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STATE OF NORTH DAKOTA

NO. 20120250

State of North Dakota

In Supreme Court

Gayln L. Olson, Bradley L. Nelson, Rebecca L. Harstad, et al.,

Appellants,

vs.

Job Service of North Dakota and American Crystal Sugar Company,

Appellees.

APPELLEE AMERICAN CRYSTAL SUGAR COMPANY'S BRIEF

APPEAL FROM MEMORANDUM OPINION AND ORDER DATED MARCH 26, 2012, AFFIRMING DECISION OF JOB SERVICE NORTH DAKOTA AND JUDGMENT DATED APRIL 2, 2012, TRAILL COUNTY DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT, THE HONORABLE STEVEN L. MARQUART

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

STATEMENT OF THE ISSUES

1 Whether Job Service of North Dakota and the District Court correctly determined that the Appellants, locked out by Appellant American Crystal Sugar, are ineligible to receive unemployment insurance ("UI") benefits under N.D.C.C. § 52-06-02(4) because their unemployment is due to a labor dispute.

STATEMENT OF THE CASE

2 On August 1, 2011,[1] the same day that the lockout began (discussed infra), certain employees (collectively referred to as "Appellants"), locked out by Appellee ACS, applied for UI benefits. (JX 4, 11).[2] On August 15, Job Service North Dakota ("Job Service") issued a Nonmonetary Determination Notice, denying the Appellants UI benefits because their unemployment is "due to a labor dispute." (JX 5). The Appellants appealed, stating: "I am available for work…. Our Union (BCTGM) was more then [sic] willing to continue working under our old contract until a settlement was reached but instead [American Crystal] chose to lay me off." (JX 9). Job Service consolidated the appeals, which were submitted on stipulated facts. (JX 11-12).

3 On October 7, Job Service denied the appeals, and held that the Appellants are ineligible to receive UI benefits "as long as the labor dispute continues." (JX 28-31). Job Service reasoned (1) "a lockout constitutes a labor dispute," citing Robberstad v. Dir. North Dakota Employment Security Bureau, Burleigh County

[1] All dates are in 2011 unless otherwise indicated.

[2] JX refers to the Joint Appendix filed by Appellants.

Civil Case No. 28570 (1980) (JX 30)[3]; (2) there is a "general policy of neutrality by the state in labor disputes" (JX 30); (3) "the [Appellants] are unemployed due to a labor dispute that is located on the premises to which the [Appellants] were unemployed" (JX 31); and (4) the Legislature's use of the "phrase 'of any kind,'" in the language disqualifying individuals from UI benefits if their unemployment is due to "a claimant's work stoppage dispute of any kind," N.D.C.C. § 52-06-02(4), "suggests that the Legislature intended for a liberal rather than a narrow interpretation" and "would include lockouts." (JX 31). Accordingly, Job Service determined the Appellants were disqualified from UI benefits due to the lockout, even though they were "willing to continue to work or ha[ve] offered to return to work under the same terms and conditions of the [Agreement]." (JX 31).

4 The Appellants sought review of this determination with Job Service, which was denied. (JX 41). The Appellants then appealed the determination to the District Court, County of Traill. (JX 52-55).

5 On March 26, 2012, The Honorable Steven L. Marquart, District Court Judge, East Central Judicial District, affirmed Job Service's determination denying unemployment benefits. (JX 56-61).

6 First, the Court found that the lockout is a "labor dispute." Judge Marquart concluded it was appropriate to apply the definition of "labor dispute" contained in Chapter 34-08 of the N.D. Cent. Code, because the phrase is "not defined in

[3] The Robberstad opinion is attached to Appellant's Addendum at 32-35.

Chapter 52-06" and "no contrary intention plainly appears." (JX 59). Borrowing this definition, and noting "[a] number of courts have reached a similar conclusion," Judge Marquart reasoned: "Crystal Sugar's actions in locking out the employees came about because of a 'controversy concerning terms or conditions of employment.' The Court concludes, therefore, that the actions of Crystal Sugar in locking out the employees because of the Union's rejection of Crystal Sugar's final offer is a labor dispute." (JX 59).

7 Second, the Court found the work stoppage was due to a labor dispute because "the plain language of the statute does not allow that conclusion" argued by the Appellants – "that this language must be construed to prohibit unemployment coverage for those individuals who voluntarily leave the job." (JX 60).

8 Third, the Court found that there was a "work stoppage" although American Crystal "has hired replacement workers and continued on with production." (JX 60). The Court "conclude[d] that the plain language of the statute does not allow that interpretation [advanced by the Appellants]. Here, the [Appellants'] inability to work because of the lockout, has caused the [Appellants] to incur a work stoppage which exists because of the lockout." (JX 60).

9 Ultimately, the Court held: "Here, the statutory language is clear and unambiguous. It allows the Court to reach only one conclusion. The [Appellants] are not entitled to unemployment benefits because of their unemployment due to a lockout." (JX 60).

10 After judgment was entered on April 2, 2012, (JX 63), this appeal to the Supreme Court, State of North Dakota followed. (JX 65).

STATEMENT OF FACTS

11 American Crystal Sugar Company ("Appellee ACS") is in the business of processing sugar beets into refined sugar. (JX 12). Its operations include sugar-beet processing facilities located in Minnesota (Moorhead, East Grand Forks, and Crookston) and North Dakota (Hillsboro and Drayton) (collectively referred to as "the Factories"). (JX 12). Certain employees who work at the Factories are represented by various Local Unions of the Bakery, Confectionery, Tobacco Workers & Grain Millers AFL-CIO (collectively referred to as "the Union"). (JX 11).

12 In the summer of 2011, Appellee ACS and the Union were engaged in negotiations for a successor collective-bargaining agreement. (JX 12). On July 28, 2011, Appellee ACS made its "final offer" to the Union, which was rejected by the Union's voting members. (JX 12).

13 On August 1, the date the most recent collective-bargaining agreement ("Agreement") between Appellee ACS and the Union expired, Appellee ACS locked out its employees whose positions are covered by the Agreement. (JX 11-12). Since that date, Appellee ACS has continued its operations with replacement workers. (JX 12).

SUMMARY OF ARGUMENT

14 The Appellants' unemployment appeal should be denied.

15 The Appellants argue that the decision below should be reversed by advancing a laundry-list of overlapping (and, at times, contradictory) theories: (1) even though, due to the lockout, "[t]hat there is a 'labor dispute' is not in dispute, … the mere existence of a 'labor dispute' does not result in disqualification for benefits" (Brief at 4, 15)[4]; (2) the labor-dispute disqualification should only apply if the claimants "voluntarily cho[se] to leave work," *i.e.* via "a strike or sympathy strike" (Brief at 5-6); (3) the general public policy behind UI benefits is designed to compensate "persons unemployed through no fault of their own" (Brief at 6, 10-11, 17-18); (4) the Appellants bear no responsibility for their unemployment, notwithstanding the fact the lockout was initiated in response to them voting down Appellee ACS's final offer (Brief at 6); (5) a lockout is not "a claimant's work stoppage," ignoring the phrase "dispute of any kind which exists because of a labor dispute" (Brief at 7); (6) the unemployment must be "caused by a labor dispute" (Brief at 7); (7) there is no "stoppage of work" because production continued with replacement workers (Brief at 8-9, 12-14); (8) the labor-dispute disqualification is silent regarding "lockouts" (Brief at 9, 14); (9) applying the doctrine of *ejusdem generis* should limit the phrase "labor dispute" to mean only strikes (Brief at 10); (10) because the phrase "of any kind" which modifies "claimant's work stoppage dispute" a lockout should not be deemed a "labor dispute" (Brief at 11); (11) the **Appellants** did not stop working because "they

[4] "Brief" refers to the Appellants' Brief.

were lockout out and immediately replaced" (Brief at 11); (12) the 1981 legislative amendment "was to ensure that **striking workers** could not obtain unemployment benefits even if replaced by their employer" (Brief at 14); (13) "in every case of an application for unemployment benefits, it is a 'labor dispute' between that claimant and that employer which led to the unemployment" (Brief at 16); (14) the Robberstad decision "has no precedential value" because it was "decided … in 1980, prior to the significant change in the statute" (Brief at 16); and (15) the post-1981 language "is not very specific," yet someone is specific enough to apply only to "a claimant's voluntary decision to create a work stoppage" (Brief at 16-17).

