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Recommended Citation

Daniel R. Mandelker, *Refusals to Work and Union Objectives in the Administration of Taft-Hartley and Unemployment Compensation*, 44 Cornell L. Rev. 477 (1959)
Available at: <http://scholarship.law.cornell.edu/clr/vol44/iss4/2>

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REFUSALS TO WORK AND UNION OBJECTIVES IN THE ADMINISTRATION OF TAFT-HARTLEY AND UNEMPLOYMENT COMPENSATION

*Daniel R. Mandelker**

Recognition that protection against the economic consequences of wage loss is a legitimate aim of government has brought with it the imposition of work refusal requirements to define properly the scope of the protection to be afforded. In unemployment compensation, for example, the claimant who unreasonably refuses new work is denied benefits. While theoretically easy to understand, work refusal tests prove difficult to apply. If too severe a limit is placed on the freedom allowed the unemployed worker in rejecting or accepting an offer of new employment, statutory policy objectives may be frustrated. An applicant for unemployment compensation may be offered a job vacant because of a labor dispute. If he is a union member, he may understandably reject the offer because of his reluctance to act as a strikebreaker. When a union on strike is engaged in permissible concerted activities,¹ its conduct is sanctioned under the National Labor Relations Act. Putting pressure on the compensation applicant to take the strike-created position would undermine a protected union position.

In the case just put the applicant can refuse the offered job under the explicit terms of the compensation statutes.² But many other work offers raise similar union-related problems, most of which the unemployment compensation statutes do not explicitly resolve. A work refusal test is also applied to union members seeking reinstatement and back pay under the National Labor Relations Act, although its use in this context may frustrate other statutory objectives of the Taft-Hartley Law. This article will analyze the work refusal tests in Taft-Hartley and in unemployment compensation in terms of the union objectives accorded recognition in the federal labor law. These interrelationships have been imperfectly recognized and inadequately resolved, both in statutory provisions and in judicial and administrative decisions, and an attempt will be made to suggest a more adequate accommodation of the policies expressed in these two programs.³

* See Contributors' Section, p. 558, for biographical data.

¹ Cox, "The Right to Engage in Concerted Activities," 26 Ind. L.J. 320 (1951).

² See the discussion in the text at note 78, *infra*. In fact, the job could be refused even though the strike were not protected by the federal labor law.

³ In the discussion that follows, no attempt will be made to differentiate between potentially different applications of the compensation law in periods of low as compared with high unemployment. That tighter standards are imposed on the employee during a recession, see Moseley, "Availability for Work in a Recession," *Emp. Sec. Rev.* Vol. 25,

COMPARATIVE PRECEDENT: WORK REFUSALS AT COMMON LAW AND
UNDER THE POOR LAW PROGRAMS

Part of the difficulty in achieving a more adequate synthesis is due to an absence of agreement as to the statutory function of the work refusal requirement. Work refusal requirements first developed as a corollary to the duty to mitigate damages in actions for wages at common law, brought by employees who had been wrongfully discharged, and as a factor in the determination of need under the poor relief programs dating from the Elizabethan statute of 1597. A comparison of common law mitigation with the poor law presents two extremes in the application of the work refusal requirement to individual preferences. While the majority position at common law gives the employee considerable latitude, in poor relief the applicant has almost no option.⁴

The familiar explanation places the employee's duty to mitigate on the point that the suit functions solely to compensate him for losses actually incurred,⁵ although several opinions choose a broader policy basis to rely on.⁶ They note that the mitigation requirement imposes a penalty on the employee who chooses to remain "willfully" idle.⁷ In so doing it serves

No. 8, p. 5 (August, 1958). *Contra*, *Tung-Sol Electric Inc. v. Board of Review*, 34 N.J. Super. 349, 112 A.2d 571 (1955) (interpreting availability for work requirement). Perhaps the difficulties experienced by unions during a period of heavy unemployment should encourage an interpretation that is unusually sensitive to the union position.

⁴ Consider also the analogy offered by suits for wages by public officers and employees who are wrongfully discharged. In the case of the public employee the contract analogy is used and he is required to mitigate. But the public officer need not do so because his compensation is conferred by law, as an incident of the office. *Fitzsimmons v. City of Brooklyn*, 102 N.Y. 536, 7 N.E. 787 (1886); *Vega v. Borough of Burgettstown*, 394 Pa. 406, 147 A.2d 620 (1959); Note, 150 A.L.R. 100 (1944). Is there a sufficient reason for not applying the mitigation principle to officers? Consider the reasons for the principle, as outlined in the text. If rights to compensation conferred by statute escape the application of the mitigation requirement then this requirement should be equally inapplicable to the Taft-Hartley and unemployment compensation statutes, at least in the absence of a provision to the contrary.

⁵ *E.g.*, *Hussey v. Holloway*, 217 Mass. 100, 104 N.E. 471 (1914); *Hendrickson v. Anderson*, 50 N.C. 246 (1858); *McKean v. Cowley*, 7 L.T.R. (n.s.) 828 (Ex. 1863).

⁶ To some extent the private nature of the cause of action is important. For example, a wrongfully discharged employee need not accept an offer of re-employment from the employer who discharged him. To require him to do so would force a modification of the original contract, which the employee may refuse. *E.g.*, *Miller v. Abraham*, 159 Ark. 493, 252 S.W. 15 (1923); *Billetter v. Posell*, 94 Cal. App. 2d 858, 211 P.2d 621 (1949); Note, 45 W. Va. L. Rev. 378 (1939). On the other hand, there is no such impediment to the employee's acceptance of an offer of re-employment in satisfaction of his duty to find work under the unemployment compensation laws. And non-discriminatory re-employment by the employer will wash out a discriminatory discharge under the Taft-Hartley Act, although back pay might be awarded to the date of the rehire.

⁷ *Wilkinson v. Black*, 80 Ala. 329 (1885); *Miller v. Mariner's Church*, 7 Me. 51 (1830); *Huntington v. Ogdensburgh & Lake Champlain R.R. Co.*, 33 How. Pr. 416 (N.Y. 1867); *Polk v. Daly*, 14 Abb. Pr. (n.s.) 156 (N.Y.C.P. 1873); *James v. Allen County*, 44 Ohio St. 226, 6 N.E. 246 (1886). Cf. *Williams v. Anderson*, 9 Minn. 50 (1864) (rule questioned). Because the recent cases seldom examine the reasons behind the mitigation rules, the early cases have had to be explored.

Of some interest is the theory that damages suffered by the employee through a failure to mitigate are too "remote" and therefore not recoverable under conventional rules of

"morality" by discouraging idleness and by preventing a "fraud" against the employer. But there are limits to the employee's responsibility. Beginning with an early dictum in 1846⁸ the courts have required the employee to look only for work of a similar nature.⁹ Most cases accept this rule uncritically. When reasons are given, it is usually that the employer is the wrongdoer,¹⁰ that the employee has the "right" to pursue the occupation of his choice,¹¹ or that the contrary rule would deprive the employee of the promise of the original contract, in terms of the type of work to be performed.¹²

Some decisions adopt the opposite view, and require the employee suing at common law to "lower his sights" after a reasonable period of time and to search for employment different from that for which he contracted.¹³ Reasons for the minority position have not been forthcoming either, except for a suggestion¹⁴ that the common law duty to mitigate,

proximate cause. *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520 (1871); *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605 (1930) (concurring opinion of Cardozo, J.).

⁸ *Costigan v. Mohawk & Hudson R.R. Co.*, 2 Denio 609 (N.Y. 1846), a leading case which is frequently cited. Compare *Byrd v. Boyd*, 4 McCord 246 (S.C. 1827), where the court is uncertain even of the duty to mitigate.

⁹ E.g., *Standard Oil Co. v. Lloyd*, 26 Ala. App. 306, 159 So. 371 (1935); *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S.W. 1113 (1894); *Gregg v. McDonald*, 73 Cal. App. 748, 239 Pac. 373 (1925); *Hinchcliffe v. Koontz*, 121 Ind. 422, 23 N.E. 271 (1890); *Bertholf v. Fisk*, 182 Iowa 1308, 166 N.W. 713 (1918); *Edgecomb v. Traverse City School Dist.*, 341 Mich. 106, 67 N.W.2d 87 (1954); *Bang v. Internat'l Sisal Co.*, 212 Minn. 135, 4 N.W.2d 113 (1942); *Tenzer v. Gilmore*, 114 Mo. App. 210, 89 S.W. 341 (1905); *Stoffel v. Metcalfe Constr. Co.*, 145 Neb. 450, 17 N.W.2d 3 (1945); *State ex rel. Freeman v. Sierra County Bd. of Educ.*, 49 N.M. 54, 157 P.2d 234 (1945); *King & Graham v. Steiren*, 44 Pa. 99 (1862); *Publishing Co. v. Burger*, 2 Tenn. C.C.A. 179 (1911); *Martin v. Board of Educ.*, 120 W. Va. 621, 199 S.E. 887 (1938); *State ex rel. Schmidt v. District No. 2*, 237 Wis. 186, 295 N.W. 36 (1940); *Silver v. Standard Gold Mines Ltd.*, 3 D.L.R. 103 (Que. Super. Ct. 1912). See also *McCormick, Damages* § 160 (1935); *Notes*, 28 A.L.R. 736 (1924), 141 A.L.R. 662 (1942).

¹⁰ *Williams v. Leaf Tobacco Co.*, 293 Ky. 270, 168 S.W.2d 570 (1943). To work a presumption against the wrongdoer is a common principle in damages law. This presumption also serves as the basis for the rule often adopted that puts the burden of proof to show a failure to mitigate on the employer. E.g., *Koenigkraemer v. Missouri Glass Co.*, 24 Mo. App. 124 (1887); *Emery v. Steckel*, 126 Pa. 171, 17 Atl. 601 (1889). Compare the suggestion that unemployment compensation is predicated on employer "fault."

¹¹ *Taylor v. Pope*, 259 S.W. 527 (Mo. App. 1924). Cf. *American Trading Co. v. Steele*, 274 Fed. 774 (9th Cir. 1921) (need not accept employment which "would affect injuriously his own future career"); *Crabtree v. Elizabeth Arden Sales Corp.*, 105 N.Y.S.2d 40 (Sup. Ct. N.Y. County 1951), aff'd, 279 App. Div. 992, 112 N.Y.S.2d 494 (1st Dep't 1952), aff'd on other grounds, 305 N.Y. 48, 110 N.E.2d 551 (1953).

¹² *Strauss v. Meertief*, 64 Ala. 299 (1879); *Cooper v. Stronge & Warner Co.*, 111 Minn. 177, 126 N.W. 541 (1910).

¹³ *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520 (1871). But cf. *Grant v. New Departure Mfg. Co.*, 85 Conn. 421, 83 Atl. 212 (1912). The Texas cases have vacillated. Compare *Texas Life Ins. Co. v. Roberts*, 55 Tex. Civ. App. 217, 119 S.W. 926 (1909), and *Simon v. Allen & Co.*, 76 Tex. 398, 13 S.W. 296 (1890), with *Weber Gas Co. v. Bradford*, 34 Tex. Civ. App. 543, 79 S.W. 46 (1904). For a qualified acceptance of the minority view see *Torson Constr. Co. v. Grant*, 251 Ky. 800, 66 S.W.2d 79 (1933). But see note 10, supra. Cf. *Ransome Concrete Machinery Co. v. Moody*, 282 Fed. 29 (2d Cir. 1922).

¹⁴ *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520 (1871).

consistently applied, requires the employee to look for work at a lower wage if employment at the promised amount cannot be found.

In sum, the common law cases dealing with the employee's duty to mitigate in his action for wrongful discharge present a mixture of private fault and social policy, of employer wrongdoing and discouragement of idleness, that are reflected in subsequent statutory programs. However, the majority of courts at common law did draw a line at forcing the employee into less desirable employment,¹⁵ although even the majority rule would permit some flexibility in administration as to the wage and occupation.¹⁶ Probably because most of the common law cases did not involve the organized worker, only one decision arose in a union context. In *San Antonio & A. P. R. R. Co. v. Collins*,¹⁷ an employee was upheld in his refusal to take a work re-assignment in another city that would have involved a loss of seniority and position under his collective bargaining contract.¹⁸

Common law mitigation, perhaps because it is employed in the enforcement of "rights" under contracts, tends to respect the employee's decision to accept or reject new work. Poor relief programs¹⁹ make different as-

¹⁵ Of some interest here is the additional requirement at common law that the employee use reasonable diligence in seeking work. Compare *Polk v. Daly*, 14 Abb. Pr. (n.s.) 156 (N.Y.C.P. 1873), with *Milage v. Woodward*, 186 N.Y. 252, 78 N.E. 373 (1906). The requirement is substantially the same as the statutory provision now common in unemployment compensation that requires the claimant to make an "active" search for work. Bureau of Employment Security, U.S. Dept of Labor, Comparison of State Unemployment Insurance Laws as of January 1, 1958, 84 (1958).

¹⁶ *Hussey v. Holloway*, 217 Mass. 100, 104 N.E. 471 (1914): It is for the jury to determine whether the employee could refuse a job at \$15 a week in an inferior position when she had been making \$18-20 a week and expected early re-employment at her regular occupation and salary. Compare the statement of the rule in *Pond v. Wyman*, 15 Mo. 176 (1851).

¹⁷ 61 S.W.2d 84 (Tex. Comm'n Appeals 1933).

¹⁸ In fact the employee was a member of a union other than the union which had negotiated the contract. This was the source of his difficulties.

¹⁹ Work refusals present a problem under the related categorical assistance programs, which are also based on need. However, since these programs cover individuals whose capacity to work is limited because of old age, blindness or other disability, their recipients present different problems than the able-bodied claimant temporarily out of work who seeks help from the unemployment compensation or poor law, and to whom this study has been limited.

