

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

PRECEDENT
BENEFIT DECISION
No. P-B-24

JOSEPH R. COURTEMANCHE
(Claimant-Appellant)

Case No. 67-5047

CURTIS MAX TAMI
(Claimant-Appellant)

Case No. 67-5048

MORRIS ALLEN McCLEAVE
(Claimant-Appellant)

Case No. 67-4780

ALBERT R. ABENTH AND OTHERS
(Claimants-Appellants)
(See Appendices B and C)
[Appendix removed in accordance
with California Code of Regulations
title 22, section 5109(e)]

Case No. 67-4779

KAISER STEEL CORPORATION AND OTHERS
(Employers-Respondents)
(See Appendix A)
[Appendix removed in accordance
with California Code of Regulations
title 22, section 5109(e)]

The claimants, members of Boilermakers Local Union No. 6 and Boilermakers Local Union No. 10, appealed from Referee's Decision No. SF-TD-700 which held that they were ineligible for unemployment benefits under section 1262 of the Unemployment Insurance Code (Appendix B) and that their appeals were dismissed under section 1328 of the code and section 5028, Title 22, California Administrative Code (Appendix C). The board granted oral argument.

STATEMENT OF FACTS

The employers herein are members of the California Metal Trades Association, hereinafter designated as CMTA. The employers individually operate metal fabricating plants in the San Francisco Bay area. The employers operate union shops and some of their collective bargaining agreements are with Boilermakers Local No. 10 of Oakland and Boilermakers Local No. 6 of San Francisco which have jurisdiction of the employers' plants involved.

The collective bargaining history of the industry, insofar as we are concerned, has been conducted for more than 25 years between the CMTA on behalf of the employers and the Boilermakers locals acting as a unit through a negotiating committee.

The established procedure for opening negotiations for new collective bargaining agreements has been for one side to give notice to the other about 45 days before expiration of the existing contract. If negotiations on the new contract continued beyond the date of expiration of the old contract, interim agreements have provided that union members would continue working under the old agreement. Some employers in the industry have not been members of CMTA, or if members, have not authorized CMTA to act for them. Interim agreements covered such employers, however, and further provided that when a new contract was agreed upon it would be accepted by those employers.

Negotiations have been conducted over the years by two authorized committees, one composed of union members and the other composed of CMTA employer members and administrative officers. The negotiating committee for the unions had authority to call a strike if the member unions had voted strike sanctions. The employer's negotiating committee had authority to affect a lockout if it felt such action warranted.

During prior negotiations and at least since 1960, the union negotiating committee had always been formally advised by CMTA in writing that strike action against one or more of its members would be considered a strike against all of its members.

Negotiations in 1965 resulted in a contract which was due to expire March 31, 1967. On January 20, 1967, in accordance with the provisions contained in the existing agreement, the unions advised CMTA they wished to open negotiations for a new contract. The CMTA responded favorably and advised further that a strike against any member of the employer group would be considered a strike against all employers.

The first meeting of the negotiating committees was on February 9, 1967. Meetings were held at irregular intervals thereafter through March 31, 1967. Many issues were raised by both sides during this period but no written offer was made by the employer negotiating committee until about April 3, 1967.

The unions involved presented the employer offer to their memberships at individual meetings on April 8, 1967. In each case the membership rejected the employer offer. Following the procedure set forth under their international constitution, and at the same meetings, strike votes were conducted. The memberships authorized a strike in each case if the negotiating committee determined such action was necessary.

In addition, those union members present at the Local No. 10 meeting in Oakland who were employees of Conesco and Fabricated Metals, Inc., members of CMTA, decided they would not work the following Monday, April 10, 1967. This decision on the part of these members was discussed by the total membership present at the meeting. A union representative testified that no specific vote was taken by the membership present on this contemplated action by the employees of the two plants, but that no objection was made to the decision not to work at the two employer premises. Conesco and Fabricated Metals, Inc. employed approximately 130 members of Local No. 10.

On the morning of April 10, 1967, prior to the hour for reporting for work, representatives of Local No. 10 appeared at the premises of Conesco and Fabricated Metals, Inc. Their purpose was to inform those members who had not been present at the April 8 meeting of the decision of their co-workers so that such employees likewise would not report for work that morning.