16 However, for the reasons discussed in more detail infra, the Applicants' arguments must be rejected. Because the Appellants' unemployment is due to a labor dispute, they are disqualified from receiving UI benefits pursuant to the applicable statute. To award benefits to employees who are unemployed solely due to a labor dispute (caused here by their rejection of the employer's offer for a new contract) would be to circumvent the law as it presently exists. Therefore, the Appellants' arguments should be directed to the Legislature, rather than this Court.

ARGUMENT

I. STANDARD OF REVIEW

17 Under N.D.C.C. Section 28-32-46, the district court must affirm Job Services' determination unless it finds, inter alia, "The order is not in accordance

with the law."[5] "Questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision." Morris v. Job Serv. N.D., 2003 ND 45, ¶ 5, 658 N.W.2d 345, 347 (N.D. 2003).

II. THE APPELLANTS ARE DISQUALIFIED

18 The applicable statute, N.D.C.C. § 52-06-02(4), disqualifies a claimant from receiving UI benefits if "the individual's unemployment is due to a strike, sympathy strike, **or a claimant's work stoppage dispute of any kind which exists because of a labor dispute** at the factory, establishment, or other premises at which the individual is or was last employed." (Emphasis added). The statute provides a limited exception: the disqualification does **not** apply if "[t]he individual is **not** participating in or directly interested in the labor dispute" **and** "[t]he individual does **not** belong to a grade or class of workers which, immediately before the commencement of the stoppage, there were members employed at the premises at which the strike, sympathy strike, or a claimant's work stoppage dispute of any kind occurs." Id. (emphasis added).

19 Here, the Appellants do **not** allege that they fit within this exception to disqualification. Rather, the Appellants argue that the labor-dispute disqualification is inapplicable to them, notwithstanding the fact that it is undisputed they are not working because of a lockout, which they acknowledge is an employer's counterpart to a labor strike, and which arose here out of the Union

[5] The other grounds for reversal are not raised by the Appellants.

membership voting down American Crystal's final contract offer. As discussed below, the Appellants' theories are unavailing: they are disqualified from receiving UI benefits as a labor dispute caused their unemployment.

A. The UI Statute Must Be Interpreted So As to be Consistent with ND's Public Policy of Remaining Neutral in Labor Disputes.

20 As recognized in Robberstad v. Dir. N.D. Emp't Sec. Bureau, Burleigh County Civil Case No. 28750 (1980), North Dakota has subscribed to the "general policy of neutrality by the state in labor disputes." Id. at 3. Because of this neutral stance, "[i]t is not relevant or decisive that the Appellants were at all times willing to continue working. The essence of the problem is that the Appellants were unemployed due to a lockout which is a labor dispute." Id.

21 As explained by another Court:

> The general purpose of the Act is to provide compensation for those who are involuntarily unemployed. However, … an individual is disqualified from receiving benefits where his unemployment is the result of a labor dispute. The legislative purpose underlying this disqualification was to establish a policy that the State would not, by the payment of compensation, favor one party to a dispute over the other party. In order to find a party ineligible for benefits, there must be a specific finding of work stoppage, a labor dispute and proximate causation between the labor dispute and the stoppage of work. A labor dispute is defined as a controversy concerning wages, hours, working conditions or terms of employment. It may take the form of a strike, **lockout**, or other form of work stoppage. **The statute does not distinguish between the stoppage of work caused by the employer or the employee, provided it is due to a labor dispute.** Furthermore, neither the unreasonableness of the demands or the merits of the dispute are material to the determination of whether a labor dispute actually exists.

Ross v. Dep't of Emp't Sec., 559 N.E.2d 100, 102-03 (Ill. App. 1 Dist., 1990) (internal citations omitted and emphasis added); see also Anderson v. Bd. of Review of the Indus. Comm'n of Utah, 737 P.2d 211, 215-16 (Utah 1987) ("[T]he worker is denied benefits any time a work stoppage is caused by a labor dispute, without regard to whether the manifestation of that dispute is a lockout or a strike. Presumably, such provisions were premised on the thought that it is inequitable to use funds built up jointly through the contributions of labor and management to sustain labor alone during an economic battle with management." (Footnote omitted)).

22 Because North Dakota's policy is to remain neutral in labor disputes, this Court must interpret the labor-dispute disqualification so as not to conflict with this policy. See Nelson v. Gillette, 1997 ND 205, ¶ 33, 571 N.W.2d 332, 339 (N.D. 1997) (declining to adopt interpretation of statute where "such a construction would conflict with public policy"). To award benefits where the unemployment is due to a lockout tips this balance towards labor.

B. The General Policy that those "Involuntarily" Unemployed Should Receive UI Benefits is Trumped by the Specific Labor-Dispute Disqualification.

23 The Appellants submit that the UI-benefit determination is as simple as: if unemployment is "voluntary," one is entitled to benefits; if unemployment is "involuntary," one is not. (Brief at 5-6, 10-11, 17-18). This ignores the public policy favoring neutrality in labor disputes. Significantly, an identical argument has been considered and **rejected** by the United States Supreme Court in the

context of a labor dispute. In Ohio Bureau of Emp't Servs. v. Hodory, 431 U.S. 471 (1977), Hodory was denied UI benefits pursuant to Ohio's labor-dispute disqualification. Id. at 473. As a result of a nationwide coal-miner strike, there was a reduction in the fuel supply; the steel plant where Hodory worked was shut down, and he was furloughed. Id. Thus, Ohio determined he "is unemployed because of this [(the coal miners')] labor dispute," and, therefore, was not entitled to UI benefits. Id. at 474. Hodory filed an action in district court, challenging the constitutionality of the Ohio statute: "The gravamen of Hodory's complaint was the assertion that the State may not deny benefits to those who, like him, are unemployed under circumstances where the unemployment is '**not the fault of the employee**.'" Id. at 475 (emphasis added). The Supreme Court *disagreed* with this argument and held that "Congress did **not** intend to require that the States give [UI] coverage to every person involuntarily unemployed." Id. at 483 (emphasis added). Indeed, the Supreme Court noted that it is appropriate for States' UI legislation "to disqualify even a person who actively opposed a strike," and noted further the disqualification "could extend to persons **laid off because of a dispute** at another plant owned by the same employer," as the labor dispute would have caused the unemployment. Id. at 486 (emphasis added).

24 Here, North Dakota's general policy favoring compensating the "involuntarily" unemployed is trumped by the specific disqualification which applies if the unemployment is due to a "labor dispute." See N.D.C.C. § 1-02-07 ("Whenever a general provision in a statute is in conflict with a special provision

in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable **the special provision must prevail and must be construed as an exception to the general provision**…." (emphasis added)); see also In re Usery, 230 S.E.2d 585, 587 (N.C. Ct. App. 1976) (r**ejecting** claimant's argument "that, because he was at all times ready, willing and able to continue working [for the Employer] but was prevented from doing so by the lockout, his resulting unemployment was 'through no fault of his own' and entitles him to benefits" because "the specific grounds for disqualification of benefits will prevail over the general policy provisions of [the unemployment-compensation act]"); Buchholz v. Cummins, 128 N.E.2d 900, 902-03 (Ill. 1955) (finding locked-out Appellants were disqualified under the labor-dispute disqualification because the lockout "would not have occurred 'but for' the dispute between the Union and the [Employer]," reasoning although "[t]he general purpose of the Illinois Act … is to relieve involuntary unemployment" the specific labor-dispute section "specifically disqualifies any individual for benefits for any week in which it is found that his unemployment is due to a stoppage of work which exists because of a labor dispute…. This labor dispute clause is a departure from the general idea of relief from involuntary unemployment. The question of voluntariness in such a case is not the test."); In re N. River Logging Co., 130 P.2d 64, 65 (Wash. 1942) ("There can be no question that the Appellants were at all times ready, able, and willing to work on and after [the date of the lockout]. It cannot be denied that their

unemployment between that date and [the end of the lockout] was involuntary as a matter of fact…. [However,] the [labor-dispute-disqualification] section makes an exception to the generally declared purpose of the act to provide compensation in all cases of involuntary unemployment.").