Aid to Dependent Children (ADC) furnishes an example of the type of work refusal problem than can arise under categorical assistance. The eligibility of children under this program may be predicated on the incapacity of the father. Belknap, "An Analysis and Criticism of the Program of Aid to Dependent Children," 6 J. Pub. L. 25, 34-39 (1957). Belknap notes the California policy that discontinues aid after the parent's continued and deliberate refusal to cooperate in plans to accept employment. For the statutory basis for this policy see Cal. Welfare & Inst. Code § 1532.6 (Supp. 1957).

Problems will arise in the definition of incapacity whenever the disability of the parent is less than total, or whenever its physical basis is not familiar. For example, in *Barnes v. Turner*, 280 S.W.2d 185 (Ky. 1955), the father had a long history of allergy, which seemed to have a psychiatric basis. He had not worked for a considerable time, although he was apparently able to do some light work. The court affirmed an administrative determination that the father was not incapacitated; limitations on the parent's ability to compete freely in the labor market should not shift the burden of supporting his children to the state. Compare *Barnes v. Barrett*, 302 S.W.2d 385 (Ky. 1957). Here the court

sumptions. Many statutes and administrators limit poor relief to unemployables,²⁰ and when aid is given to the able-bodied the work refusal test functions as part of the determination of need to insure that help will not be given to the "sturdy beggar." This approach reflects a social attitude that taints with moral fault and views with suspicion those individuals who have to apply for aid,²¹ and who are said merely to seek a benefit that the state is "privileged" to give or withhold.²²

A recent survey of general assistance practices found that when aid was given to employables the applicant was invariably referred to the local employment office.²³ Several statutes provide more directly that aid will not be given to individuals who refuse employment,²⁴ though sometimes with a limitation to persons physically able to work.²⁵ On the issue of the type of job which the applicant must accept, a few statutes are silent.²⁶ Two require that the job be "suitable" but do not define this term,²⁷ while a few require that the job pay the prevailing wage,²⁸ or that the conditions of employment be reasonable.²⁹ Nothing is said about union objectives, apart from an occasional provision that allows the applicant for relief to refuse a job that is vacant because of a labor dispute.³⁰

affirmed an administrative finding of incapacity. This father was physically capable of doing work, but the opinion recites that an underlying neurosis kept him idle. The court merely found that at the present time and from a "practical standpoint" the man was incapacitated.

Categorical assistance thus complements unemployment compensation. The incapacitated applicant is not available for work and so is not eligible for unemployment compensation. Freeman, "Able to Work and Available for Work," 53 Yale L.J. 123 (1945). But he may be eligible for categorical assistance. Conversely, the Barnes case would indicate that the children of the "available" parent are not eligible for ADC.

²⁰ See Mandelker, "The Need Test in General Assistance," 41 Va. L. Rev. 893, 907, 908 (1955). The first English poor law was limited to employables. Poor Law, 1597, 39 Eliz. 1, c. 3.

²¹ See Brown, "Public Relief 1929-1939," at 224, 225 (1940).

²² See Mandelker, "Judicial Review in General Assistance," 6 J. Pub. L. 100 (1957).

²³ Gentile & Howard, "General Assistance" 8 (1949). This may be required by statute or regulation. See, e.g., the Ohio statute cited in note 24, *infra*; Minn. Public Welfare Manual § 2534 (Department of Public Welfare, November 4, 1953); Utah Regulations, Employable Assistance § 4472 (Department of Public Welfare, June 1, 1954).

²⁴ Ariz. Rev. Stat. Ann. § 46-233(4) (1956); Cal. Welfare & Inst. Code § 2864 (Supp. 1957) (Emergency Relief Law); Ill. Ann. Stat. c. 23, § 401 (1958); Ind. Ann. Stat. § 52-152 (Burns 1951); Mich. Stat. Ann. § 16.455(2) (e) (Supp. 1957); N.J. Rev. Stat. § 40:8-108 (Supp. 1958); § 44:1-94 (1940); N.D. Rev. Code § 50-0118 (1943); Ohio Rev. Code § 5113.04 (1953). For a similar requirement imposed administratively see, e.g., R.I. Public Assistance Service Manual § 201.2, p. 4 (November 15, 1951).

²⁵ For example, the Michigan statute applies to persons "mentally and physically able to work."

²⁶ Arizona (shall not refuse "available" employment); North Dakota. Under the Indiana law the applicant cannot refuse work paying a "reasonable" compensation. But he is also directed to accept any work payable in money or in kind, apparently without regard to the suitability of the employment. See N.J. Rev. Stat. § 48:8-108 (Supp. 1958) ("willing to work but . . . unable to secure employment").

²⁷ California (suitability to be defined by state department); Illinois. Cf. N.J. Rev. Stat. § 44:1-94 ("proper" employment).

²⁸ E.g., Michigan.

²⁹ Indiana (alternative requirement); Ohio.

³⁰ California, Ohio.

No judicial interpretations of these statutes have been found, but the available evidence indicates that the work refusal requirement in poor relief is administered in terms of minimizing the relief load, without much consideration of individual preferences. This is so in spite of a study during the depression of the 1930's, indicating that only about 3% of the reported refusals of relief applicants to accept jobs were unjustified.³¹ The explanation lies in the nature of the program. Poor relief grants aim at the guarantee of aid at a subsistence level,³² higher standards cannot be expected in the administration of the work refusal requirement.³³

TAFT-HARTLEY: THE FEDERAL LABOR LAW

When work refusal requirements appear in social legislation, the statutory intent does not always indicate whether the majority rule at common law or whether the subsistence standard of the poor law is to be applied.³⁴ In the case of the National Labor Relations Act, differing attitudes in the courts and in the National Labor Relations Board contribute to the failure to establish an accepted base from which this requirement can be administered.

Reinstatement problems under Taft-Hartley can arise in two contexts. Workers on strike may be entitled to reinstatement depending on the reason for the activity and the action taken by their employer. If the employees strike over an employer unfair labor practice, they are entitled to

³¹ Arthur, "Summary Study of Alleged Job Refusals by Relief Persons" 6 (FERA 1936). Of 603 job refusals studied, only 20 were classified as unjustified. The writer reports one case, involving what to him are extenuating circumstances, in which an applicant who was a union member refused a job at one-half the union scale because it would have meant the loss of union membership and would have jeopardized his future employment. This and other cases involving extenuating circumstances comprised 17% of the job refusals studied, so that a substantial number of job refusals in poor relief involved discretionary evaluations of suitability by the applicant.

³² Mention should also be made of the vagrancy laws, which appeared early in English and American history and which imposed penalties on able-bodied workers who left their home communities to seek better opportunity elsewhere. The first such law was apparently 12 Rich. 2, c. 3 (1388). Even today, the vagrancy laws are still used in some areas as a club to force able-bodied men to work. Gentile & Howard "General Assistance," 8 (1949). At least two states define the refusal of an able-bodied person to work as vagrancy. N.D. Rev. Code § 50-0118 (1943); Ore. Rev. Stat. § 166.060(1)(a) (1957). Vagrancy prosecutions for work refusals might also be brought under the customary statute defining a vagrant as any person living in idleness with no visible means of support. See Lacey, "Vagrancy and Other Crimes of Personal Condition," 66 Harv. L. Rev. 1203, 1209 (1953), noting 37 jurisdictions where vagrancy is so defined. Compare those few poor relief statutes which make public work assignments compulsory for recipients, as in Pa. Stat. Ann. tit. 62, § 2522 (1941), or which make ineligible for relief the recipient who refuses to take a public work assignment when it is offered, as in N.Y. Social Welfare Law § 164(4) (Supp. 1958).

³³ Recent statistics indicate an average monthly payment in general assistance of \$64.27 per case. *Weekly* payments in unemployment compensation averaged \$30.45 per case. "Social Security in Review," Soc. Sec. Bull., Vol. 22, No. 1, p. 1 (January, 1959).

³⁴ Under Taft-Hartley the work refusal requirement is judicially imposed. The lack of available legislative histories prevents an analysis of statutory intent under state unemployment compensation statutes, and the federal labor standards provision, which is some-

reinstatement even though replaced.³⁵ But when the strike is called for economic reasons the employer need not rehire the strikers if he has secured permanent replacements,³⁶ provided he does so without discrimination. Outside the context of labor-management conflict, the employee may be entitled to reinstatement under the terms of section 8(a)(3), which prohibits employers "by discrimination in regard to hire or tenure of employment . . . to . . . discourage membership in any labor organization."³⁷

When it will "effectuate the policies" of the act,³⁸ the National Labor Relations Board may order reinstatement with back pay. While the Supreme Court has said that back pay is awarded to carry out the public purpose in securing labor peace rather than to give personal redress,³⁹ its handling of the back pay remedy belies this characterization.⁴⁰ Although the reinstatement section does not carry a work refusal requirement, the Court read one into the law in *Phelps Dodge Corp. v. NLRB*.⁴¹ In an admixture of reason reminiscent of the common law cases, the Court pointed out that only "actual" losses should be compensated, that the employee is not entitled to back pay if he has "willfully incurred" a loss by refusing another job, and concluded that the adoption of the work refusal test will advance "the healthy policy of promoting production and employment."⁴²

Nothing was said in *Phelps Dodge* about the application to work refusals of a requirement that the discharged employee be forced to lower his sights. In its decisions on the necessity of seeking dissimilar work at lower pay the Board has generally followed the prevailing common law view,⁴³ while the courts of appeals have followed the minority common law position.⁴⁴ Unfortunately, beyond a reference to general statutory

what protective of the union position, has no generally helpful congressional history. Note, 56 Yale L.J. 384, 392 (1947). But see note 155, *infra*.

³⁵ NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938).

³⁶ *Ibid*.

³⁷ 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(3) (1952).

³⁸ 49 Stat. 454 (1935), 29 U.S.C. § 160(c) (1952).

³⁹ *United Automobile Workers v. Russell*, 356 U.S. 634, 643 (1958); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 200 (1941).

⁴⁰ For similar comments see 106 U. Pa. L. Rev. 135 (1957); Note, 50 Yale L.J. 507 (1941). See also *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953) (in making back pay awards the Board "must have regard for considerations governing the mitigation of damages"); *NLRB v. Armstrong Tire & Rubber Co.*, 6 CCH Lab. L. Rep. Par. 65, 229 (5th Cir. 1959) (same).

⁴¹ 313 U.S. 177 (1941).

⁴² *Id.* at 198, 200.

⁴³ *Southern Silk Mills, Inc.*, 116 N.L.R.B. 769 (1956), enforcement denied, 242 F.2d 697 (6th Cir. 1957); *Brotherhood of Painters, Local No. 419*, 114 N.L.R.B. 295 (1955). Cf. *Columbia Pictures Corp.*, 82 N.L.R.B. 568, 580 (1949).

⁴⁴ *NLRB v. Southern Silk Mills*, 242 F.2d 697 (6th Cir. 1957), cert. denied, 355 U.S. 821 (1957); *NLRB v. Moss Planing Mill Co.*, 224 F.2d 702 (4th Cir. 1955). The common law cases which Moss Planing cites are among those adopting the minority position. See 46 Geo. L.J. 350 (1958); 43 Va. L. Rev. 951 (1957). In *Southern Silk Mills*, the trial

purposes, none of the cases has articulated the reasons for its result. As yet there is no Supreme Court interpretation. However, differences between the Board and the courts seem more a matter of emphasis. Just like the prevailing common law view, the Board's holding that the employee need only take substantially equivalent employment permits some elasticity, and the courts require that the job offered must be "suitable," in part in terms of the individual's training and background. Neither the Board nor the courts have been sufficiently explicit in articulating the standards of suitability to be applied. The only apparent settled point of difference lies in the Board's continued insistence that the aggrieved employee not be compelled to take another job at less pay than his former employment.

Work refusal requirements in Taft-Hartly must also be tested in terms of their impact on other sections of the statute. The provisions of the National Labor Relations Act reveal a statutory pattern protective of union conduct. Apart from those cases in which the union transgresses a specific unfair labor practice provision, such as the one prohibiting secondary boycotts,⁴⁵ its conduct is protected whenever it falls within the ambit of permitted concerted activities. The federal statute thus reflects an environment favorable to union organizing, to good faith bargaining and collective agreements, and to strikes for bargaining objectives.⁴⁶ Should the work refusal requirement as administered in aid of the reinstatement remedy conflict with these other statutory purposes, it may alter this otherwise favorable statutory climate.

Conflicts of this type have arisen infrequently, and the cases have usually deferred to the union position and to the policy of other provisions in the act that are protective of union activities. One court of appeals permitted the Board to consider the effect of the new job on the employee's seniority status in his former position.⁴⁷ Of particular interest is *NLRB v. Armour & Co.*⁴⁸ Here the employees were offered a choice between transfer to a less desirable job or the abandonment of their union activities. Because the job offer was itself discriminatory under section 8(a)(3), the court held that a rejection would not require a deduction from back pay. The case raises the question whether a job offer imposing conditions running contrary to other provisions of the statute would be forced on the employee. Board cases, however, have indicated that the

examiner had required the employees to lower their sights, in part because of his decision that compensation under the statute is not given as a matter of "right" but as an incidental effect of the back pay order.

⁴⁵ 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4) (1952).

⁴⁶ 49 Stat. 449 (1935), 29 U.S.C. § 141 (1952).

⁴⁷ *Corning Glass Works v. NLRB*, 129 F.2d 967 (2d Cir. 1942).

