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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 America Crystal Sugar Company,

Appellees.

APPELLEE AMERICAN CRYSTAL SUGAR COMPANY'S PETITION FOR REHEARING

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

FELHABER, LARSON, FENLON & VOGT, P.A.
Paul J. Zech, N.D. Bar No: 04929
220 South Sixth Street, Suite 2200
Minneapolis, MN 55402
(612) 339-6321
Attorney for Appellee
American Crystal Sugar Company

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STATEMENT OF THE ISSUE

1 Whether this Court properly reversed the District Court's decision that Claimants were disqualified from receiving unemployment benefits.

ARGUMENT

2 America Crystal Sugar ("ACS") respectfully requests reconsideration pursuant to N.D.R.App.P. 40 because the Court has overlooked and misapprehended the law.

I. THIS COURT SHOULD GIVE DEFERENCE TO THE AGENCY INTERPRETATION

3 The present case involves a majority opinion of two judges, a concurring opinion, and two separate dissents. This is a case where the Court should defer to the interpretation of the statute by the agency charged with its execution, Job Service of North Dakota, as suggested by Chief Justice VandeWalle. Opinion at ¶ 71 (citing Frank v. Traynor, 1999 ND 183, 600 N.W.2d 516). "The construction of a statute by an administrative agency charged with its execution is entitled to weight and **we will defer** to a reasonable interpretation of that agency **unless it contradicts clear and unambiguous statutory language**." Frank, 600 N.W.2d at ¶ 12 (emphasis added). As the majority and one dissent concluded the language was ambiguous, deference to Job Service is appropriate. Additionally, Job Service and the district court reached conclusions different from this Court, and as the majority noted: "the parties advance different, rational plain language statutory interpretations." Opinion at ¶ 16. Job Service's construction of the statute should

be given deference because it does not contradict clear and unambiguous statutory language.

II. ALTERNATIVELY, THE LANGUAGE OF THE STATUTE IS NOT AMBIGUOUS

4 If the Court declines to give deference to Job Service, then alternatively, the language of the statute is not ambiguous. The primary objective in statutory interpretation is to determine the legislature's intent, and the Court must look first at the statute's language to determine intent. State v. Martin, 2011 ND 6, ¶ 5, 793 N.W.2d 188. Words in a statute are given their plain, ordinary and commonly understood meaning, unless defined by statute or a contrary intention plainly appears. N.D.C.C. §1-02-02. The letter of the statute cannot be disregarded under the pretext of pursuing its spirit when the language of the statute is clear and unambiguous. N.D.C.C. §1-02-05.

5 N.D.C.C. §52-06-02(4) provides an employee is disqualified from unemployment benefits when:

> [T]he individuals' 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. . .

6 While everyone agrees "due to a strike, sympathy strike" is not in question, the majority's interpretation of the provision reads out the words "strike" and "sympathy strike" from the plain language of the statute. By concluding a "claimant's work stoppage dispute of any kind" means the claimant must have initiated the work stoppage, the majority is re-stating the definition of a strike.

"Strike" is already in the statute, and the statute should not be read such that the subsequent clause is superfluous. Each word in a statute is presumed to have meaning, N.D.C.C. §1-02-38(2), yet the majority's interpretation disregards the first part of the disqualification provision. Hobach v. City of Minot, 2012 ND 117, ¶ 14, 817 N.W.2d 340.

7 The majority's interpretation of the statute essentially adds in the word "initiated" after "claimant" and before "work stoppage." If the legislature had intended to do so, it would have.

8 The majority's interpretation also reads out the phrase "dispute of any kind." The full phrase at issue is "claimant's work stoppage **dispute**." If the legislature intended to disqualify from benefits only employees who **initiated** a work stoppage, then it would have no reason to include the far broader term "dispute" in this phrase. A lockout is a "work stoppage dispute" between a union and employer, and such a dispute results in claimants not working.

9 While the majority is correct that the issue in Robberstad was whether a lockout was a labor dispute (Opinion at ¶ 19), they disregard the Robberstad court's analysis—many state statutes excluded lockouts by express reference, and those states that did not have an express provision were interpreted broadly to provide lockouts **disqualified** applicants from benefits. Robberstad v. Dir., N.D. Emp't Sec. Bureau, Burleigh County Civil Case No, 28570 (1980) at 2-3.

