General
174 Social Hall Avenue
Salt Lake City, Utah
Attorneys for Respondent

FILED
JUN 24 1964

Clark, Supreme Court, Utah



TABLE OF CONTENTS

	Page
Statement of the Kind of Case	3
Disposition by Board of Review	4
Relief Sought on Appeal	4
Statement of Facts	4
Argument	9
Point 1. The Board of Review, Industrial Commission of Utah, Department of Employment Security, and its Appeals Referee Erred as a Matter of Law in Finding that the Claimants in the Week Ended October 19, 1963, Left Work Voluntarily Without Good Cause.	9
Conclusion	25

STATUTES

Utah Code Annotated, 1953	
35-4-1	3
35-4-5 (a)	7, 25

TEXTS

American Law Review 2d, Vol. 90, page 836	25
---	----

IN THE SUPREME COURT OF THE STATE OF UTAH

Case No. 10085

UNITED STEELWORKERS OF AMERICA,
LOCAL UNION NO. 5236, for an on behalf of its
members employed by Columbia - Geneva Division,
United States Steel Company, a corporation,

Appellant,

vs.

THE DEPARTMENT OF EMPLOYMENT
SECURITY OF THE INDUSTRIAL COMMIS-
SION OF UTAH AND THE BOARD OF RE-
VIEW and COLUMBIA-GENEVA DIVISION
OF UNITED STATES STEEL COMPANY, A
CORPORATION,

Respondents.

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an administrative proceeding to determine
eligibility for unemployment benefits pursuant to 35-
4-1, et seq., Utah Code Annotated, 1953.

DISPOSITION BY BOARD OF REVIEW

The Board of Review, Department of Employment Security, Industrial Commission of Utah, upheld the decision of the Appeals Referee and entered its decision denying unemployment benefits to all claimants in the class represented by appellant union.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Board of Review decision and judgment in its favor as a matter of law.

STATEMENT OF FACTS

Appellant, United Steelworkers of America, Local Union No. 5236, is the certified and recognized collective bargaining agent for the unit of employees at Columbia-Geneva Division, United States Steel Company Pipe Mill at Geneva, Utah, and represents the following named claimants who are employed by United States Steel Corporation at its Geneva, Utah, plant:

Anthony Domenichello
ElRoy J. Cunningham
Kent V. Fisher
John E. Dolinar
Austin McEwan
Arthur L. Lund
Howard D. Armstrong
Duane M. Hancock
Boyd Williams
Jim D. Downey

Galen Johnson
James A. Neil
Verl M. Brimhall
Oran Wall
Andrew Christiansen

The issues and facts regarding each claim are identical and the appellant filed its joint and consolidated petition for and on behalf of each of the above-named claimants, its members. (R. 51).

Each of the claimants were working for the company at the large diameter pipe mill until the middle of October, 1963, when there occurred a reduction of force in the large diameter pipe mill which affected the claimants in this case.

The local union's contract with the company provides that:

"Should an employee refuse demotion in a reduction of force to a lower job in the line of regression within the unit, he will be laid off and recall will be in accordance with the provisions of the section, 'Increase of Forces'."

In accordance with the contract provisions, the company proposed and offered demotions to lower occupations and lower pay rates to the fifteen claimants. Some workers in the large diameter pipe mill unit, who were also offered demotions, accepted and continued their employment; however, the fifteen claimants in this case refused the demotions to lower occupations and lower pay rates.

The claimants who became unemployed by reason of refusing the demotion did not lose re-employment or seniority rights and retained other continuing rights as company employees and were not removed from the company employment rolls and as the need arose, were to be recalled in accordance with the provisions of the union contract relative to "Increase of Forces".

On various dates during the week from October 13 to October 19, 1963, a company representative attempted to contact each claimant and offered each reduced grades and classes of work beginning October 21, 1963.

At various times in the past in similar instances of reduction of force, some claimants have accepted a cut back in grade and continued employment and some claimants have refused the cut back in grade and took layoffs and recall in accordance with the provisions of the contract. In the instant case, employees could have accepted the cut back grade and would have continued in employment. However, an exact number of other employees with less seniority rights would have been laid off. Some of the claimants felt they had justification by reason of other job prospects, two or three actually had temporary or part time work for a few days, but at the time they chose to become unemployed, none had any definite date to begin on regular permanent fulltime work of any kind. None of them had intervening employment before claiming unemployment benefits.