⁴⁸ 154 F.2d 570 (10th Cir. 1946).

discharged employee's participation in strike and picket line activity may be such as to compel a finding that he "willfully" failed to seek other work.⁴⁹

The relationship of the work refusal test in Taft-Hartley to union objectives has been seldom litigated and little developed. In the context in which this appraisal has been made, customary evaluations lose force, such as the phrasing of the work refusal problem in terms of an underlying antagonism between common law mitigation and the broader purposes of the federal labor statute.⁵⁰ Compared to court opinions under Taft-Hartley requiring a lowering of sights, the majority common law rule is a good deal more favorable to the employee. Additional insight into the impact on union objectives of the work refusal requirement can be furnished by an inquiry into the unemployment compensation laws, under which cases involving this problem are common. A survey of unemployment compensation should also assist in an evaluation of the role of the work refusal test, both under the compensation statutes and the Taft-Hartley Act.

This survey of work refusals in unemployment compensation will tentatively proceed on the assumption that the policies of the National Labor Relations Act are applicable. Employees who have worked in businesses that are subject to the NLRA and who apply for unemployment benefits arguably are entitled to the protection of the federal labor law. Apart from the interstate commerce implications of an applicant's former position, the state unemployment compensation legislation has been passed under the equivalent of a federal enabling act. Statutory and administrative reconciliation with the purposes of the federal labor law would be in order on this basis, and the partial recognition in the federal unemployment compensation statute of labor's protected status lends support to this assertion.

In the discussion that follows, specific interpretive problems arising under the work refusal provisions of the unemployment compensation act will be tested in terms of these assumptions. Since the federal labor statute evinces a general encouragement of union concerted activity

⁴⁹ Ozark Hardwood Co., 119 N.L.R.B. 1130 (1957) (employees on picket line did not look for work); Columbia Pictures Corp., 82 N.L.R.B. 568 (1949) (employee collecting strike donations).

See Daykin, "Back Pay Under the National Labor Relations Act," 39 Iowa L. Rev. 104 (1953); Lahne, "The NLRB and 'Willful Idleness,'" 8 Lab. L.J. 665 (1957). Compare with related unemployment compensation statutory provisions the NLRB view that the employee must actively seek work, and that the employee is disqualified if he participates in a voluntary strike. On the latter point see the Ozark case, *supra*.

⁵⁰ Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (dissenting opinion); Farber, "Reversion to Individualism: The Back-Pay Doctrines of the NLRB," 7 Ind. & Lab. Rel. Rev. 262 (1954).

apart from its specific provisions, work refusals will be evaluated in light of their impact on collective bargaining as well as in terms of their effect on the specific provisions of the act itself. Finally, a reconstruction of the Taft-Hartley and unemployment compensation acts will be attempted in terms that more adequately take into account the aims of the work refusal test in light of federal statutory labor policy.

UNEMPLOYMENT COMPENSATION

Statutory Background

The work refusal test in unemployment compensation measures the claimant's present attachment to the labor market.⁵¹ It is contained both in available for work provisions that determine eligibility for aid and in work refusal provisions that disqualify the recipient from the receipt of benefits.⁵² Almost all state laws disqualify the applicant for refusing to accept "suitable work" without "good cause."⁵³ While most of the statutes list the criteria to be considered in the determination of suitability, these do not touch on the problems arising from union affiliation.⁵⁴ The statutes also disqualify employees for participation in a labor dispute,⁵⁵ and conflicts between this and the labor standards provision immediately come to mind.

However, in accordance with the directive of the federal statute, all states contain a protective labor standards provision. It provides that the claimant need not accept "new work" if it is 1) "vacant due directly to a strike, lockout, or other labor dispute," or 2) if it carries wages and conditions of employment "substantially less favorable" than those

⁵¹ Compare common statutory provisions that test the applicant's previous attachment to the labor market. These disqualify the applicant if he was discharged for misconduct, or if he quit work for other than good cause. Comparisons *infra* note 53, at 87-95. Significant parallels might be found between the work refusal and voluntary leaving provisions. For example, the status of the employee who quits because of lack of union representation, or because the plant wages are below scale, parallels the case of the applicant who refuses suitable work for similar reasons. See Pa. Stat. Ann. tit. 43, § 802(b) (Supp. 1957). In determining whether the employee left with good cause, "the department shall give consideration to the same factors, insofar as they are applicable . . . with respect to the determination of suitable work." And benefits under this section are not to be denied "where as a condition of continuing in employment such employee . . . would be denied the right of collective bargaining under generally prevailing conditions."

⁵² The discussion that follows deals with the standard work refusal provisions in the unemployment compensation laws. A few states have non-standard provisions that depart from the common model. These are discussed in Appendix A.

⁵³ Bureau of Employment Security, U.S. Dep't of Labor, Comparison of State Unemployment Insurance Laws as of January 1, 1958, 84 at 96-99 (1958). A few statutes, while not using the "suitable work" language, contain substantially similar provisions.

⁵⁴ *Id.* at 97: "The usual criteria are the degree of risk to a claimant's health, safety, and morals; his physical fitness and prior training, experience, and earnings; the length of his unemployment and his prospects for securing work in his customary occupation; and the distance of the available work from his residence." The cases have not considered these criteria as exclusive of other considerations, although most courts have required the claimant to lower his sights as his unemployment lengthens and his prospects dim.

⁵⁵ *Id.* at 99-101.

“prevailing for similar work,” or 3) if as a “condition” to employment the applicant would have to join a “company union” or “resign from or refrain from joining” a bona fide union.⁵⁶

Work refusals are also tested under the eligibility provision contained in all laws requiring the employee to be “available” for work,⁵⁷ to which the labor standards provision is also applicable. Furthermore, the statutes either explicitly incorporate the “suitable work” test into the availability provision or it has been read in by administrative and judicial interpretation.⁵⁸ Accordingly, the applicant need only be available for suitable work which he does not have good cause to refuse.

Questions immediately arise as to the relative function of the availability requirement as compared with the disqualification for refusing suitable work. Suggestions that availability is a “rough”, while the explicit work refusal disqualification is a “fine”, screen for testing job refusals⁵⁹ are refuted by administrative practice.⁶⁰ The comment has been

⁵⁶ These provisions are required by Int. Rev. Code of 1954, § 3304(a)(5), and are reproduced in full in Appendix A. They apply both to the eligibility and the disqualification sections. Compare the similar provision in the Federal Railroad Unemployment Insurance Act. It contains additional sections more favorable to the union position:

“No work shall be deemed suitable . . . if—

. . .
(ii) . . . the rate of remuneration is less than the union wage rate, if any, for similar work in the locality;

. . .
(iv) acceptance of the work would require him to engage in activities in violation of law or which, by reason of their being in violation of reasonable requirements of the constitution, by-laws, or similar regulations of a bona fide labor organization of which he is a member, would subject him to expulsion from such labor organization; or

(v) acceptance of the work would subject him to loss of substantial seniority rights under any collective bargaining agreement between a railway labor organization, organized in accordance with the provisions of the Railway Labor Act, and any other employer.” 52 Stat. 1099 (1938), as amended, 45 U.S.C. § 354(c) (1952).

⁵⁷ *Op. cit. supra* note 53 at 84-86.

⁵⁸ Fifteen states now provide that the employee need only be available for suitable work or its equivalent. *Supra* note 53 at 84. For judicial interpretations to like effect see *Garcia v. California Stab. Comm'n*, 71 Cal. App. 2d 107, 161 P.2d 972 (1945); *Reger v. Administrator*, 132 Conn. 647, 46 A.2d 844 (1946); *Raborn v. Heard*, 87 So. 2d 146 (La. App. 1956); *Swanson v. Minneapolis-Honeywell Regulator Co.*, 240 Minn. 449, 61 N.W.2d 526 (1953); *Krauss v. A. & M. Karagheusian, Inc.*, 13 N.J. 447, 100 A.2d 277 (1953); *In re Miller*, 243 N.C. 509, 91 S.E.2d 241 (1956), noted in, 34 N.C.L. Rev. 591 (1956); *Unemployment Comp. Comm'n v. Dan River Mills Inc.*, 197 Va. 816, 91 S.E.2d 642 (1956). Sometimes the court will add the “good cause” limitation by holding that the claimant must be available for suitable work which he does not have good cause to refuse. A contrary interpretation by the Ohio court, *Brown-Brockmeyer v. Board of Review*, 70 Ohio App. 370, 45 N.E.2d 152 (1942), has been changed by statute. Ohio Rev. Code § 4141.29 (Supp. 1957). The cases often rely on *Freeman*, “Able to Work and Available for Work,” 55 *Yale L.J.* 123 (1945) (citing administrative interpretations). To the same effect see *Altman*, “Availability for Work” 90 (1950); U.S. Social Security Bd., *Principles Underlying Availability for Work* 11, 12 (Mimeo 1945).

⁵⁹ This thesis is suggested by *Altman*, *op. cit. supra* note 58, at 84-87, 108. He points out that a man who refuses a suitable job without good cause is commonly disqualified for the job refusal, but may be found available if he is willing to accept other suitable work. But even this administrative practice has little meaning when the disqualification for suitable work is more severe.

⁶⁰ See *Comment*, 1952 U. Ill. L.F. 164.

made,⁶¹ to which a review of the cases lends support, that administrators dealing with a specific instance of work refusal tend to apply the disqualification or to find the claimant unavailable depending on the severity of the penalty which they choose to impose. Availability is tested each week,⁶² and ineligibility on this basis may be temporary. The disqualification for a work refusal is more permanent. Some states disqualify for the remainder of the unemployment, some for several weeks, and some cancel benefit rights earned by the employee.⁶³

Like Taft-Hartley and the common law, unemployment insurance thus pays benefits only to persons who reasonably refuse work. In the former, however, the work refusal test appeared to be applied in terms of a standard external to the individual involved. Unemployment insurance permits some consideration of individual preference, inasmuch as the applicant may refuse "suitable" work for "good cause." Difficulties have arisen in attempts to find independent meanings for these two terms. Judicial and agency interpretation, while not settled, tends to limit "good cause" to reasons personal to the employee and to apply the "suitability" standard to the job itself.⁶⁴ But the two parts of the work refusal disqualification merely represent differing perspectives of the same problem, and they tend to merge in the decisions.⁶⁵ However, the introduction of "good cause" considerations does permit an individualized administration⁶⁶ which, apart from the labor standards provision, can lead

⁶¹ Becker, "The Problem of Abuse in Unemployment Benefits" 53 (1953); Comment, 30 Texas L. Rev. 735 (1952).

⁶² Supra note 53 at 83.

⁶³ Supra note 53 at 98, 99. For this reason, the Social Security Board preferred a determination of unavailability. "Principles Underlying Availability for Work," supra note 58, at 3.

⁶⁴ For a good discussion see *Swanson v. Minneapolis-Honeywell Regulator Co.*, 240 Minn. 449, 61 N.W.2d 526 (1953). The Pennsylvania cases are in accord. E.g., *Haug v. Unemployment Comp. Bd. of Review*, 162 Pa. Super. 1, 56 A.2d 396 (1948). For a similar agency practice see Letter from Max M. Horton, Director, Michigan Employment Security Commission, to the writer, January 9, 1959. See also Menard, "Refusal of Suitable Work," 55 Yale L.J. 134 (1945).

⁶⁵ This corresponds to the position taken in U.S. Social Security Bd., Principles Underlying the Suitable-Work Disqualification 7 (Mimeo 1945). Compare *Tung-Sol Electric Inc. v. Board of Review*, 35 N.J. Super. 397, 114 A.2d 285 (1955).

⁶⁶ Consider the impact of a personalized test on the problems involved in dealing fairly with a high volume of claims. Disqualifications in unemployment compensation have been running at a rate approximating one million a year, while new qualifying claims have been averaging from five to nine million a year. In an average year about half of these disqualifications were attributable to findings of unavailability and to disqualifications for work refusals. "Trends in Disqualifications," 1935-1955, *Employment Security Review*, Vol. 22, No. 8, pp. 41, 45 (August, 1955). As the number of claims increase the experience is that the number of disqualifications decrease. The article reports that the appeal provisions in the statute have worked well. At that time over two million appeals had been taken, and an average of 14 out of every 100 disqualified claimants was seeking appellate review. *Id.* at 46.

The table shows the disqualifications attributable to unavailability and to the disqualification for refusal to work.

to a consideration of objections based on a union orientation.⁶⁷

From this brief review, the purpose of the work refusal requirement in unemployment insurance emerges ambiguously. Perhaps the closest analogy is poor relief, since in both programs the work refusal test functions as a prime determinant of eligibility, and in both programs the eligibility test is framed, to some extent, in terms personal to the applicant. Dispute has flared, however, between those who accept the analogy to the subsistence program of poor relief, and those who reject it and who view unemployment insurance as a status program⁶⁸ which seeks to protect

Disqualifications Per 1000 Claimant Contacts

	1945	1949	1954
Availability	8.3	5.4	6.7
Refusal of Suitable Work	2.4	.8	.9
All Others	5.2	5.8	9.5
Total	15.9	12.0	17.1

Adapted from *Id.*, Table 7, at p. 46.

In 1954, out of 1,616,000 disqualifications, 633,000 were attributable to unavailability, while 83,000 were attributable to a refusal to accept suitable work. Claimant contacts represent initial claims filed, to which are added the total continued weeks of insured unemployment.

⁶⁷ For typical judicial statements indicating the subjective nature of the determination see *Mohler v. Department of Labor*, 409 Ill. 79, 97 N.E.2d 762 (1951) (availability); *Pacific Mills v. Director of Div. of Emp. Security*, 322 Mass. 345, 77 N.E.2d 413 (1948) (administrator has discretion in determining suitable work; statutory criteria not exclusive); *Higgins v. Board of Review*, 33 N.J. Super. 535, 111 A.2d 288 (1955) ("Individualization is administratively inherent in the concepts of willingness, readiness, and availability for work"). In recent years, a tendency toward amplifying and making more particular the disqualification provisions has tended to narrow the area of administrative discretion. "Trends in Disqualifications," *supra* note 66, at 41-43. However, this tendency has not been evident in the provisions affecting union objectives.