25 Further, the North Dakota Legislature provided that the labor-dispute disqualification applies if the "claimant's work stoppage dispute … exists because of a labor dispute" **unless**:

> a. The individual is not participating in or directly interested in the labor dispute which caused the strike, sympathy strike, or a claimant's work stoppage dispute of any kind; **and**
>
> b. The individual does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the strike, sympathy strike, or a claimant's work stoppage dispute of any kind occurs, and of whom are participating in or directly interested in the dispute[.]

N.D.C.C. § 52-06-01(4) (emphasis added). It is significant that this exception nowhere states that the application of the disqualification depends on voluntariness. Rather, whether or not the claimant is "directly interested in the labor dispute" or belongs to the class of workers employed before the stoppage has nothing to do with whether he or she "chose" to stop working.

26 Delaware interpreted similar language in Frazer v. Unemp't Ins. Appeal Bd. of the State of Del., 1982 WL 172830 (Del. Super. July 12, 1982), as providing a limitation on the application of the voluntary/involuntary inquiry, and affirmed the denial of benefits to locked out workers. In Frazer, the Appellants "maintain[ed]

that in furtherance of the [unemployment-compensation] Act's general policy of protecting workers from the hazard of involuntary unemployment, the Court should interpret [the labor-dispute disqualification statute] to exclude stoppages of work occasioned by a lockout when the employees are willing and able to work." Id. at *2. The Delaware Court disagreed, reasoning:

> The Appellants, however, fail to acknowledge that the Delaware Supreme Court has clearly limited application of the "volitional test" to Appellants who are not direct or indirect participants in the labor dispute. The instant Appellants … are members of the labor union which was engaged, in their behalf, in contract negotiations with [the Employer] at the time of the lockout. As such, they were participants in the labor dispute and the "volitional test" is inapplicable to them. They are precluded from entitlement to benefits….

Id. (internal citation omitted). Similarly, here, because the Appellants do not claim to fit within the exception to disqualification, their direct interest in the labor dispute trumps any claim of "involuntariness."

C. North Dakota Has Held A Lockout Is A "Labor Dispute" Under the UI Statute, Disqualifying Locked-Out Employees from UI Benefits.

27 Significantly, the Appellants concede: "That there is a 'labor dispute' is not in dispute." (Brief at 4). Even in Brown v. Tex. Emp't Comm'n, 540 S.W.2d 758 (Tex. Ct. App. 1976), relied upon by the Appellants here,[6] the Texas Court held "[a] lockout is a 'labor dispute,'" as "[a] 'lockout' is the employer's withholding of work from his employees in order to gain a concession from them,

[6] See n.11, infra, discussing why Appellants' reliance on Brown is misplaced.

and is the employer's counter-part of a strike." Id. at 760.[7] However, Appellants argue that the lockout should be somehow exempted from the labor-dispute disqualification. This argument has already been rejected in North Dakota.

28 In light of the public policies discussed supra, a North Dakota District Court squarely held that a "lockout" is a labor dispute for purposes of UI benefits in Robberstad v. Dir. N.D. Emp't Sec. Bureau, Burleigh County Civil Case No. 28750 (1980), interpreting the statutory language then in effect (which disqualified Appellants if the unemployment "is due to a stoppage of work which exists because of a labor dispute"). (AD 32-35). Because the Legislature has failed to amend the disqualification statute to **exclude** locked-out employees in the thirty-two years following this decision, it may be presumed that it has **endorsed** the Court's interpretation that locked-out employees are not entitled to UI benefits. See Lamb v. State Bd. of Law Exam'rs, 2010 ND 11, ¶ 10, 777 N.W.2d 343, 349 (N.D. 2010) ("Where courts of this State have construed [a] statute and such construction is supported by the long acquiescence on the part of the legislative

[7] Appellants rely on Alexander v. EAB, 420 N.W.2d 812 (Iowa 1988), as standing for the proposition that "[a] stoppage of work does not disqualify a claimant for unemployment compensation benefits when that stoppage of work results from an employer lockout." (Brief at 13). Alexander is distinguishable as the Iowa Court was "persuaded that the disqualification … was not intended to encompass a stoppage of work which results from an employer's lockout of Appellants" because "[w]e think the legislature unequivocally manifested this intent when it **nullified**, by joint resolution, an administrative rule which provided that '[a] lockout is a labor dispute.'" Id. at 814 (emphasis added). As there has been **no** similar amendment in North Dakota, the Appellants' reliance on this case is misplaced.

assembly and by the failure of the assembly to amend the law, it will be presumed that such interpretation of the statute is in accordance with legislative intent." (Quotation omitted, alteration in original)); Kenmare Educ. Assoc. v. Kenmare Pub. Sch. Dist., 2006 ND 136, ¶ 19, 717 N.W.2d 603, 609 (N.D. 2006) (noting the "legislature's failure to amend language interpreted by the courts is evidence the court's interpretation is in accordance with the legislative intent"); Hoffman v. N.D. Workers Comp. Bureau, 2002 ND 138, ¶ 18, 651 N.W.2d 601, 608 (N.D. 2002) ("[W]e presume the Legislature is aware of judicial construction of a statute, and when it fails to amend a particular statutory provision, we further presume it has acquiesced in that construction.").

29 Contrary to the Appellants' argument that Robberstad "does not apply to the [C]laimants herein" because it was "decided … prior to a significant change in the statute," (Brief at 16), the fact that the Legislature revisited this statute in 1981, following the Robberstad decision, further bolsters Appellee ACS's position. The Legislature failed to modify the statute in any way that would affect the Robberstad Court's interpretation vis-à-vis lockouts. Moreover, the Legislature has defined a "labor dispute" in another section of the Century Code as "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," which would encompass a lockout. N.D.C.C. § 34-08-01(2). This definition is applicable to the UI statute as there is no indication that the Legislature intended differently.

N.D.C.C. § 1-01-09 ("Whenever the meaning of a word or phrase is defined in **any** statute, such definition is applicable to the same word or phrase wherever it occurs in the same or subsequent statutes, except when a contrary intention plainly appears." (Emphasis added)).[8]

D. Other Jurisdictions Hold a "Labor Dispute" Includes a Lockout Absent Limiting Language.

30 The Appellants argue that the labor-dispute disqualification should not encompass lockouts because, inter alia, "North Dakota's statute does not mention 'lockouts' among those specific disqualifying types of labor disputes for which it directs a disqualification." (Brief at 9). This argument lacks merit. The conclusion that a "labor dispute" disqualification encompasses a lockout has been endorsed by numerous other jurisdictions whose statutory language fails to specifically clarify whether it should (or should not) include a "lockout."[9] See Abas v. Bd. of Review, Nev. Dep't of Emp't Training, 2009 WL 3191419 at **1-2

[8] The Appellants argue against interpreting a "labor dispute" as encompassing lockouts, suggesting that "[s]urely, in every case of an application for unemployment benefits, it is a 'labor dispute' between the claimant and the employer that led to the unemployment." (Brief at 16). This argument must be rejected as it ignores that "[t]echnical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or as are defined by statute, must be construed according to such peculiar and appropriate meaning or definition." N.D.C.C. § 1-02-03.

[9] Appellee ACS agrees with the Appellants' representation that the specific phrasing North Dakota's labor-dispute disqualification statute is unique among the States. However, these cases interpreting the phrase "labor dispute" are still instructive because, in each and every example cited herein, the statutory language was silent as to whether the disqualification included (or excluded) lockouts.