The Senior Appeals Referee (R. 44, 45) ruled:

"One of the primary matters of objection by the claimants in this case is that in similar circumstances in prior years, the department did not disqualify claimants who had chosen to become unemployed rather than accept demotion."

And,

"Judging from the reasons for voluntarily becoming unemployed as given by some of the claimants, it appears that to a considerable extent they were motivated by the fact that they thought they would be better off with unemployment compensation, plus company supplemental unemployment benefits, rather than continue at the reduced pay rate."

Ten claimants applied for their unemployment compensation commencing the weeks of October 20, 1963. Four claimants applied for the week of October 27, and one claimant for the week of November 3, 1963. (R. 43).

Title 35-4-5(a), Utah Code Annotated, 1953, provides:

"An individual shall not be ineligible for benefits or for purposes of establishing a waiting period:

(a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for not less than one or more than the five next following weeks, as determined by the commission according to the circumstances in each case, provided that when such individual has had no bona fide employment

between the week in which he voluntarily left such work without good cause and the week in which he filed for benefits he shall be so disqualified for the week in which he filed for benefits and for not less than one or more than the five next following weeks.”

Each claimant's regular job, grade and pay rate is shown in the chart below, together with the grade and pay rate which the company asserted each claimant was offered (R. 43, 64-75) :

Claimant	Regular Job	Grade	Work Offered		Pay Rate
			Pay Rate	Grade	
A. Domenichello	O.D. Welder	14	\$3.125	6	\$2.565
E. Cunningham	I.D. Welder	14	3.125	7	2.635
K. Fisher	O.D. Welder	14	3.125	6	2.565
J. Dolinar	Hand Arc Welder	10	2.845	2	2.285
A. McEwan	O.D. Welder	14	3.125	6	2.565
A. Lund	Hand Arc Welder	10	2.845	4	2.285
H. Armstrong	Expander	14	3.125	6	2.565
D. Hancock	Operator	10	2.845	2	2.285
B. Williams	Welder	14	3.125	7	2.635
J. Downey	O.D. Welder	14	3.125	7	2.635
G. Johnson	End Facer	10	2.845	4	2.425
J. Neil	Operator	14	3.125	7	2.635
V. Brimhall	I.D. Welder	14	3.125	7	2.635
O. Wall	End Facer	10	2.845	2	2.285
A. Christiansen	Operator	10	2.845	2	2.285
	Tax. Welder	10	2.845	2	2.285
	Expander	14	3.125	7	2.635
	Operator	14	3.125	7	2.635

The Appeals Referee, after hearing, affirmed the department representative's denial of benefits during the disqualification period on December 20, 1963, and

held as a matter of law that in the week ended October 19, 1963, the claimants left work voluntarily without good cause, and were thus ineligible for benefits pursuant to 35-4-5(a).

ARGUMENT

POINT 1. THE BOARD OF REVIEW, INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, AND ITS APPEALS REFEREE ERRED AS A MATTER OF LAW IN FINDING THAT THE CLAIMANTS IN THE WEEK ENDED OCTOBER 19, 1963, LEFT WORK VOLUNTARILY WITHOUT GOOD CAUSE.

In accordance with the union-company seniority agreement, the fifteen claimants at the pipe mill division of Columbia-Geneva Steel Company, formerly Consolidated Western Steel Company, had the option and choice to either regress to a lower job classification and pay status or to take a layoff whenever a force reduction is necessary. This agreement has been in effect since 1957 and since that time workers have, on many occasions, elected to take layoff without loss of unemployment compensation benefits.

In fact, the Department of Employment Security in former years did not disqualify workers who had chosen to become unemployed rather than to accept demotion. The employer contended that in 1958 it

questioned the Department of Employment Security policy of allowing benefits under these conditions, and it was the department ruling at that time that no disqualifying issue existed. This ruling apparently continued in full force and effect until this layoff in October, 1963.

Illustrative of the above, one of the claimants, a Mr. Dolinar, testified (R. 103-105):

“Mr. Bills: During—since May of 1955 there have been many increases and decreases. Have you yourself taken direct layoff?

Mr. Dolinar: Yes, sir.

Mr. Bills: In the operation before. Can you tell us approximately when?

Mr. Dolinar: Oh, I would say approximately 1958.

Mr. Bills: And you took a layoff in 1958 from—do you recall which job?

Mr. Dolinar: I would say it would probably have been chipper grinder or flux and wire—probably chipper grinder.

