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Jerre S. Williams

THE LABOR DISPUTE DISQUALIFICATION—A PRIMER AND SOME PROBLEMS

JERRE S. WILLIAMS*

Particularly in the last five years there has been a substantial maturing of the labor dispute disqualification of the various state unemployment compensation statutes. The unpredictable and vacillating administrative decision has given way to more authoritative court decision. In turn, the nonconforming court decision has tended to disappear as clear majority interpretations of the various questions arising under the disqualification begin to develop. Further, and perhaps most significantly, a number of states which have experimented with various nonconforming types of labor dispute disqualification provisions have tended to abandon these experiments and return to the more conventional pattern. Hence, with regard to most of the questions arising under the labor dispute disqualification, generally accepted answers are emerging—answers which do not vary across jurisdictional lines.

There has been scholarly exploration with respect to all questions in the labor dispute disqualification. The various ramifications have been evaluated in inquiring and thorough detail.[1] It now appears to be time for a primer, and the first part of this article is so designed. Yet it is highly inaccurate to state that the possibility of change in the labor dispute disqualification has disappeared. Some problems it raises continue to invade areas of sensitive concern both to employers and to employees. The second portion of this article will be directed at exploring some of those more sensitive areas.

I. The Primer

Approximately three-fourths of the states now have in effect a labor dispute disqualification provision which follows closely the original

* Professor of Law, University of Texas.

1. The single article most comprehensively and currently covering the labor dispute disqualification is Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. of Chi. L. Rev. 294 (1950). See also, Abramowitz, *"Stoppage of Work Due to a Labor Dispute" as Defined by the Unemployment Compensation Laws*, 10 Geo. Wash. L. Rev. 604 (1942); Bullitt, *Unemployment Compensation in Labor Disputes*, 25 Wash. L. Rev. 50 (1950); Feldman, *The Garden of Live Flowers: Terminating the Trade Dispute Disqualification under the California Unemployment Insurance Act*, 27 So. Cal. L. Rev. 3 (1953); Fierst and Spector, *Unemployment Compensation in Labor Disputes*, 49 Yale L.J. 461 (1940); Lesser, *Labor Disputes and Unemployment Compensation*, 55 Yale L.J. 167 (1945); Moore, *Unemployment Benefits and Labor Disputes*, 2 Lab. L.J. 414 (1951); Pribram, *Compensation for Unemployment During Industrial Disputes*, 51 Monthly Lab. Rev. 1375 (1940); Wagner, *Unemployment Benefits in Labor Disputes*, 53 Dick. L. Rev. 187 (1949); Notes, 49 Col. L. Rev. 550 (1949); 17 Ind. L.J. 250 (1942); 49 Mich. L. Rev. 886 (1951); 33 Minn. L. Rev. 758 (1949).

Social Security Board draft bill.[2] In addition, most of the other states follow the draft bill but with one significant change. This change will be discussed briefly later. A text of the draft bill, then, will serve as the theme for our primer. It is as follows:

> "Sec. 5. An individual shall be disqualified for benefits—(d) For any week with respect to which the commissioner 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: *Provided,* That this subsection shall not apply if it is shown to the satisfaction of the commissioner that—
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> (1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and
>
> (2) He does not belong to a grade or class of workers of which, immediately before commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;
>
> *Provided,* That if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment or other premises."[3]

A reading of this standard statutory provision reveals that there are ten major questions raised within its text. They are:

1. What constitutes a "stoppage of work"?
2. What constitutes a "labor dispute"?
3. What casual relationship is required by the words "unemployment due to a stoppage of work"?
4. What casual relationship is required by the words "stoppage of work which exists because of a labor dispute"?
5. What constitutes a "factory, establishment or other premises"?
6. What constitutes "participating in" a labor dispute?
7. What constitutes "financing" a labor dispute?
8. What constitutes being "directly interested" in a labor dispute?
9. What constitutes membership in "a grade or class of workers," some of whom are participating in, financing or directly interested in a labor dispute?
10. What constitute "separate branches of work which are commonly conducted as separate businesses in separate premises"?

There is one other question obviously raised by this provision, what constitutes "total or partial unemployment"? However, this question permeates the entire benefit area of the unemployment compensation law and is subject to no different treatment in the labor dispute disqualification.[3a]

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2. See the citations and classification of all the statutes in Shadur, *supra* note 1, at 295.
3. The Draft Bill was based in large measure upon the British Provision. Moore, *supra* note 1, at 414.
3a. Williams, *Eligibility for Unemployment Insurance, supra,* p. 286.

1. *What constitutes a "stoppage of work"?* Some earlier adjudications tended to establish the proposition that all that was required to have a stoppage of work was to have someone unemployed as a result of a labor dispute. This was a way of saying that stoppage of work meant the stoppage of work by the individual who was unemployed.[4] The obvious result of this interpretation was to equate stoppage of work with unemployment and by this means the stoppage of work provision was eliminated from any practical application. Almost all jurisdictions, however, have now fallen in line behind the leading case of *Lawrence Baking Co. v. Michigan Unemployment Compensation Commission.*[5] In this case the bakery employees who went on strike were replaced in a period of 15 minutes, and the employer continued normal full operation. The Michigan Supreme Court held that there was no stoppage of work; thus the labor dispute disqualification was not applicable. This holding clearly meant that the stoppage of work required by the provision must be a stoppage of the business activity at the factory or establishment rather than the unemployment of the individual.

The *Lawrence Baking Co.* rule raises the question of the percentage of curtailment of the business activity of the establishment necessary to reach the "stoppage of work" which the statute requires. Also raised is the question as to the percentage of resumption of business activity necessary for the stoppage of work to end. While various factors obviously would enter in, the courts tend to concentrate on the diminution of the activities of production in determining the question of existence of a stoppage of work.[6] The critical breaking point would seem to be about a 20 to 30 percent cut in production as being sufficient to establish a stoppage.[7]

4. The leading case in establishing this definition of "stoppage of work" was Board of Review v. Mid-Continent Petroleum Corp., 193 Okla. 36, 141 P.2d 69 (1943). This case, in view of a statutory amendment, is no longer followed in Oklahoma.

5. 306 Mich. 198, 13 N.W.2d 260 (1944). More recent leading cases in accord are Sakrison v. Pierce, 66 Ariz. 162, 185 P.2d 528 (1947); Robert S. Abbott Pub. Co. v. Annunzio, 414 Ill. 559, 112 N.E.2d 101 (1953).

6. Mountain States Tel. & Tel. Co. v. Sakrison, 71 Ariz. 219, 225 P.2d 707 (1950); Magner v. Kinney, 141 Neb. 122, 2 N.W.2d 689 (1942); Deshler Broom Factory v. Kinney, 140 Neb. 889, 2 N.W.2d 332 (1942); Ablondi v. Board of Rev., 8 N.J. Super. 71, 73 A.2d 262 (1950).

7. *Compare* for example, 12 BEN. SER. #11, 13875—Okla. A. (1949) (holding a 30% cut in production sufficient to constitute a stoppage) and BEN. SER., Report 9-25, Vt. A (Dec. 1950) (holding a 10 to 20% cut in production not sufficient to constitute a stoppage of work). See Shadur, *supra* note 1, at 310.

The above citations to administrative decisions are to the now well known Benefit Series Service on Unemployment Compensation. The difference in the format of the two citations is occasioned by the change in the system of designation of decisions in the Benefit Series. This change took place between the two decisions. The earlier system was to assign a volume number on a yearly basis and a designation by number to the monthly issues. The cases were numbered consecutively from the beginning of the publication of the Benefit Series. The change in the system of designation was to number each monthly report serially and then to number the pages within the report. Thus the

A curious hiatus is seemingly created by the universal requirement that for a stoppage of work to cease, there must be a resumption of "normal production."[8] Logically it could be argued that if a drop from 85 to 80% production would start a "stoppage of work," then a return to 85% production should end the stoppage. Yet the courts require a restoration of "normal production." This would appear to be one of those seeming inconsistencies that delight the logically minded scholar but have little practical significance. It is comparable to the rather traditional definition of "partial disability," under the workmen's compensation statutes, as being any disability less than 100%, but with the definition of "total disability" recognizing that a person does not have to be 100% disabled to be considered "totally disabled."[9] The administrators and the courts will be looking for a "substantial curtailment" of production and a return to substantially "normal production." More definiteness can hardly be expected in anything so obviously purely a question of degree.[10]

2. *What constitutes a "labor dispute"?* Only one state specifically defines the term "labor dispute" in its labor dispute disqualification statutory provision.[11] In this statute the definition of the Norris-LaGuardia Act[11a] is used. Most of the other states, while not specifically fastening upon the definition of the Norris-LaGuardia Act or definitions to be found in other social legislation, still tend to define the term in very much the same way.[12] There is little indication that differences in statutory wording have made any impact upon the holdings as to whether or not a labor dispute was in existence.[13] A few of the states instead of using the term "labor dispute" use the term "strike". Even in those states there is little indication of a difference in approach.[14] As might be expected, some have asserted that it is regrettable to use a broad definition of labor dispute, a definition taken from such social legislation as the Norris-LaGuardia Act, in the labor

Vermont report cited above is to be found in Report Number 9 (for December, 1950) at page 25.

8. Sakrison v. Pierce, 66 Ariz. 162, 185 P.2d 528 (1947); Robert S. Abbott Pub. Co. v. Annunzio, 414 Ill. 559, 112 N.E.2d 101 (1953); see, Abramowitz, *supra* note 1, at 612.

9. For a clear statement of these principles see Texas Employers' Ins. Ass'n v. Brock, 36 S.W.2d 704 (Tex. Comm. App. Sec. B, 1931). See also 2 LARSON, WORKMEN'S COMPENSATION LAW § 57.51 (1952).

10. Of course, it is always theoretically possible that such logical inconsistencies can cause trouble. See Shadur, *supra* note 1, at 318. But no substantial problem has in fact here been presented.

11. Alabama, ALA. CODE, tit. 26, § 214 (Supp. 1953).

11a. 47 STAT. 70 (1932), 29 U.S.C.A. §§ 101 *et. seq.* (1947).

12. ". . . [T]he term broadly includes any controversy concerning terms or conditions of employment or arising out of the respective interests of employer and employee." Ablondi v. Board of Rev., 8 N.J. Super. 71, 73 A.2d 262, 264 (1950). See Fierst and Spector, *supra* note 1, at 473.

13. See Note, 49 COL. L. REV. 550 (1949).

14. Peterson, *Unemployment Insurance in Colorado—Eligibility and Disqualification*, 25 ROCKY MT. L. REV. 180, 211 (1953); Note, 49 COL. L. REV. 550 (1949).

dispute disqualification provision.[15] It is true that the result of the use of the broad definitions here is a tendency to narrow benefits to employees, whereas, the purpose of those definitions when they were drafted in broad terms was to protect employees. But these fears would appear to be largely unjustified. In the first place there is little demonstration that the breadth of the definition in the labor dispute disqualification has had any substantial impact. Secondly, it may properly be stressed that the use of the term "labor dispute" by a legislature when legislative definitions of the very same term were already in effect, would indicate that the legislature intended that the term be interpreted in the same way. This same reasoning applies also in the draft bill of the Social Security Board. The Board knew of these definitions when it drafted the suggested labor dispute disqualification provision without defining the term "labor dispute." If some other definition had been intended, it would seem only fair to place the burden upon the legislature to make its intent clear.