(Nev. Sept. 2, 2009) (finding locked-out employees were disqualified because their "unemployment is due to a labor dispute"); Dietrich Inds., Inc. v. Teamsters Local Unit 142, 880 N.E.2d 700, 703 (Ind. Ct. App. 2008) ("A strike or a lockout can be a labor dispute as long as there is a controversy concerning the terms and conditions of employment."); Wilcoxson v. Emp't Sec. Comm'n of Wyo., 741 P.2d 611, 612 (Wyo. 1987) (upholding the disqualification of locked-out claimant, reasoning "[u]pon a plain reading of [the labor-dispute-disqualification statute], it is clear the legislature intended that, if unemployment is due to a work stoppage resulting from a labor dispute, the individual is disqualified from receiving unemployment benefits…. Absent some indication from the legislature that it intended to fund unemployment compensation for locked out employees …, this Court will not extend coverage…. We hold that the intent of the legislature was to include the term 'lockout' within the language 'work stoppage resulting from a labor dispute'…."); Abilla v. Agsalud, 741 P.2d 1272, 1278 (Haw. 1987) (concluding lockout constituted a "labor dispute," noting "[t]he absence of an express provision that a 'lockout' is a 'labor dispute' within the meaning of the unemployment compensation law can hardly be equated with silence"); Pfenning v. Dep't of Emp't & Training, 522 A.2d 743, 746 (Vt. 1986) ("We think the plain meaning of 'labor dispute' is broad enough to encompass a lockout…."); Smith v. Mich. Emp't Sec. Comm'n, 301 N.W.2d 285 (Mich. 1981) (lockout is a labor dispute disqualifying employees from UI benefits); Usery, 230 S.E.2d at 587-88 (finding "a lockout by management which results in work stoppage" is a "labor

dispute," disqualifying the Appellants from receipt of UI benefits where the statute "does not define 'labor dispute' to include only those work stoppages caused by strikes, or, conversely, by lockouts; it is neutral on its face"); Adams v. Indus. Comm'n of Mo., 490 S.W.2d 77, 79-80 (Mo. 1973) (same, reasoning "in most jurisdictions in which the question has arisen under a statute similar to [Missouri's labor-dispute disqualifications statute], the courts have held that a work stoppage resulting from a lockout arising from a disagreement in matters subject to collective bargaining is a labor dispute entailing disqualification from unemployment benefits…. The approach in these cases is in accord with settled principles of statutory construction and avoids the pitfalls inherent in any effort to determine cause and fault in labor disputes"); Henzel v. Cameron, 365 P.2d 498, 502 (Or. 1961) (same, noting "[u]nder [labor-dispute disqualification] statutes containing no express exception of 'lockouts' from the operation of labor dispute disqualifications it is generally agreed that a work stoppage resulting from a lockout is a labor dispute entailing disqualification" (quotation omitted)).

31 As recognized by other Courts, States which have determined locked-out employees should receive UI benefits specifically provide such an exception from the labor-dispute disqualification in the statutory language. Anderson, 737 P.2d at 216 (noting the "minority" of states which provide UI benefits for locked-out workers "have achieved this result by adding the words 'other than a lockout' at the end of the draft act's 'labor dispute' exclusion"); Local 7-641, Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Labor, 449 N.E.2d 134, 137 (Ill. 1983)

("In the minority of States that have chosen to so characterize a lockout, the language of the statute is clear. Typically, the statute provides that an individual is ineligible for benefits if his unemployment is due to a stoppage of work which exists because of a labor dispute 'other than a lockout.'"). Accordingly, Appellant's reliance on legislative silence is misplaced. To the contrary, North Dakota's failure to amend the statute to explicitly include such an exclusion from the disqualification suggests that the Legislature did not intend to extend UI benefits to locked-out employees.

E. A "Claimant's Work Stoppage" Dispute Cannot Be Limited to Strikes.

32 The Appellants argue a lockout cannot be considered a "claimant's work stoppage dispute," claiming that "[e]ach of the reasons for denial of benefits [("strike, sympathy strike, or claimant's work stoppage dispute of any kind")] is focused on the claimant's **voluntarily** choosing to leave work." (Brief at 5). This argument should be rejected as it has no support in the text. Indeed, Appellants' proposition is belied by the inclusion of the phrase "of any kind." Further, if the Appellants' proposed limitation on "claimant's work stoppage dispute of any kind" is endorsed, it would render the phrase meaningless. Essentially, the Appellants suggest that the statutory language be read to disqualify Appellants whose **voluntary** unemployment "is due to a strike, sympathy strike, or a strike." (See Brief at 6, arguing in heading III.: "Not Only Has There Been No **Strike**…" (emphasis added)). Based on well-settled principles of statutory interpretation, "a

claimant's work stoppage dispute of any kind" must mean something other than a "strike." See N.D.C.C. § 1-02-38(2) ("In enacting a statute, it is presumed that … [t]he entire statute is intended to be effective"); Sandberg v. Am. Family Ins. Co., 2006 ND 198, ¶ 9, 722 N.W.2d 359, 362 (N.D. 2006) ("We construe statutes to give effect to all of the provisions, so that no part of the statute is rendered inoperative or superfluous."). Similarly, the phrase "of any kind" must be given meaning. Again, if the disqualification only applied in the strike context, the phrase "of any kind" would be rendered a nullity.

33 For the same reasons, the Appellants' reliance on the rule of *ejusdem generis* is misplaced. (Brief at 10). Appellants argue that "the enumeration of specific types of only claimant-based work stoppages in the previous parts of the phrase … should cause the more general part, 'labor dispute,' to be interpreted consistently with the specific language so that only employee or union-initiated work stoppages … are precluded from unemployment benefits." (Brief at 10). Appellants ignore: "The doctrine of *ejusdem generis* is an attempt to reconcile an **incompatibility** between specific and general rules so that **all words** in a statute … can be **given effect**, all parts of a statute can be construed together and **no words will be superfluous**." Resolution Trust Corp. v. Dickinson Econo-Storage, 474 N.W.2d 50, 53 (N.D. 1991) (quotation omitted and emphasis added). Not only is there nothing "incompatible" with the meaning endorsed by Job Service, it is the **Appellants'** proposed interpretation which would render the language "work stoppage dispute of any kind" superfluous.

F. There is a "Work Stoppage" Despite Continued Production.

34 Contrary to Appellants' argument, the lockout is a "work stoppage," and it is of no consequence that the work at American Crystal has continued with replacements. The 1981 Amendment to the labor-dispute disqualification (Senate Bill 2354)—which replaced the phrase "stoppage of work" with "strike, sympathy strike, or a claimant's work stoppage dispute of any kind" and **deleted** the language: "that there shall not be deemed to be a stoppage of work in any factory, establishment, or other premises unless there shall be a substantial stoppage of work in each of said factory, establishment, or other premises"— was in response to the striking Amoco workers' receipt of UI benefits. See Legislative History at AD[10] at 2, 6 (Jim Cowley, Amoco Oil, Proponent, noting "under the current law, we must make a choice. Either pay the workers who have walked off the job voluntarily or cut back or even cut down so that there is a work stoppage defined by the law").[11] Because the Amoco workers **were** replaced, the work **did** continue, and under the pre-1981 language, the disqualification did not apply absent a total "work stoppage." Amoco Oil Co. v. Job Serv. N.D., 311 N.W.2d 558, 559 (N.D. 1981). The Legislature amended the statute to ensure that

[10] AD refers to Appellants' Addendum.

[11] It is appropriate to consider the legislative history to discern statutory intent because the phrase "work stoppage dispute of any kind" is susceptible to more than one meaning.

employees who are unemployed due to a labor dispute would be disqualified from receipt of benefits until the work stoppage **dispute** was over:

> [Based on the current statutory language] once it is determined there is no longer a substantial stoppage of work (reasonably normal operations are resumed), the labor dispute provisions no longer apply. All who are unemployed because of the stoppage of work could then be paid if they were otherwise eligible. Senate Bill 2354 would make the following principal **changes** to this section of the law… All portions of the law would remain the same except that whether now when there is no longer a stoppage of work, the individual involved in the dispute could draw benefits if otherwise eligible. **Under Senate Bill 2354 no benefits would be paid to those involved in the dispute until the dispute is ended.**

March 3, 1981, Senate Testimony of Mr. Deisz at 3-4 (Emphasis added) (see AD at 14-15). The Appellants rely on **only** the first two sentences of the testimony quoted supra to argue that there is no work stoppage at American Crystal because "'reasonably normal operations' were never stopped … and there was never a 'stoppage of work,'" claiming that "[t]he [Job Service] Referee's decision otherwise also flies in the face of [this] testimony." (Brief at 8-9). This argument misconstrues the testimony by taking it out of context, and disregards the language that the Legislature deleted in 1981.[12]

[12] Appellants acknowledge this, later, stating: "In light of this statutory history, it is evident that the North Dakota Legislature's intent … in 1981 was to ensure that striking workers could **not** obtain unemployment benefits **even if replaced** by their employer." (Brief at 14 (emphasis added)). In light of the 1981 Amendment and legislative history, Appellants' reliance on numerous cases from other jurisdictions, which hold that a "stoppage of work," requires that the work at the employer's establishment stop (not merely the claimant's work) is misplaced. (Brief at 12-15).

