

UNEMPLOYMENT COMPENSATION COMMISSION OF VIRGINIA

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Decision of Commissioner

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In the Matter of

ROBERT A. BROWNING, Claimant,
[REDACTED]
Claim #6.

WISE CONTRACTING COMPANY, INC.,
Employer.

Appeal from Examiner

Date of Appeal: November 28, 1947

Date of Hearing: December 8, 1947

Decision No.: 339 - C

Date of Decision: April 6, 1948

Place: Richmond, Virginia

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This is an appeal filed by the claimant from the decision (No. D-2290; A. E.-1164) of the Examiner, dated November 24, 1947.

THE ISSUE

Whether or not the claimant failed to apply for available, suitable work as directed by the Employment Service is the issue in this case.

FINDINGS OF FACT

On September 9, 1947, the claimant filed for unemployment compensation benefits. He had duly registered for work at the office of the Virginia State Employment Service. He was registered as a "Carpenter 1", which is a skilled classification. The registration record shows that his work experience over a period of eighteen years has been that of a general carpenter, and that during that time he had done very little finishing work. His separation report, dated September 11, 1947, reveals that he was last employed by Wise Contracting Company at Ashland, Virginia, and was separated from that employment on account of the fact that he had failed to report for work over a two weeks period due to illness. His last day of work was August 8, 1947. His wage scale while working on this last job was \$1.65 per hour. The prevailing wage for skilled carpenters in the Richmond area at the time of the referral was \$1.65 per hour in accordance with an agreement between contractors and the Union to which the claimant belongs. This agreement was effective July 1, 1947.

On October 27, 1947, the claimant was directed to apply for a carpenter's job at a wage scale of \$1.65 per hour. Rose & Lafoon, Richmond real estate developers, had filed a requisition with the Employment Service for carpenters of the grade to which the claimant had been classified, and it is stipulated in the record that this requisition was for carpenters to be employed by P. J. Peterson, a contractor, then engaged in building houses for Rose & Lafoon.

Peterson operated an open shop business. He did not have a closed shop agreement with the United Brotherhood of Carpenters and Joiners of America, of which union the claimant was a member. Peterson had once had a contract with this union but the contract had expired about eighteen months or two years prior to the referral, and he refused to enter into a new contract. Peterson, therefore, was willing to hire carpenters without regard to union status, and he was operating his business on that basis.

At the time of the referral of the claimant to this job in response to the requisition on file, it was made known to the claimant that Peterson was operating an open shop, but that the job would pay \$1.65 per hour. Mr. Browning, the claimant, refused to contact Peterson and make application for the job to which he had been referred. In his testimony at the hearing on appeal before the Examiner he was asked the following questions to which he replied as shown:

"Q. Mr. Browning, you appealed from the decision of the Deputy which disqualified you from October 27, 1947, through November 30, 1947, and reduced the total amount of potential benefits by five times the weekly benefit amount. Will you state the reason for your appeal and why you think this disqualification should not be imposed?

"A. The first reason and the only reason is I can't work on a non-union job without being fined, blackballed, insurance taken away and put out of the lodge. That is their law. Another reason is I have to have a ground job. I can't climb like I used to. I worked at Camp Lee, Bellwood, McGruder, Dupont and if they needed men they sent for me. The other men climbed the ladder and I cut it and it fits good. I am a ground man.

"Q. You speak of the law. Do you mean the law of your union?

"A. Yes, they will not allow me to work on a non-union job.

"Q. What is your age?

"A. 63 last June.

"Q. You state you can't climb. Why can't you?

"A. I am blind in this eye. I have bifocus and I can't step up a ladder. Move your hand. I can't see nothing move. At a distance I can see something.

"Q. This job that you were referred to at Rose & Lafoon at \$1.65 an hour, your main reason for refusing the referral was it was not a union job. Is that correct?

"A. That is the only one. Absolutely."

In his testimony before the Commissioner on appeal from the decision of the Examiner, he was asked the following questions to which he responded as shown:

"Q. Are you the claimant here before the Commissioner?

"A. Yes.

"Q. Did you make application for unemployment insurance, and if so, can you tell me approximately when?

"A. I have it on the card here. September 9, 1947.

"Q. Were you at any time disqualified?

"A. Yes. I drew \$45.00 and then they told me they disqualified me for five weeks.

"Q. What was the reason?

"A. They wanted me to take a non-union job. I don't know who it was from. I told them I couldn't take it.

"Q. Did you check up on the person that they referred you to?

"A. To tell you the truth, I didn't pay any attention to it. I wasn't interested in taking it and I don't remember who the name was. Peterson I believe, but I couldn't swear to it.

"Q. How long did they disqualify you?

"A. Five weeks.

"Q. Did the Interviewer tell you that it was a non-union job?

"A. Yes.

"Q. Why did you refuse at that point to take the job?

"A. Well, the reason why, I would be blackballed and probably fined by my lodge.

"Q. Would they do anything else?

"A. I don't know. I wasn't taking no chances."