With regard to specific issues, the decisions have become substantially standardized in the last few years. Thus, a lockout is considered to be a labor dispute except in those states which specifically exclude lockouts from the application of the labor dispute disqualification.[16] The problem of the exclusion of lockouts in the definition of the term "labor dispute" will be the subject of more detailed consideration in the second portion of this article. Further, it is held that the merits of the labor controversy have no relation to the applicability of the provision.[17] This is so even though the dispute is occasioned by employer violation of law,[18] or violation of contract,[19] or because of the generally unreasonable or arbitrary nature of his position.[20] Again, there are a few states which have specific provisions with respect to the merits of the labor dispute, but absent such provisions the boards and courts stress time and again the irrelevance of such considerations. This is another matter which will be discussed in the second portion of this article. Further, the miners' "no contract—no work" policy has been almost universally held to be a labor dispute within the statutory meaning.[21] So also have jurisdictional

15. Fierst and Spector, *supra* note 1, at 473, 490; Pribram, *supra* note 1, at 1377; Casenote, 17 IND. L.J. 250 (1942) *passim.*
16. Fierst and Spector, *supra* note 1, at 479.
17. Lesser, *supra* note 1, at 169.
18. *E.g.*, Burleson v. Unemployment Comp. Bd. of Rev., 173 Pa. Super. 527, 98 A.2d 762 (1953).
19. *E.g.*, W. R. Grace & Co. v. California Empl. Comm'n, 24 Cal.2d 720, 151 P.2d 215 (1944).
20. *E.g.*, Almada v. Administrator, Unempl. Comp. Act, 137 Conn. 380, 77 A.2d 765 (1951).
21. *E.g.*, Dallas Fuel Co. v. Horne, 230 Iowa 1148, 300 N.W. 303 (1941); Hogan v. Unemployment Comp. Bd. of Rev., 169 Pa. Super. 554, 83 A.2d 386 (1951); Block Coal & Coke Co. v. United Mine Workers, 177 Tenn. 247, 148 S.W. 2d 364, 149 S.W.2d 469 (1941); Miners in Gen. Group v. Hix, 123 W.Va. 637, 17 S.E.2d 810 (1941). *Contra:* United States Coal Co. v. Unemployment Comp. Bd., 66

disputes, but with somewhat less unanimity.[22]

3. *What causal relationship is required by the words "unemployment due to a stoppage of work"?* The obvious intent of the requirement of causal relationship contained in these words is to insure that the employee who is unemployed *from* the business establishment which is now tied up in a strike, will be disqualified from unemployment compensation benefits only so long as the strike is the cause of his unemployment. Without such a causal relationship, the employee is entitled to benefits. The significant factor in finding such a lack of causal relationship is conclusive evidence that the claimant's employment has been severed. This is opposed to being simply suspended as is the usual situation of those engaging in a strike. The clearest means to demonstrate this requisite severence of the employment relationship is the obtaining by the claimant of bona fide permanent employment at some other place. If there is a bona fide intent that the new employment be permanent, the relationship with the struck enterprise is considered to be permanently severed, even though the employee soon is laid off at the new place of employment. This principle was clearly demonstrated in the leading case of *Mark Hopkins, Inc. v. California Employment Commission,*[23] a case which has become almost universally accepted. The only question is whether the new employment is in fact bona fide and intended to be permanent.[24]

The same severance of the employment relationship can also result, of course, from employer discharge of an employee. A discharge before the strike begins is relatively easily recognized as a severance. The most critical discharge situation is the case where the employer purports to fire all the employees unless they return to work by a certain time. The court holdings are almost universally to the effect that these purported discharges are not in fact a severing of the employment relationship, unless the employees so discharged, by some overt act, reveal that they accept the employer's action as a discharge.[25] Perhaps some criticism of the more extreme holdings in this

Ohio App. 329, 32 N.E.2d 763 (1940).

22. Alvarez v. Administrator, Unempl. Comp. Act, 139 Conn. 327, 93 A.2d 298 (1952) (dispute between local union and parent); Westinghouse Electric Corp. v. Unemployment Comp. Bd. of Rev., 165 Pa. Super. 385, 68 A.2d 393 (1949) (rival unions competing for recognition); *In re* Deep River Timber Co.'s Employees, 8 Wash.2d 179, 111 P.2d 575 (1941) (interunion rivalry leading to strike). *But cf.* Board of Review v. Hix, 126 W. Va. 538, 29 S.E.2d 618 (1944) (interunion rivalry leading to strike held not labor dispute). See Bullitt, *supra* note 1, at 69; Shadur, *supra* note 1, at 303.

23. 24 Cal.2d 744, 151 P.2d 229 (1944). *Accord,* Bergen Point Iron Works v. Board of Rev., 137 N.J.L. 685, 61 A.2d 267 (1948). See Feldman, *supra* note 1, at 11.

24. Shadur, *supra* note 1, at 315.

25. Gentile v. Director of Div. of Empl. Secur., 329 Mass. 500, 109 N.E.2d 140 (1952); Buzza v. Appeal Bd., 330 Mich. 223, 47 N.W.2d 11 (1951) (although employer had discharged employees engaged in slowdown, the disqualification was still applicable in absence of a showing others were available to take the

area is justified. A number of these cases indicate that skillful wording of such discharges by lawyers makes them look quite final to the employees who receive them but not to the company, nor to the unemployment compensation commission, nor to the courts. On the other hand, it is only realistic to recognize that many such purported discharges actually are employer's strike techniques and the employees are in fact not discharged.

In theory the employee should be just as free to sever the employment relationship by quitting as by obtaining intervening employment or by being discharged by the employer. And in theory this is the law. However, unless intervening employment is obtained, there are serious difficulties in proving a bona fide intent to quit. The courts, of course, are afraid of the employee who asserts that he has quit solely for the purpose of obtaining unemployment compensation benefits. Typically these employees have every expectation of returning to their previous employment if the labor dispute is settled to their satisfaction in the reasonably near future. The legal principle is clear and established. But the cases in which the employee succeeds in such an assertion are relatively rare.[26]

4. *What causal relationship is required by the words "a stoppage of work which exists because of a labor dispute"?* Not only must the unemployment of the claimant be caused by a stoppage of work, this stoppage of work must in turn have been caused by a labor dispute to bring into play the labor dispute disqualification. After a considerable amount of vacillation, it is now generally accepted in most jurisdictions that the requisite causal relationship between stoppage of work and labor dispute is a "but for" relationship.[27] This means that the employee is disqualified only in those cases in which he would be working "but for" the existence of the labor dispute. Thus, if a business establishment is shut down because of a strike, and while it is so shut down the season under which it normally operates ends, the labor dispute disqualification is no longer applicable. The

place of discharged employees); State *ex rel.* Employment Secur. Comm'n v. Jarrell, 231 N.C. 381, 57 S.E.2d 403 (1950) (during strike employer posted notice plant was closing indefinitely and that all employees were free to seek employment elsewhere; held, no discharge).

Sometimes employees find themselves in the rather unusual position of trying to prove that they have been discharged for misconduct during the course of a strike. The reason for such attempt on the part of an employee is that if he can in fact prove the discharge for misconduct he can become eligible for benefits after the misconduct disqualification expires. The decisions strain in every possible way to avoid finding a discharge in such cases. Bankston Creek Collieries v. Gordon, 399 Ill. 291, 77 N.E.2d 670 (1938); Board of Review v. Mid-Continent Petroleum Corp., 193 Okla. 36, 141 P.2d 69 (1943). See in general, Feldman, *supra* note 1, at 27.

26. See Deshler Broom Factory v. Kinney, 140 Neb. 889, 2 N.W.2d 332 (1942); Feldman, *supra* note 1, at 17.

27. See Shadur, *supra* note 1, at 313; Note, 49 COL. L. REV. 550, 554 (1949). *But cf.* Abramowitz, *supra* note 1, at 615; Note, 10 OHIO ST. L. J. 238, 249 (1949) (the test is "proximate cause").

strikers are entitled to compensation benefits even though the labor dispute continues.[28] This is so because the employees would now be unemployed whether or not there was a labor dispute. In a further carrying out of this principle, it is now held that a shutdown occasioned by a lack of orders, even though that lack of business was brought about by employer notification to customers of an impending shutdown because of a strike, is not a stoppage of work caused by a labor dispute. As long as the lack of orders would cause the business to be shut down regardless of a strike, the strikers are entitled to compensation benefits.[29] By applying the same reasoning, it is also held with substantial regularity today that a shutdown occasioned by some cause wholly unrelated to a labor dispute enables employees participating in a labor dispute that later arises to draw compensation benefits until the other cause is removed. For example, a company is forced to close down by mechanical failure three days before a scheduled strike. When the day of striking arrives, the strikers will be entitled to continue drawing compensation benefits until the mechanical difficulties are or could have been repaired.[30]

An unusual and significant variant of the causal relationship problem is posed by the situation in which the employer begins to close down his business a few days in advance of and in anticipation of a stoppage occasioned by a strike, or takes a period of some days in restoring production after a strike has ended. The cases now hold generally that the disqualification is applicable and benefits are not payable in these instances. Thus, in the steel industry, where the blast furnaces must be shut down a few days in advance of the strike, it is now generally held that this is a stoppage which exists "because" of a labor dispute.[31] And in those instances where it takes some time to restore production after the labor dispute ends it is held that the disqualification continues until the stoppage of work ends.[32] The courts have recognized the possibility of abuse of this principle, par-

28. 10 BEN. SER. #8, 11730—Okla. A (1946); BEN. SER., Report 12-23, Calif. A. (Mar. 1951). In Great A.&P. Tea Co. v. New Jersey Dep't of Labor, 29 N.J. Super. 26, 101 A.2d 573 (1953), during a strike of egg candlers, the employer decided to abandon the egg candling operation. On the effective date of this abandonment, the striking candlers were held eligible for benefits.

29. Gulf Atlantic Warehouse Co. v. Bennett, 36 Ala. App. 33, 51 So.2d 544 (1951). See Shadur, *supra* note 1, at 314.

30. Bryant v. Hayden Coal Co., 111 Colo. 93, 137 P.2d 417 (1943); Muncie Foundry Div. v. Review Bd., 114 Ind. App. 475, 51 N.E.2d 891 (1943); 3 BEN. SER. #1, 2423—W. Va. A (1939); 10 BEN. SER. #5, 11481—Minn. A. (1946); 10 BEN. SER. #6, 11593—Pa. R (1947). See Note, 49 COL. L. REV. 550, 555 (1949).

31. Bako v. Unemployment Comp. Bd. of Rev., 171 Pa. Super. 222, 90 A.2d 309 (1952); 12 BEN. SER. #6, 13445—Ga. A (1948); 12 BEN. SER. #6, 13450—Ill. A (1947); BEN. SER., Report, 49-35, Ala. B (Apr. 1954).

32. American Steel Foundries v. Gordon, 404 Ill. 174, 88 N.E.2d 465 (1949); Carnegie-Illinois Steel Corp. v. Review Board, 117 Ind. App. 379, 72 N.E.2d 662 (1947); Saunders v. Maryland Unempl. Comp. Bd., 188 Md. 677, 53 A.2d 579 (1947); Buzza v. Appeal Bd., 330 Mich. 223, 47 N.W.2d 11 (1951); *In re* Stevenson, 237 N.C. 528, 75 S.E.2d 520 (1953); Bako v. Unemployment Comp. Bd. of Rev., 171 Pa. Super. 222, 90 A.2d 309 (1952).

ticularly in the period taken in restoring production. They have, therefore, indicated a willingness to go into the reasonableness of the time taken in restoring production,[33] although such periods up to a month in length have been upheld.[34] New Hampshire, by statute, has limited this period for restoring production to two weeks to avoid the possibility of abuse.[35]

The marked and significant difference between the statutes of those states which do not follow the draft act and those states which do, is the omission of the requirement that there be a stoppage of work. Typical of such a statute is that of Nevada. In contrast to the wording of the draft act, the Nevada statute reads that a claimant will be disqualified for any week in which, "his total or partial unemployment is due to a labor dispute in active progress at the factory, establishment, or other premises," etc.[36] Of course, since no stoppage of work is required, no causal relationship between a work stoppage and a labor dispute is required under such a statute. Since a stoppage of work is not required, the disqualification is applicable only while there is "a labor dispute in active progress." In these states a shutdown in anticipation of a strike does not serve to disqualify the claimants until the labor dispute becomes active. By the same reasoning, the time necessary to the employer to restore production after a labor dispute has ended is a compensable time.[37]

These holdings might be taken as justifying the assumption that a statute omitting the "stoppage of work" requirement would be more liberal in granting compensation benefits by interpreting the labor dispute disqualification more narrowly. Such is not the case. The omission of the stoppage of work requirement also means that the claimants are disqualified so long as they are part of a labor dispute in active progress, even though no stoppage of work has resulted. Thus under the rule of the *Lawrence Baking Company* case, where the employees were replaced in a period of a few minutes by other workers but continued their strike activity, the result of their persistence would be continued deprivation of compensation benefits.[38] Under

33. Ablondi v. Board of Rev., 8 N.J. Super. 71, 73 A.2d 262 (1950); Chrysler Corp. v. Review Bd., 120 Ind. App. 425, 92 N.E.2d 565 (1950).