Mr. Bills: And which job were you offered in 1958?

Mr. Dolinar: I was offered—

Referee: You mean at that time?

Mr. Bills: At that time.

Mr. Dolinar: The job of gardiner.

Referee: What class would that be and what class had you been on, grade?

Mr. Dolinar: I am not sure what job I was on. It was probably on a job class 10, and the gardiner job is a job class 3.

Mr. Bills: Now did you make application for unemployment compensation at the time of the layoff in 1958?

Mr. Dolinar: Yes, I did.

Mr. Bills: Did you receive unemployment compensation?

Mr. Dolinar: Yes, I did.

Mr. Bills: Was there any comments, other than force reduction, placed on the blue slip that was issued to you by the company?

Mr. Dolinar: As I recall, there was nothing other than force reduction.

Referee: Let me interrupt here. Maybe we can save some time. *I think probably it should be stipulated, shouldn't it, Mr. Dremann, that in prior years in the similar situation, when these claims have been filed, there haven't been any disqualifications?*

Mr. Dremann: *That is my understanding.*

Mr. Boorman: Well, subject to this, that a protest was made in 1958 and it was ruled against Consolidated Western and they didn't file an official protest or an appeal, and they accepted at that time, they accepted the initial determination.

Referee: As far as we are concerned, as far as these individuals and their claims are concerned—

Mr. Boorman: That is right.

Referee: —there haven't been any disqualifications—

Mr. Boorman: Not since that time.

Referee: —prior to 1963.

Mr. Boorman: That is true, as far as I know.

Referee: Mr. Bills, would that be agreeable with you?

Mr. Bills: Yeah.

Referee: I mean it would just save you asking that question of all these men.

Mr. Bills: The reason for this particular question was because earlier—in the beginning this morning, there was reference made to the 1958 incidents. I have no knowledge of it and wanted to find out whether or not in 1958 there had been some protests on the basis of these people.

Mr. Boorman: Well, there was a protest and it didn't get to the appeal stage. It was Consolidated Western's protest, it went into the initial determination and by letter or otherwise—

Referee: I think it may be in—

Mr. Boorman: It may be in your record, uh-huh. But it was never appealed officially, at least to my knowledge.

Mr. Dremman: I have no information of it myself, but I will accept what you say as a fact."

The stipulation referred to in the above testimony was proposed in order to save time of the hearing officer for the identical situation was repeated and repeated throughout the hearing by other claimants who had the

same experience as Mr. Dolinar, and there is no need to incorporate all such testimony in this brief.

Claimant Williams reflected the reasons which mainly motivated his decision to accept layoff rather than demotion. He testified (R. 118):

“Referee: So you have accepted cutbacks in the past?

Mr. Williams: Several times.

Referee: How low?

Mr. Williams: How low?

Referee: Yes.

Mr. Williams: I don't recall going below a 2, but I have to accept a 2 to even get in there. So I have accepted a job class 2 on up through 10 at different occasions. I worked on one of these—

Referee: When was that, how long ago?

Mr. Williams: It has been about every year since 1956. At the operation of the mill they have no set pattern of operation. *They may work six months a year, they may work ten.*

Referee: What was the reason you wouldn't accept it this year?

Mr. Williams: I have talked to several of the fellows throughout the mill who have been off for several months, *their unemployment has expired—*

Referee: You mean their unemployment benefits?

Mr. Williams: Their unemployment benefits have expired. Some of them had some of their

SUB payments still available, but I felt I was in a little better shape financially than some of those may have been, so being the Good Samaritan I accepted to take this cutback and let one other man stay on who would normally have been bumped out of the mill and out of all benefits had I stayed on. *So the state would have to pay benefits to one man, one way or another.*"

Mr. Johnson's testimony illustrated that there was no real assurance of even the proffered demoted grade (R. 128):

"Mr. Johnson: I don't know. Just like I said, while I was on vacation I was lowered three job classes.

Mr. Boorman: And as you indicated, you have taken jobs all the way from 6 up through job class 10 on prior cutback. Is that right?

Mr. Johnson: I have accepted jobs. I have also taken layoff before without any trouble.

Mr. Boorman: Did you in fact tell Mr. Littlefield and Mr. Jones that you would take the cutback if you could hold job class 10, but you wouldn't do it if all you could hold was a 7?