G. The Appellants' Work Stoppage Dispute is Due to the Labor Dispute.

35 The Appellants argue that the language "claimant's work stoppage" suggests it must be their choice to stop working, ignoring that the phrase reads "claimant's work stoppage **dispute of any kind**."[13] Even if one follows the Appellants' argument and agrees that it is not *their* "work stoppage,"[14] it does **not** follow that it is not their "work stoppage dispute," particularly as it may be "of any kind." Indeed, the Appellants fail to even advance this (futile) argument.

36 It cannot be contested that the Appellants' work stoppage **dispute** (the lockout) is due a labor dispute, involving those particular Appellants who are directly interested in the outcome and belong to the appropriate class of workers. Thus, their "unemployment is due to … a claimant's work stoppage **dispute**." See Local 7-641, 449 N.E.2d at 136 ("We need not and do not decide the factual dispute between the parties concerning whether the terms of [the Employer's] final

[13] The Appellants' reliance on Brown v. Tex. Emp't Comm'n, 540 S.W.2d 758 (Tex. Ct. App. 1976), (Brief at 16) is misplaced. In Brown the labor-dispute disqualification applied if the "unemployment is due to **the Claimant's stoppage of work** because of a labor dispute…." Id. at 760 (emphasis added). The Texas Court held that the disqualification did **not** apply to locked-out employees because "[w]e are unable to see how Appellants' involuntary unemployment under these facts could be construed to be due to the 'claimant's stoppage of work.' Instead, it was the company's stoppage of work." Id. In contrast, here, a "claimant's work stoppage dispute of any kind" is not so limiting: a lockout constitutes a kind of "work stoppage dispute."

[14] This is a disputable assumption given that the lockout was triggered by the **employees'** refusal to accept American Crystal's final offer. (JX 12).

or interim offer were onerous or significantly worse than the terms of the existing contract. Regardless of whether the individual plaintiffs and other members of the plaintiff union involved in the labor dispute were strikers or constructively locked out employees, we hold that they are ineligible for benefits under the Act because they were directly interested in the labor dispute which caused the stoppage or work."); Kania v. Saffer, 506 P.2d 384, 385 (Colo. Ct. App. 1972) (same, finding "as a result of the labor dispute, a work stoppage in the form of a lockout occurred and that the Appellants' unemployment was due to this lockout"); see also In re Sadowski, 257 A.D. 529, 531, 13 N.Y.S.2d 553, 555 (N.Y.A.D. 3 Dept. 1939) ("Under this [labor-dispute-disqualification] statute it is immaterial whether claimant was an actual striker or whether she was unable to work 'because of a strike.' She was deprived of her employment **because of** the strike and consequently not eligible for benefits….") (emphasis added).

37 Again, whether the **Appellants** caused the unemployment is irrelevant. The appropriate inquiry is whether the **labor dispute** caused the unemployment.[15] In IBP, Inc. v. Aanenson, 452 N.W.2d 59 (Neb. 1990), the UI statute disqualified Appellants whose "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 or she is or was last employed." Id. at 61-62. The Nebraska Supreme Court

[15] Even the Appellants acknowledge this in passing: "The words of the statute clearly require a finding that the claimant's unemployment is **caused by a labor dispute**, not simply the existence of a labor dispute." (Brief at 7 (emphasis added)).

held that "the lockout Appellants are **disqualified** from receiving unemployment compensation pursuant to [the labor-dispute disqualification], for the period of the lockout," because "the evidence affirmatively establishes that the **labor dispute** … was the cause of the unemployment of the Appellants." Id. at 65-66 (emphasis added).

38 Cases arising under other "involuntary" circumstances confirm that the appropriate inquiry when applying the labor-dispute disqualification is whether the unemployment is caused by the labor dispute, **not** whether the Appellants voluntarily caused the unemployment by striking.

39 In Jenks v. Wis. Dep't of Indus., Labor & Human Relations, 321 N.W.2d 347 (Wis. Ct. App. 1982), five different unions represented employees at the plant. Id. at 349. When one of the unions went on strike, the employer notified the members of the four (non-striking) unions that they would be laid off "because the [striking employees] were so integrated into the overall operation of the plant that the manufacturing process could not be carried on." Id. The non-striking employees were denied benefits because Wisconsin determined that their unemployment was "because of … a labor dispute." Id. The Court of Appeals affirmed the disqualification, finding that the statute "denies unemployment benefits to workers laid off because of a strike in their workplace." Id. at 352 (footnote omitted).

40 In Adomaitis v. Dir. of the Div. of Emp't Sec., 136 N.E.2d 259 (Mass. 1956), the Employer was in the business of processing wool owned by its

customers. Id. at 260. Because the **customers** feared a strike, the **customers** stopped sending wool to the Employer, and the Employer laid off employees due to lack of work. Id. These employees were deemed ineligible for benefits under the labor-dispute disqualification because the work stoppage "exists because of a labor dispute." Id. at 260-61; see also Mortensen v. Bd. of Review, Div. of Emp't Sec., 121 A.2d 539, 541 (N.J. 1956) (holding the labor-dispute disqualification applied because the "diminished work volume which occasioned the Appellants' unemployment resulted from the strike threat").

41 The Appellants argue: "There can be no dispute, the lockout that led to these Appellants' unemployment is 100% - produced, caused, created or as a result of actions by the employer…. Therefore benefits should be awarded." (Brief at 6). This argument ignores that it is undisputed that the Appellants would be working but for the fact that American Crystal's "final offer was rejected by the voting members" of the Union. (JX 12). More fundamentally, the Appellants would be working **but for the labor dispute**. The Appellants are disqualified.

CONCLUSION

42 Based on the foregoing reasons and those to be advanced at oral argument, the Appellants' appeal must be denied.

Respectfully submitted,

FELHABER, LARSON, FENLON & VOGT, P.A.

Dated: August 6, 2012

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2012, I e-mailed a true and correct copy of the following:

APPELLEE AMERICAN CRYSTAL SUGAR COMPANY'S BRIEF; and
APPELLEE AMERICAN CRYSTAL SUGAR COMPANY'S ADDENDUM

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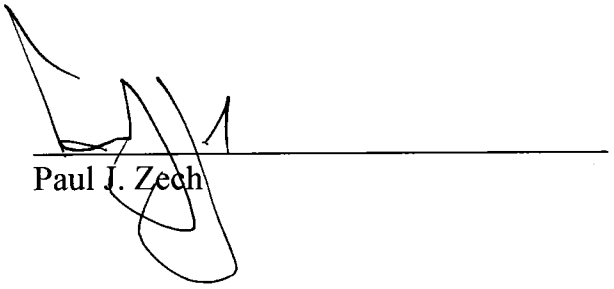

Paul J. Zech

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AUGUST 3, 2012
STATE OF NORTH DAKOTA

NO. 20120250

State of North Dakota

In Supreme Court

Keith Abrahamson, Joann Allard, Deborah A. Ambuehl, et al.,
Appellants,

vs.

Job Service of North Dakota and
America Crystal Sugar Company,
Appellees.

APPELLEE AMERICAN CRYSTAL SUGAR COMPANY'S ADDENDUM

APPEAL FROM MEMORANDUM OPINION AND ORDER DATED MARCH 26, 2012, AFFIRMING DECISION OF JOB SERVICE NORTH DAKOTA AND JUDGMENT DATED APRIL 2, 2012, TRAILL COUNTY DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT, THE HONORABLE STEVEN L. MARQUART

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INDEX TO ADDENDUM

Slip Copy, 2009 WL 3191419 (Nev.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 2009 WL 3191419 (Nev.))