34. Carnegie-Illinois Steel Corp. v. Review Bd., 117 Ind. App. 379, 72 N.E.2d 662 (1947); Bako v. Unemployment Comp. Bd. of Rev., 171 Pa. Super. 222, 90 A.2d 309 (1952) (three weeks).

35. N.H. REV. LAWS c. 260, § 1 (4) p. 481 (1953).

36. NEV. STATS., § 5(d), p. 343 (1951). Other states using this type of statute include Alabama, California, Florida, Kentucky, Louisiana, Minnesota, Ohio, Oregon, South Carolina, Tennessee, and Wisconsin. The federal laws for the District of Columbia and Alaska also omit the stoppage of work requirement. Michigan and Pennsylvania having once had the "labor dispute in active progress" statute have now adopted the "stoppage of work" statute.

37. American Steel & Wire Co. v. Unemployment Comp. Bd. of Rev., 161 Pa. Super. 622, 56 A.2d 288 (1948) (under the earlier Pennsylvania law, see note 36 *supra*); 10 BEN. SER. #3, 11332—Ore. A(1946).

38. P.340 *supra*. The reasoning of the court is clearly based upon this distinction in the light of Michigan amendment of its statute to include the requirement of stoppage of work.

these statutes it has been held that where striking employees have been replaced and normal production has existed for a period as long as a year, the striking employees are still denied compensation benefits so long as they continue to attempt negotiation with their former employer.[39]

5. *What constitutes a "factory, establishment or other premises"?* In general, the intent of the provision concerning factory, establishment or other premises seems to be one of limiting the situs of the labor dispute to a particular plant. This is using the words to draw a geographical line.[40] However, a substantial number of states have broadened the meaning of the words by enlarging the definition of the word "establishment" to cover different factories or plants of a particular employer which are reasonably close together geographically and have a substantial amount of economic interdependence. The leading case is *Chrysler Corporation v. Smith,*[41] which held that all nine plants owned and operated by the Chrysler Corporation in and around Detroit were one "establishment" within the meaning of this provision. The test which the court used was a finding that there was "functional integrality" among the various plants. Holdings along these lines have followed in a number of other jurisdictions,[42] in spite of the fact that if carried to its logical conclusion the concept of functional integrality would eliminate whatever was meant to be accomplished by way of limitation through the "factory, establishment or other premises" clause. This is so because without "functional integrality" there would be no unemployment due to a labor dispute. So any person out of work because of a labor dispute would automatically be ineligible for benefits as being in a functionally integrated job. The validity of this broad definition of establishment is also subject to some doubt through the narrow definition of the same term which has developed under the Fair Labor Standards Act. There the Administrator has insisted upon "establishment" being interpreted as one particular business premises,[43] and his interpretation has been accepted by the courts.[44]

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39. 12 BEN. SER. #2, 13126—Calif. A (1948). See Feldman, *supra* note 1, at 39-41.

40. See the thorough discussion of this matter in Shadur, *supra* note 1, at 321, 322, including some useful comparison with the wording of the British law which seems clearly to establish the original intent that this provision apply geographically. See also, Note 49 COL. L. REV. 550, 556 (1949).

41. 297 Mich. 438, 298 N.W. 87 (1941), 36 ILL. L. REV. 581 (1942).

42. Mountain States Tel. & Tel. Co. v. Sakrison, 71 Ariz. 219, 225 P.2d 707 (1950); Matson Terminals, Inc. v. California Empl. Comm'n, 24 Cal.2d 695, 151 P.2d 202 (1944); Spielmann v. Industrial Comm'n, 236 Wis. 240, 295 N.W. 1 (1940); 11 BEN. SER. #1, 12123—Mo. A (1947); 4 BEN. SER. #3, 5361—Wash. A (1940).

43. 29 CODE FED. REGS. § 779. 3(b) (Supp. 1954).

44. A. H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945); McComb v. W. E. Wright Co., 168 F.2d 40 (6th Cir. 1948).

The functional integrality test, however, has not been carried to its logical conclusion. The challenge came in May of 1949, when the Dearborn plant of the Ford Motor Company was shut down as the result of a strike. This strike caused Ford assembly plants all over the United States to close down for lack of parts. The Ford Motor Company actively and energetically opposed the payment of unemployment compensation benefits to the employees of the various shutdown Ford assembly plants. Ford was successful only in Georgia.[45] The overwhelming majority of the states held that the laid-off employees of these various assembly plants were entitled to compensation insurance.[46] Since these employees were members of the same union as the striking employees in Detroit, and indeed the union through its bargaining in Detroit was representing all of these employees throughout the United States, they were obviously interested in the dispute and would have been disqualified if it were not for the "factory, establishment or other premises" limitation. We must conclude therefore that the limitation of this section is a combination of the functional integrality and the geographical tests. Functional integrality will be found only in those cases where there is not only significant economic interdependence but also relatively close physical proximity.

The justification for the establishment limitation is subject to substantial doubt. After the loss of its cases, the Ford Motor Company made a concerted drive to have the legislatures of the various states amend their compensation statutes so that employees laid off under those circumstances would be disqualified from obtaining compensation benefits. The company's complete failure to obtain such amendment should not foreclose consideration of it. This is one of the matters which will be considered in more detail in the second portion of this article.

6. *What constitutes "participating in" a labor dispute?* The more obvious aspects of participation in a strike need hardly be detailed. Any employee who actively walks off his job as part of the strike is clearly participating. So also is the employee who takes part in such activities as picketing. The question concerning participation which has resulted in the most litigation has been the question posed when an employee not otherwise a member of the striking group refuses to cross the picket line which has been set up by strikers. The holdings

45. Ford Motor Co. v. Abercrombie, 207 Ga. 464, 62 S.E.2d 209 (1950).

46. Ford Motor Co. v. Kentucky Unempl. Comp. Comm'n, 243 S.W.2d 657 (Ky. 1951); Ford Motor Co. v. Division of Empl. Secur., 326 Mass. 757, 96 N.E.2d 859 (1951); Nordling v. Ford Motor Co., 231 Minn. 68, 42 N.W.2d 576 (1950); Ford Motor Co. v. New Jersey Dep't of Lab. & Ind., 5 N.J. 494, 76 A.2d 256 (1950); Machcinski v. Ford Motor Co., 277 App. Div. 634, 102 N.Y.S.2d 208 (1951); Ford Motor Co. v. Unemployment Comp. Bd. of Rev., 168 Pa. Super. 446, 79 A.2d 121 (1951); Ford Motor Co. v. Unemployment Comp. Comm'n, 191 Va. 812, 63 S.E.2d 28 (1951).

are now almost unanimously to the effect that refusal to cross the picket line for any reason other than fear of physical violence makes the person who refuses to cross the picket line a participant in the labor dispute.[47] The rationale is the obvious belief that refusal to cross a picket line is a taking of sides and an act of giving aid to those picketing.[48]

This would hardly be subject to doubt or criticism if it were not for another provision of the unemployment compensation laws. The Federal Social Security Law requires that every state unemployment compensation law provide that benefits shall not be denied to a claimant for refusing to accept new work under any of the following conditions: "(A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) 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."[49] The result of this provision is that any unemployed person, not unemployed *from* the establishment which is engaged in the labor dispute, is free to refuse to cross a picket line and take a job as a strike breaker. Yet the employee of the company having the dispute who refuses to cross the picket line is disqualified. The interaction or relationship of these two statutory provisions is worthy of more detailed attention, and is therefore discussed later.

7. *What constitutes "financing" a labor dispute?* This provision has relatively little significance in the various statutes. Specific payment of contributions or strike benefits to the striking union would establish a financing. The litigation has been largely concerned with whether mere payment of regular union dues is sufficient to establish a financing in those cases where only a part of the union is on strike and other members of the union are out of work because the plant has shut down. The rule generally accepted today is that the pay-

47. The cases establishing this proposition are far too numerous for an attempt at exhaustive citation. See Fierst and Spector, *supra* note 1, at 486, 487; Shadur, *supra* note 1, at 325; Note, 49 COL. L. REV. 550, 559 (1949).

In Brown v. Maryland Unempl. Com. Bd., 189 Md. 233, 55 A.2d 696 (1947), the claimant was held to be disqualified for refusal to cross the picket line although it was shown that only one or two days' work would have been available to him if he had crossed the line. Fierst and Spector, *supra* note 1, at 487, points to a case where a non-union employee who was opposed to the strike joined the picket line soley to get the free sandwiches the union was supplying the pickets. He was disqualified as a participant.

48. See Meyer v. Industrial Comm'n of Missouri, 240 Mo. App. 1022, 223 S.W.2d 835, 838 (1949).

49. 26 U.S.C.A. § 1603 (a) (5) (Supp. 1954).

ment of union dues alone is not enough to establish a financing of a labor dispute.[50]

8. *What constitutes being "directly interested" in a labor dispute?* Although a claimant is not participating in a dispute and not financing a dispute, he still may be disqualified because he is directly interested in the dispute which caused the stoppage of work. Direct interest is demonstrated in those cases where the employee while not actually on strike serves to benefit from a strike settlement by obtaining, most obviously, a raise in wages. The purpose of the provision as it is applied to this kind of case is to prohibit the "key man" strike. If it were not for this provision, a union could pull sufficient key men off the job to cause a shutdown of the plant. Then all other employees thrown out of work, although their interest in the strike was as great as the few strikers, would be entitled to compensation benefits. It is felt that this is too close to allowing strike benefits to be paid.

But the holdings have gone substantially beyond this situation. For example, it is now well established that an employee will be found to be directly interested in the labor dispute even though he bitterly opposes it, and if the strikers are successful he will be injured rather than benefitted by the settlement. Thus even in a case where a minority union is engaged in an organizational strike, complete with violent picketing which keeps the majority union members from crossing the picket line to go to work, the majority union members have been refused unemployment compensation benefits.[51] Or an employee barred from work by a plant shutdown resulting from a recognition dispute is barred from compensation benefits even though he is bitterly opposed to the union. He is held to be "directly interested."[52] Although these holdings may sound extreme, they are well accepted and established today.[53] Assuming that the concept of direct interest is justified, it is not surprising that the commissioners and courts would be unwilling to embark into the morass of trying to determine whether or not the interest was beneficial.

Finally, the rule is not clear, and the cases are divided, concerning the applicability of the "directly interested" provision to employees

50. Outboard, Marine & Mfg. Co. v. Gordon, 403 Ill. 523, 87 N.E.2d 610 (1949). See Shadur, *supra* note 1, at 328; Note, 49 COL. L. REV. 550, 561 (1949). *But cf.* Note, 33 MINN. L. REV. 758, 761, 762 (1949).

51. Badgett v. Department of Ind. Rels., 243 Ala. 538, 10 So.2d 880 (1942).

52. Nobes v. Michigan Unempl. Comm'n, 313 Mich. 472, 21 N.W.2d 820 (1946); *cf.* Martineau v. Director of Div. of Empl. Secur., 329 Mass. 44, 106 N.E.2d 420 (1952).

Probably the most extreme holding is Local No. 658 v. Brown Shoe Co., 403 Ill. 484, 87 N.E.2d 625 (1949). In this case an entire shoe factory shut down because of a strike in one small department. The court held all employees put out of work by the shutdown to be "directly interested." Thus in one fell swoop were all the exemptions contained in the statute eliminated.