Mr. Johnson: That's what I told them the first day when they first came around. I told them I would accept a 10. Then the next day, it was probably about the day after, we discussed the 7 and I said, 'What assurance is there after my vacation?' And he said he could not guarantee me a 7 after my vacation.

Mr. Boorman: Well, in fact by the very nature of jobs and operations you can't guarantee any for any—

Mr. Johnson: Well, then why should they put it on our blue slips?

Mr. Boorman: But they can offer it to you, can't they?

Mr. Johnson: They can offer, but don't guarantee, like I said. They cut these three job classes before just while I was on vacation, so there is no assurance at all of a guarantee.

Mr. Boorman: No further questions."

Such is the case with claimant Neil, who testified (R. 128, 129):

"Referee: Do you have any comments or any corrections you would like to make in regard to the record so far?

Mr. Neil: Yes, I was offered a job class 10 the first time they came around.

Referee: When was that?

Mr. Neil: It was October 15 or 16. And then they came back the next day—

Referee: What did you say when they offered class 10?

Mr. Neil: I would take it.

Referee: All right, then what?

Mr. Neil: Then the next day I was offered job class 7, and I told them I wanted to think it over. In the meantime, the next day, I got a call from Larry Jones offering me a job class 10 and I asked him definitely would it be a job class 10 that would last indefinitely and he said yes, he would guarantee me a job class 10.

Referee: And what date was that, on the 17th?

Mr. Neil: The 17th or 18th.

Referee: Who did this, did you say?

Mr. Neil: Larry Jones.

Referee: Where?

Mr. Neil: A telephone call from, I imagine, from the plant to my place.

Referee: And what did you say?

Mr. Neil: I told him I would take a job class 10.

Referee: What happened?

Mr. Neil: The following day, or the day after, I was contacted by Mr. Littlefield, who at the time our grievance man, John Dolinar, was with us, and offered me a job class 7 and I refused. I had a question on it first. I talked with John and that on it, and then refused it."

How the cutback affected the low men on the seniority list was related by claimant Hancock (R. 115, 116):

"Mr. Hancock: I am fairly well on the seniority list, I am fairly well down on the line because somewhere in line we drew straws, and I have been—I have been subject to layoff a lot, and I have got laid off so many times, I can't remember how many times.

Referee: Now you started to say something else when I interrupted you and asked you how long you had been with the company. Can you recall what you were about to say?

Mr. Hancock: No.

Referee: What is there you had in mind here—

Mr. Hancock: Well, I think maybe that—

Referee: —that you would like to add.

Mr. Hancock: The times that I was over in the Little Mill I was called back in on say a 10 or an 8, or something like that, two or three times.

Referee: Speak up a little bit.

Mr. Hancock: And I don't, as I recall, I am not sure, as I recall, I don't think I ever took a reduction of force to labor. I never was—as a rule I got laid off. But this time, this year, I refused it twice in 1963.

Referee: You haven't accepted cutback in the past, ever?

Mr. Hancock: Down to labor, I don't think I ever did.

Referee: No, I mean to any classification on this demotion process.

Mr. Hancock: I never did, my seniority was low enough and when they was going—when I was over there, maybe one time when the Big Mill was running it seems to me I went over on that, the way the seniority ran.

Referee: Now your grade was 10 here.

Mr. Hancock: And I was laid off, I can't remember, I think I took layoff, whether I did or whether I was laid off I can't remember, and then I was called back. They got two shifts running in the Little Mill so that gave me a fairly good job, so I went back two or three times, it seems to me like I got back on. I always accept

them when they call me back. But I don't think I ever went over on a job from the Big Mill when it was completely shut down . . .

Referee: I don't think you are going to record unless you speak louder and more distinctly.

Mr. Hancock: That is all I have.

Referee: Well, now why didn't you accept the cutback this time?

Mr. Hancock: Well, just because in the past seven or eight years I have been working there, it has always worked out I have done better when I did that. I did refuse labor, which I usually got laid off. The few times . . .

Referee: Well, did you have—go ahead.

Mr. Hancock: No, I didn't have any prospects. I always looked, but I never did find a job. Maybe I did two or three times, but between the SUB and unemployment I seemed to do better than staying on on labor out there, when you figure gas and everything. And in the past we always—there was no question asked. There was nothing on our blue slip and we went down to the unemployment office and there was no questions asked and nothing. In fact, this time I was really surprised it said something on the blue slip. I went over there to Geneva, I wasn't contacted personally that there was going to be anything on the blue slip on this. And I don't think nobody or anyone of them actually knew that there was going to be anything on the blue slip because it was like in the past, reduction of force, and we go down and . . . And that was another thing, I didn't like graveyard, as far as that goes. But that is what you contend with on the . . . ”

Mr. McEwan, a claimant, explained the "no guarantee" offer by the Company (R. 107):

"Referee: And do you have any comments or any corrections you would like to make?