10 While both the majority and the dissent note the legislature does not engage in idle acts, N.D.C.C. §31-11-05(23), it is significant that following Robberstad,

where a lockout excluded an applicant from receiving unemployment, the legislature did not add any statutory language addressing lockouts. Instead, it made the disqualification language broader by adding: "strike, sympathy strike or claimant's" as well as "dispute of any kind." The legislature acted by expanding the group of people disqualified from receiving unemployment, not narrowing it.

11 The Robberstad court specifically **rejected** North Dakota's adoption of a "volitional test" asking whether claimants are unemployed through some voluntary conduct on their part. Id. at 3. The majority's suggestion that the work stoppage be **initiated** by claimants tacitly adopts such a volitional test.

12 The majority concluded ACS and Job Service's statutory construction reads "a claimant's" out of the statute. Opinion at ¶ 14. To the contrary, ACS and Job Service's construction provides meaning to each word. The statute makes clear that when claimants are no longer working—whether by a strike, sympathy strike, or other work stoppage dispute, they are not entitled to benefits. Claimants stopped performing work as a result of a "work stoppage dispute," and as a result, are not entitled to receive unemployment.

13 The Court may not disregard the words "strike," "sympathy strike," and "dispute of any kind" to reach a contrary conclusion. The majority's opinion takes away meaning to all three phrases, effectively legislating a new, narrower law.

III. EVEN IF THE LANGUAGE IS AMBIGUOUS, LEGISLATIVE INTENT SUPPORTS AFFIRMANCE

14 Chief Justice VandeWalle concluded that while he believes the language of the statute is ambiguous, "[t]he legislative history of the amendments to the statute is no less ambiguous as illustrated by the majority opinion and Justice Sandstrom's dissenting opinion." Opinion at ¶ 71. While select excerpts of the legislative testimony can support either position, the intent of the legislation requires affirmance of the district court's order.

15 If the legislature intended to allow union employees to recover unemployment benefits in the case of lockouts, they could have done so by changing the language to "any other claimant **initiated** work stoppage." Or, as in other states, the Legislature could have expressly carved out "lockouts." They did not do so.

16 Significantly, the majority opinion disregards that the 1981 amendment replaced "stoppage of work" with "strike, sympathy strike, or claimant's work stoppage dispute of any kind." The 1981 amendment added **more** ways an individual could be disqualified from benefits rather than broadening benefit availability.

17 Justice Sandstrom's dissent notes the starting place for determining the intention of legislation is considering "[t]he object sought to be attained." N.D.C.C. §1-02-39(1). All parties agree the history of the statute reflects a purpose to "preclude unemployment benefits to those in labor disputes even if the

work did not completely stop." Opinion at ¶ 54. The 1981 legislation attempted to remedy a situation created by the 1980 Amoco Oil union employees' strike. Because Amoco retained replacement workers, union members were awarded unemployment since work continued. Amoco Oil Co. v. Job Serv. North Dakota, 311 N.W.2d 558, 559 (N.D. 1981). The legislation was subsequently amended to preclude such non-working union employees from receiving benefits when a facility kept running. Hearing on S.B. 2354 Before the Senate Industry, Business & Labor Comm'n, 47th N.D. Legis. Sess. (Feb. 2, 1981). Viewed in the context in which the amendment was proposed, "claimant's work stoppage dispute" must be interpreted to mean that where the company is still operating, whether by lockout or employee strike, union employees are not entitled to unemployment benefits. The purpose of the amendment was not to make unemployment benefits easier to get, which is what the majority opinion has wrongly concluded.

18 Likewise, the majority's view of the statute ignores the interpretation of the agency charged with enforcement and interpretation. The majority cited legislative history from 1981 session, including written testimony from Job Service Deputy Executive Director Mike Diesz providing Job Service's interpretation of the final form of the legislation to the House Industry Business and Labor Committee. Opinion at ¶ 22. The majority recognized that Job Service understood the purpose of the proposed amendment was to address situations such as Amoco, where employees participating in a labor dispute could collect benefits so long as there was no factory-wide work stoppage. See id. Diesz testified with

respect to such situations, "Under Senate Bill 2354 no benefits would be paid to those **involved in the dispute** until the dispute is ended." Id. (quoting hearing testimony, emphasis added). Diesz's testimony reflects that the purpose of the bill was to narrow the ability of claimants involved in a labor dispute from collecting benefits, not broaden it. Job Service's testimony supports that the legislation applied to both strikes and lockouts.