The Union to which the claimant belongs has adopted a constitution and by-laws, which, among other provisions, contains a provision (Section 8, under heading "Fines and Penalties") as follows:

"Any member who works on a non-union job shall be fined, upon conviction, not less than ten dollars (\$10.00), or expelled."

This provision is found in the constitution and by-laws of the Local Union No. 388, having jurisdiction in Richmond and vicinity.

Members of the Union are entitled to certain health, accident and death benefits. When a member is expelled he forfeits his rights to such benefits.

Since Peterson refused some eighteen months or two years ago to execute a closed shop agreement with the Union, it is contended by representatives of the Union who testified before the Commissioner that a labor dispute exists between Peterson and the Union. The Commissioner finds that there was no labor dispute existing between Peterson and the Union at the time the claimant was referred to a job with Peterson. The Commissioner finds further that the claimant refused to apply for the job to which he was referred solely because it was a non-union or open shop job.

The Deputy disqualified the claimant for five consecutive weeks on the ground that he had refused to apply for suitable work as directed by the Employment Service. This decision of the Deputy was affirmed by the Examiner acting as an appeal tribunal.

OPINION

Counsel for the claimant insists that the claimant was justified in refusing to apply for the job on the ground that the work was not suitable. It is stated in the brief filed by counsel that -

"Had claimant accepted the referred employment, he would have lost his membership in the Brotherhood of Carpenters and the benefits he had accumulated in the union, because:

1. He would have accepted employment on a non-union job;
2. He would have accepted employment at a wage rate lower than the union wage rate; and,
3. He would have been required to work for an employer with whom there existed an actual labor dispute, although the claimant did not refuse to work for this reason."

Further reference is made by counsel to the statements in the record to the effect that the claimant had defective eyes and other illness and could not climb, being limited to ground work.

On this last point, there is nothing to show that Peterson would have failed to recognize these physical impairments and have made his assignments of

jobs accordingly. Suffice it to say here that the claimant did not refuse the referral for that reason, but solely because it was a non-union job. There is no evidence that the job would not have been suitable for this reason alone.

The job was not unsuitable because of the wage scale. The wage offered by Peterson was \$1.65, the prevailing wage. Whether or not he would have paid the scale demanded by the union for overtime is not shown nor did the claimant make any inquiry of Peterson regarding this. In fact, the claimant failed to raise that issue when he was referred to the job, and he did not fail to apply for the job for that reason. Again, it is pointed out that the claimant stated that he refused the job for no other reason than that it was a non-union job. Moreover, the job, even if it had not paid the overtime wage scale, would still have been a suitable job since it would have paid the regular wage scale demanded by the union for regular time. The wage scale was not "substantially less favorable to the individual than those prevailing for similar work in the locality." A carpenter who has been out of work from August 8th to October 27th cannot be justified in refusing to apply for a job that pays \$1.65 per hour for regular time when that is what he was paid on the last job.

It has been found as a fact that a labor dispute did not exist between Peterson and the union. There is no evidence in the record to indicate that there was a controversy existing between Peterson and his employees of any nature whatever. The only evidence in this record is that Peterson had notified the union more than a year before the claim was filed, that he would not enter into a new closed shop contract. There is nothing in the record to indicate that at the time of the refusal by the claimant to apply for a job with Peterson there were any negotiations pending between the union and Peterson. If there is, or was at the time of the referral which was refused by the claimant, a labor dispute between Peterson and the union - that is, if the circumstances as outlined, constitute a labor dispute - there is nothing in the record to indicate that the job to which Peterson was referred was "vacant due directly to a strike, lockout, or other labor dispute." Neither the claimant nor any of his witnesses claim that the particular job to which the claimant was referred was vacant due "directly" to a labor dispute. According to a statement made by Mr. J. F. Johns, President of the Richmond Building Trade Council, one of claimant's witnesses, he could not recall exactly the date when Peterson refused to make a new contract with the union, and merely stated "I'd say anywhere from a year or two years ago." Mr. Rustad, business representative for Local No. 388, to which the claimant belongs, stated that Peterson cancelled his contract "somewhere about 18 months or 2 years ago." During this period of 18 months or two years, Mr. Peterson had continued in business, employing carpenters and other labor, some of whom were members of the claimant's union. One would be required to accept the improbable in order to believe that a labor dispute existed when the claimant filed for benefits or that this claimant was referred to a job made vacant due directly to a labor dispute. No claim is made that the job is vacant because some other worker quit because of a labor dispute.

It is contended by counsel for the claimant that the refusal of members of the union to accept employment from Peterson was "as much a strike against Peterson as it would have been had the members of the union formerly been employed by him, and had left their employment in concert." Before there can be a strike there must first be the relationship of employer and employee. If, as a result of a labor dispute the employees of an employer stop work, then the employees are en-

gaged in a strike. If the employer, during a labor dispute, refuses to let his employees work, that constitutes a lockout. We have found no authority to support the view expressed by claimant's counsel. There is no evidence that a strike has ever occurred at Peterson's place of operation.