Two additional examples of the individualization of the disqualification requirement are of interest here. Most cases now recognize as valid a refusal to accept work on Saturday for religious reasons. E.g., *Swenson v. Employment Security Comm'n*, 340 Mich. 430, 65 N.W.2d 709 (1954); *Tary v. Board of Review*, 161 Ohio St. 251, 119 N.E.2d 56 (1954). Statutory inclusion of the "risk to morals" as a factor affecting suitability facilitates this interpretation, and highlights the individualized approach of the statute. Are labor union ideals moral in character?

Another problem that has caused difficulties involves the applicant who finds no job requiring his skills in his labor market. Provided there are some openings for those with the applicant's qualifications, some courts find him available. E.g., *Reger v. Administrator*, 132 Conn. 647, 46 A.2d 844 (1946). Other courts find him unavailable on the ground that there is no availability of work, even though the applicant is available for work. *Wiley v. Carroll*, 201 S.W.2d 320 (Mo. 1947). The former approach has been characterized as subjective, inasmuch as it credits the employee's attitudes, so long as there is some market for his skills. See Note, 17 *Fordham L. Rev.* 150 (1948). What happens when the employee is willing and able to do work for which there is no market is another question. This problem is discussed in the text, *infra*, in terms of the worker who restricts himself to non-union jobs in an area that is heavily unionized. Compare *Jackson v. Review Bd.*, 124 Ind. App. 648, 120 N.E.2d 413 (1954).

⁶⁸ A related argument centers on whether the program seeks to alleviate short-term or long-term unemployment. Until federal aid was made available in 1958 to extend unemployment compensation benefits, some observers had put the program in the short-term category. See Brockway, "Federal Policies on Unemployment Insurance—What Are They And What Should They Be?" in Proceedings of New York University Eleventh Annual Conference on Labor 301 (1958); Riesenfeld, "The Place of Unemployment Insurance Within the Patterns and Policies of Protection Against Wage-Loss," 8 *Vand. L. Rev.* 218 (1955). Compare Burns, "Unemployment Compensation and Socio-Economic Objectives,"

the standard of living enjoyed by the applicant in his previous position.⁶⁹ While the benefit provisions of the statute have taken a middle ground,⁷⁰ a consensus has not yet been reached on this issue.

Since unemployment compensation has been categorized as a social insurance that confers a "right", in contrast to poor relief, which is handed out as a matter of "privilege",⁷¹ a better analogy might be made to the common law, which similarly applies the work refusal requirement to contracts of employment conferring "rights." But the common law analogy has been rejected when it has been considered.⁷² Accordingly, the answer has to be found in explicit statutory unemployment compensation policy.

An important ingredient of that policy is the statutory language defining the type of unemployment entitled to compensation. In the early model bill prepared for state adoption by the federal agency the declaration of policy limited the purposes of the law to the compensation of "involuntary" unemployment for the benefit of persons unemployed through no "fault" of their own.⁷³ While a later model bill omitted these provisions, and while some state statutes have dropped them,⁷⁴ courts and

55 Yale L.J. 1 (1945). Conceivably, a program geared to long-term unemployment would insist on a stricter work refusal policy, on the theory that the support of the voluntarily idle on a long-term basis would be too costly. For a discussion of the development of unemployment compensation see Witte, "An Historical Account of Unemployment Insurance in the Social Security Act," 3 Law & Contemp. Prob. 157 (1936).

⁶⁹ This cleavage in opinion was much in evidence during the debates on the future of unemployment compensation that took place during the immediate post-war period. See Becker, *op. cit.* supra note 61, at 12-37, 54-61. In part, the more conservative, or subsistence, school was worried about the possible adverse effects on production levels of a liberal benefit policy.

⁷⁰ Benefits are intended to equal 50% of the wage received prior to unemployment. However, because of recent inflationary trends the statutory objective has not been realized, and statutory maxima tend to depress the benefit amount even further. Burns, *Social Security and Public Policy* 52 (1956). Considering the impact of income taxes and working expenses on gross earnings, the benefit may still be roughly equivalent to the net wages offered in new employment paying substantially less than the previous job. While this is a factor that would tend to encourage idleness, other provisions in the program have the opposite effect. Benefits are ordinarily payable only for six months. *Supra* note 53, at 75, 76. Furthermore, the exhaustion rate in unemployment compensation has been surprisingly high, even in good times. In 1953, a relatively good year, the exhaustion rate was over 25% in more than half of the states. Riesenfeld, *supra* note 68, at 240.

⁷¹ For a classic statement see tenBroek & Wilson, "Public Assistance and Social Insurance—A Normative Evaluation," 1 U.C.L.A.L. Rev. 237 (1954). See also Mandelker, "A Legal Perspective on General Assistance," 31 Soc. Serv. Rev. 418 (1957). The generally unsettled status of the privilege doctrine in constitutional law is explored in Note, 40 Minn. L. Rev. 486 (1956).

⁷² The few statements that have been found indicate that common law principles do not control the interpretation of the unemployment compensation act. E.g., *Copper Range Co. v. Michigan Unemployment Compensation Comm'n*, 320 Mich. 460, 31 N.W.2d 692 (1948) (labor dispute disqualification).

⁷³ This history is discussed in Harrison, "Forenote: Statutory Purpose and 'Involuntary Unemployment,'" 55 Yale L.J. 117 (1945).

⁷⁴ La. Rev. Stat. § 23:1471 (Supp. 1956); Me. Rev. Stat. c. 29, § 1 (Supp. 1957); R.I. Gen. Laws § 28-42-2 (1956); Utah Code Ann. § 35-4-2 (1953); W. Va. Code Ann. § 2366(1) (1955); Wis. Stat. Ann. § 108.01 (1957). Eleven states have no statutory declaration of policy. Most of the remaining statutes have policy sections carrying the voluntary-

administrators often frame their interpretations of work refusal requirements in terms of the "voluntary-fault" standard in the declaration of policy.⁷⁵ From this perspective, claimant rejections of job offers imposing conditions thought inimical to union objectives can be attributed to the "voluntary" act of an employee who is at "fault."⁷⁶

Finally, mention should be made of a common judicial and administrative declaration that, insofar as a work refusal involves union con-

fault language. Arkansas amended its statute in 1949 to include this language. Ark. Stat. Ann. § 81-1101 (Supp. 1957). An occasional statute will omit either the reference to fault, Ill. Ann. Stat. c. 48, § 300 (Supp. 1958), or to the involuntary nature of the unemployment, Ind. Ann. Stat. § 52-1525 (Burns 1951). References to the voluntary-fault language are common in the cases, but whether the omission of either or both of these characterizations will have an influence on the decisions is problematical.

⁷⁵ For cases interpreting work refusal provisions in these terms see, e.g., *Welch v. Review Bd.*, 115 Ind. App. 230, 58 N.E.2d 363 (1944); *Robinson v. Maryland Employment Security Bd.*, 202 Md. 515, 97 A.2d 300 (1953); *W. T. Grant Co. v. Board of Review*, 129 N.J.L. 402, 29 A.2d 858 (1943). See also *Riesenfeld*, supra note 68; *Sanders*, "Disqualification for Unemployment Insurance," 8 Vand. L. Rev. 307 (1955). Conversely, unemployment compensation becomes an employer fault law, especially in view of provisions which limit the disqualifying effect of a voluntary quit by the employee to cases where the good cause was attributable to the employer. See *Anson v. Fisher Amusement Corp.*, 93 N.W.2d 815 (Minn. 1958); *Clague & Reticker*, "Trends in Disqualification From Benefits Under State Unemployment Compensation Laws," Soc. Sec. Bull., Vol. 7, No. 1, pp. 12, 22 (January, 1944).

⁷⁶ The emphasis on employee fault in decisions on work refusals is accentuated by experience rating provisions, which are now found in all states except Alaska. Supra note 53, at 21. Except in three states, which levy a nominal employee tax, the unemployment compensation program is financed entirely by employer contributions. *Id.* at 18. Under experience rating the amount of the employer tax varies directly with the unemployment benefits attributable to his business, so that a good employment record will result in a low tax. Supra note 53, at 32-36. Ten states charge benefits to the most recent employer. Twenty-three charge proportionately all of the employers for whom the employee worked during the base period for which the benefits are calculated. Ten states charge the base period employers in inverse chronological order, with maximum limits on the amount that can be charged to any one employer. Especially under the latter type of provision, offers to work by previous employers figure in a determination of the applicant's disqualification. This may create complications in administration, and may give previous employers an unfair opportunity to disqualify applicants. For example, an employee who left a previous employer may not be disqualified under the act if he left for good cause. Supra note 53, at 89. When he subsequently becomes unemployed, the previous employer, if he is to be charged for the benefits to be paid, may offer the employee his old job. At this point the employee risks the possibility of disqualification for refusing suitable work. While he can refuse suitable work for good cause, differences in interpretation under the two sections may result in disqualification for the refusal but not for the voluntary leaving. See Bureau of Employment Security, U.S. Dept't of Labor, *Unemployment Insurance Legislative Policy: Benefits, Eligibility* 63 (Mimeo 1953).

For a case adopting the "fault" approach to a work refusal on the ground that the state statute contained an experience rating provision, see *Mills v. South Carolina Unemployment Compensation Comm'n*, 204 S.C. 37, 28 S.E.2d 535 (1944) (interpreting availability requirement). An indication of this thinking can be found in the statement of policy in the Wisconsin Act:

Each employing unit in Wisconsin should pay at least a part of this social cost [unemployment], connected with its own irregular operations, by financing compensation for its own unemployed workers. . . . Whether or not a given employing unit can provide steadier work and wages for its own employees, it can reasonably be required to build up a limited reserve for unemployment.

Wis. Stat. Ann. § 108.01(1) (1957).

But cf., *Ault v. Unemployment Compensation Bd. of Review*, 188 Pa. Super. 260, 146 A.2d 729 (1958).

siderations, the unemployment insurance program must remain neutral.⁷⁷ This attitude stems from statutory provisions disqualifying claimants engaged in a labor dispute, but the labor standards provisions discussed above raise a conflicting intent. More accurately, the relationship of unemployment compensation to union aims and objectives remains unresolved. This relationship will be examined in the discussion that follows. Attention will first center on work refusal problems arising out of a labor-management dispute, and work refusal determinations that conflict with federal labor policy. The discussion will then be directed to the negative impact of the unemployment insurance law on the objectives and achievements of the labor union movement, and finally to the positive impact of the law on claimants who are uncommitted or antagonistic.

Labor-Management Disputes

Claimants for unemployment compensation may refuse "new work" that is vacant because of a labor dispute, but if they are unemployed because of a labor dispute at their place of employment they are disqualified for its duration.⁷⁸ As compared with similar provisions in the National Labor Relations Act, these sections of the unemployment insurance law impose a relatively gross test. Under neither provision are the merits of the dispute considered.⁷⁹ An employee may refuse new work vacant

⁷⁷ See Williams, "The Labor Dispute Disqualification—A Primer and Some Problems," 8 Vand. L. Rev. 338, 356, 357 (1955).

⁷⁸ *Supra* note 53, at 99-101. The most recent comprehensive review of the labor dispute disqualification will be found in Williams, *supra* note 77, which discusses many of the problems raised in this section from the perspective of the labor dispute disqualification rather than the refusal to work requirement. See also Jones, "The Conflict Between Collective Bargaining and Unemployment Insurance," 28 Rocky Mt. L. Rev. 185 (1956).

Most state provisions incorporating the labor dispute disqualification follow the draft bill, which provides for disqualification for any week in which the unemployment "is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises" at which the applicant was last employed. Williams, *supra* note 77, at 339.

⁷⁹ An example is furnished by the recurring problem of the employee who refuses to cross the picket line that another union has set up at his plant. The NLRB has held that section 8(a)(3) is not violated if the employee is discharged for this reason. *Snow Auto Parts Co.*, 107 N.L.R.B. 242 (1953), noted, 21 U. Chi. L. Rev. 765 (1954). The employee would also be disqualified from unemployment compensation for having participated in the labor dispute. *E.g.*, *Beaman v. Safeway Stores, Inc.*, 78 Ariz. 195, 277 P.2d 1010 (1954) (applying voluntary quit disqualification); *Matson Terminals, Inc. v. California Employment Comm'n*, 24 Cal. 2d 695, 151 P.2d 202 (1944) (applying labor dispute disqualification); *McCann v. Unemployment Compensation Bd. of Review*, 163 Pa. Super. 379, 62 A.2d 87 (1948); AA 160.25-41 (N.J. B 1957) (employee refused suitable work). See Shadur, "Unemployment Benefits and the 'Labor Dispute' Disqualification," 17 U. Chi. L. Rev. 294, 325-27 (1950). But cf., 3:4541-Ind. A. (For construction of citation form used, see Appendix B, p. —) The applicant refused to cross a picket line set up by employees striking the general contractor on a construction job. He worked for a subcontractor, and was upheld in his refusal because crossing the picket line would have hurt his status in his own union. On this basis the work was found unsuitable.

However, refusals to cross picket lines or to take job offers are upheld when the applicant would be subject to picket line or other union violence if he did so. *E.g.*, *McCann v. Unemployment Compensation Bd. of Review*, *supra*; 9:11624-Hawaii R; 5:7041-Ohio A; 5:7555-Ohio A. Because of the physical danger to the applicant such decisions are inevitable,

because of a dispute, even though the union on strike may be violating an unfair labor practice provision of the federal act, but he will be disqualified if his union strikes, though it be protected activity under the federal law. Because these two provisions of the unemployment compensation laws impose differing policies, cases will arise in which legitimate doubt exists as to which is applicable. In these instances, consideration of the underlying purposes of the law is noticeably lacking.⁸⁰ Instead, the decision to apply one provision or the other has a constructional basis, so that the employee's work refusal is automatically accepted or rejected depending on the attitude taken toward the technicalities of the statutory language.