53. See Fierst and Spector, *supra* note 1, at 487; Shadur, *supra* note 1, at 329; Note, 49 COL. L. REV. 550, 561 (1949).

whose wages or working conditions are not involved in the labor dispute but will undoubtedly be readjusted in line with the settlement of the dispute. These are the cases in which the employer must grant concessions to employees not in the bargaining unit for the purpose of avoiding disrupting disparities in working conditions in the various aspects of the enterprise.[54]

9. *What constitutes membership in a "grade or class of workers," some of whom are participating in, financing or directly interested in a labor dispute?* This is the dragnet provision of the labor dispute disqualification portion of the unemployment compensation laws. An employee is out of work because of a stoppage of work resulting from a labor dispute at the establishment where he is employed. He is not participating, he is not financing, and he stands neither to gain nor lose in any direct fashion as the result of the settlement of the dispute. Yet under this provision he is disqualified if he is found to be in the same "grade or class" of any workers who are participating in, financing or interested in the labor dispute. Some courts have interpreted this provision so broadly that they view the grade or class as being the entire plant or establishment.[55] The obvious result of such an interpretation is to eliminate all of the provisos concerning participation, financing and direct interest. Other have based the interpretation upon the bargaining unit—which, in the case of multi-plant bargaining, is an even broader interpretation.[56] The breadth of these interpretations goes beyond the purpose of the provision. The provision was meant only to accomplish an additional protection against the "key man" strike and also to avoid encouraging defection from a union during the course of a labor dispute.[57]

The breadth of the provision, however, is not fully revealed until its most unusual aspect is seen. The provision creates a broad area of guilt by association. Suppose that the production workers at an industrial establishment are in one bargaining unit and the clerical workers in another. The production workers go out on strike over an

54. General Motors Corp. v. App. Bd., 11 BEN. SER. #3, 12280—Mich. Cir. Ct. (1947) (holding such employees disqualified); *accord*, 10 BEN. SER. #2, 11270—Utah A (1946); *cf.*, Nobes v. Mich. Unempl. Comp. Comm'n, 313 Mich. 472, 21 N.W.2d 820 (1946). *Contra*: 10 BEN. SER. #10, 11842—Conn. R. (1946). See Note, 49 COL. L. REV. 550, 562 (1949).

55. Westinghouse Elect. Corp. v. Unemployment Comp. Bd. of Rev., 165 Pa. Super. 385, 68 A.2d 393 (1949); 10 BEN. SER. #8, 11700—Ind. R. (1946); 11 BEN. SER. #9, 12737—Kans. R (1948).

56. Chrysler Corp. v. Smith, 297 Mich. 438, 298 N.W. 87 (1941) (see p. 347, *supra*); Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942) (employees in four separate plants of employer all in same "grade or class" because in same bargaining unit).

The bargaining unit interpretation also has the effect of barring large numbers of unemployed workers in cases where wildcat stoppages in one small department shut down an entire plant. Brown Shoe Co. v. Gordon, 405 Ill. 384, 91 N.E.2d 381 (1950); 10 BEN. SER. #6, 11604—Va. A (1946); 10 BEN. SER. #4, 11439—W. Va. A (1946).

57. See Lesser, *supra* note 1, at 169.

alleged speed-up on the production line. This strike causes the plant to shut down and makes the clerical workers unemployed. Under these circumstances the clerical workers normally are entitled to benefits. They are not participating in the dispute, they are not financing the dispute, they do not have a direct interest in the dispute, and they would not seem to be a member of a grade or class of workers which is involved in the dispute.[58] So far so good. However, suppose that one clerical worker takes it upon himself to join in the strike by participating in the picketing. All other clerical workers are now in a grade or class of workers where there is one member of such a grade or class participating in the strike. All clerical workers are now barred from compensation benefits under the holdings.[59] This aspect alone of the grade or class provision would seem to indicate that further evaluation is necessary. This, then, is another question which will be discussed in more detail in part II.

10. *What constitute "separate branches of work which are commonly conducted as separate businesses in separate premises"?* The separate branches provision is meant to be a proviso applicable to the entire labor dispute disqualification section. A number of states so compose their statutes that it appears to be a proviso applicable only to the grade or class provision. The appearance is misleading; those states in which the proviso is so organized nevertheless treat it as applicable to the entire labor dispute disqualification section.[60]

The proviso plays a dual role, one broadening the disqualification and one narrowing it. Both roles are now well established in the decisions. The more obvious purpose of the proviso is to narrow the grade or class provision to cut off the kind of extreme cases mentioned in the discussion of that provision, at least in those instances where the business would seem to be separable into different distinct departments.[61] This is a narrowing of the disqualification. On the other hand, it has come to be used as frequently as a means of extending the disqualification. This occurs in the instance where there has not been a sufficient curtailment of production to constitute a stoppage of work throughout the entire establishment, but in the separable branch or department there has been a sufficient curtail-

58. Although sometimes the interpretations referred to in notes 55 and 56, *supra*, would group clerical employees with production employees, usually they are held to be in a different group or class unless in the same bargaining unit. See Local No. 658 v. Brown Shoe Co., 403 Ill. 484, 87 N.E.2d 625, 628 (1949).

59. *In re* Persons Employed at St. Paul & Tacoma Lumber Co., 7 Wash.2d 580, 110 P.2d 877 (1941); Abshier v. Review Bd. of Indiana Empl. Secur. Bd., 122 Ind. App. 425, 105 N.E.2d 902 (1952) (alternative holding); 9 BEN. SER. #12, 11030—Ill. R (1945); 9 BEN. SER. #11, 10975—Mass. R (1946); 10 BEN. SER. #4, 11394—N. Mex. A. (1946).

60. See Shadur, *supra* note 1, at 323 n. 124.

61. Wicklund v. Commissoner of Unempl. Comp. & Placement, 18 Wash.2d 206, 138 P.2d 876 (1943); 10 BEN. SER. #1, 11144—Mass. R. (1946); 8 BEN. SER. #10, 9961—W. Va. A. (1945).

ment. This provision, in such instances, enables the finding of a stoppage of work which in turn establishes grounds for disqualification of the striking employee in such branch or department.[62] Without the provision, there would be no stoppage of work and the striking employees would not be disqualified.

One final word by way of summary. Most of the states which do not follow the draft provision, that is, do not require the stoppage of work, nevertheless include the various provisos concerning participating in, financing and being directly interested in the labor dispute. A few do not.[63] If these provisions are not in the statute, then we have a relatively simple situation. All employees who are out of work at the establishment where the labor dispute is going on as a result of that labor dispute are barred regardless of their interest in, participation in or association with others in connection with the labor dispute. It would seem safe to conclude that most states believe that this makes the labor dispute disqualification too broad. Yet, we have seen that the grade or class proviso as interpreted comes close to accomplishing this same result indirectly. But it must be concluded that the overwhelming majority of the states believe that unemployment because of a labor dispute is alone not enough to justify disqualification from unemployment compensation benefits. This being so there will always then remain the question involved in drawing the lines to bar some employees unemployed because of labor disputes and to grant benefits to others. This discussion has been in the nature of a primer. Yet with the necessity of drawing such lines there will always be the hard problems and the hard cases. It is to some of these that we now turn our attention.

II. Some Problems

There is a surprising strength among those who have investigated the labor dispute disqualification under the Unemployment Compensation Acts in support of the idea that the best solution to the problems which arise thereunder would be to abolish the disqualification completely.[64] This could legally be done; there is nothing in the federal

62. Walgreen Co. v. Murphy, 386 Ill. 32, 53 N.E.2d 390 (1944); Caterpillar Tractor Co.v. Durkin, 380 Ill. 11, 42 N.E.2d 541 (1942); Blakely v. Review Bd. of Indiana Empl. Secur. Div., 120 Ind. App. 257, 90 N.E.2d 353 (1950).

The curious twist of Mountain States Tel. & Tel. Co. v. Sakrison, 71 Ariz. 219, 225 P.2d 707 (1950), is worth noting. There the court used a broad definition of establishment in order to find a stoppage of work. There was hardly enough stoppage in some separate telephone exchanges to find a work stoppage there. But the court found all the installations in the state to be one establishment. Lumping them all together, there was enough decrease in business to find a work stoppage.

63. Alabama, California, Delaware, Kentucky, Minnesota, Ohio, Wisconsin. New York also does not have any of the provisos, but it has an overall time limit on the disqualification.

64. See Fierst and Spector, *supra* note 1, at 489-491; Schindler, *Collective Bargaining and Unemployment Insurance Legislation*, 38 Col. L. Rev. 858

act which requires that there be a labor dispute disqualification.[65] Those who advocate the repeal of the disqualification in toto combine two basic justifications for their position. The first is that the labor dispute disqualification actually thwarts the basic purpose of the unemployment compensation laws—the giving of benefits to those who are unemployed.[66] The second justification is that even though some rational basis could be found for the disqualification, the difficulties in applying the disqualification and the seemingly inevitable broadness of its terms are such that the "game is not worth the candle."[67] As the Social Security Law nears its 20th anniversary, it is well to evaluate the law with regard to all of its parts. A provision as controversial as the labor dispute disqualification seems particularly vulnerable to a re-visiting.

The arguments which have been traditionally advanced in favor of the labor dispute disqualification are three in number: First, the statute is designed to compensate for involuntary unemployment only. The unemployment occasioned by a labor dispute is voluntary. Therefore it is contrary to the basic theory of the statute to provide compensation for such unemployment. Second, there are serious financial dangers involved in undertaking to compensate large masses of workers who go out on strike. There is no actuarial means to face up to such an unpredictable drain upon the compensation funds. Third, government should remain neutral in labor disputes. The payment of unemployment compensation benefits would violate this neutrality not only by providing a source of strike benefits to the employees, but by paying those benefits out of the taxes which the employer has paid. In addition, of course, the payment of benefits would increase the employer's taxes in most states by assessing him a relatively unfavorable experience rating which would automatically raise his tax.

Those who advocate the abolition or the substantial narrowing of the labor dispute disqualification attack the validity of these asserted justifications. They point out that no matter what protestations there are concerning the theory behind the unemployment compensation law, in fact a voluntary-involuntary rationale is not the basic theme of the statute.[68] In this assertion they appear to be justified. As has already been pointed out, there are several significant instances in

(1938); *passim;* 9 U. OF CHI. L. REV. 751, 756, (1942). But see Lesser, *supra* note 1, at 177, 179; Notes, 49 MICH. L. REV. 886, 895 (1951), 17 IND. L.J. 250, 251 (1942).

65. See Note, 10 OHIO ST. L.J. 238, 239 (1949).

66. Schindler, *supra* note 64, *passim.*

67. Fierst and Spector, *supra* note 1, at 489.

68. Bullitt, *supra* note 1, at 54; Fierst and Spector, *supra* note 1, at 464; Lesser, *supra* note 1, at 171; Shadur, *supra* note 1, at 296 n.8; Note, *Eligibility for Unemployment Benefits of Persons Involuntarily Unemployed Because of Labor Disputes,* 49 COL. L. REV. 550 (1949) *passim.*

which employees are denied compensation benefits under the labor dispute disqualification even though their unemployment is clearly involuntary. Any case involving a true lock-out is such an instance. In addition the "directly interested" employee who is not in sympathy with the strike, who stands to lose from the strike, and who clearly wishes to work if at all possible to do so, can hardly be said to be voluntarily unemployed. This same analysis is also applicable to the employee who is caught up in the "guilt by association" aspect of the grade or class provision. On the other side of the ledger, there are instances elsewhere in the unemployment compensation law where voluntary unemployment does not constitute a disqualification. The whole concept of "voluntary leaving with good cause" is such an instance.[69] Further, the provisions, already referred to, having to do with the unemployed claimant's right to refuse employment where a labor dispute exists, or where he is required to work for less than the prevailing working conditions in the locality, constitute clear instances of compensable voluntary unemployment.[70]

Yet the voluntary-involuntary rationale continues to persist, especially in court decision. It should be anachronistic to read of "voluntary" unemployment in connection with the labor dispute disqualification provision. Even less understandable is the constant continuing reference in the cases to the question of "fault."[71] This is not the question of fault going to the merits of the labor dispute but is the use of the word synonymously with voluntary unemployment.[72] It must be recognized that this is simply loose talk.