C

Only the Westlaw citation is currently available.An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

Supreme Court of Nevada.

Joey A. ABAS; Mary Vriend; Lisa Gleason; Sherrie Holbron; Amber Hamilton; Mary Keohokapu; Estalita Manabat; Victoria Ramos; Yancy Magrata; Victor Remo; Vilma Samson; Carlos Maravilla; Lena Fernandes; Angelo D'Souza; Cirilo Bautista, Jr.; Nancy Cabanban; Barbara Coombs; Brian Callahan; Carol Dillon; Carmen Laconto; Luz Alton; Linda Tortora; Caroline Rosario; Isabel Walters; Gloria Casey; Evelyn Trinidad; Bruce Pullen; Lourdes Pereira; Gary Friedrich; Emelinda McManus; Eric Grigore; Lawrence Hawk; Linda Bartlett; Phil McHale; Leesa Allen; Carmen Buchler; Emelin Lincoln; Betty Johnson; Paul Chowanec; Judith Chowanec; Nicole Hosley; Chet Garcia; Elda Garcia; Shelby Sher; Deborah Whitford; Byron Mefford; Elizabeth Chilimidos; Nathan Vought; Sharon Larsen; Kirsten Barger; Marie Joanne Apostol; Shawn Warren; Jeffrey Nicks; Michelle Salazar; Corazon Gonzales; Janice Duncan; Pia-Angela Tillis; Robert Bender; Orlando Dalipe; Trudy Wegscheid; Mary Kleier; Vicki Seldney; Rose Almanza; Lilia Cordoba; Jocelynn Jaojoco; Dinah Miguel; Gloria Healy; Melinda Powe; Eleanor Malden; Bernardo Penalosa; Chad Ditullio; Scott Matthews; Joyce Blaszak; John Sheltr; Sutee Luckmunkong; David Pusatere; Robert Casey; Rose Flores; Rosemarie Miranda; Leona Ng; Laura Alton; Chiao Martin; Wilfredo Malixi; Maria Tolentino; Evelyn Csaba; Nenita Danao; Norma Gayoso; Cecilia Hardie; Eliza Fecurka; Guillermo Ligsay; Joyce Sales; Johnny Pereira; Erlinda Bayani; Crosso Gumalo; Ifelita Guiua; Ma Rachel Morales; Flordeliza Nicolas; Sara Enciso; Chandana Paliskara; Gustavo Obregon Banos; Karen Leongas; Pravin Patel; Judith Moore; Antonio Arnaiz; Romilio Miguel; Maria Espinoza; Jeffrey Oppenheim; Ann Gialitis; Aida Redondo; Jennifer Esguerra; Gloria Sarnicola; Cleo Sanchez-Dudas; Reginald Esguerra; Ronald Esguerra; Carol Horn; Diane Angis; Fred Biel; Cynthia Corino; Lawrence Lemasters; Gregory Imberger; Joseph Figueroa, Jr.; Sandra Spiotto; Kristin McCray; Frank Colosimo; Carol La Gesse; James Shusteric; Stephen Raymond; Linda Tolbert; Rachel Williams; June Smith; Sydney Porter; Betty Mendoza; Jessica Spangler; Pamela Wallace; La Shaun Thomas; Kristel Estes; Loretta Villas; Traci Kahl; Ricky Torres; Anita Gobozy; Robert Ablang; Michael Shore; Tanya Shimono; Elaine Flores; Mark Wallace; Janet Carr; Evelyn Anderson; Karen Chisum; Loris Accor; Linda Derooy; Cathleen Kassler; Liwayway Canillo; Teresa James; Trichia Terflinger; Margaret Spence; Sandee Hedges; Patricia Saunders; Stephanie Carr; Margarita Miron; Cathy Roberts; Georgina Pisors; Darlene Shimono; Tanya Osterman; Randy Carr; Alfred Covarrubias; Edith De Alba; Rose Mark; Edward Garcia; Audrey Cuasito-Marquin; Edna Takushi; Teresita Andres; Myrna Mari; Natalie Herrera; Lynn Butay; Craig Lee; Melania Mamauag; Rebeca Decastro; Melody Vivo; Rosario Farillas; Jan Christian Marquina; Paul Panaligan; Belinda Burkhalter; Mitchell Laursen; Marilou Escobar; Lea Raymundo; Romulo Tolentino; Gonzalo Yabut; Lei Ann Laconsay; Veneta Mayor; Bhanu Joshi; Susan Hortizuela; Mai To; Maria Martinez; Rose Schiavone; Mary Chris Celoza; Aiqin Niu; Paula Holmes; Marcia Morgan; Rubia Guenette; Edward Mix; Karen McNary; Helen Glass; Joetta Lester; Brandy Maus; Elizabeth Hann; Teresa Gilbert; Benediccion Quinto; Ricardo Gasca; Karen Andrews; Chris Krey; Gladys Revering; Shannon Eckman; Leanna Trinidad; Beverly Weglar; Sandra Everett; Corey Vernon; Li Johnson; Rhonda Adamovich; Phyllis Murray; Juanita Shamblin; Efren Saclolo; Sheila Fitton; William Daish; Jamie Benavidez; Robin Coleman; Jennifer Ratagick; Marietta Dasalla-Denne; Winifred Baker; Maria Villalba; Festus Iyoha; Elmer Rice; Sonja Wagner; Steven Workman, Ii; James Parks; Le-

onard Lopez; Brian Reinert; Daniel Monasterial; Terrayna Grieves; Clarice Thomas; Sharon Davis; Erin Murray; Buffie Taylor; Amanda Aranda; Veronica Mingo; Imelda Pasalo; Belinda Corrow; Frank Garcia, Jr.; Pauline Quijada; Barbara Grey; Debi Stupnik; Angelita Rumsey; Isabel Serna; Catalina Ramiro; Katherine Bailey; Doreen Sloan; Mattie Foster; Lenora Granger; Tekehia Sanders; Mary Burnham; Rosendo Chavez; Felicia Johnson; Diane Hoitt; Charles Desormeaux; Susan Bindhamer; Scott Moretti; William Roman; Michael McGeough; Maureen Rubin; Roy Carlo; Mary Carlo; Wanda Fernandez; Steve Sporcic; Jodi Brege; Denise Lebron; Marcia Stoker; Julie Asselin; Navinchandra Chauhan; Tyrita Buckner; Laura Tietje; Marissa Osterman; Ronald Kupfersmid; L. Bryant; Verlene Sullivan; Roland Miller; Nancy Hall; Lizzie Coleman; June Pitts; Lillian Romo; Rosa Gutierrez; Deborah Anderson; Rosalie Marquez; Renae Sanders; Karen Pagliuca; Jerome Murray; Monica Espinoza; Veronica Quijada; Stella Dizon; Garry Raley; Evelyn Neal; Penny Wilson; Hector Macias; Rodrigo Rodriguez; Karen Lopez; Warren Wolf; Maria Hoge; Susan Parks; Judith Poole; Sandra Shockey; Lakisha Jefferson; Dominica Sumagit; Betsy Alcarac; Jaywilmore Corpuz; Jocelyn Tomita; Pascuafilda Gano; Reyna Felt; Christopher Williams; Maria Ceniceros; Mahatma Gutierrez; Catherin Pascoe; Lachanda Sullivan; Laqwanda Oakley; Irma Serna; Margaret Smith; Christina Richardson; Rosemary Clark; Jessica Edmunds; Charles Spence; Linda Popjoy; Courtney Carroll; Anthony Ramos; Roberto Carillo; Chong Tran; Christine Meyer; Roland Morton; Patricia Hamlin; Pauline Harteau; Frank Flanagan; Christine Biaggi; Brett Evans; Richard Keirn; Paul Mason; Gena Hart; Gabriel Ballantine; Shirleen Perkins; Cynthia Pulaski; Roberta Peters; and Tracy Castner, Appellants,

v.