Part of the explanation lies in the closely confined nature of the labor dispute section. One example is presented by the employee who was discharged prior to the time the labor dispute began.⁸¹ He is not disqualified as the labor dispute has not caused the unemployment. Similarly, the dynamics of the strike frequently create instances in which the labor dispute disqualification no longer applies. A common example is the strike that is broken. Either the employer manages to resume production with replacements, or he discharges the strikers during the conduct of the strike. While court and administrative⁸² decision is divided, in most states either the resumption of production⁸³ or the discharge⁸⁴ will terminate the dispute and make the labor dispute disqualification inapplicable for this reason.⁸⁵

but have the anomalous result of strengthening the hand of the striking union that chooses to resort to unlawful acts. Union violence in this context is an unfair labor practice under the National Labor Relations Act. 20 NLRB Ann. Rep. 101-03 (1955).

⁸⁰ Consider the difficult problem presented by the office employee who is asked to take a position left vacant by the strikers. Since he is not identified with the strike the labor disputes section does not disqualify. But the labor standards provision does not apply because technically the work is not "new" in terms of the employment relationship with the employer. A few cases uphold the job refusal on the ground that to do otherwise would violate the intent of the labor standards provision. 10:11625-Hawaii R; 11:12900-Mass. R. (dictum); 4:5229-N.J. D.

⁸¹ See the discussion in the text at note 92, *infra*.

⁸² Because appellate court appeals in unemployment compensation are relatively rare, considering the volume of disqualifications, resort has been had to state administrative decisions. The only generally available source for administrative decisions by state unemployment compensation review boards and referees is the Benefit Series of the Bureau of Employment Security of the Federal Department of Labor. The Series reports selected administrative decisions on a monthly basis. It is more fully described in Appendix B, where the citation form adopted for cases in the Series is also given.

⁸³ On this point the leading case is *Lawrence Baking Co. v. Michigan Unemployment Compensation Comm'n*, 308 Mich. 198, 13 N.W.2d 260 (1944). Accord, *Sakrison v. Pierce*, 66 Ariz. 162, 185 P.2d 528 (1947).

⁸⁴ For cases finding the labor dispute disqualification inapplicable on this ground see *Milne Chair Co. v. Hake*, 190 Tenn. 395, 230 S.W.2d 393 (1950); 11:12565-Conn. R; 12:13598-Mass. R. Compare *Thomas v. California Employment Stabilization Comm'n*, 39 Cal. 2d 501, 247 P.2d 561 (1952); *Employment Security Comm'n of North Carolina v. Jarrell*, 231 N.C. 381, 57 S.E.2d 403 (1950).

⁸⁵ But the employees may decide not to strike. Cf. *Copper Range Co. v. Michigan Unemployment Compensation Comm'n*, 320 Mich. 460, 31 N.W.2d 692 (1948) (no dis-

Some precedence is given to the labor disputes section, since occasional claims that the labor standards provision has made the labor disputes disqualification inoperable have been rejected whenever no question exists about the disqualification of the employee because of the dispute.⁸⁶ The phrase in the labor standards section allowing the employee to reject "new work" vacant because of a labor dispute is not applied to the last employment, and the decisions are probably correct since to hold otherwise would nullify the labor disputes disqualification altogether. Accordingly, an explicit offer of work by the employer during the course of the strike cannot be rejected as unsuitable under the labor standards clause.⁸⁷

But when the labor disputes section is no longer applicable for the reasons cited above, the decisions tend to reach a contrary conclusion. Consequently, in spite of professions of neutrality, the law takes sides. If the strike has failed and the employer has reopened, the cases allow the employee to reject an offer to return to work yet still collect compensation.⁸⁸ In informal opinions, however, a contrary result was indicated by the majority of the state agencies responding to a questionnaire⁸⁹ that presented this fact situation as one of a series of hypotheses.⁹⁰ A dis-

qualification; company closed after employees refused wage reduction); 1:373-N.H. A. (similar).

There are a few statutory limitations on the labor dispute disqualification. In West Virginia the disqualification is not applicable if the strike is called over wages that are less than prevailing. *Homer Laughlin China Co. v. Hix*, 128 W. Va. 613, 37 S.E.2d 649 (1946). Nine states exclude a stoppage of work due to a lockout. *Supra* note 53, at 100. But cf. *Erie Forge & Steel Corp. v. Unemployment Compensation Bd. of Review*, 188 Pa. Super. 405, 146 A.2d 751 (1958). However, when the labor dispute disqualification is inapplicable, the employees may be disqualified for having voluntarily quit work without good cause. *International Furniture Co. v. Unemployment Compensation Bd. of Review*, 185 Pa. Super. 235, 138 A.2d 207 (1958).

⁸⁶ *Barber v. California Employment Stabilization Comm'n*, 130 Cal. App. 2d 7, 278 P.2d 762 (1954); *Bilodeau v. Maine Employment Security Comm'n*, 153 Me. 254, 136 A.2d 522 (1957). But cf., *Buckeye Coal Co. v. Unemployment Compensation Bd. of Review*, 161 Pa. Super. 594, 56 A.2d 393 (1948) (labor dispute disqualification applied but work at struck plant also held unsuitable). Compare *Beaman v. Safeway Stores, Inc.*, 78 Ariz. 195, 277 P.2d 1010 (1954) (must pick disqualification section most applicable).

⁸⁷ *American Tool Works v. McDermott*, LD 205.2-33 (Ohio C.P. 1956). For a contrary position see U.S. Social Security Bd., "Principles Underlying the Suitable-Work Disqualification" 17 (Mimeo 1945). An employer's job offer during a strike may or may not be privileged under the National Labor Relations Act, depending on whether it is calculated to undermine the union's position. *Olin Mathieson Chemical Corp. v. N.L.R.B.*, 232 F.2d 158 (4th Cir. 1956), *aff'd*, 352 U.S. 1020 (1957).

⁸⁸ *Sakrison v. Pierce*, 66 Ariz. 162, 185 P.2d 528 (1947) (labor standards section applied to avoid finding of unavailability); SW 315-11 (Hawaii B 1953); SW 490-3 (Tenn. B 1951) (work not new but is found unsuitable). The Hawaii decision held that to force the strikers to take the work offered them after the strike was broken would violate the statute's policy of neutrality toward labor disputes. Compare 9:10301-Tenn. R. See also "Principles Underlying the Suitable-Work Disqualification," *supra* note 87.

⁸⁹ To supplement court opinions and administrative decisions, a questionnaire posing several hypothetical questions involving union problems under the unemployment compensation acts was sent to half of the state agencies. A response was requested in terms of the applicable policy. The survey and its results are described in Appendix C.

⁹⁰ See Case #4 in the letter to unemployment compensation agencies, Appendix C.

qualification was imposed on the ground that the labor dispute was still in progress or that the work offered was suitable. Only a few agencies would find the job unsuitable either on general grounds or on an application of the labor standards provision.⁹¹ As noted earlier, the employee's relationship with the dispute may also be severed on an individual basis. He may be discharged prior to the commencement of the strike,⁹² or during its progress,⁹³ or he may find new employment during the strike and then be laid off involuntarily from the new job.⁹⁴ In these situations, the cases permit him to reject a job offered by the employer at the struck plant.

Those decisions dealing with severance on an individual basis appear correct vis-a-vis the compensation law, since the employee is no longer identified with the dispute, or never was, and the severance can be said to come about through no fault of his own. To compensate strikers when the strike has failed involves the law in the dispute, however, since the expectation of receiving unemployment benefits may encourage them to continue. But since the unemployment compensation acts are not selective in terms of the merits of the strike,⁹⁵ to pay benefits in either of the cases indicated does not always match well with the policy of the federal labor law. For example, an employee who strikes for economic reasons and who is permanently replaced under circumstances free of discrimination for union reasons is not entitled to reinstatement under Taft-Hartley but may be entitled to unemployment compensation. In this case the statutes protect the employee through the reinstatement remedy so long as he remains attached to his job, and then consistently substitute unemployment benefits when he has been replaced. However, employees who strike over an employer unfair labor practice and who are then replaced are entitled *both* to unemployment compensation and to reinstatement with back pay. Since the unemployment compensation paid may not be offset against the back pay award,⁹⁶ a double recovery may result.

⁹¹ Iowa, Michigan (perhaps), New Jersey (if condition of employment clause violated), and Utah. Job suitable: Alabama, California, Pennsylvania. Labor dispute disqualification applicable: Connecticut, Florida, New York, Ohio. South Dakota and perhaps Michigan would not apply the labor standards section but would approach the problem under the individualized statutory criteria relating to job suitability. The variance between administrative practice and the few available administrative and court decisions is of interest. Little explanatory comment was offered by the respondents replying to the questionnaire.

⁹² *Davis v. Hix*, 140 W. Va. 398, 84 S.E.2d 404 (1954), noted, 57 W. Va. L. Rev. 231 (1955); SW 315-5 (Cal. B 1950); 11:12418-Conn. R.; 12:13288-Kan. R.; 11:12854-Okla. A. See also LD 175-55 (Tex. A 1958) (employee ill and off work for one month prior to strike).

⁹³ 3:3445-Del. A.; 4:5285-Ind. A.

⁹⁴ *Bergen Pt. Iron Works v. Board of Review*, 137 N.J.L. 685, 61 A.2d 267 (Ct. Err. & App. 1948); 11:12859-Ohio R.

⁹⁵ Comment, 49 Mich. L. Rev. 886 (1951).

⁹⁶ Unemployment benefits are not deductible from the back pay award. *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361 (1951).

Cases involving work refusals in connection with strike activity not found to be disqualifying are also tested under the "availability" provision. In these cases the decision has turned on the striker's involvement with the union. If the striker is free to seek other work in spite of the strike he is found available,⁹⁷ but if his involvement in union activity effectively prevents him from seeking work elsewhere he is held to be unavailable.⁹⁸ While not directly applicable to this type of case, the labor standards provision conceivably manifests a statutory intent protective of strikes whenever the labor disputes disqualification does not apply. However, the labor standards clause has not been considered, and the cases echo the notion of a "voluntary" limitation on employment which obviously derives from the statutory declaration of policy. Practically, however, the striker may have to abandon the strike to collect compensation,⁹⁹ which, although consistent with the labor dispute disqualification, is inconsistent with the intent behind the labor standards provision. The cases call for a decision on the merits, and do not seem aware that the results reached pull the unemployment compensation act against, rather than for, the strikers.

An extreme interpretation of "availability" in the strike context, which emphasizes this point and which runs contrary to the purpose behind the federal labor law, was adopted in a Kentucky administrative decision.¹⁰⁰ In this case the employee actively and sincerely looked for work, in spite of picket line obligations. However, the employers to whom she applied

⁹⁷ Milne Chair Co. v. Hake, 190 Tenn. 395, 230 S.W.2d 393 (1950); 3:3114-Idaho A; 4:6634-Ind. R (no offers of employment had been refused and no obligation to appear on picket line); 12:13768-Mass. A (though receiving strike benefits applicants had looked for other work); 3:2897-N.D. A; AA 475.05-13 (W. Va. A 1958). Cf., AA 475-05-1 (R.I. B (1950) (crewman out of work because of dispute between canneries and boat owners).

⁹⁸ Cases predicated on applicant's decision to become personally involved: Clinton v. Hake, 185 Tenn. 476, 206 S.W.2d 889 (1947) (affirming board of review on the facts); 11:12651-Conn. R (based also on finding of picket line violence); 12:13598-Mass. R (apparently based on receipt of strike benefits); 10:12051-N.J. R (applicant elected president of union). Cases predicated on union's action: 12:13079-N.J. R (union struck all places of employment and prohibited members from working at struck plants); 12:13240-N.Y. R (applicant prohibited from taking job during strike on pain of losing union membership). But cf., 1:502-Wis. A.

For a similar holding on availability in an analogous situation see the cases involving the miners' union tactic of working only a three-day week if the old contract expires before a new one can be negotiated. Bedwell v. Review Bd., 119 Ind. App. 607, 88 N.E.2d 916 (1949); Unemployment Compensation Comm'n v. Tomko, 192 Va. 463, 65 S.E.2d 524 (1951), noted, 9 Wash. & Lee L. Rev. 109 (1952).

⁹⁹ See Producers Produce Co. v. Industrial Comm'n, 365 Mo. 996, 291 S.W.2d 166 (1956). The strikers were held unavailable because of a finding that their positions were still vacant and that they intended to maintain the employer-employee relationship and resume their old jobs when the strike was over. Cf., Adams v. American Lava Corp., 188 Tenn. 69, 216 S.W.2d 728 (1948).

¹⁰⁰ AA 475.05-15 (Ky. B 1958). Compare SW 475.8-3 (Del. B 1956). Here the applicant was a union member, and an employer refused to accept her because he did not want union girls in his factory. No disqualification was found; while the applicant might have resigned the union and obtained the job, this would be contrary to the labor standards provision.

refused to take her because of her prior identification with a strike against a former employer. For this reason, the applicant was found to be unavailable. That the right to strike and picket is constitutionally and legally guaranteed could not affect a determination of eligibility under the unemployment insurance law.