Those who advocate the abolition of the labor dispute disqualification dispose of the objection concerning the excessive drain upon the compensation funds and the supposed actuarial difficulties as simply unproved speculation. It has been suggested that there is no reason to expect any more difficulty from the drain of funds to pay benefits to strikers than to employees unemployed for other reasons.[73] Or even if there is a greater danger this is nevertheless a poor ground since unemployed persons are entitled to the benefits regardless of

69. See *e.g.* Kempfer, *Disqualification for Voluntary Leaving and Misconduct*, 55 YALE L.J. 147, 155 (1945); Teple, *Disqualification: Discharge for Misduct and Voluntary Quit*, 10 OHIO ST. L.J. 191, 198 (1949).

70. See *e.g.* Menard, *Refusal of Suitable Work*, 55 YALE L.J. 134, 138 (1945); Note, *Suitable Work Under Unemployment Compensation Statutes*, 10 OHIO ST. L.J. 232, 233 (1949). See p. 49 *supra*.

71. *E.g.* Bucko v. J. F. Quest Foundry Co., 229 Minn. 131, 38 N.W.2d 223 (1949); Board of Review v. Mid-Continent Petroleum Corp., 193 Okla. 36, 141 P.2d 69 (1943); Hogan v. Unemployment Comp. Bd. of Rev., 169 Pa. Super. 554, 83 A.2d 386 (1951); see Bullitt, *supra* note 1, at 55, 56.

72. ". . . [T]he *fault* which governs is the ultimate and final act causing the unemployment rather than any preliminary act. . . ." (in discussing the distinction between strike and lockout). Bucko v. J. F. Quest Foundry Co., 229 Minn. 131, 143, 38 N.W.2d 223, 231 (1949); see Pribram, *supra* note 1, at 1375; Wagner, *supra* note 1, at 193.

73. Lesser, *supra* note 1, at 177; Note, 49 MICH. L. REV. 886, 890 (1951); *cf.* Note, 49 COL. L. REV. 550, 551 (1949).

the reason.[74] But the "excessive drain" argument in support of the labor dispute disqualification cannot be disposed of quite so glibly. There certainly are factors present which would indicate that the drain upon the compensation funds caused by a protracted and widespread labor dispute could perhaps be enough to exhaust the fund. True, the strike as a reason for unemployment is just another reason for unemployment. But by its nature a strike creates widespread unemployment instantly, thereby constituting an immediate drain upon the compensation funds. It was estimated during one of the miners' "no contract-no work" strikes that if the state of West Virginia had paid compensation benefits to the miners the fund would have been entirely exhausted in eight weeks.[75]

No doubt it would be practical to pay compensation benefits to striking workers. The problem is not so much an actuarial problem of calculating how much money would be necessary to pay benefits in such circumstances. The problem rather is simply one of whether we want to set the tax high enough so that we can afford to pay such benefits. For this reason the actuarial analysis in and of itself should hardly control our determination except insofar as it tends to place a price upon the payment of unemployment benefits during a labor dispute. Without actually knowing precisely what that price would be, it would seem pertinent, nevertheless, to inquire into the justification for such a move to see whether it would be acceptable if a substantial increase in price (tax) were necessary.

Finally, the advocates of abolition or a substantial narrowing of the labor dispute disqualification deny that there is any reason why government should remain neutral in labor disputes.[76] And in the alternative they argue that even though government should remain neutral, the labor dispute disqualification is not an achievement of neutrality.[77] Certainly, there is some validity to these assertions. The government does not maintain a neutrality with respect to all kinds of labor disputes. And there would seem to be little justification for government to maintain a neutrality with respect to a dispute which was, for example, occasioned by an employer's refusal to abide by the law. But broader statements to the general effect that government should play an activist role with respect to all labor disputes,[78] although uttered in the name of the principle of collective bargaining, in fact deny the principle. So far at least, we have tended to view government's role in the collective bargaining process as being no

74. Lesser, *supra* note 1, at 176; *cf.* Note, 49 MICH. L. REV. 886, 889 (1951).
75. Pribram, *supra* note 1, at 1376; *cf.* Moore, *supra* note 1, at 423.
76. Lesser, *supra* note 1, at 175, 176; Schindler, *supra* note 64, at 868-872; Shadur, *supra* note 1, at 299.
77. Fierst and Spector, *supra* note 1, at 465; Lesser, *supra* note 1, at 175; Shadur, *supra* note 1, at 297, 298; *cf.* Note, 49 COL. L. REV. 550, 551 (1949).
78. *E.g.*, Fierst and Spector, *supra* note 1, at 464; Schindler, *supra* note 64, at 873, 874; 17 IND. L.J. 250 (1942).

more than establishing a relative equality of bargaining power. Then the rest is left to the parties. Any attempt to establish a plan whereby government paid or withheld compensation benefits upon a determination as to which side ought to succeed in the labor dispute would certainly establish the government in an active role concerning what are fair and just working conditions. The unemployment compensation law does not seem to be the place where such a major shift in governmental policy should take place.

The abolitionists, however, assert that the payment of compensation benefits to strikers would not be a form of control of the collective bargaining process. Simply the paying of the small benefit sums would hardly be the controlling factor in a union's determination as to whether to strike for its demands. It is stressed that the benefits paid are far short of wages.[79] Further, insofar as employers claim that they would be forced by their taxes to pay strike benefits to their striking employees, the answer is given that the economists recognize that these taxes are passed on either to the employees or to the consumers.[80] Thus, the burden is not really upon the employer. As has been stated, a union would hardly go out on strike just to get compensation benefits.[81]

True, a union hardly would go out on strike just to get compensation benefits. But this is an avoidance of the basic issue. True, the economist may be able to establish that the employer does pass on his payroll taxes. However, this economic theory is not very helpful to the employer who sees his experience rating drastically altered because of the strike which occurred at his plant. The new higher tax which he will pay may ultimately be passed on to someone else, but the employer is going to have a serious struggle accomplishing that result. And he will not like it. The reliance of some persons upon the fact that the compensation benefits are substantially below wages, and therefore can hardly be considered strike benefits, entirely overlooks the fact that while they may be somewhat inadequate, to the extent they exist they do constitute strike benefits. They do enable the union to have just that much more financial backing to its bargaining strength. To that extent such payments clearly would be to the benefit of the union over the situation that presently exists.

On a relative scale it might be that payment of these compensation benefits would place the government in a more neutral position. This would be so in those cases where the union's bargaining power needs strengthening for relative equality. But in the absolute sense this is certainly not governmental neutrality. And here it is the absolute meaning which is the overt meaning. Whether or not it is other than

79. Fierst and Spector, *supra* note 1, at 465; Shadur, *supra* note 1, at 298.
80. Schindler, *supra* note 64, at 872; Shadur, *supra* note 1, at 298.
81. Fierst and Spector, *supra* note 1, at 465.

neutral to pay compensation benefits to strikers, it gives that appearance. And in a political democracy this is enough.

For better or for worse, it probably is time we recognize that the labor dispute disqualification is here to stay. This is particularly so because the recent relatively rapid standardization of decision, and consequent increase in predictability, has tended to weaken one of the arguments of the advocates of abolition. If the provision were in fact administratively unworkable, if courts and administrative agencies were so seriously floundering that no one had any idea as to the law, then a better case for abolition would be made. But the provision is becoming relatively standardized and predictable. And insofar as its basic philosophy is concerned, it looks fair to most people. It would be hard to sell the average voter on the proposition that an employer should be taxed to build a fund to pay unemployment benefits to an employee who is out on strike for higher wages against that employer.

Let us accept, then, once and for all the proposition that in the foreseeable future the labor dispute disqualification will remain. But the fact that its basic theory is acceptable to the people does not automatically establish it as a sound provision in all particulars. There are doubtful aspects of the statute, areas where change may be acceptable and, perhaps, expected.

The format of the labor dispute disqualification is to bar from compensation benefits all those unemployed because of a stoppage of work growing out of a labor dispute at a particular business establishment. Then this sweeping disqualification is limited by the provisos concerning participation, financing, direct interest and membership in a grade or class. The obvious import of these provisos is to narrow the disqualification by allowing some who otherwise would be subject to the disqualification to be eligible for compensation benefits. In the light of this fact it would then be a curious twist for these provisos to be interpreted so broadly that they result in a breadth of the labor dispute disqualification substantially identical with that which would exist if the provisos were not part of the statute. In some jurisdictions this is exactly what has happened.

The culprit is, by and large, the grade or class provision. The extreme breadth given to the definition of grade or class as well as the guilt by association aspect have been mentioned previously.[82] The net result of an interpretation of grade or class so broad that it encompasses all of the workers at a given plant or all of the employees in a bargaining unit when the bargaining unit encompasses several plants, or one entire plant, is easily stated. Since the breadth of the labor dispute disqualification is already limited to the stoppage at the

82. See p. 351, *supra*.

factory, establishment or other premises, any interpretation of grade or class to cover all the employees at the factory, establishment or other premises has, in terms, wiped out the limiting provisos completely. No employee outside the factory or establishment would be affected by the labor dispute disqualification in any case. And the interpretation of grade or class to cover the entire factory or establishment either directly or by the breadth of the bargaining unit automatically undoes what the statutory provisos try to do. Some states have done this in spite of the fact that it obviously is not in legislative contemplation.[83]

And for the few cases which completely equate the grade or class with the factory or establishment there are a number of cases which closely approximate such an interpretation. These are the cases which lump all production workers in one grade or class even though there may be a number of bargaining units within the production group and even though the labor dispute may be limited to one small bargaining unit.[84]

A narrower interpretation of grade or class tends to equate the employee under the grade or class provision with the employee who is directly interested. Some decisions have tended to do this although by interpretation it eliminates the grade or class provision.[85] Elimination by interpretation would hardly appear to be justified. But elimination of the grade or class provision by legislative amendment is a worthwhile goal. It is hard to conceive of any case involving the payment of compensation benefits in a labor dispute situation which would not find ample protection of the labor dispute disqualification in the participating and directly interested provisions of the statute. As has already been stated, the mere failure of an employee to cross the picket line is held to be a participation. Any impact which the labor dispute or its settlement may have on a particular employee can be sufficient to involve him as being directly interested. Even those employees who oppose the strike and stand to lose as a result thereof are barred from benefits as being directly interested. Since a class as broad as production workers, as a practical matter, eliminates all the provisos, we must conclude that the legislature had a more narrow definition in mind.

Perhaps the kind of case where the grade or class proviso was meant to apply, then, would be the kind where the shutting down of one department in a bargaining dispute would require the shutting down of the other departments because the production of the struck department was necessary to production elsewhere. Yet here, as long as the production workers in the other departments were not

83. See cases cited in notes 55 and 56, *supra*.
84. See note 58, *supra*.
85. See Note, 49 COL. L. REV. 550, 564, 565 (1949).

participating in any way in the dispute and did not stand to gain or lose in any way as a result of the dispute and were not financing the dispute, there would hardly seem to be any justification for disqualifying them from unemployment compensation benefits. True, to pay them benefits relieves some pressure upon the striking bargaining unit because the strikers have not thrown large numbers of employees out of work without compensation benefits. However, there is no indication that the legislatures had this last consideration in mind in the grade or class provision. They were concerned about the "key man" strike,[86] but the directly interested provision would seem to alleviate this concern. A first step for serious consideration could well be the elimination of the grade or class provision. This would enable a person unemployed as the result of a strike to obtain compensation benefits unless he was participating in, financing or directly interested in a labor dispute. This appears to be an adequate scope for the disqualification.[87]

Somewhat parenthetically, it should be noted that there is another way of getting rid of the difficulty involved in applying the provisos to the labor dispute disqualification. One state, New York, avoids the intricate questions involved in participation, interest and grade or class by simply disqualifying all persons unemployed because of a labor dispute, but with an alleviation of the hardship of a broad disqualification by limiting the period of disqualification to seven weeks.[88] The present trend is against the utilization of such a technique. Several other states had similar provisions in the past and have eliminated them.[89] Yet the advisory council on Social Security to the Senate Finance Committee, in 1948, recommended that a federal standard on disqualifications be adopted prohibiting a labor dispute disqualification for more than six weeks.[90] The only exception to this would have been a general provision which would have allowed a longer disqualification upon a showing of fraud or misrepresentation on the part of the claimant.