Also on the morning of April 10, the assistant business manager for Local No. 6 of San Francisco received a call from a member employed at Saracco Tank and Manufacturing Company, a CMTA member, and employer of about 55 Local No. 6 members. The representative of Local No. 6 went to

the plant and learned that member employees wanted to know if they had health and welfare coverage. The representative said that the contract had expired and he did not know the answer to their question. The member employees said they would not work without assurance of such coverage and indicated they would walk off the job. The representative testified he advised the members to remain and to allow the negotiating committee to proceed with its job. The union members walked out about 1 p.m. The representative said the walkout was not sanctioned by Local No. 6. He said when the men left the plant and entered the company parking lot he issued several sashes from the trunk of his automobile which bore the sign "Picket-AFL-CIO," as well as a sign which stated that the men in the plant were on strike.

The contract which expired March 31, 1967 provided, as did earlier contracts, that the employer was obligated to pay monthly health and welfare premiums for all employees employed on the first day of the month. If an employee was terminated after the first of the month, he would be protected for the entire month even though terminated. In years prior to 1967, when contracts were not negotiated until after expiration of the prevailing contract, employers had made such payments for all employees as though the expired contract had continued in force.

The chairman of the employer negotiating committee was advised on the afternoon of April 10, 1967 of the incidents at the three plants mentioned above. He sent telegrams to the business agents of Locals Nos. 6 and 10, which said the actions at the three employer units were considered a strike against all employer members and would be treated as such unless the employees immediately returned to work. The employees at the three plants involved did not report for work when their shifts began April 11, 1967.

At about midnight, April 10, 1967, and at the beginning of the day shift, April 11, all employer units informed departing swing shift workers and reporting day shift workers that the employer in each instance was suspending the employer-employee relationship. All employees were informed there would be no further work until the trade dispute had been settled and that this action was being taken because the employer group considered the strike against its three members as a strike against all members. Notices to the same effect were posted at the entrances to each of the employing plants.

At the same time that the employers were giving notice to union members on the morning of April 11, other union members appeared at the gates of each employer unit carrying placards which stated they were locked

out by the employer, that wages, working conditions and a new contract were at issue. These placards were not exhibited at the three employer units where the initial incidents occurred.

A federal mediator had been called in to assist in the negotiations. The mediator, among other duties, acted as a liaison between the two. Late in the afternoon of April 11, 1967, the mediator brought a message to the employer unit that the unions had agreed that all employees would return to work. On April 12 the employer negotiating committee passed this information to employer members, and on the afternoon of that day the employers contacted their employees and instructed them to report for work April 13, 1967. A number of Consec employees returned to work on the morning of April 12, 1967. A management spokesman informed them that because production lines had been shut down work could not begin until April 13.

All employee members of Local No. 6 of San Francisco returned to work April 13, 1967, in response to the recall by the employers. The business manager of Local No. 10 testified that he considered the employer action of April 11, 1967, suspending the employment relationship, was still in force despite the recall to work and would remain in force until a new contract was negotiated, because of his interpretation, members of Local No. 10 who inquired of their union when they received the recall to work were told not to return. Some members of Local No. 10 did return to work at several plants on April 13, 1967, including Fabricated Metals. These workers were later advised that morning by officials of Local No. 10 to leave their work. The result was that members of Local No. 6 complied with the recall on the San Francisco side of the Bay, but no members worked in any of the East Bay plants.

On April 14, 1967, telegrams were sent by the chairman of the employer committee to the business agents of Locals Nos. 6 and 10 and an identical written statement to the union negotiating committee through the federal mediator. The telegrams stated that in as much as many employees had not returned to work on April 13, 1967, the lockout would be resumed by the employers unless all men returned to work on Monday, April 17, 1967. Members of Local No. 6 returned to work April 17 but members of Local No. 10 remained away from their jobs as instructed by their representatives.

The chairman of the employer negotiating committee instructed employer members to renew the lockout at all plants when it was learned that all union members had not returned to work. This final shutdown continued until a new contract was negotiated with an effective date of May 11, 1967. The department determined the trade dispute ended that day.