The real and only reason given by the claimant for refusing to apply for the job was because it was not a union, or closed shop, job. He justifies his action on the ground that had he accepted the job he could have been disciplined by his union and could have been expelled, thereby losing certain union benefits provided by the union to its members in certain cases. He takes the position that since it is a by-law or rule of his union that he cannot remain a member in good standing and work for a non-union employer the work was, for that reason, unsuitable.

It is provided in the Act that no work shall be deemed suitable -

"if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

Although the record reveals that members of the claimant's union actually worked for Peterson without first resigning from the union and without being fined or expelled, it would seem to be true that had claimant accepted a job from Peterson he could have been expelled or forced to surrender his membership. There is no evidence, nor is it contended by the claimant, that Peterson, as a condition precedent to employing the claimant, would have required him to resign from his union. The requirement to resign was laid down by the claimant's union. No doubt it is to the advantage of the union to adopt, maintain and enforce such a rule. These rules are instrumental in achieving and maintaining union unity. The worker, when he joins the union and subscribes to its restrictive rules and regulations, does so at his own peril, in the confident belief, no doubt, that the benefits to be derived thereby will outweigh everything else.

This Commission has heretofore taken the position that the requirement to resign from the union must be imposed by the prospective employer if the provision of the statute is to have any effect. If the employer requires an applicant for a job to resign from his union in order to be hired, then the work is not suitable and a claimant cannot be disqualified for refusing the job. That is the meaning of the statute. The work would have been suitable to a carpenter not a member of a union. It would be sanctioning a discrimination to hold that the work is unsuitable to the claimant merely because he has agreed not to work on a non-union job. We will assume that two claimants, both being carpenters of the same experience and skill, apply at the same time for unemployment compensation benefits. One belongs to a union, the other does not. Both are referred to the same employer who has two identical jobs, at the same wage scale and in every other respect equal. The employer operates an open shop. He will employ both men, his only requirement being that they render efficient service. Both claimants turn down the referral - the non-union man for no good reason at all, and the union man solely because the union he belongs to has adopted a rule whereby he will be apt to be expelled from his union if he accepts the job. Would the Commission be administering the law fairly and free from discrimination if it disqualified the non-union man and failed to

disqualify the union man? The answer appears too obvious to merit further discussion.

This point was raised in the case of Chambers vs. Owens-Ames-Kimball Company, Supreme Court of Ohio, decided May 22, 1946, and reported in C.C.H., Article 8174. In that case, the Court said:

"This Court has heretofore held that as to the right to work and to earn a living there can be no distinction between union and non-union workmen, and by the same token there can be none as to the right to receive Unemployment Compensation."

One who joins a union containing a restriction such as is contained in the by-laws of claimant's union does so voluntarily. If such claimant, as a result of such rule, refuses a job or refuses to apply for a suitable job, he thereupon becomes voluntarily unemployed. The Unemployment Compensation Act is not designed to pay benefits to those who are voluntarily out of work. In the case of Barclay White Company, et al, vs. U. C. Board of Review - Pennsylvania, reported in C. C. H. at paragraph 8160, and decided January 6, 1947, the Pennsylvania Supreme Court in considering a case in point said: "The public policy of the Commonwealth does encourage membership in labor organizations but retention of membership therein is not a surrender to the circumstances of the kind and quality which will turn voluntary unemployment into involuntary unemployment. It would do great violence to the clear and unequivocal wording of the statute to hold that a labor or any other organization can control payments of unemployment benefits to its members by merely forbidding them to work at wages less than those set by it, or with certain persons, or at certain places or under certain conditions. If eligibility under such conditions is to be added to the Act, that must be done by the Legislature, and not the Courts."

And in the same case the Court says:

"The language 'condition of being employed, the employee would be required * * to resign from * * any * * labor organization', as used in the (Pennsylvania) Act, obviously refers to a condition, in the offer of employment made by the employer, requiring the prospective employee to resign from a labor organization" - citing Chambers vs. Owens-Ames-Kimball Company, 67 N.E.(2d) 439, and Bigger vs. Unemployment Compensation Commission (Del.) 46 Atl. (2d), 137 - "Where, however, the offer of the employer is unconditional, it was not intended that the employee be eligible for compensation where he refuses the proffered position merely because of a condition imposed on him by others."

This Commission has consistently taken the position that the beneficent provisions of the Unemployment Compensation Act are available to claimants who are, without fault of their own, unemployed, and are in all respects eligible. This claimant took himself out of that category when he refused to apply for available, suitable work. He was no longer free from fault. One who refuses to apply for available, suitable work when directed to do so by the proper authority, and while a claimant for benefits, is subject to a disqualification. The decision of the Examiner will be sustained.

DECISION

For the reasons set forth herein it is the judgment of the Commission that the disqualification imposed by the Deputy, and subsequently sustained by the Examiner shall remain in full force and effect, and that benefits are denied to the claimant from October 27, 1947, through November 30, 1947.



Jno. Q. Rhodes, Jr., Commissioner.