The time limit approach is not logical. But it may well be intensely practical. A broad disqualification eliminates all complicated questions concerning the narrowing provisos of the labor dispute disqualification. At the same time the overall time limit avoids the harshness of a permanent broad disqualification. Obviously the administrative and legal burden is lessened to a tremendous extent.

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86. See note 57, *supra*.
87. See Note, 49 COL. L. REV. 550, 566; *cf.* Shadur, *supra* note 1, at 336.
88. N.Y. LABOR LAW § 592 (1). Rhode Island also has a specific overall time limitation to the labor dispute disqualification. There the limit is eight weeks. Yet the Rhode Island statute also contains the limiting provisos.
89. Alaska, Louisiana, Pennsylvania, and Tennessee. See Shadur, *supra* note 1, at 317 n. 100.
90. *Report of the Advisory Council on Social Security to the Senate Finance Committee*, SEN. DOC. No. 206, 80th Cong., 2d Sess. 39 (1948).

Yet, regrettably, the provision has not found favor. At least one state supreme court eliminated the provision by interpretation[91] before the legislature got around to its repeal. Its lack of favor must be grounded upon the obvious fact that a difficult labor dispute lasting over seven weeks, a dispute in which the employer's position would be a highly sympathetic one, would tend to destroy public and legislative sympathy with the provision. The same considerations that make it doubtful that any legislature would accept repeal of the entire disqualification apply with full impact in any labor dispute which extends beyond a statutory time limit of disqualification. Perhaps this would be a good practical approach from the administrative point of view. It does not appear to be politically feasible.

Not all attention should be directed at the possibility of narrowing the labor dispute disqualification. In general, the disqualification is intended to bar from compensation benefits all those employees who are participating in, financing or are directly interested in a labor dispute or are in a grade or class of employees falling into these categories. The limitation upon this proposition is to be found in the "factory, establishment or other premises" provision. The labor dispute, the stoppage of work, the employee who is participating in or directly interested in the labor dispute must all be at the same factory, establishment or other premises.

On the basis of the statutory wording, the holdings in the various cases involving the labor dispute at the Ford Motor Company's Dearborn plant, holdings granting benefits to the employees out of work at the assembly plants elsewhere in the United States, appear to be proper. The term "factory, establishment or other premises" seems clearly to contemplate a more narrow definition than all of the plants of an employer throughout the United States.[92]

But why should there be such a narrowing of the applicability of the disqualification? In those instances where there is nationwide collective bargaining between a union and a particular employer, such as in the case of the Ford Motor Company or a large steel company, obviously the bargaining going on at the central headquarters is for the benefit of all the employees of that company throughout the nation. Allowing the payment of benefits to the employees at the various plants throughout the nation in the case of a strike at the headquarters plant, is to do precisely the same thing as allowing the "key man" strike within a given plant. As we have seen, the very purpose of the directly interested provision of the statute is to prevent

91. Adams v. American Lava Corp., 188 Tenn. 69, 216 S.W.2d 728 (1948); Clinton v. Hake, 185 Tenn. 476, 206 S.W.2d 889 (1947). These cases held that a striker was not "available" for employment elsewhere, thus not allowing the then four week labor dispute disqualification even to begin to run.

92. See p. 348, *supra*.

such key man strikes.[93] Yet in the Ford Motor Company situation the striking employees at Dearborn were in effect striking for all of the employees throughout the United States. All of them stood to benefit by the successful outcome of that strike. Why should the labor dispute disqualification provision so carefully bar the possibility of a partial or "key man" strike within a given plant and allow precisely the same union technique on the broader geographical basis without disqualification?

The attempt by the Ford Motor Company to correct this situation from their point of view by obtaining state amendments to the unemployment compensation laws met with complete failure.[94] Their position obviously was not politically winsome. Yet logic was on their side. The combined factors of the tremendous broadening of the scope of the disqualification in such a case and the politically explosive pattern of barring local people from compensation because of something going on far away in another state must be the explanation for the political failure of such a provision. Either the directly interested provision of the statute is suspect,[95] or suspect is the provision which allows those directly interested to obtain unemployment compensation benefits so long as the overt manifestation of the dispute, the strike, is occurring at some other place.

Suspicion alone is not enough. The present logically inconsistent provisions may be the best way to handle the problem. Perhaps the best rationalization would be simply that the labor dispute disqualification should be as narrow as is politically and democratically feasible. And the factory, establishment or other premises provision is one which has proved to be politically feasible. Other laws of venerable stature have had no greater justification. But at least it ought to be said that the suggested broadening of the "factory, establishment or other premises" provision should be evaluated away from the heat of an emotional controversy and in an objective fashion.

These matters have related to specific provisions of the labor dispute disqualification. A more significant evaluation of the present stature of the provision must be set in the less parochial background of the pattern of unemployment compensation generally, its purposes and its practical application. An illuminating beginning for such an

93. See p. 350, *supra*.

94. The proposed "Ford Amendment" to the labor dispute disqualification provided that after the words, "at the factory, establishment of other premises at which he is or was last employed," of the Draft Act, p. 339, *supra*, the following words were to be added: "or because of a labor dispute at a factory, establishment or other premises, either within or without this state, which (1) is owned or operated by the same employing unit which owns or operates the premises at which he is or was last employed, and (2) supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed, provided that . . ." (there following the usual provisos of the Draft Act).

95. Note, 49 COL. L. REV. 550, 566 (1949).

evaluation is to face the peculiar results posed by the disqualification for participating in or being interested in a labor dispute, on the one hand, and, on the other, the definition of "suitable work" which enables an unemployed claimant to continue to draw benefits while refusing to accept employment. By way of reminder, the suitable work definition establishes that work is not suitable if the position is vacant due directly to a strike, lockout or other labor dispute; or if the working conditions are substantially less favorable than those prevailing in the locality; or if the individual would be required to join a company union or resign from any bona fide labor organization.[96] The third definition concerning company unions and bona fide labor organizations has little practical significance today in view of the provisions of the federal labor law and the labor law of most of the states.[97]

This definition of suitable work means that an unemployed individual drawing compensation may continue to draw compensation and is not required to take a position which is open because of a strike. Nor is he required to take any position in which working conditions are less favorable than those prevailing in the locality. In contrast, the employee who works at a plant which is involved in a labor dispute, and who refuses to cross a picket line to go to his job, is disqualified from obtaining unemployment compensation benefits. Even further, the participant in a strike protesting an employer's unwillingness to offer working conditions equal to those prevailing in the locality is also disqualified from receiving unemployment compensation benefits.[98]

The decisions bar employees who refuse to cross a picket line on the basis that those employees are taking sides in the labor dispute and are becoming participants in the dispute. Yet the job applicant coming from the outside is not considered a participant or as taking sides in the dispute when he refuses to become a strike breaker. A persuasively logical argument could easily be made that the two cases should be treated in the same way.[99] However, in the practical realities of the situation they are not the same. The employee of the plant where the labor dispute is going on is in a position making neutrality in the dispute impossible. Continuing to work for the employer is taking sides in the employer's behalf, and refusing to work constitutes taking sides on behalf of the strikers. On the other hand, the out-

96. See p. 349, *supra.*

97. Section 8(a) (2) of the Taft-Hartley Act, 61 STAT. 140 (1947), 28 U.S.C.A. § 158 (a) (2) (Supp. 1954), making company domination of labor unions unlawful.

97. Section8 (a) (2) of the Taft-Hartley Act, 61 STAT. 140 (1947), 29 U.S.C.A. payment of benefits in strikes designed to protest substandard working conditions. See p. 370, *infra.* And see also the discussion of the Connecticut definition of lockout at p. 368, *infra.*

99. See Lesser, *supra* note 1, at 170; Note, 49 MICH. L. REV. 886, 894 (1951).

sider is not in the picture at all with respect to the labor dispute until the question arises as to whether he will or will not become a strike breaker. He is actually in a position of neutrality when he refuses to take the job as strike breaker. Stated in another way, this means that the employee of the struck company is a factor, a plus quantity, in the dispute, whether he likes to be or not. Both sides in the dispute recognize his weight and wish to sway it to their side. On the other hand, the outsider is not a factor in the calculations of the parties, is not a weight to be swayed to one side or the other. Such a person is of no significance with respect to the strike until that person takes a strike-breaking job.

There is one aspect of this interaction between the two provisions, however, which is worthy of particular consideration. On the basis of the analysis mentioned above, it would seem that a distinction should be made between the employee of the struck establishment who refuses to cross the picket line to go to his own job, and the employee who refuses to take on the duties of one of the striking employees. Where the employee refuses to carry on his own regular duties because of a strike or picket line, it appears that he is aligning himself with the strikers. However, if his employer orders him to serve actually as a strike breaker, a strong argument can be made that he is then in the relative position of the outsider applying for work at a struck plant. This would mean that if he refused such strike-breaking employment he would nevertheless be entitled to benefits. The courts have not made this distinction.[100] Yet, it appears that this distinction would be the most accurate way to resolve the apparent conflict or dilemma which is raised by the interaction of the labor dispute disqualification and the first portion of the "suitable work" definition.

The applicability of the second portion of the suitable work definition, that having to do with the prevailing wages in the locality, has a more serious and far reaching significance. An employee who resigns his job because the employer is not paying the prevailing wage in the locality is entitled to unemployment compensation benefits. Since the work was not suitable, his resignation was for good cause

100. See Muncie Foundry Div. etc. v. Review Bd. of Empl. Secur. Div., 114 Ind. App. 475, 51 N.E.2d 891, 894 (1943). "[I]f work is available at the factory, establishment, or other premises at which he last worked, and an employee fails to make himself available for the work . . . but avoids the work because of a labor dispute there existing in which he is participating, he is disqualified for benefits." *Accord*: 10 BEN. SER. #3, 11296—Ill. R (1946).

Yet in a closely analogous situation, benefits generally are payable. These are cases where employees have been laid off for lack of work. They are recalled to replace strikers since jobs are now available. The usual holding has been that refusal by the recalled employee to take the job offered under these circumstances does not serve to disqualify from benefits. 11 BEN. SER. #5, 12418—Conn. R (1947); BEN. SER., Report, 8-19, Fla. A (Nov. 1950); 12 BEN. SER. #4, 13288—Kans. R. (1948); BEN. SER., Report, 20-27, N.Y. A (Nov. 1951); 11 BEN. SER. #10, 12854—Okla. A (1948); 12 BEN. SER. #4, 13344—Tex. R (1948).

connected with his employment.[101] Yet, if that same employee joins with other employees to strike to try to get wages raised to the level prevailing in the locality, the employees are engaged in a labor dispute and they are disqualified from receiving benefits. This seeming inconsistency can be resolved by the pat explanation that there is a difference between a quitting and a strike. This is not enough, however. The application of the suitable work definition reveals that the government is willing to take sides with respect to such matters. Stated in another way, this means simply that government is at least to some degree willing to look into the merits concerning questions involving working conditions. If government is willing to do so in some areas, then is there any reason why government should not do so in the area of labor dispute disqualification? This opens up the broad and general question as to whether government should deny or grant unemployment benefits in a labor dispute based upon the merits of the respective positions of the parties.

Even assuming that the labor dispute disqualification is here to stay there is certainly still wide room for inquiry as to whether every labor dispute for every reason should be subject to the same disqualification. To take an extreme example, suppose that a coal mine is obviously unsafe—dangerous for any miner who would enter the mine. Suppose that the mine owner for one reason or another, nevertheless insists that the miners go to work in the mine. If the miners refuse to work until the unsafe conditions are corrected, in most jurisdictions this will be held to be a labor dispute. The miners will be barred from unemployment compensation.[102] It seems almost incredible that the denial of compensation in such a case is necessary to any vindication of a public policy to remain neutral in labor disputes, or to compensate only for involuntary unemployment, or to fear compensation because of the high cost to society of paying benefits. The unwillingness of some states to accept such a completely negative role has led to attempts in a few to inject, to some degree, the consideration of the merits in determining whether there shall be disqualification from unemployment compensation benefits of those involved in a labor dispute.