The appeal of claimant Pfenning (ID No. 837, Appendix C) was not filed in timely fashion. He had relied upon his union to file his appeal. The other claimants listed in Appendix C offered no explanation for the late filings of their appeals.

REASONS FOR DECISION

Section 1262 of the California Unemployment Insurance Code provides that an individual is not eligible for unemployment compensation benefits if he left his work because of a trade dispute and that such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress at the establishment in which he was employed.

The term "trade dispute" is not defined in the Unemployment Insurance Code or in regulations of the Department of Employment or of this board. Federal law as contained in the Norris-LaGuardia Act provides the following definition:

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer or employee."

This board in years past has had many occasions to consider the nature of a trade dispute, and in Benefit Decision No. 6566 we set out the following:

"The term 'trade dispute' is a broad one and may be properly applied to any controversy which is reasonably related to employment and to the purpose of collective bargaining

(Benefit Decisions Nos. 5527 and 5719). It is broader than 'strike' or 'lockout' (Benefit Decision No. 4838), and the existence of a trade dispute is not dependent upon the stoppage of work. . . "

This board has held in Benefit Decisions Nos. 1020 and 5799 that rejection of an offer made during the course of negotiations, taking of a strike vote, a walkout or a lockout are all actions which would constitute or are indicative of a trade dispute.

Judicial consideration of the term is found in People v. Smith, 133 C. A. 2d Supp. 777, 284 P. 2d 203, in which the court stated:

". . . The scope and meaning of the term 'trade dispute' in this statute have been frequently before the courts, and while no decision has formulated a definition of it, the courts have apparently had no difficulty in ascertaining whether a particular situation was or was not within its meaning, nor have any of the decisions suggested that there was any uncertainty about it. [Numerous citations followed] In all of these cases the term 'trade dispute' has been regarded as relating to the relations between employers and those who did or might work for them. It extends to contentions between employers and unions, even though no members of the union are then working for such employers. . . ."

We conclude under the facts of these case and available controlling principles that a trade dispute was in existence within the meaning of section 1262 of the code. The coexistence of a trade dispute and unemployment, however, do not automatically disqualify a claimant for unemployment insurance benefits.

The Supreme Court of California established the "volitional test" in Bodinson Manufacturing Company v. California Employment Commission, 17 Cal. 2d 321, in holding that to be ineligible for benefits a claimant's unemployment must result from the voluntary act of the claimant and not from the action of others. The Supreme Court thereafter had opportunity in Bunny's Waffle Shop v. California Employment Commission, 24 Cal. 2d 735, to distinguish between unemployment resulting from the voluntary act of a claimant and unemployment virtually forced upon him by the act of the

employer. The court held in Bunny's that even though a trade dispute exists, a claimant will not be disqualified if he merely left work during the course of a trade dispute, but must be out of work because of the trade dispute.

Our first issue herein then is whether the claimants were voluntarily out of work because of a trade dispute.

Certain members of Local No. 10 of Oakland agreed on the evening of April 8, 1967 not to work at two plants of the employer group on Monday, April 10, 1967. The membership of Local No. 10 had just rejected an employer offer made during the course of contract negotiations and the membership present further voted strike sanction if the negotiating committee felt this was a proper course. The intended action of those members of Local No. 10 against Conesco and Fabricated Metals, Inc. was known to other members present and to officers of the union. No objection was made to the proposed walkouts at the two plants. Further on the morning of April 10, before the day shift began Local No. 10 representatives appeared at the two plants. They informed arriving members who had not been present at the April 8 meeting of the decision of their co-workers and successfully urged them not to report for work.

It is logical and evident from the facts that the strike at the two plants was approved for practical purposes both by the membership of Local No. 10 and by the officers of Local No. 10. This board has held in Benefit Decisions Nos. 6250, 6524 and 6525 that approval by a union representative of action of members is an indication of the concurrence of the union in such action. Similarly in Benefit Decision No. 5395, this board observed that a factor to be considered in the application of the volitional test is to ascertain if there was a repudiation of a walkout by nonstriking members. In the case before us, there was no such prior or subsequent disaffirmance.