Mr. McEwan: Well, nothing in particular. I was contacted on October 16 by Mr. Jones and Littlefield as to the shutdown of the Large Diameter Mill, and I was told that I could possibly hold a 5 or 6 job class in the Small Mill. I asked Mr. Jones at the time if there was any guarantee of this and, of course, he said no, there was not such a way that he could guarantee anything. So I told him I would like to have a day to think it over because I had some more work in mind, and asked if he would let me have until the next day to give him an answer, which he said, yes. So I think it was the 17th in the afternoon when Mr. Jones and Littlefield contacted me again and I had also contacted that partner of mine on some work we wanted to do, which would have been self-employment. And so when Mr. Jones and Littlefield contacted me the 17th, I told them that I would decline, I would sign off, which all he had to offer me was a slip stating labor in the Small Mill, which I signed off. I went to Geneva and turned in my badge and received my papers as termination. And at such time I turned back to Consolidated the white slip to claim my pay check. And at that time, Mr. Seely will recall, I had a talk with him in his office and he asked me what I was taking off, because it's the first time that I had never taken layoff. There might have been the other time, but in the talk with Mr. Seely he asked me why I was taking layoff and I told him I would rather take it at that time because I

thought I would have more chance of getting another job early in the fall rather than later.

And I asked him how things looked in the Small Mill. He laughed and said, 'Not very good, because we just lost a large order which they had thought they had.' And that is about all that was said. I told him I chose to take layoff because of my own personal reasons, and that was that I hold some claims, I and another fellow, and we wanted to get more samples before fall weather set in, and also to do location work, if weather permitted."

Company witness Jones supported the "no guarantee" and the so-called new policy of disqualification by stating (R. 75, 76):

"Mr. Dremann: Mr. Jones, when you were asked whether or not you could guarantee that they stay on there, you naturally could not guarantee this because you could not anticipate that the man would remain in that particular area of operations, could you?

Mr. Jones: No.

Mr. Dremann: Now when the Large Diameter Mill was shut down, was this shut down for a specific period of time, or for an indefinite time?

Mr. Jones: We had completed the order we were on and as far as I know we anticipated no more for the next little while. I wouldn't know for sure.

Mr. Dremann: That part of the mill is still down and you don't anticipate any definite re-opening at this time.

Mr. Jones: Not as far as I know.

Mr. Dremann: As far as you know specifically. That is all I have.

Referee: All right, can we have Mr. Littlefield, who can give us some more information. All right—yes, Mr. Bills?

Mr. Bills: Mr. Jones, you have indicated you have been with the company since September 1961.

Mr. Jones: In the capacity of personnel representative—I started in April of 1959, and in the capacity of personnel representative September 1961.

Mr. Bills: So you have been engaged in these layoffs and callbacks since your initial employment of 1959, rather than 1961?

Mr. Jones: No, 1961 is when as personnel representative I worked—got involved in the work—

Mr. Bills: How many force reductions—well, put it this way, there has been other force reductions accomplished at the Consolidated Plant prior to October that you have been involved in?

Mr. Jones: Yes, sir, every fall, approximately every fall, we have the same situation.

Mr. Bills: In the others prior to the one in October, the one in dispute here, was there employees that have taken direct layoff in lieu of reducing down?

Mr. Jones: Yes.

Mr. Bills: Was there any notation made on their separation notice?

Mr. Boorman: If you know.

Mr. Bills: If you know.

Mr. Jones: No, there was not.

Mr. Bills: You do know for sure there was not?

Mr. Jones: I do know for sure there was no notations other than reduction of force noted on their blue slip.

Referee: You mean no notation such as we referred to on our example on the 637-A, I think it was Mr. Dolinar's case.

Mr. Jones: Yes, sir.

Mr. Bills: Now I believe you mentioned that the afternoon of October 16 was the first knowledge that you had that the—under the new policies of the Columbia-Geneva Division, that there was going to be a notation made on the separation notice, the blue slip.

Mr. Jones: I believe that was the correct date."