A similar case was posed in the questionnaire distributed to the state agencies, and the replies received voiced an almost unanimous contrary opinion.¹⁰¹ The position of the Kentucky board would permit employers to deprive employees of compensation simply by refusing them employment on the basis of their union activities. Yet a refusal to hire based on reasons connected with union affiliation is an unfair labor practice under section 8(a)(3) of the federal labor law. Consequently, under the Kentucky interpretation, the unemployment insurance act can be used to sanction employer conduct that would be violative of the federal labor law. That the employee might successfully bring an unfair labor practice charge against the employer who refuses to hire him does not alter the consequences of the case for the administration of unemployment compensation.

This discussion of the treatment under unemployment insurance of employees involved in strike activity, but not covered by the labor disputes disqualification, has pointed up inconsistencies in the opinions. Most of the cases project the compensation law into the dispute, but pull variously for or against the strikers. How these cases should be resolved is an open question. If the labor disputes section is inapplicable perhaps the inclusion of a labor standards provision points toward a recognition of the employee's right to strike. A theoretically neutral decision is difficult to construct, since a decision for or against the striker will have an effect for or against the strike. Under the present statutory structure in unemployment compensation, however, the cases can be reconciled. When the employer resumes production after having replaced or discharged the employee, the unemployment can no longer be considered as voluntarily incurred. But the presence of the employee on the picket line may be said to have imposed a voluntary limitation on availability. More explicit consideration of the impact of these decisions on labor policy would require the introduction of new statutory concepts.

¹⁰¹ See Case #5 in the letter to unemployment compensation agencies, Appendix C. Of the agencies replying to this hypothetical, only Connecticut would find the applicant unavailable. Nine would find him available: Alabama, California, Florida, Iowa, Michigan, New Jersey, New York, Ohio, and Utah. The California agency reasoned that since to strike is a "right" guaranteed by law, the unemployment of the individual under the circumstances indicated is not his "fault."

Conflicts with Federal Labor Policy Outside the Strike Context

Disqualification policies in unemployment compensation laws also lose sight of the fact that union-management relations are not always carried on in the blacks and whites of a strike. In the case of contract reopenings, the dynamics of the bargaining process are such that the strike is often only the last resort, and prolonged negotiations may precede the union's decision to call out its members. As relationships reach the breaking point, other union members may be reluctant to take a position in a plant where "trouble" can be anticipated. But in the few cases that have considered a refusal to work for this reason the claimants have been denied compensation.¹⁰² The labor standards provision has not been applied because no labor dispute is in actual progress.

The effect these decisions will have on the relative bargaining powers of the union and the employer is difficult to ascertain, and will depend on plant turnover, the state of the labor market, and the strength of the bargaining union. But this approach tends to conscript a labor force for the employer, inasmuch as compensation claimants who turn down a job offer do so on pain for forfeiting their benefits. While the effect on the union of new accretions to the plant force depends on immeasurable imponderables, the employer has an opportunity to weaken the union. Knowing that a strike is in the offing, he might chance the discharge of the active union leaders, with the knowledge that unemployed workers to whom he offers the vacancies may find themselves compelled to accept them.

In the latter situation, union-oriented compensation claimants who are referred to these jobs might reject them because they were vacated as the consequence of an alleged employer unfair labor practice. The employer may also have a prior record of anti-union animus, marked by discriminatory discharges, coercive tactics, and similar conduct. Although no cases have arisen in which a job rejection for this reason was considered,¹⁰³ one of the cases in the questionnaire sent to the state agencies posed this problem in terms of prior conduct of the type described. Most of the responses would not accept the job refusal, although there was some indication of a contrary decision in the case of a pending violation.¹⁰⁴ They represent a failure to consider the union-oriented objections

¹⁰² *Bigger v. Unemployment Compensation Comm'n*, 43 Del. 553, 53 A.2d 761 (1947); SW 475.05-3 (Cal. B 1953); 10:11368-Conn. R. Cf. *Sweeney v. Unemployment Compensation Bd. of Review*, 177 Pa. Super. 243, 110 A.2d 843 (1955).

¹⁰³ But cf., SW 475.55-13 (Ore. A 1954). There was "trouble" between the union and the employer who offered the job, and the claimant would have lost his union status had he taken it. The work refusal was accepted.

¹⁰⁴ The responses were given to case #2 in the letter to state agencies. The following states indicated either that the work was suitable or that the applicant did not have

which fall outside the specific protection of the labor standards provision, which protects the union from the potential strikebreaker only if it chooses to strike.¹⁰⁵ But since striking employees are disqualified under the compensation statute, this course of action may also give the union pause.

Another category of cases giving rise to potential conflicts in policy is typified by the union leaders discharged during contract negotiations. Here, as in other cases involving a discharge that discriminates against union members, the employees may file an 8(a)(3) complaint with the NLRB asking for reinstatement and back pay. If the complaining employee willfully refuses other work he may not fully recover his back pay should he succeed, although he will still be entitled to reinstatement. With this in mind, it is open to question whether it is consistent or inconsistent with the policies of the National Labor Relations Act to excuse this employee from the work refusal disqualification in unemployment compensation. Since the labor law requires him to seek other work, perhaps the unemployment compensation law should do likewise. On the other hand, an ultimate finding in the employee's favor would characterize the dismissal as involuntary on his part, and the greater financial resources

good cause to refuse it: California (board to be neutral in labor matters); Florida; Michigan; New Jersey; New York; Ohio; Pennsylvania. Replies from the following states indicated that the applicant might be able to reject the offered work: Connecticut (if present violation by employer); Iowa (if employee could make out strong case); South Dakota (past unfair labor practices might give good cause to refuse); Utah (possibly if present violation by employer).

There is some support for the minority position in an occasional opinion. See SW 475.75-5 (N.Y. 1952), holding that the applicant has good cause to refuse a job subject to a union security clause invalid under the Taft-Hartley Act because it required immediate union membership without the statutory 30-day grace period. Hiring under such a clause constitutes an unfair labor practice under 8(a)(3). Cf., *Baker v. Powhatan Mining Co.*, 8:10040-Ohio Ct. D. (Ct. App.), rev'd, 146 Ohio St. 600, 67 N.E.2d 714 (1946). The concurring opinion in the court of appeals decision found that the employer's offer of work involved an unfair labor practice under the federal statute because it constituted an unlawful refusal to bargain collectively with the union. Accordingly, the work refusal was justified, as a contrary holding would undermine judicial policy sustaining the right of workers to organize and bargain collectively.

¹⁰⁵ Compare *Ludwigsen v. New Jersey Dep't of Labor*, 12 N.J. 64, 95 A.2d 707 (1953). Employees in the company cafeteria were covered by the union's contract. When the employer turned the cafeteria over to an independent contractor, cafeteria employees refused to go to work for him because they would lose their rights under the contract and because he was claimed to be unsympathetic to unions. After a union-instigated boycott of the new cafeteria management by the production employees, the employer agreed to transfer the cafeteria employees to production jobs in the plant.

The cafeteria employees were found unavailable for work during the period of the work refusal, the court noting that the new cafeteria management offered the employees work at the old wages and on the same conditions. Acknowledging that the reason for the collective refusal to work was understandable, the court nevertheless held that it could not be considered in a determination of suitability or good cause under the statute. Unions have usually objected to the conversion of plant departments to an independent contractor status because it enables the principal employer to escape his obligations under applicable legislation. An employer who does so may be found guilty of an unfair labor practice under the federal labor relations act. *NLRB v. Houston Chronicle Pub. Co.*, 211 F.2d 848 (5th Cir. 1954).

available to the employer would support the giving of compensation to the employee to sustain him while he is prosecuting the NLRB charge, should he elect this course of action. Although the unemployment compensation paid cannot reduce the back pay award, the employee would probably have turned down suitable employment during the litigation period. This refusal could be characterized as a willful refusal of work sufficient to bring about a reduction of the back pay award, which practically avoids a double recovery. In balance, however, the imponderables in this situation also make for a difficult decision.

Almost unanimously, the few suggestive administrative decisions that have touched on this problem,¹⁰⁶ and the agency responses to the posing of this case on the questionnaire,¹⁰⁷ do not allow the applicant for benefits to refuse a new job on the grounds of a pending 8(a)(3) charge. They proceed on the claimed neutrality of the unemployment insurance act in union matters, and on the irrelevance to the statute of the policies of the federal labor law.

Contrary decisions in the cases discussed in this section may aid the union position, although the effects of a decision either way may be problematical. At least these cases indicate that when the merits of the controversy are projected into a decision on the compensation claim the unemployment insurance statute cannot remain neutral. Whether the compensation act can be designed to evaluate the controversy without at

¹⁰⁶ Unfortunately, both cases occurred during the War Labor Board (WLB) period of World War II. In one case the employees refused other work on the ground that to do so would jeopardize their reinstatement rights. The referee found against them on the ground that the WLB might rule in their favor and that in all probability they would ultimately receive back wages because of the WLB decision. 8:9535-Pa. A.

Compare 7:8960-Ill. A. In this case the employees had been discharged following a strike. They claimed that to force them to take other work would break up the union. Because of this limitation they were found unavailable, the referee holding that considerations of union solidarity could not override the war effort. Here the WLB had certified the employees as available for other work, both in the interest of the war effort and because in its opinion the settlement of the dispute before the WLB would not be jeopardized if the employees involved took other jobs. The referee relied on this certification and also remarked that the employees had limited their availability to their previous employer, but that reemployment with him was problematic and could occur only at the instance of the WLB.

¹⁰⁷ See Case #1 in the letter to state unemployment agencies, Appendix C. As the case was stated, the agencies were asked whether the applicant could refuse any job offer because of the pending 8(a)(3) charge. With one exception, the answer was in the negative, either on the ground that the applicant had made himself unavailable or that he had refused work without good cause. See letters from Alabama, Connecticut, Florida, Indiana, Iowa, Michigan, New Jersey, New York, Ohio, Pennsylvania, South Dakota, and Utah. The responses indicated that union considerations simply could not enter into the determination, and the South Dakota response relied explicitly on that state's right-to-work law, prohibiting union security. California indicated that the applicant would be unavailable under the circumstances posed, but that he might possibly have good cause for refusing a placement if taking the new job would jeopardize his case.

An employee discharge is justified under the National Labor Relations Act if it is "for cause." 49 Stat. 444 (1935), as amended, 29 U.S.C. § 160(c) (1952). An employee discharged for "cause" under the federal statute may or may not have been discharged for "misconduct" under the state unemployment compensation act. See the South Dakota letter. A discharge for "misconduct" is disqualifying. Comparisons *supra* note 53, at 93-95.

the same time collaterally enforcing the Taft-Hartley Act is another problem.

Protecting the Gains of the Union Movement

In accord with court decisions under Taft-Hartley and the minority position at common law, the unemployment insurance statutes have been interpreted to impose a sliding scale.¹⁰⁸ Under the usual interpretation, the claimant must lower his sights as to wage and occupation after he has searched for a job at his previous trade for a reasonable period of time, and if re-employment in this trade does not appear probable. Whether this interpretation points unemployment compensation toward the subsistence standard of the poor relief law is a matter for speculation. At this point, the problem is to determine whether the wage achievements of the union movement can act as a brake on the application of the sliding scale.

Analysis starts once more with the impact of the labor standards provision on the work refusal disqualification. To take a case falling within the explicit terms of that section, a union man out of work may be offered a job in an open shop, paying below the union scale. As a "condition" of employment the employer may insist that he resign his union membership. This "condition" is prohibited by the labor standards provision, and the applicant may refuse the job as unsuitable. Perhaps the employer offering the job may not insist on resignation, but the union may insist that the employee forego his affiliation if he takes the open shop job offered to him. Case acceptance of the employee's rejection of a job for this reason is divided.

¹⁰⁸ For typical cases see, e.g., *Broadway v. Bolar*, 33 Ala. App. 57, 29 So. 2d 687 (1947); *Claim of Jackson*, 68 Idaho 360, 195 P.2d 344 (1948); *Di Re v. Central Livestock Order Buying Co.*, 246 Minn. 279, 74 N.W.2d 518 (1956); *Hallahan v. Riley*, 94 N.H. 48, 45 A.2d 886 (1946); *Breskin v. Board of Review*, 46 N.J. Super. 338, 134 A.2d 730 (1957); *In re Shotkin*, 4 App. Div. 2d 924, 166 N.Y.S.2d 923 (3d Dep't 1957). Pennsylvania has vacillated in the application of this rule. For cases rejecting the proposition that the applicant has a reasonable time to look for a job equivalent to his previous one see *Merck & Co. v. Unemployment Compensation Bd. of Review*, 184 Pa. Super. 138, 132 A.2d 727 (1957); *Glen Alden Coal Co. v. Unemployment Compensation Bd. of Review*, 169 Pa. Super. 356, 82 A.2d 64 (1951). These cases indicate that the "reasonable time" rule was limited to the reconversion period following the second World War, and that applicants now have to make an immediate readjustment, to a lower level if necessary. But cf., *Cicerella v. Unemployment Compensation Bd. of Review*, 185 Pa. Super. 63, 137 A.2d 853 (1958); *Reed v. Unemployment Compensation Bd. of Review*, 182 Pa. Super. 428, 128 A.2d 112 (1956); *Glen Alden Coal Co. v. Unemployment Compensation Bd. of Review*, 169 Pa. Super. 124, 82 A.2d 74 (1951).

Labor has opposed the application of the sliding scale because it allegedly inhibits re-employment by injuring self-respect and by dashing the hope that the previous status will be maintained. Labor Looks at Unemployment Insurance 16-18 (Report of the Conference Workshop of Organized Labor on Employment Security 1946). See also Loysen, "Suitable Work' for Unemployment Benefit Claimants," *American Economic Review*, Vol. 1, No. 6, p. 9 (September-October, 1944) (history of the sliding scale requirement); Peterson, "Unemployment Insurance in Colorado—Eligibility and Disqualification," 25 *Rocky Mt. L. Rev.* 180 (1953) (discussing basic interpretive problems).