Members of Local No. 6 of San Francisco likewise held a membership meeting April 8, 1967. On April 10, 1967 about 55 members of Local No. 6 walked off their jobs at the Saracco plant. A union representative was present at the time of walkout and he immediately supplied the strikers with picket sashes and a sign stating that the men in the plant were on strike. We conclude under the authorities cited above that this act constituted approval of the walkout and concurrence in it by an authorized union official and hence by the union itself.

Following these walkouts by union members on both sides of the Bay, the employers closed their doors to all union members April 11, 1967. This action by the employers was in line with CMTA policy that "a strike against one is a strike against all" and could result in a lockout by all employers. This employer policy was known to the union negotiating committee.

A lockout is an employer's withholding of work from his employees in order to gain a concession from them (Restatement of the Law of Torts, Vol. 4, Sec. 787(a)).

We feel it proper at this point to mention that the role of this board is, and must be, one of neutrality in consideration of trade disputes (W. R. Grace and Company v. California Employment Commission, 24 Cal. 2d 720). It is not within our jurisdiction to evaluate the merits of a controversy but only to determine whether a trade dispute exists and if workers voluntarily left their work because of such trade dispute.

The leading case involving "a strike against one is a strike against all" is McKinley v. California Employment Stabilization Commission, 34 Cal. 2d 239. An association of bakers had bargained for years with a labor union and entered into a master collective bargaining agreement, signed solely by the union and the secretary of the association. When negotiations broke down and a strike was threatened, the employer association notified the union that a strike against any one member would be considered a strike against all members. When the union struck one plant, all employers closed their plants. The union contended that employees in all plants but the first were locked out, that their unemployment was involuntary and they were therefore eligible for unemployment benefits. In denying their claim, the Supreme Court of California said:

"The volitional test established in Bodinson Mfg. Co. v. California Emp. Com., 17 Cal. 2d 321, was based upon the principle that innocent victims of a trade dispute should not suffer loss of their unemployment insurance rights. But the unemployment of the bakery workers was caused by their own action taken with full knowledge of its consequences. In the waffle shop case, the unemployment was due to a lockout; here the lockout of the bakers was due to a strike. The lockout of the restaurant workers was attributed to the concerted action of the employers; the strike of the bakers was by the vote of all the employees concerned and was directed against all of the employers who were parties to the master contract. The volitional test itself is based upon a just analysis of a substantial

subjective element and it cannot properly be extended or perverted by insistence upon mere form. In this case the union members knew from letters and statements as well as from prior strike action that any strike during negotiations would result in stoppage of all work. When, in the face of that information, union members authorized a strike, they placed themselves outside the class of persons who are properly protected by the subjective volitional exception to section 56 which was stated and applied in the Bodinson case."

The McKinley principle was reaffirmed recently in Artiques v. California Department of Employment, 259 A.C.A. 429, 66 Cal. Rptr. 390, a case decided after the issuance of the referee's decision herein. In the Artiques matter, union motion picture projectionists negotiated with an association of theater owners. The employers had conducted their affairs with the union for many years through the association. The association had informed the union negotiating committee that a strike against any one member would be considered a strike against all members. The union struck one leading theater and the employers thereafter closed all theaters. The court reviewed Bodinson, McKinley and other cases in point and concluded:

"... we must hold that the respondents are not entitled to unemployment insurance benefits. . . . The 'subjective volitional test' of those cases requires this conclusion. Gardner (53 Cal. 2d 23, 29, 346 P. 2d 193) held that the only sound and fair way to apply the subjective volitional test of Bodinson is to enforce it where there is a trade dispute between parties negotiating a master collective bargaining contract, each acting through authorized representatives, 'against the party who strikes the first blow with the drastic economic weapon of strike or lockout.' "

This board has been guided by the judicial interpretations set out above. In Benefit Decisions Nos. 6495 and 6526, we held that an employer notice that a strike against one would be considered a strike against all, given to the union representative involved, constituted sufficient notice so as to bind all union members to such notice.