19 Finally, as Justice Sandstrom notes, the majority relies upon an exchange at the end of a Senate Committee hearing that is not contained in the committee minutes. The committee minutes, on the other hand, all reflect "that the legislation was intended to further **restrict** the ability of employees to receive unemployment benefits while in a work stoppage dispute even if some work continued at the plant . . . ." Opinion at ¶ 58. Because the legislature intended to further restrict the ability to receive unemployment benefits, this Court should not render a contrary opinion expanding benefit availability.

IV. THE MAJORITY'S INTERPRETATION DOES NOT FOLLOW NORTH DAKOTA'S POLICY OF REMAINING NEUTRAL IN LABOR DISPUTES

20 North Dakota has subscribed to the "general policy of neutrality by the state in labor disputes." Robberstad, at 3. Significantly, the plain language of the statute reads: "dispute of any kind **which exists because of a labor dispute**." N.D.C.C. §52-06-02(4). The majority's opinion assumes that only a claimant "initiated" work stoppage dispute would disqualify a claimant from benefits. This focus on the fact that a lockout is not "claimant initiated" fails to follow the policy

of neutrality **and** specifically disregards Supreme Court authority in Ohio Bureau of Emp't Servs. v. Hodory, 43 U.S. 471, 483 (1977).

21 Other courts applying disqualification statutes have interpreted the phrase "labor dispute" to encompass lockouts. See Abas v. Bd. of Review, Nev., 2009 WL 3191419 at 1-2 and cases cited in ACS's Brief at 16-18. States that have allowed locked-out employees to receive benefits have done so because of unequivocal statutory language providing for eligibility. See ACS Brief at 18-19.

V. EJUSDEM GENERIS DOES NOT AID THE COURT HERE

22 A majority of the Court, albeit not the majority opinion, concluded **ejusdem generis** does not apply here. Justice Crothers concluded that **ejusdem generis** analysis "is at best unnecessary and at worst incorrect." Opinion at ¶ 33. Justices Sandstrom and VandeWalle find it does not apply. **Ejusdem generis** is applied "in discerning the intent of legislation." Here, there is no need to apply **ejusdem generis**, as the intent of the legislation was clear—to preclude employees participating in a labor dispute from receiving unemployment benefits, even if the plant was still operating. Even if **ejusdem generis** were helpful in ascertaining legislative intent, as Justice Sandstrom writes, the canon applies when a "drafter has tacked on a catchall phrase at the end of an enumeration of specifics . . . . But here, a catchall phrase was not tacked on. Rather, additional specifics were added to pre-existing language." Opinion at ¶ 67.

CONCLUSION

23 For these reasons, ACS requests that this Court reconsider its Opinion and make a final disposition of affirmance without re-argument, or restore the case to the calendar for re-argument or re-submission.

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

By: _____
Paul J. Zech, N.D. Bar No: 04929

Dated: March 12, 2013

220 South Sixth Street, Suite 2200
Minneapolis, Minnesota 55402
Telephone: (612) 339-6321
Fax: (612) 338-0535
E-Mail: pzech@felhaber.com

ATTORNEYS FOR APPELLEE
AMERICAN CRYSTAL SUGAR COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2013, I e-mailed a true and correct copy of the following:

APPELLEE AMERICAN CRYSTAL SUGAR COMPANY'S PETITION FOR REHEARING

to the following:

Michael Pitcher
Assistant Attorney General
Office of Attorney General
500 North Ninth Street
Bismarck, ND 58501-4509
mtpitcher@nd.gov

Daniel E. Phillips
Solberg Stewart Miller & Tjon
P.O. Box 1897
1129 Fifth Avenue South
Fargo, ND 58107-1897
dphillips@solberglaw.com

Paul J. Zech