BOARD OF REVIEW, Nevada Department of Employment Training & Rehabilitation-Employment Security Division; Appeal Tribunal, Nevada Department of Employment Training & Rehabilitation-Employment Security Division; Administrator, Nevada Department of Employment Training & Rehabilitation-Employment Security Division; and Medco Health Solutions of Las Vegas, Inc., Respondents.

No. 50739.
Sept. 2, 2009.

Background: Claimants sought review of administrative decision denying petition for unemployment benefits. The Eighth Judicial District Court, Clark County, Sally L. Loehrer, J., denied petition for judicial review. Claimants appealed.

Holdings: The Supreme Court held that:
(1) a "labor dispute," for purposes of disqualification from unemployment compensation, includes employer-based lockouts, and
(2) claimants engaged in dispute over wages and benefits were statutorily disqualified from unemployment compensation.

Affirmed.

West Headnotes

[1] Unemployment Compensation 392T 152

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(D) Labor or Trade Disputes
392Tk152 k. Lock-Outs in General. Most Cited Cases

The phrase "labor dispute," for purposes of disqualification from unemployment compensation, has a plain meaning and includes employer-based lockouts. West's NRSA 612.395(1).

[2] Unemployment Compensation 392T 151

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(D) Labor or Trade Disputes
392Tk151 k. Strikes and Walk-Outs in General. Most Cited Cases

Unemployment Compensation 392T 152

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(D) Labor or Trade Disputes
392Tk152 k. Lock-Outs in General. Most Cited Cases

Employees of health care company were engaged in a labor dispute, regardless of whether they were locked out or conducted a strike, and thus were statutorily disqualified from unemployment compensation, where the lock-out was the result of failed negotiations concerning employees' wages and medical benefits. West's NRSA 612.395(1).

McCracken, Stemerman & Holsberry

Jackson Lewis LLP

J. Thomas Susich

ORDER OF AFFIRMANCE

***1** This is an appeal from a district court order denying a petition for judicial review of an administrative decision in an unemployment matter. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellants consist of 347 employees employed by respondent Medco Health Solutions of Las Vegas, Inc. Appellants appeal the district court's order denying their petition for judicial review of the Nevada Department of Training and Rehabilitation Employment Security Division's Board of Review's (Board) determination that they, as employees of Medco, were statutorily disqualified from receiving unemployment benefits under NRS 612.395. NRS 612.395(1) provides, "A person is disqualified for benefits for any week with respect to which the Administrator finds that his total or partial unemployment is due to a labor dispute in active progress at the factory, establishment or other premises at which he is or was last employed." In addition, the Board determined that appellants were not exempted from disqualification under NRS 612.395(2)'s exceptions (*i.e.* when "[t]he person is not participating in or financing or directly interested in the labor dispute which caused his unemployment[,] ... and ... [t]he person does not belong to a grade or class of workers ... whom are participating in or financing or directly interested in the labor dispute").

On appeal, appellants argue that an employee who is unemployed due to an employer-based lock-out is not precluded from collecting unemployment benefits under NRS 612.395(1). We determine that appellants' challenge is without merit. Therefore, we affirm the district court's order denying the petition for judicial review. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Standard of review

This court has established that when it reviews an administrative unemployment compensation decision, it is bound by the same standard of review as the district court, and examines the Board's administrative record for abuse of discretion. *Clark County Sch. Dist. v. Bundley,* 122 Nev. 1440, 1444, 148 P.3d 750, 754 (2006); *see* NRS 612.530(4). The Board's factual determinations will be afforded deference if they are supported by substantial evidence. *Bundley,* 122 Nev. at 1444, 148 P.3d at 754. Substantial evidence is that which "a reasonable mind could find adequately upholds a conclusion." *Id.* at 1445, 148 P.3d at 754. If the Board's determination is based on substantial evidence, this court will defer to the Board's "fact-based legal conclusions with regard to whether a person is entitled to unemployment compensation." *Id.* But, if the issue presented is a question of statutory interpretation, this court will review the Board's decision de novo. *See id.; Torrealba v. Kesmetis,* 124 Nev. ----, ----, 178 P.3d 716, 721 (2008).

"Labor dispute" under NRS 612.395(1)

[1] NRS 612.395(1) provides, "A person is disqualified for benefits for any week with respect to which the Administrator finds that his total or partial unemployment is due to a *labor dispute* in active progress at the factory, establishment or other premises at which he is or was last employed." (Emphasis added.) The basic contentions between

appellants and respondents Medco and the Employment Security Division of the Nevada Department of Employment, Training and Rehabilitation (ESD) are grounded in the breadth and scope of the term "labor dispute," as used in NRS 612.395(1). Appellants claim that this issue is one of first impression, which requires this court to construe NRS 612.395(1). Medco and ESD disagree and argue that this court cannot construe the statute because the statute has a plain meaning, which this court has already decided in *Airport Casino v. Jones*, 103 Nev. 387, 741 P.2d 814 (1987). We agree with Medco and ESD and conclude that the phrase "labor dispute," for purposes of disqualification from unemployment compensation under NRS 612.395(1), has a plain meaning and includes employer-based lockouts, as already established by this court in *Airport Casino v. Jones*, 103 Nev. at 391, 741 P.2d at 817.

***2** In *Airport Casino*, this court defined the term "labor dispute" to "include[ ] 'any controversy concerning wages, hours, working conditions,' or terms of employment." *Id.* (quoting *Gorecki v. State*, 115 N.H. 120, 335 A.2d 647, 648 (N.H.1975)).

In applying this definition of "labor dispute" to the facts of this case, we examine the Board's administrative record for abuse of discretion, affording deference to the Board's findings if they are supported by substantial evidence. *See Clark County Sch. Dist. v. Bundley*, 122 Nev. 1440, 1444-45, 148 P.3d 750, 754 (2006); *see also* NRS 612.530(4).

[2] Here, the Board adopted the appeal tribunal's findings of fact and reasons for affirming ESD's decision in all respects. By adopting those findings and conclusions, the Board concluded that a labor dispute, as defined in *Airport Casino*, existed in this case-regardless of whether appellants were locked out or conducted a strike-because the dispute between appellants and Medco amounted to a controversy regarding wages, hours, and working conditions. After reviewing the record, we conclude that substantial evidence supports the Board's findings.

Our conclusion that substantial evidence supports the Board's findings in this case is based on the undisputed fact that Medco's lock-out was the result of failed negotiations concerning appellants' wages and medical benefits. Because a dispute over wages and medical benefits is " 'a[ ] controversy concerning wages' ... [and] terms of employment," *Airport Casino*, 103 Nev. at 391, 741 P.2d at 817 (quoting *Gorecki v. State*, 115 N.H. 120, 335 A.2d 647, 648 (N.H.1975)), we conclude that the Board did not abuse its discretion by determining that appellants were not entitled to unemployment benefits pursuant to NRS 612.395(1).

With respect to appellants' claim that this labor dispute does not necessarily lead to disqualified unemployment, as provided in NRS 612.395(2), we conclude that appellants' claim is unavailing. While appellants are correct in that an employee may not be disqualified if he or she establishes that he or she is subject to the exception provided in NRS 612.395(2), our review of the record and the Board's findings reveals that appellants failed to demonstrate that they were subject to that exception. *See Alldredge v. Archie*, 93 Nev. 537, 541, 569 P.2d 940, 943 (1977) (clarifying that the claimant of the unemployment benefits has the burden of proving-to the satisfaction of the administrator-that he meets the requirements under NRS 612.395(2)'s exception). Thus, the Board's finding that appellants were at least supporting and financing the dispute because they would gain or lose as a result of the settlement thereof is supported by substantial evidence, and we conclude that the Board did not abuse its discretion by denying appellants' claim for recovery.

Having considered appellants' contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Nev.,2009.

Abas v. Board of Review
Slip Copy, 2009 WL 3191419 (Nev.)

END OF DOCUMENT

Not Reported in A.2d, 1982 WL 172830 (Del.Super.)
(Cite as: 1982 WL 172830 (Del.Super.))