In terms of potential impact on the sliding scale, the union probably condemns all open shops on the ground that their existence and reinforcement only weakens the union position in the long run. But the cases approach the problem through the language of the statute. The initial determination is whether a resignation required by the union, if the employee takes an open shop job, is a "condition" of the employment prohibited by the labor standards provision. If not, the applicant could still be awarded compensation on the ground that he had refused the work with "good cause."¹⁰⁹

The cases are divided, the decisions rejecting the work refusal finding either that expulsion from the union was not a condition imposed by the employer or that the applicant did not have good cause,¹¹⁰ while the decisions accepting the work refusal interpret the condition language differently or find "good cause."¹¹¹ Underlying the decision on the effect of the union-enforced resignation, however, is a series of secondary considerations that echo the test of the sliding scale. Some of the cases rejecting the work refusal point out that the nonunion job paid the union scale,¹¹² or that the reasonable period during which the applicant could refuse a downward adjustment had expired.¹¹³ Similarly, cases accepting the job refusal may point to the fact that the nonunion job does not pay the union scale,¹¹⁴ or that the applicant's chances of re-employment at a

¹⁰⁹ The cases do not usually indicate whether the shop is "open" in the sense that no union has been recognized by the employer as bargaining representative, or in the sense that the union, though recognized, does not operate under a union security clause. However, in most instances the first meaning appears to be intended. For earlier discussions see Menard, "Refusal of Suitable Work," 55 *Yale L.J.* 134 (1945); Note, 56 *Yale L.J.* 384 (1947). Constitutional objections to allowing the applicant to refuse nonunion work when expulsion from his union will result are discussed in the Yale note.

¹¹⁰ *Bigger v. Unemployment Compensation Comm'n*, 43 Del. 553, 53 A.2d 761 (1947) ("condition" must be imposed by employer); *Chambers v. Owens-Ames-Kimball Co.*, 146 Ohio St. 559, 67 N.E.2d 439 (1946); *Barclay White Co. v. Unemployment Compensation Bd. of Review*, 356 Pa. 43, 50 A.2d 336 (1947), cert. denied, 332 U.S. 761 (1947); *Elnit v. Unemployment Compensation Bd. of Review*, 168 Pa. Super. 158, 77 A.2d 668 (1951); 10:11203-Ga. A.; 7:8893-Ga. A.; 8:9145-Ind. A.; 8:9412-Kan. A.; 7:8547-Kan. A.; 8:9802-Mich. A.; 12:13306-Miss. A., aff'd, Bd. Rev. #23-BR-48 (unpub.); 7:8637-Miss. A.; SW 475.55-15 (Mo. B 1956); SW 475.55-5 (Nev. B 1953); 10:11669-Tenn. R. In some of the cases the union would have imposed a substantial fine rather than expulsion, but these instances are treated on the same basis, apparently on the assumption that payment of the fine would prove difficult and expulsion would eventually result for this reason.

¹¹¹ 9:10415-Ark. AG; SW 475.55-11 (Conn. B 1954); 12:13508-Conn. R.; 6:8177-Conn. R.; 8:9314-Fla. A.; 7:8667-Fla. A., aff'd on other grounds, 7:8813-Fla. R.; 8:9040-Ill. R.; 3:2415-Iowa R., rev'd, District Court (unpub.); 12:13762-Ky. A.; 10:11216-Ky. A.; 9:10644-Mich. A.; 9:10196-N.J. R.; AA 475.85-3 (Okla. A. 1952); 8:10135-Okla. R.; 5:7211-Tenn. A.; 6:8146-Va. A. Under the New York statute this result is reached because an applicant is allowed to refuse a job when it would "interfere" with his union membership. 7:9004-N.Y. R. See Appendix A.

¹¹² 7:8893-Ga. A.; 8:9145-Ind. A.; 8:9412-Kan. A.; 7:8637-Miss. A.; SW 475.55-15 (Mo. B 1956).

¹¹³ 8:9145-Ind. A.; 7:8637-Miss. A. Cf., 7:8547-Kan. A. (applicant had been union member for short period).

¹¹⁴ 6:8177-Conn. R.; 8:9049-Ill. R.; 4:6337-Ind. A. (employer had been listed as unfair); 6:8223-N.C. R. Cf., SW 475.55-3 (Tex. B 1951) (nonunion job offered applicant paid

union job are good.¹¹⁵ To the extent that these secondary considerations are decisive, the *per se* objection to a nonunion job is not accepted. Either the readjustment phase of the sliding scale rule is applied in spite of the union's blanket condemnation, or the downgrading impact of the sliding scale is modified only to the extent that the job offered represents a departure from the union's own wage achievement.

An even better indication of the effect of union objections on the application of the sliding scale is furnished by those cases in which union expulsion will result and the job is refused on the explicit ground that it does not pay the union scale. Here the labor standards provision is again potentially applicable on the grounds that resignation from the union is a "condition" of the job offer, and the applicant may claim "good cause" for rejecting the job. Under the labor standards provision the applicant need not take a job paying less than the prevailing wage, so that if a job paying below scale is also below the prevailing wage limit no constructional problems are presented. Difficulties occur in the cases in which the wage, though prevailing, is not the union scale.¹¹⁶ Since the statute permits the applicant to reject a job that pays less than the prevailing wage, by inference a job that meets this standard may be deemed suitable under the statute.

But the cases that have considered this question merely divide along the same lines, and for the same reasons, as those cases in which the job was rejected and expulsion threatened because the employment would be in an open shop. Some of the cases accepting the applicant's refusal do so without qualification,¹¹⁷ but some apply the "reasonable adjustment period" rule and note that the applicant had not been unemployed long enough to force him to lower his sights.¹¹⁸ In the cases rejecting the job

union scale but did not have same fringe benefits). Occasionally, reference is made to the fact that the applicant has substantial rights in hospital and other benefits, accruing because of his union membership, and that he is entitled to keep these. See 9:10644-Mich. A.

¹¹⁵ 8:9314-Fla. A (job offered applicant paid union scale); 8:9049-Ill. R.; 4:6334-Ill. R.; 9:10196-N.J. R.

¹¹⁶ Many of the cases, however, indicate only that the wage is below union scale, without indicating whether it is the prevailing wage for the locality.

¹¹⁷ 9:10515-Ark. A; 2:2165-Ind. A (applicant offered prevailing wage); 12:13066-Mass. A (even though union had raised his scale during applicant's unemployment period and employers had not accepted new rate); 7:8693-Mass. A (job offered was under jurisdiction of another union); 7:8691-Mass. A (same); 8:9506-Mich. A; 5:7280-Neb. R; 7:8996-N.J. A, aff'd, Bd of Review Decision No. BR-5389 (unpub.); 7:8771-N.Y. R; 2:1472-N.Y. A (union would have imposed penalty). Cf., 10:11688-Ariz. A (based, in part, on the fact that applicant was not trained for the job that was offered him); 6:8177-Conn. R (union agent told applicant that to accept work substantially below union scale would jeopardize his getting work at union rate).

¹¹⁸ 8:9791-La. A (applicant out of work for only two weeks); 8:9601-La. A (three weeks); 8:9418-La. A (similar; union agent had refused to send applicant to work paying less than union scale). Cf., *Industrial Comm'n, v. Brady*, 128 Colo. 490, 263 P.2d 578 (1953) (wages offered applicant found not to be prevailing); 9:11046-La. A (applicant expecting re-employment).

refusal, the fact that the time for a readjustment had arrived is sometimes considered.¹¹⁹

When expulsion is threatened by the union if the claimant takes a job that imposes conditions inimical to union objectives, an opportunity is presented to resolve the conflict between union and statutory policy. However, although some consideration has been given to the union position, an undue concentration on the technicalities of the statutory language has often prevented real analysis of the problems of integrating the administration of the statute with the claims which the union has advanced.¹²⁰

In somewhat similar cases the job offered to the claimant requires the resolution of a conflict between the terms of the statute and a union-negotiated collective bargaining contract. When the claimant rejects the job because the wage is unsatisfactory his rejection is not accepted if the wage has been set under the terms of the contract.¹²¹ By analogy to those cases in which the work refusal is accepted because the job offered pays below the union scale, the decisions in this situation accept the union-negotiated wage as evidence that the job offer is satisfactory. In other cases the contract supports the claimant's rejection. Most commonly, the problem has arisen in terms of job priority; the employee turns down

¹¹⁹ 7:8567-Ark. A (job offered paid prevailing wage); 8:9106-Utah A, *aff'd* Industrial Comm'n, Case No. 44-C-63 (unpub.); 9:10679-Wash. A (also noting that chances of getting union work were remote). Both the Utah and Washington cases noted that expulsion at the behest of the union was not a "condition" of the job offered to the applicant. For cases rejecting the applicant's work refusal for the same reason, without considering the readjustment factor, see *Speer v. Industrial Comm'n*, 8:9761-Fla. Ct. D (Circ. Ct.) (union agent had told applicants not to take the job); SW 475.8-1 (N.C. A 1949); 7:8453-Va. A.

¹²⁰ In a few miscellaneous cases the decisions allow the claimant to reject the job for union-connected reasons, when to take it would result in loss of union status. 5:7013-Ill. A (applicant would have been subject to summary dismissal from new job, without benefit of arbitration); 2:1994-Ind. A (journeymen would have lost union status if took job as laborer); SW 475.55-13 (Ore. A 1954) (there was "trouble" between the union and the employer who offered the job); 8:9367-Pa. R (employer offering job not under union contract because he had taken kickbacks from employees). The cases recognize the reasons for the refusal as "good cause" under the statute without much analysis of the implications of the result. Cf. 2:1070-N.Y. A (manual work as strikebreaker found unsuitable for skilled worker because it would affect his seniority and chances of re-employment in skilled position). On the other hand, unreasonable union restrictions have been recognized as such and have not been enforced. E.g., 6:8231-Ill. R (union forbade outside construction worker from taking inside work).

¹²¹ 5:7437-Ind. A; 10:11228-Mass. R; 7:8762-Mo. R, *aff'd*, *Miller v. Unemployment Comp. Comm'n*, Circ. Ct. Jackson County, April 29, 1944 (unpub.). Sometimes the applicant is offered a job which pays a wage that has been negotiated by another union but which is less than the wage commanded by the union to which the applicant previously belonged. Nevertheless, the same result has been reached. 11:12685-N.J. R; 12:13627-N.D. A. In the New Jersey case the commission, while admitting that the unemployment compensation act could not be used to drag down living standards, and while stating that a union man could reject a nonunion wage substantially below scale, held that its decision was fortified by the policy of the NLRB to recognize only one bargaining union for each group of workers. The case contains a lengthy and union-oriented discussion of the problems under consideration.

the job because it has been offered to him in violation of seniority provisions.

While the cases divide, and while many recognize the limitations contained in the union's agreement,¹²² they are short on analysis except in those instances in which expulsion from the union would result if the job were taken contrary to orders. In the cases which do not give weight to the union agreement the decisions usually say that the statutory provisions must be given precedence. No analysis of the role of a collective bargaining contract in unemployment compensation is undertaken. Since the peaceful settlement of labor disputes through the negotiation of collective bargaining agreements is the ultimate aim of federal statutory labor policy, an accommodation of this policy with the unemployment insurance act would seem to require the giving of some consideration to the contract terms.

Finally, an opportunity for the assessment of the impact of union policy on the compensation act is presented by cases in which the applicant rejects job offers that impose conditions inconsistent with union objectives, but in which the union has not threatened expulsion if the work is accepted. Although the job may be rejected because it is nonunion, or because it is below scale, the labor standards provision is not expressly applicable because loss of union membership will not result if the job is accepted. Only the policy of the labor standards provision may be applicable to give the applicant "good cause" to refuse the job offer.

Practically all of the decisions find that the applicant does not have good cause to refuse a job for these reasons.¹²³ Perhaps this result is

¹²² In the following cases, the applicant's seniority did not entitle him to the job: 3:2496-Cal. A (would have led to expulsion from union); SW 475.05-7 (Conn. B 1954); 3:4227-Ind. A (crediting applicant's honest belief, including fear of expulsion from union); 3:4779-N.Y. A (work-rotation plan, disobedience would have led to expulsion from union); 3:2517-N.Y. A (same); 2:1300-Pa. A; 4:5120-Wis. A (would have led to expulsion from union). Cf., 1:497-N.Y. A (applicant may reject work offered for only part of a week, contrary to union agreement). See also the cases in which the loss of seniority rights in the old job, if a result of the new employment, has been considered as a factor in justifying the refusal. *Industrial Comm'n v. Parra*, 111 Colo. 69, 137 P.2d 405 (1943) (concurring opinion); *Hobbs v. Board of Review*, 68 Ohio L. Abs. 369, 122 N.E.2d 707 (1953); 5:6897-Ill. A; 4:6393-Ind. A; SW 475.1-7 (Wis. A 1955) (involved in determination of availability). Cf., *Goings v. Riley*, 98 N.H. 93, 95 A.2d 137 (1953) (applicant's availability determined in part with reference to union contract provisions governing shift priorities).

In a few cases the contract provisions have not been controlling. SW 475.1-11 (Ky. B 1956) (with respect to dispute with employer over use of new machinery); SW 475.05-9 (Mich. B 1955) (with respect to suitability of job offer under the act); SW 475.1-13 (Ore. B 1958) (similar). But cf., SW 475.1-3 (Mich. B 1954) (applicant bound by contract provisions governing mailing of notice of recall). Compare *ACF Industries, Inc. v. Industrial Comm'n*, 320 S.W. 2d 484 (Mo. 1959).