One means of doing this has been for a state to exclude a lockout from the definition of labor dispute.[103] This simply means that in any case in which the dispute is determined to be a lockout, the labor

101. Lesser, *supra* note 1, at 170.

102. In 10 BEN. SER. #5, 11497—OHIO R (1946), the state mine inspector found that the oxygen content in the mine was too low. The employees refused to work in the mine until the employer corrected the condition. Held: this was a labor dispute; benefits denied.

103. Arkansas, Connecticut, Kentucky, Minnesota, Mississippi, New Hampshire, Ohio, Pennsylvania. In addition two states, Colorado and Utah, instead of using the term "labor dispute" in their statutes, use the term "strike."

dispute disqualification is completely inapplicable and the employees are entitled to unemployment compensation benefits.

The first and most obvious problem in connection with any such exclusionary device is the difficult and probably impossible job of trying to differentiate between a strike and a lockout. Several of the state statutes having such an exclusion from the definition of labor dispute do not even undertake a statutory definition of the term lockout. The court is left only with the general understanding as to the meaning of the term as its guide. Since many work stoppages undoubtedly combine both a strike and lockout,[104] the court is given an impossible task. In addition some lockouts, just as some strikes, may be so meritorious that it is the kind of situation where the government should align itself on the side of the locking-out employer. As is to be expected, the courts have done a great deal of floundering in trying to draw the line between a strike and a lockout.

With regard to the possibility of a particularly meritorious lockout, as mentioned above, consider for a moment the pattern of the so-called "whipsaw" strike. This is the situation in which the union bargaining with an association of several employers strikes one employer to obtain better working conditions from all the employers. An increasingly common technique used by the employer members of the association in such a case is to lock out the employees in the establishments which the union has not struck. The obvious purposes here are to oppose a form of the key man strike and also to prevent the union from using the wages obtained by these employees as strike benefits for the strikers. An early and leading case in California, *Bunny's Waffle Shop* v. *California Employment Commission*,[105] held that the employees unemployed as the result of such employer activity were not unemployed as the result of a labor dispute. Benefits were paid.

In recent years, however, the law has swung sharply in favor of the employers in such a whipsaw situation. The National Labor Relations Board has recently legalized the employer lockout under these circumstances.[106] The more current indications, even in those jurisdictions which exempt the lockout from the disqualification, are that the employees thus out of work will be disqualified.[107] The statute of

104. See *e.g.*, Employees of Utah Fuel Co. v. Industrial Comm'n of Utah, 99 Utah 88, 104 P.2d 197 (1940), holding that there was a "strike" where the employer, knowing of the union's strike deadline notified the workers not to come to work. See also the discussion of an Ohio administrative decision in Note, 10 OHIO ST. L.J. 238, 242, 244 (1949).

105. 24 Cal.2d 735, 151 P.2d 224 (1944).

106. Buffalo Linen Supply Co., 109 N.L.R.B. No. 69, (July 26, 1954). A contrary board holding was reversed in Leonard v. N.L.R.B., 205 F.2d 355 (9th Cir. 1953); *cf.* Morand Bros. Bev. Co. v. N.L.R.B., 204 F.2d 529 (7th Cir. 1953).

107. McKinley v. California Empl. Stab. Comm'n, 34 Cal.2d 239, 209 P.2d 602 (1949); Note, 33 MINN. L. REV. 758, 768 (1949). *Contra:* Bucko v. J. F. Quest Foundry Co., 229 Minn. 131, 38 N.W.2d 223 (1949).

the state of Utah does not refer to "labor dispute." Instead, it uses the term "strike." Yet even Utah has held that the employees locked out in the whipsaw situation are unemployed because of a "strike" within the meaning of that term in the statute.[108] A definition of lockout which relies upon the overt manifestation of a lockout in the traditional dictionary definition is subject to the failures exemplified by these cases.

In spite of these difficulties some courts have still talked in terms of "fault" in attempting to define the difference between a strike and a lockout. This is not fault with regard to the merits of the dispute as such, but fault to establish who was the acting party in causing the work stoppage.[109] It must be recognized that in many cases this is an utterly hopeless task.

In an attempt to obviate the fault or instigator concept in the strike/lockout determination, some states by statute and by court interpretation have attempted to define lockout in what would be admittedly artificial, and yet perhaps workable terms. The approach has been to fasten upon the status quo. If the work stoppage is occasioned by an employer attempt to obtain working conditions more to his advantage than had previously been the case, then the dispute is a lockout. If, on the other hand, the attempt is by the employees to obtain better working conditions, the dispute is a strike.[110]

Such an approach is certainly questionable. It could hardly be doubted that there will be instances where an employer's insistence upon a wage decrease is eminently fairer to his employees than his willingness, in other circumstances, to grant an increase. So also, a union's insistence upon a wage increase in some circumstances would be more justifiable than a protest in other circumstances against a proposed decrease. Yet under this application of a lockout exemption, the merits of the dispute are determined solely upon which side is trying to alter the status quo. And what will be done with that case where the union is insisting on a wage increase and the employer is insisting on a decrease? This exaltation of the status quo might be a closer approach to an evaluation of the merits of a labor dispute than no evaluation at all. However, it is an obvious attempt to approximate the merits by the use of a device which is related to the merits only in small measure.

There is, however, another argument in favor of the status quo

108. Olof Nelson Constr. Co. v. Industrial Comm'n, 243 P.2d 951 (Utah 1952).

109. See Morris v. Unempl. Comp. Bd. of Rev., 169 Pa. Super. 564, 83 A.2d 394, 397 (1951) ("... fault is assessed against the party whose actions constitute the final cause of the stoppage."); Wagner, *supra* note 1, *passim*.

110. For the statutory approach and its implications see the discussion of the Connecticut statute, p. 368, *infra*. For such a definition by decision see Magner v. Kinney, 141 Neb. 122, 2 N.W.2d 689 (1942); BEN. SER., Report, 21-9, Pa. B (Dec. 1951); *cf.* P. McGraw Wool Co. v. Unempl. Comp. Bd. of Rev., 176 Pa. Super. 9, 106 A.2d 652 (1954). See Lesser, *supra* note 1, at 181.

approach through the lockout exclusion in the labor dispute disqualification. This definition of lockout would clearly tend to discourage wage reductions. Further and even more important, in times of declining economic activity when wage levels are falling generally, it would tend to counteract the trend of tightening money. This would be accomplished by making more money available for spending through the payment of unemployment compensation benefits to all employees striking against a wage decrease. This role, while not justifiable on the basis of determining the merits of a labor dispute, does in an activist sense tend to satisfy one of the basic purposes of the unemployment compensation law. The payment of unemployment compensation benefits is not only for the purpose of helping to sustain the unemployed worker but is also for the purpose of keeping money circulating in times of declining economic activity. While it seems to be an arbitrary way to do it, defining the strike/lockout in terms of the status quo would seem to accomplish this objective.

Surprisingly enough, however, the one state that would be most expected to adopt and use the status quo rationale in defining the lockout as an exclusion from the labor dispute disqualification, has turned away. The state is Connecticut. The Connecticut statute exempts lockouts from the definition of labor dispute "unless the lockout results from demands of the employees, as distinguished from an effort on the part of the employer to deprive employees of some advantage they already possess."[111] Here would seem to be the status quo interpretation clearly enacted into statute. And the Connecticut administrative board and the lower Connecticut courts so held over a period of years. But in 1951 the Supreme Court of Errors of Connecticut abandoned the status quo interpretation of these words. In *Almada v. Administrator, Unemployment Compensation Act*,[112] the court held that the words "an effort on the part of the employer to deprive employees of some advantage they already possess," was not a definition of the term lockout but was simply a description of that term. The court said that if the legislature had intended to define all lockouts in this fashion, then it would not have been necessary to use the word lockout at all, "[t]he legislature could have accomplished its full purpose by making the statute read that the disqualification would not apply if the unemployment resulted merely 'from an effort on the part of the employer to deprive employees of some advantage.' "[113]

111. CONN. GEN. STATS., § 7508 (3) (1949). One portion of the West Virginia statute, see p. 370, *infra*, also includes the status quo definition of lockout. *Cf.* the Mississippi statute exempting only "unjustified" lockouts from the lahor dispute disqualifications, Miss. Code Ann., § 7379(e) (1952).

112. 137 Conn. 380, 77 A.2d 765 (1951). *Accord*, Assif v. Adm'r, Unempl. Comp. Act, 137 Conn. 393, 77 A.2d 772 (1951).

113. Almada v. Adm'r, Unempl. Comp. Act, 137 Conn. 380, 388, 77 A.2d 765, 770 (1951).

By this means the court established the proposition that there must be the attempt on the part of the employer to deprive the employees of some advantage plus also a lockout, undefined in the statute. And then the court proceeded to define lockout in these terms: "To constitute a lockout as the word is used in the statute, the conditions of further employment announced by the employer must be such that the employees could not reasonably be expected to accept them and they must manifest a purpose on the part of the employer to coerce his employees into accepting them or some other terms. If they are anything short of that and the employees cease work, the unemployment which ensues cannot be said to be involuntary on the part of the employees . . . . When an employer brings about a work stoppage by the imposition of terms of employment which his employees could not reasonably be expected to accept, it is just as much a withholding of employment by him as it is where he causes a work stoppage by locking the doors of his plant. A withholding of employment accomplished in either way constitutes a lockout under the statute."[114] So it is that Connecticut returned to the court definition of the term lockout, with all of its attendant difficulties.

The lesson here is that the artificial or unreal definition of lockout, as the Connecticut court pointed out, is a sophistry. If the legislature wants to decide the question of the merits of a work stoppage by which side wishes to alter the status quo, it should do so directly and not try to hide behind some artificial definition of lockout. By the same token, an inquiry into who is the winner of the battle of maneuver in forcing the other party to instigate the work stoppage is far removed from a determination of the merits of the particular dispute. And this is assuming that the instigator of the stoppage can be determined, a highly doubtful assumption. The broader lesson of this analysis is that the use of the device of excepting lockouts from the definition of labor dispute in the labor dispute disqualification is not an effective means of tipping the weight of the state to one side or the other in cases where an active stand by government appears to be indicated.[115]

There have been three other means by which states have attempted to evaluate labor disputes with a view to justifying the payment of compensation benefits to persons unemployed as a result thereof. One state has simply by court interpretation injected this element. Another

114. *Id.* at 389, 77 A.2d at 771.

115. It should be mentioned at this point that the states having the lockout exclusion from the labor dispute disqualification have not been willing to allow the question of strike or lockout to turn upon whether there has been improper or even illegal activity on the part of the employer. Employee work stoppages in protest of employer law violation or breach of contract are still found to be strikes. Hogan v. Unemployment Comp. Bd. of Rev., 169 Pa. Super. 554, 83 A.2d 386 (1951); Byerly v. Unemployment Comp. Bd. of Rev., 171 Pa. Super. 303, 90 A.2d 322 (1952).

state by statutory provision has injected the element of prevailing working conditions in the locality. Several other states have exempted from disqualifying labor disputes those disputes caused by employer violation of law or breach of contract.

Alabama is the state which by court interpretation has injected an element of official governmental concern over the merits of a labor dispute. The case is *Department of Industrial Relations v. Stone.*[116] It involved a work stoppage occasioned by a typical bargaining dispute. However, the court found that the employer had taken a position in the bargaining which was so unfavorable to the employees that there no longer was a "bona fide" labor dispute. The court stated: "It cannot be said that the dispute is 'bona fide' and there is integrity of dealings if the employer makes demands and attempts to enforce conditions that are practically impossible of fulfilment, or if undertaken will result in scarcely any remuneration for the employee. . . . Under the evidence in the instant case the court was authorized to find that the demands of the employer required the claimants to work under conditions that were practically impossible. The conclusion was also deducible that if the assigned duties could have been performed in some manner the pay on the tonnage basis would have been far below a fair living wage. . . . We do not want to be understood as overlooking the doctrine that in matters here presented the courts must not be concerned with the reasonableness or unreasonableness of the respective demands of the disputants. The effect of our holding is that under the evidence disclosed by this record there was not a 'labor dispute' within the purview of the applicable law."[117] Other states have shown no disposition to get into this treacherous area of court determination of the reasonableness of a position taken by a party in a labor dispute.