Since it has been determined that a strike did in fact occur, and farther that a lockout was a foreseeable consequence of the strike, it follows that the claimants who were unemployed because of such a lockout were voluntarily out of work because of a trade dispute and accordingly are ineligible for benefits within the meaning of section 1262 of the code as of April 11, 1967.

The employer group thereafter on April 11 informed the union negotiating committee that work would be available on April 13, 1967 at all plants. This statement was made by the employer group on information it had received that all employees would return to work. All members of Local No. 6 of San Francisco reported to their places of employment on April 13, 1967. Some members of Local No. 10 of Oakland returned briefly to their plants on April 13, 1967 but left their jobs thereafter on advice of union officials.

The employer group again made it known that a complete lockout would again go into effect Monday, April 17, 1967, if all union member employees did not report to all employer premises on April 17, 1967. Members of Local No. 6 returned to work on that date, but members of Local No. 10 continued to remain away from their jobs as instructed by their representatives. This final shutdown of April 17 continued until May 11, 1967.

Locals Nos. 6 and 10 had been conducting negotiations as an entity. The locals sought solution of common issues and achievement of common goals through a single negotiating committee. They had been given notice, as in the past, that strike action against any individual member of CMTA would be considered as a strike against all members of the employer group. Members of Local No. 10 thereafter struck Conesco and Fabricated Metals, Inc. Members of Local No. 6 walked off their Jobs at Saracco and picketed the premises.

The employer lockouts followed. It is not possible for us to say that the claimants were not responsible for their unemployment. In McKinley, 34 Cal. 2d 239, the Supreme Court emphasized that the volitional rest set out in Bodinson must be based on substance and not mere form. The substance of events herein leads to the conclusion that both Local No. 6 and Local No. 10 members took the first steps and voluntarily left their jobs.

It is clear from the evidence that the CMTA offer to end the lockouts were conditioned on the provision that all workers return to their employments. Members of Local No. 6 responded affirmatively on April 13 and April 17, 1967 but only a portion of Local No. 10 members complied.

It is not possible to separate the actions of Local No. 10 and Local No. 6 members. They acted as a unit in negotiations, and the employer representative had made it clear that the invitation to return to work was for all and not just some of the workers affected. It is perhaps unfortunate for members of Local No. 6, who were willing to return when CMTA offered to lift

the lockouts, that their affairs were so intertwined with and indivisible from those of members of Local No. 10. These are the facts, however, and it was the choice of both locals that they be so aligned. We conclude that the actions of the members of both locals on and after the pivotal date of April 10, 1967 were voluntary, mutually binding, undertaken for a common goal and were acquiesced in, or not objected to, by union officers.

The claimants McCleave (1D No. 478; Appeals Board Case No. 67-4780) and Courtemanche (1D No. 161; Appeals Board Case No. 67-5047) filed separate appeals and presented separate argument. Their contentions however are substantially those discussed with respect to other members of Local No. 10 to which they belonged. They are therefore ineligible, during the period here under consideration, for the same reasons as set forth previously with respect to other members of Local No. 10.

The claimant Tami (1D No. 687; Appeals Board Case No. 67-5048) alleges in his appeal that he was not a voting member of any local at the time of the strike. The only evidence in the record, however, is to the effect that he was a member. He therefore also is ineligible for the same reasons as other members of his local, which is also Local No. 10.

With respect to those claimants whose appeals present the issue of timeliness, section 1328 of the Unemployment Insurance Code provides that a claimant may appeal from a determination within ten days from mailing or personal service of the notice of determination.

Title 22 of the California Administrative Code, section 5028, provides that if an appeal is not filed within the time permitted by the code, the referee shall issue a decision dismissing the appeal unless the appellant shows good cause for the late filing.

We have held in the past that reliance by a claimant on his union to timely file his appeal was not good cause for subsequent late filing. We conclude the claimant Pfenning (ID No. 837) has not established good cause, and the other claimants listed in Appendix C have established no cause for the late filings of their appeals.

DECISION

The decision of the referee dismissing the appeals of those individuals listed in Appendix C is affirmed. The decision of the referee denying benefits to all other claimants under section 1262 of the code is affirmed.

Sacramento, California, August 27, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

LOWELL NELSON

JOHN B. WEISS