The finding that each claimant left work voluntarily without good cause is as a matter of law contrary to the uncontradicted evidence. What motivated the claimants to refuse to accept work of a lesser grade and pay is immaterial. Motivation, whether laudable or not, does not supply the statutory grounds to invoke the penalty. It may have been unwise for these claimants to turn down the work offer; on the other hand since fifteen men at the bottom of the seniority list would, in any case have gone out the gate, the action of these claimants could be viewed as a Samaritan act.

But the crux of the case is not motivation. When

a claimant shows that he is exercising a right and privilege granted him under his contract to accept a layoff rather than a demotion, he has met the burden of showing good cause. The contract establishes no other conditions and neither does the statute. "Should an employee refuse demotion in a reduction of force to a lower job in the line of regression within the unit, he will be laid off and recall will be in accordance with the provisions of the section, 'Increase of Forces'." (R. 42).

There is good reason for this contractual prerogative. A fact judicially to be noted, and referred to briefly in the record, is the big steel — steel workers workers Supplemental Unemployment Benefit program bargained between employer and union over the years as an aid to steel industry's chronic and automated layoffs.

The same number of steel employees would have been laid off whether or not these claimants accepted the demotion, and there would have been no additional burden on the unemployment compensation fund, assuming all were otherwise eligible.

The sole cause of the layoff was the Company's reduction in force caused by its shutdown of the Large Diameter Pipe Mill because of lack of business, not the worker's refusal to accept lesser jobs. Fifteen men would not have worked in any case.

There was no available work for fifteen men and no matter what would have happened, fifteen men in this unit would have been required to stay home.

A long established plant practice determined which employees should perform the other available work and since the practice led to a proper determination of the men who should perform it, there can be no question that there was a lack of work as to the remaining unit members.

Claimants frankly concede there are situations where an employee will be better off by going home than by accepting the lower rated job offer. This was the plant practice and custom since 1956, an accepted internal means by which the senior employee has the advantage in preference to a junior employee. Nor had the Company protested the practice until this case in October 1963. Never before, under like shutdown circumstances, had the Company noted "refusal to take lesser jobs" on a worker's blue separation slip as a disqualifying factor. The Department of Employment Security, through its past rulings, had acquiesced and accepted the practice. Thus, based upon contract rights, Company-Union custom and practice, and departmental agreement, good cause existed. Finally, leaving work was not voluntary, it was caused by the Pipe Mill shut down.

The Board of Review's decision (R. 144) discloses its own concern with the problem:

"The appellants on their appeal point out that during previous periods in instances of reduction of force, claimants who refused to accept cut-backs in grade and who refused to continue their employment received unemployment compensa-

tion benefits without disqualification. This Board finds that as a matter of fact previous rulings of the Department did not disqualify claimants in similar cases and that benefits were paid. This Board, however, points out that it is not bound by previous decisions of the Commission or its representatives and that neither is the Commission bound by previous decisions made at the representative level. The decisions in the earlier cases are not *res judicata* as to the instant claimants. The Utah Supreme Court and other state Supreme Courts generally hold that prior decisions of an administration board are not binding except that in some cases the courts hold that they will not be permitted a retroactive effect. Benefits are denied accordingly.”

CONCLUSION

This writer has found no Utah case or other precedent which would assist the court in deciding this matter.¹ The case is one of first impression before this court. Claimants are mindful that the purpose of Section 35-4-5(a) is to prevent workers from obtaining benefits when there is work available which they decline to accept, but in this case there can be no question that there was an actual lack of work for fifteen men. The Company did not have the right to compel these claimants to accept the lesser job and it did not need these men because of the shutdown of its Large Diameter Pipe Mill. To deny these claimants their benefits and

¹ One annotation which may be helpful is contained in 90 ALR 2d 836. There appears, however, to be a definite split of authorities in the cases cited.

also to penalize them for receiving the supplemental unemployment benefits, would seem to be misapplication of the State Unemployment Compensation Law. Affirmance of the decision below would also deprive these claimants of their contract rights in an industry where too frequent layoffs, necessitated by business cutbacks, new methods, including automation, and other matters over which neither Company nor workers have control, have produced reasonable and responsible internal methods, such as are present in this case to meet the challenges of this century.

Respectfully submitted,

Draper, Sandack & Saperstein
A. Wally Sandack

Attorneys for Appellant

606 El Paso Natural Gas Building
Salt Lake City, Utah

Dated: June 24, 1964.