The state of West Virginia has adopted the prevailing working conditions approach. The statute reads: "No disqualification under this subsection shall be imposed if the employees are required to accept wages, hours or conditions of employment substantially less favorable than those prevailing for similar work in the locality, or if employees are denied the right of collective bargaining under generally prevailing conditions. . . ."[118] The close relationship between this statutory provision and the status quo definition of lockout previously discussed is obvious. Yet this prevailing working conditions approach is a more valid and useful concept. As has been previously pointed out, status quo for its own sake has little to do with the merits of a particular labor dispute. Some element of merit, however, can be perceived in a situation where the employer is insisting that his employees work under less favorable working conditions than those prevailing in the

116. 36 Ala. App. 16, 53 So.2d 859 (1951).
117. 53 So.2d at 861.
118. W. VA. CODE ANN., § 2366 (78)[4](4) (1949).

locality. Further, this approach has the administrative advantage of requiring no more than a decision which is already required under other provisions of the unemployment compensation law. Since the standard here is the same one which is part of the definition of "suitable work," the state of West Virginia is not asking its administrative agency or its courts to do anything unique by using the same concept in the labor dispute disqualification portion of the statute.[119]

However, the West Virginia statute is still subject to some of the same objections applicable to the status quo definition of a lockout. While perhaps closer to a determination of the honest merits of the dispute, the prevailing working conditions approach can still be only an approximation. There may easily be some instances where an employer could not afford to offer the prevailing working conditions of the locality, instances where the business enterprise is in serious financial difficulties. Employer insistence upon lower than prevailing working conditions in such a circumstance could be much more justified than another employer's insistence upon paying only the prevailing wage when a wage rate far above could easily be afforded. Yet in the former case the statute would authorize payment of benefits while in the latter case the employees would be disqualified for striking in opposition to the employer.

A narrow and much more realistic approach to the problem of attaching at least some significance to the merits of the labor dispute in determining disqualification of striking employees is to allow benefits to be paid if the work stoppage has been instigated by unlawful conduct of the employer. For one thing, here is a standard with a reasonable amount of definiteness. Also, it obviates the objections applicable to the status quo and prevailing working conditions approaches.

These states exempt from the labor dispute disqualification those work stoppages which have been occasioned by the employer's violation of law. In addition some states have added a further exemption in those cases where the stoppage is brought about by an employer violation of the collective agreement. The typical statutory provision embodying these elements is that of Arizona. It reads as follows: "If the Commission, upon investigation, shall find that the dispute, strike, or lock-out is caused by the failure or refusal of any employer to conform to the provisions of any agreement or contract between employer and employee or any law in the state of Arizona or of the United States pertaining to hours, wages, or other conditions of work, such dispute, strike or lockout shall not render the workers ineligible for benefits."[120]

119. For a case defining "locality" in narrow geographical terms to the benefit of the employer, see West Virginia Coal & Trans. Co. v. Board of Rev., 7 BEN. SER. #11, 8872—W. Va. Cir. Ct. (1944).

120. ARIZ. CODE ANN., § 56-1005(d) (Supp. 1951). The only other state that is completely comparable to Arizona in including both the element of employer

It would undoubtedly be argued by many that even the element of law breaking should not be inserted into the labor dispute disqualification of the unemployment compensation law.[121] The argument would be along the general line that it is not the role of the unemployment compensation provisions to enforce other laws. Violation of other laws or breaches of contract should be handled with the sanctions established for that purpose. Then too, it can be argued that the payment of compensation benefits in work stoppages caused by employer violation of law is a one-way penalty. No comparable penalty would be assessed upon a union or the strikers for a violation of law or contract by them. This is so because they are denied benefits anyhow. There is, therefore, no further sanction under the unemployment compensation law against them.

The payment of benefits in such a case, however, should hardly be viewed as a penalty against the employer. It must be remembered that the basic objective is to pay benefits for unemployment. The denial of benefits to striking employees is an exception to the rule. The payment of benefits to employees striking in protest of employer law violation or contract breach, then, is no more than saying "we have here a case clear enough on the merits so we know that the basic policy behind the labor dispute disqualification will not be thwarted if we here allow benefits." In answer to the assertion that paying such benefits would be one-sided because there is no way under the statute by which a union or employee law violation can be specifically dealt with, it should be recognized that the entire statute is one-sided in this sense. The loss of employment by an employee is, by analogy, a business failure of that employee. The unemployment compensation law gives him benefits for this business failure. Yet we have no provision in law by which an employer suffering a business failure gets compensation benefits. The whole concept of unemployment compensation is one-sided in this respect. And it would be made no more one-sided by the payment of compensation benefits to strikers protesting employer illegal practices.

The most valid objections to the operation of a statutory provision such as Arizona's are procedural ones. How can you know in a given compensation claim proceedings whether or not the employer has

law violation and employer contract breach is Arkansas. ARK. STAT. ANN., § 81-1106 (d) (1947). Two other states, Montana and Utah, include only the element of employer law violation. MONT. REV. CODES ANN., § 87-106(d) (Supp. 1953); UTAH CODE ANN., § 35-4-5(d)(1) (1953). One other state, New Hampshire, includes only the element of employer breach of contract. N. H. LAWS, c. 260, p. 481, § 4 D (4) (1953). Thus, the following four states pay compensation benefits when employees strike to protest employer law violation: Arizona, Arkansas, Montana, Utah. The following three states pay compensation benefits when employees strike to protest employer breach of collective bargaining agreement: Arizona, Arkansas, New Hampshire.

121. Note, *Unemployment Compensation—Effect of the Merits of a Labor Dispute on the Right to Benefits*, 49 MICH. L. REV. 886, 888 (1951).

violated the law or breached the contract? The problem is difficult if the question is violation of state law or breach of contract. The problem becomes even more overpowering if the question is violation of federal law. It is of the nature of unemployment compensation that the initial decision concerning whether or not compensation will be paid be made with the utmost expedition. Almost the whole reason for unemployment compensation is thwarted if the claimant is put off until some final authoritative adjudication by a court is made months or years hence. It follows that under these statutory provisions compensation administrators will find it necessary constantly to be making decisions concerning whether there had been an employer violation of law or breach of contract, and then acting upon those decisions by awarding or denying compensation. Under these circumstances it will be inevitable that there will be cases involving, for example, a determination that the employer has violated the National Labor Relations Act and that this has precipitated the strike. The strikers will be paid their benefits. One year later in an unfair labor practice proceeding before the National Labor Relations Board, the Board might hold that the employer had not committed an unfair labor practice. Or suppose that the Board holds that the employer committed an unfair labor practice but a year after that the federal court of appeals reverses the Board, holding that the Board's decision is not supported by substantial evidence considering the record as a whole. State courts also inevitably would disagree in some cases with their own administrative agencies on a finding of law violation and contract breach.

This circumstance might well appear to be an insurmountable objection to some who consider the acceptability of the statutory approach of Arizona and similar states. Yet the difficulties are not as serious in practical application as in theory. So the National Labor Relations Board or a court does hold some months later that employees in a given labor dispute were not entitled to the compensation benefits they were paid. The only significance of such a holding at that time would be the fact that the employer's experience rating had suffered as a result of the compensation earlier paid. This could be obviated simply by providing that if the decision to pay compensation is later overturned or shown to be erroneous, the employer's account will not be charged. It would hardly seem justified to attempt also to recapture the payments from the employees.[122] The case obviously would have been a close one or the original decision would not have been made, and the recapture would not be of substantial significance to the administration of unemployment compensation.

Such inconsistent holdings would not create a pretty pattern. The picture would appall the lover of order and "everything in its place."

122. *But cf.*, Lesser, *supra* note 1, at 180.

Yet, as a practical matter, what harm would be done by such order-destroying inconsistencies?[123] They would hardly occur often enough to constitute a serious threat to the unemployment compensation funds. The compensation benefits are not so large that it can be said the striking employees obtained a "windfall." If the employer is protected in his experience rating, we can say that he has had to put up with a strike in which the strikers have obtained some benefits by way of unemployment compensation. But this is not too serious a price to pay. The case will have been a close one. The employer's liability to the occurrence of such a strike is no more than a risk of incorrect court decision, a risk which he must run, in common with all persons generally, in all of his business and personal life.

Turning the case around, if the initial determination is against compensation, a later determination by some court or agency that compensation should have been allowed reveals no weakness in the provision. At least the employees had a chance for compensation, which is more than they have now. The fact that they lost that chance through erroneous decision has not placed them in any worse position than they would have been without the provision.

A balancing of the factors reveals that this is one area where the states can very properly move in narrowing the labor dispute disqualification. It is hard to evoke sympathy for the employer who has caused a work stoppage through his unlawful conduct. And it is difficult to insist that the employee who is out of work because of his employer's unlawful conduct is not entitled to compensation benefits because instead of completely abandoning his employment he tries to pressure his employer into acting within the law. The abuses and dangers which might well go with an attempt to assess the merits in every labor dispute are not present.

Such an approach is somewhat akin to the relationship between the federal Fair Labor Standards Act and the National Labor Relations Act. The role of the Fair Labor Standards Act is to set up a mimimum to which all persons are entitled. Then the parties are turned loose under the ground rules of collective bargaining set up under the National Labor Relations Act to see if, through collective bargaining, they can obtain a better level of working conditions than the minimum

123. In Members of Iron Workers' U. v. Industrial Comm'n, 104 Utah 242, 139 P.2d 208 (1943), there had already been an NLRB adjudication that the employer had refused to bargain collectively in violation of federal law. The court held that this was not binding and that the state should make an independent determination as to whether the strike was occasioned by employer violation of law. The court found no law violation and denied benefits.

Cf. Jordan v. Craighead, 114 Mont. 337, 136 P.2d 526 (1943) (upholding a commission determination on the merits that the employer had not refused to bargain); Reddick v. Scott, 217 Ark. 38, 228 S.W.2d 1008 (1950) (remanding to the administrative tribunals with directions to make findings concerning employer violation of law and breach of contract).

guaranteed by the wage and hour law. The Arizona type statutory provision would be no more than setting up a bare minimum standard of law-abidingness. Once that standard was reached, then the employees would be turned loose for collective bargaining, with the state remaining neutral by refusing to pay compensation benefits to the strikers.

Perhaps if there were a way to do it accurately, a broader investigation of the merits in the labor dispute disqualification might be advisable. But without the practical difficulties attendant upon such a broad program, the minimum requirement of law-abidingness is feasible. It is not an approach to compulsory arbitration, a governmental setting of standards, as would be the case if "just cause" were used in assessing every labor dispute.[124] To build the floor under which no employer could go without having his striking employees entitled to benefits, a floor placed at the level of lawful conduct by the employer, is certainly justifiable. This is one direction in which the labor dispute disqualification provisions of the unemployment compensation law should properly go.[125]

CONCLUSION

To be realistic we started with the proposition that the labor dispute disqualification of the unemployment compensation law has a permanent place in the statutory scheme. Accepting this, however, does not require us to close our eyes to the fact that the provision has been interpreted in surprisingly broad strokes for an *exception* to the overall basic purpose of the statute. Also, significantly, some of the directions of interpretation have not been subject to searching analysis of their validity. There is now, and always will be, room for such continuing analysis. May we hope that the legislatures and the courts will face up to this task.

124. *Cf.* Lesser, *supra* note 1, at 179.
125. *Cf.* Lesser, *supra* note 1, at 179; Shadur, *supra* note 1, at 307; Note, 49 MICH. L. REV. 886, 894 (1951).