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MILWAUKEE BOILER MANUFACTURING CO.,

Plaintiff,

DIRECTIONS FOR JUDGMENT

vs.

DEPARTMENT OF INDUSTRY, LABOR AND  
HUMAN RELATIONS, ALEKSANDRS ABOLINS,  
EDGAR H. BAETJE, IRVIN BRUMFIELD, JR.,  
WALLACE CASTEL, WALTER CHEPECK, et al,

Defendants.

Case No. 135-318

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BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE

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This is an action to review the decision of the Department of Industry, Labor and Human Relations (hereinafter department) affirming an appeal tribunal decision ruling that defendant-employees were entitled to unemployment compensation.

Defendants participated in a strike from March 22 until July 19, 1971. A letter was then sent to their employer announcing their unconditional readiness to report to work. The employer ordered four of the strikers to return to work but said that there was no work available for defendants and that they would be called as the need arose.

Defendants filed for unemployment compensation during subsequent weeks. The plaintiff-employer's response was that they had been replaced and were not entitled to re-employment at that time. From the department's finding that defendants were entitled to unemployment compensation, the plaintiff-employer brings this appeal.

STATUTES INVOLVED

"108.02(18) Eligibility. An employee shall be deemed 'eligible' for benefits for any given week of his unemployment unless he is disqualified by a specific provision of this Chapter from receiving benefits for such week of unemployment, and shall be deemed 'ineligible' for any week to which such a disqualification applies."

"108.02(21) provides:

"UNDEFINED TERMS. Any word or phrase used in this chapter and not specifically defined herein shall be interpreted in accordance with the common and approved usage thereof and in accordance with other accepted rules of statutory construction.

No legislative enactment shall control the meaning of interpretation of any such word or phrase, unless such enactment specifically refers to this chapter or is specifically referred to in this chapter."

"108.04(10) An employee who has left (or partially or totally lost) his employment with an employing unit because of a strike or other bona fide labor dispute shall not be eligible for benefits from such (or any previous) employer's account for any week in which such strike or other bona fide labor dispute is in active progress in the establishment in which he is or was employed."

"111.02 DEFINITIONS. When used in this subchapter'

"111.02(3) The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives."

The issue in this case is whether the employees in question were disqualified from receiving unemployment compensation after the strike ended.

We can find no reason in law to overrule either the findings or the order of the department allowing benefits.

Both parties agree that the strike, which caused defendants' absence until July 19, 1971, was ended on that date. The department ruled that thereafter the employees' absence was not subject to disqualification under 108.04(1).

Evidence was given by the plaintiff that a labor dispute continued after July 19, 1971, but there was apparently no evidence that indicated how the alleged continuation of the claimed dispute caused the further unemployment of defendants.

The department chose to believe defendants' evidence that there was no substantial continuation of the dispute. Plaintiff's arguments, based on the definition of "labor dispute" contained in sec. 111.02(8), are not relevant to the definition of that term set forth in sec. 108.04(10) as defined by sec. 108.02(21). Even if definitions from 111.02 were relevant, plaintiff offers no evidence that the alleged continuation of the dispute caused the unemployment. On the contrary, plaintiff continued to operate his business, apparently as usual, with a working force comprised of the non-striking employees, replacement workers, and the four rehired strikers.

Plaintiff's second argument, grounded on the premises that since he was willing to keep defendants on a waiting list they are thus ineligible for unemployment compensation, is without support in the law.

The 1961 Rice Lake Creamery case cited by the plaintiff applies only until there is a determination that the active progress of the dispute has ended. That occurred here on July 19, 1971. Actually, the Rice Lake Creamery case supports the department's position in this review as evidenced by the following quotation from that case:

"In the case of replacement of striking employees with other workers, when there is no affirmative action on the part of the employer to discharge any particular striker, it would seem that discharge or termination of the employee status of the strikers for the purpose of unemployment compensation should not and cannot be determined until the active progress of the dispute had ended. Then, those striking employees offering to return to work, but not accepted by the employer, become eligible for unemployment benefits on the theory that at that time they are discharged, their employee status terminated and, consequently, their unemployment from actual work or service is then no longer attributable to the strike."

Rice Lake Creamery Co. v. Industrial Comm., 15 Wis. 2d 177 (1961), 186. (Emphasis added)

NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) is inapplicable also. The Supreme Court in that case determined that it was an unfair labor practice for the employer not to rehire when he had received no indication that employees were not willing to wait.

The present case concerns unemployment compensation rather than a labor violation, and plaintiff-employer received notice of employees' giving up their right to reinstatement when he received notice of their claims for unemployment compensation.

Employers who replace striking employees have customarily been required to contribute to unemployment compensation funds at the termination of a dispute. The plaintiff concedes in its brief that if the offer of the employees to return is not accepted, they become eligible for unemployment compensation.

The plaintiff, however, argues that since defendants were told they might be rehired in the future, they can never become eligible for unemployment compensation.

This rationale would make the right to re-employment after a strike a liability rather than a benefit to strikers. Also, it would be contrary to the statutory purpose of prohibiting retaliatory discharges. An employer could replace all his employees during a strike, and, by promising to re-employ them as needed, could effectively deprive them of any unemployment compensation.

This section of the National Labor Relations Act has never been so construed, and the employer's arguments are insufficient to support such an onerous construction. Employees who are laid off work are generally entitled to unemployment compensation, and plaintiff has alleged no adequate reason showing this case to be within any exception.

The findings and decision of the department are therefore affirmed.

Counsel for the defendant may prepare a proper form of judgment confirming the findings and order of the department. A copy of the proposed judgment should be sent to counsel for the plaintiff before submission to the Court for signature.

Dated February 14, 1973.

BY THE COURT:

/s/Richard W. Bardwell  
Circuit Judge