Superior Court of Delaware.
David H. FRAZER, et al.
v.
UNEMPLOYMENT INSURANCE APPEAL BOARD OF the STATE of Delaware, DEPARTMENT OF LABOR, and Delmar News Agency.

No. 91A-DE-8.
Submitted June 9, 1992.
Decided July 12, 1982.

Bayard Marin, Marin and Hudson, Wilmington.

Herbert Stant, Gen. Manager, Delmar News Agency, Wilmington.

O'HARA, Judge.

***1** This is an appeal by claimant-appellants ("claimants") from a decision of the Unemployment Insurance Appeal Board ("Board") affirming a Referee determination that claimants were not entitled to benefits under the Unemployment Compensation Act ("Act"), 19 *Del.C.* § 3301 *et seq*. Since the Board, after taking additional testimony, affirmed the Referee's determination and adopted his findings, the Court relies upon the Referee's decision for the findings of fact and conclusions of law.

The Referee found that 1) the claimants (twelve in number) were employed as truck drivers by Delmar News Agency ("Delmar") on June 30, 1981 when the contract between the drivers and Delmar expired; 2) negotiations for a new contract had occurred prior to that date but had not resulted in a new contract as of July 1, 1981; 3) on July 1, 1981, the claimants reported to work and found the door locked with a note on the door which stated that due to suspension of operations no drivers were needed; 4) the claimants reported for work every day for one week thereafter; 5) the claimants had previously agreed to continue to work under the old contract but during the contract negotiations after June 30, 1981 the employer refused to use the claimants under any condition; and 6) on or about July 9, 1981 non-driver inside employees of Delmar were laid off, with notice that the layoff was for reasons beyond Delmar's control.

Based upon these facts, the Referee concluded that the work stoppage was the result of a labor dispute. Specifically, Delmar had engaged in a lockout. The Referee consequently denied the claimants' entitlement to benefits under the Act, relying upon 9 *Del.C.* § 3315(4), which provides:

> An individual shall be disqualified for benefits
>
> (4) For any week with respect to which the Department finds that his total or partial 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 is or was last employed.

The claimants contend that the Board's decision, affirming the Referee's determination, was based on insubstantial evidence and, therefore, constituted an abuse of discretion. The claimants also contend that, even assuming Delmar's activities constituted a lockout, the claimants are not thereby disqualified from unemployment benefits under Delaware law. They further maintain that the Department of Labor review procedures violated the claimants' due process rights of adequate notice and a decision based upon evidence adduced at the hearing.

As to claimants' first contention, the Court initially notes its circumscribed role on review of a decision of the Board. The Court is bound by the Board's finding of fact, if supported by the evidence

and in the absence of fraud. 19 *Del.C.* § 3323(a), *Haskon, Inc. v. Coleman*, Del.Supr., 310 A.2d 657 (1973), *Unemployment Insurance Appeal Board v. Duncan*, Del.Supr., 337 A.2d 308 (1975). In particular, "where a party with the burden of proof fails to convince the Board below, the resulting finding of fact can be overturned ... only for ... inconsistencies, or a capricious disregard for competent evidence." *Ridings v. Unemployment Appeal Board*, Del.Super., 407 A.2d 238 (1979).

***2** Although, as claimants indicate, Delmar neither appeared nor testified at the Referee or Board hearing, the Court cannot accept claimants' contention that this absence resulted in no credible evidence of a labor dispute. A lockout exists where an employer suspends operations as a result of a dispute with his employees over wages, hours or working conditions. 76 Am.Jur.2d § 81, p. 991. Furthermore, a lockout encompasses that situation where a contract has expired, a new one has not been negotiated, and, despite the employee's offer to continue working under pre-existing terms, the employer refuses to extend the status quo pending final settlement. *Erie Forge and Steel Corp. v. Unemployment Compensation Board of Review*, Pa.Supr., 163 A.2d 91 (1960). Testimony by the two representative claimants included sufficient, consistent references to the expiration of the contract, the on-going contract negotiations, and the duration of the work stoppage (coinciding with the period during which no contract existed) to support the Board's conclusion that Delmar had engaged in a lockout.

Claimants contend, however, that, even if it was a lockout, they are not thereby disqualified under § 3315(4). In effect, they maintain that in furtherance of the Act's general policy of protecting workers from the hazard of involuntary employment, the Court should interpret § 3315(4) to exclude stoppages of work occasioned by a lockout when the employees are willing and able to work.

The claimants maintain that in applying § 3315(4) the Delaware Supreme Court has employed a "volitional test" to determine a claimant's eligibility or ineligibility for benefits. *Lowe Bros. Inc. v. Unemployment Insurance Appeal Board*, Del.Supr., 332 A.2d 150 (1975), *Chrysler Corporation v. Unemployment Insurance Appeal Board*, Del.Supr., 345 A.2d 418 (1975). Application of the "volitional test" to a lockout of employees who are willing to work, according to claimants' argument, results in a finding of eligibility for benefits.

The claimants, however, fail to acknowledge that the Delaware Supreme Court has clearly limited application of the "volitional test" to claimants who are not direct or indirect participants in the labor dispute. *Chrysler Corp. v. Unemployment Insurance Appeal Board*, supra. The instant claimants, with two possible exceptions, are members of the labor union which was engaged, on their behalf, in contract negotiations with Delmar at the time of the lockout. As such, they were participants in the labor dispute and the "volitional test" is inapplicable as to them. They are precluded from entitlement to benefits under the provisions of § 3315(4).

Although the record is contradictory and the claimants have not raised the issue, it appears that two of the claimants (Topor and Riccio) may not have been union members. As to those individuals the Board's finding that the work stoppage resulted from a labor dispute need not result in disqualification. If, in fact, they were not members of the union, were not direct or indirect participants in the dispute, they would be eligible for unemployment compensation under the standards enunciated by the Delaware Supreme Court.

***3** We do not agree that direct interest in the outcome of a labor dispute constitutes a disqualification for benefits under § 3315(4).... Claimant involvement in the causation of the unemployment is the sole focal point of § 3315(4) when read in light of public policy underlying the Act. *Lowe Bros. Inc. v. Unemployment Insurance Appeal Board*, supra, p. 153.

Further findings of fact are warranted with regard to the status of these claimants.

The claimants also argue that the procedures of the Department of Labor with respect to administrative review are violative of due process. In particular, the failure of administrative procedures to provide claimants on appeal to the Board with a written transcript of the Referee hearing is challenged as having resulted in inadequate notice to claimants and affirmance of the Referee's decision based upon evidence not adduced in the record.

This Court declines to hold that procedural due process requirements mandate that on appeal to the Board a claimant is entitled to a written transcript of the Referee hearing. The Delaware Supreme Court has held, as a matter of statutory interpretation, that § 3321(b) of the Act requires transcripts of the proceedings only upon appeal to the Superior Court. Provision of transcripts at other junctures is discretionary. *Holmes v. Rosbnow*, Del.Supr., 297 A.2d 51 (1972). The statute and administrative procedures thereunder are not violative of due process if analysis of 1) the private interest affected; 2) the risk of erroneous deprivation of such interest through the use of the procedures; and 3) the administrative burden attendant with an additional or different procedure results in the conclusion that such a procedure is not essential to the guarantee of due process. *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Applying the above criteria, this Court concludes that although the private interest in unemployment compensation benefits is significant, the risk of erroneous deprivation as a result of the procedures is not substantial, particularly since appealing claimants have access to the record, can make their own transcript, and can further appeal to the Superior Court. Additionally, the administrative and fiscal consequences resulting from a requirement that transcripts of Referee hearings be provided unduly burdens the administrative process. Specifically, in the instant case, the Court finds that the alleged error resulting from the administrative procedures was harmless error. The record of the hearing itself, absent the misidentified employee's letter, was sufficient to support the Board's determination.

For the reasons herein stated, the decision of the Board is remanded for review of its applicability to claimants, Topor and Riccio, but as to all other claimants the decision of the Board is affirmed.

IT IS SO ORDERED.

Del.Super.,1982.
Frazer v. Unemployment Ins. Appeal Bd. of State of Del., Dept. of Labor
Not Reported in A.2d, 1982 WL 172830 (Del.Super.)

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