¹²³ 10:11100-Cal. A (work offered under jurisdiction of another union); 12:13282-Fla. A (work offered nonunion, but applicant's union had made referrals to open shops); 8:9221-Ind. A (objection to nonunion job paying below scale considered as factor in application of sliding scale); 2:2170-Mass. R (work offered was nonunion); 7:8497-Minn. R (same; to uphold applicant here would discriminate against nonunion members); 10:11864-Miss. A (nonunion work offered at prevailing wage but below scale for union

reached because of the lack of an objective manifestation of union disapproval, and the union's refusal to expel may indeed be taken as an estoppel of the individual claimant. Additionally, refusals based on subjective "good cause" may be viewed with suspicion, although the following discussion of the contrary treatment of applicants rejecting jobs requiring union membership somewhat negates this conclusion.

So far, the discussion has centered on the impact that union policies and achievements have had on the work refusal requirement. All of the cases that have been considered can also be handled under the "availability" test, and some of the cases of work refusal discussed above have actually been disposed of on the basis of unavailability. At this point, however, interest centers on the truer case of availability. The claimant, when registering for employment, may restrict himself only to union positions, or to jobs paying the union scale. Sometimes he agrees to be considered for nonunion jobs outside his trade. As indicated earlier, since the labor standards provision is applicable to a determination of availability, it might conceivably allow a consideration of union-oriented objectives.

Almost uniformly, the decisions hold unavailable the applicant who imposes restrictions of the type described above, although the agency responses to a case of this type on the questionnaire indicate somewhat greater leniency. However, the reasons for the finding of ineligibility are varied, and many cases are difficult to categorize because they turn on a variety of factors. To the extent that the decisions can be generalized, they indicate a decided reliance upon the availability provisions alone, which do not in terms refer to union objectives. Since availability is often taken to mean total exposure to the job market, in most cases in which the applicant limits his availability to union jobs, or to jobs paying the union scale, the finding of ineligibility is almost automatic.¹²⁴

located in another community); 6:8113-N.M. R (work offered was nonunion); SW 475.65-3 (N.Y. A 1951) (set aside on appeal; applicant contended that to take nonunion work below scale would weaken union position in the industry); 9:10558-N.C. A (work offered was nonunion); SW 475.65-1 (Ohio A 1950) (work offered at prevailing wage but below scale); 11:13007-Pa. R (work offered at prevailing wage but in violation of rates set by applicable contract); 10:11670-Tenn. R (applicant had moved to community where union work not available); 8:9105-Utah A, aff'd, Industrial Comm'n, Case No. 44-6-63 (unpub.) (work offered was nonunion; can't consider personal attitudes of employee). Cf. SW 500.7-13 (Colo. A 1951). Contra, 12:13723-Ore. A (applicant found unavailable on other grounds). Cf., 9:10735-Mich. R (can refuse nonunion job because of honest belief that loss of seniority and union membership would result). Compare SW 500.7-1 (Okla. A 1949).

¹²⁴ Mills v. Mississippi Employment Security Comm'n, 228 Miss. 789, 89 So. 2d 727 (1956); 12:13921-D.C. A.; 7:8673-Ill. A (though refusal of work outside usual occupation is with good cause when loss of union membership and benefits would have resulted); 8:9052-Ind. A.; 7:8364-Mo. A, appeal dismissed, Comm'n Dec. No. C-1303 (unpub.) (applicant limited herself to previous employer with whom she expected re-employment in six weeks); 7:9010-Ohio R.; 7:8708-Ore. A (union would not permit employment outside

Other cases that find the applicant ineligible are willing to consider mitigating factors in an appropriate case,¹²⁵ one of the most important of which is the degree of unionization of the job in question in the locality in which the work is sought. Both the cases and the agency responses indicate that if the area and job are substantially unionized the restriction on availability to unionized positions might well be upheld.¹²⁶ This approach would at least give weight to the extent of unionization as a factor in the individual's job environment. The sliding scale and specific labor standards provisions are additional considerations that enter into a determination of these cases. Decisional attitudes toward the limitation of availability to union work have been influenced by the length of the applicant's unemployment and by his chances of rehire at his usual union occupation,¹²⁷ and by the agency's attitude toward the threatened

usual craft during off season); 7:8398-Ore. A; SW 475.55-1 (Pa. B 1950); 7:8853-Pa. R; 12:13112-Tenn. R (dictum); AA 475.85-1 (Va. B. 1950); 8:9853-Wash. A. Cf. 8:9532-Ore. A.

Question #3 in the letter to unemployment compensation agencies put this problem in terms of a market that was 50% unionized for the job in question. See Appendix C. Responses indicating an automatic finding of unavailability were received from Iowa, Michigan, Ohio, Pennsylvania, and South Dakota.

In some of the cases the employee limits himself to, but is unable to find, union work either because he has moved to an area which is not heavily unionized or in which the union local, having jurisdiction, will not give him a work permit or exacts a waiting period before it will do so. In these cases the decisions find the applicant unavailable, treating the move as a voluntary disqualifying act on the part of the applicant. That the decisions would credit an exclusionary local union rule is hard to understand. 7:8805-Cal. A (local union would not give clearance); 5:7447-Conn. R (local union had waiting period); 8:9577-Fla. R; AA 475.97-7 (Ill. B 1951) (local union would not give license to applicant and gave local members job priority); 8:9048-Ill. A (local union had waiting period); 10:11670-Tenn. R (applicant moved to community where only nonunion work available). At the same time, many decisions fail to accept rules of the applicant's own union that limit his availability. 7:8749-Ga. R (applicant allowed to look for work only through union business agent); 7:8578-Ill. R (applicant not allowed to take off-season work outside his occupation). Cf., SW 170.2-21 (N.Y. B 1954) (not good cause to refuse work not obtained through union hiring hall). Perhaps the difficulty lies again in the statutory disapproval of restrictions imposed by the applicant on himself.

¹²⁵ Only a few cases made an automatic finding of availability. 7:8331-Mo. R (emphasizing applicant's long career as union carpenter); 9:10209-Pa. R. Cf., 7:8766-N.J. R.

¹²⁶ In the following cases this was one of the facts supporting the decision: 8:9482-Fla. A (area heavily unionized); AA 475.85-13 (Pa. B 1956). Similar opinions were given in agency responses from Alabama ("substantially all" work in his occupation and locality unionized), California (90%), and Florida (available unless work prospects considerably reduced). The New York response was similar, indicating that the applicant was entitled to reasonable personal preferences, and that the agency would want to know how many jobs were foreclosed by this limitation.

For holdings of unavailability, proceeding from the same premise, in which there was little unionization in the area, see *Avrani v. Appeal Board*, AA 475.85-5 (Mich. Circ. Ct. 1954) (area 10% unionized); 7:8905-Md. A, aff'd, Bd. Dec. No. 572 (unpub.) (based in part on point that no local work available at union scale); AA 475.05-9 (N.Y. A 1954) (40% unionized and applicant limited job-hunting activities to union offices). Cf., AA 475.05-17 (W. Va. A 1958). The area was 90% unionized but the decision found the applicant unavailable, in part because he was only making efforts to find work through his union.

¹²⁷ Findings of availability based in part on short period of employment and reasonable prospects of finding usual work at union wage: 8:9128-Cal. R; 8:9482-Fla. A; 8:10112-Mich. A. For contrary decisions based in part on the same assumption, in which the claimant's prospects were less sanguine, see 9:10252-Ill. R; 8:9221-Ind. A; 9:10338-Kan. A;

union expulsion of an applicant who registers for a nonunion or below scale job. If the union-imposed penalty is considered a "condition" of employment, the applicant is held to be available, apparently on analogy to the labor standards provision.¹²⁸

For the most part, even when the decisions have considered the impact of the work refusal disqualification on the realization of union objectives and the protection of union achievements, they have not supported the union stand. This results from a tendency to give preference to the general objectives of the compensation statute, even in work refusal cases in which an application of the labor standards provision would support the union-oriented position. An example is furnished by the cases that apply the generally applicable sliding scale to an employee who rejects a job offer because of a threatened union expulsion.

When the work refusal is approached in terms of availability, the decisions appear explainable more in terms of the degree of individual exposure to the labor market rather than the acceptance or lack of acceptance of the union objection. For example, most of the decisions have found unavailable the applicant who is foreclosed from finding union jobs because he has been suspended or expelled from his union for misconduct or nonpayment of dues.¹²⁹ These cases represent the approach to availability indicated above, rather than a sympathy for union affairs. Some of them emphasize that the applicant accepted the union's decision without appealing, and on this basis appear influenced by the self-imposed and voluntary nature of the restrictions on work.

Unionizing the Nonunion Employee

By way of contrast to the situations discussed in the preceding section, the cases dealing with the nonunion claimant's refusal to take a job which would require him to join the union give precedence to the claimant's

7:8905-Md. A, aff'd, Bd. Dec. No. 572 (unpub.); 11:12285-Mo. A; 10:11521-Va. A. Agency responses emphasizing these considerations were received from Alabama, California, Connecticut, New Jersey (held available, but must take nonunion job offering union wage), New York, and Utah.

¹²⁸ 8:9128-Cal. R; 9:10209-Pa. R. For cases where prominence was given to this fact see 8:10112-Mich. A; AA 475.85-13 (Pa. B 1956). Agency responses indicating that consideration be given to this factor were received from California and Connecticut. *Contra*, *Avram v. Appeal Board*, AA 475.85-5 (Mich. Circ. Ct. 1954); AA 475.85-11 (Miss. A 1955). Agency responses from Ohio and Pennsylvania indicating unavailability relied on court cases limiting the "condition" language of the labor standards provision to conditions imposed by the employer. Conflicts in the Pennsylvania cases are apparent. *Cf.*, 9:10252-Ill. R (unavailable; union would not impose penalty); 7:9029-W. Va. R (similar).

¹²⁹ 6:8124-Colo. A; 2:1963-Ind. A; 2:2031-N.Y. A; 11:12167-Wis. A; 2:1556-Wis. A; 1:655-Wis. A. *Contra*, 5:7690-Cal. R; 3:3584-Mo. R; 3:3841-Mass. R. *Cf.*, 8:9672-Ind. A (relying on point that area not heavily unionized for this occupation). Contrast some early Wisconsin cases, where the employee was laid off under the terms of a collective bargaining contract or under a union demand that nonunion workers be laid off before union workers. Nonunion employees who were laid off were found available because the discharge came about through no act of their own. 1:432-Wis. A; 1:431-Wis. A; 1:298-Wis. A.

objections over the general policies of the compensation statute.¹³⁰ Most of the decisions accept the applicant's refusal to take a job requiring union membership, and in some instances are willing to indulge in assumptions contrary to those applied in the converse situation in which the union member refuses a position because it will jeopardize his union standing.

An example is furnished by the cases handling the refusal of a job requiring union membership by applying the availability requirement. Many of these decisions turn upon such factors as the extent of unionization for the job in the locality, or the extent to which the nonunion applicant has brought about his limitation to a market in which all or most of the jobs in his trade are unionized.¹³¹ Other opinions recognize a self-imposed limitation to nonunion work as a personal right,¹³² or treat the union shop as having been imposed by the employer who signed the

¹³⁰ A brief survey of a problem that is tangential though somewhat related to the subject under discussion lends support to the statement that the decisions proceed from the language of the unemployment compensation statute, with little attention to labor policy. Often an employee out of work is referred to a job under the jurisdiction of another union. Because of inter-union jurisdictional conflicts, the employee's own union may not let him take the new job unless he drops his previous union affiliation, which often the employee is reluctant to do because of accumulated seniority and benefit rights. Instead of proceeding to an analysis on the basis of public policy toward inter-union conflicts, the decisions have accepted or not accepted the work refusal in these cases for reasons similar to those already discussed in connection with some of the other problems. For example, when the work refusal is accepted, the decision may rely on the point that the labor standards provision makes a job unsuitable if the employee would have to resign from his union to take it. But it is doubtful whether this section was meant to be applied to inter-union conflict. 8:9305-Cal. R.; 4:5283-Ill. A.; 5:7199-Ind. A.; 5:8180-Kan. A.; 10:11547-La. A. (improperly applying "company union" proviso to excuse taking of new job under jurisdiction of other union); 9:10368-Mo. R. (applicants expected early recall); 9:10900-Mo. A. (reasonable prospects of securing work in usual occupation); 5:7206-N.H. A.; 6:7911-Ohio A.; 3:3240-W. Va. A. Cf., *Bowman v. Troy Launderers & Cleaners Inc.*, 215 Minn. 226, 9 N.W.2d 506 (1943) (contention raised but not considered); 7:8494-La. A. (applicant would have lost death benefits and would have had to pay large initiation fee to rejoin); 8:9247-N.J. A. (applicant would have lost prestige in old union).

When the refusal is not accepted, the decision may rely on the familiar ground that the "condition" which requires the resignation is imposed by the applicant's own union and not by the employer offering the job. 9:10333-Ind. R.; 3-4405-Ky. A.; 7:8890-Mo. A.; 8:9266-Pa. A. Cf., SW 475.05-11 (Wash. A 1956) (no good cause; applicant did not want expense of belonging to two unions). In a few cases this problem has arisen in the context of a fight for recognition by two unions within the same plant. Members of the losing union who have refused to affiliate with the winning union have been upheld on the ground that the job required as a "condition" of employment that they forego membership in their old union. 3:4218-Cal.; 2:908-Cal. (revised in unpub. opinion); 2:1975-Ore. A. For a similar treatment of the same problem under the National Labor Relations Act prior to the 1947 amendments see *Rutland Court Owners, Inc.*, 44 N.L.R.B. 587 (1942). But cf., *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355 (1949).

¹³¹ Held available: 2:2045-Ind. A, modified, 2:2318-Ind. R. (voluntary leave found); 9:10336-Kan. A.; 6:7934-Mass. A. (when available for other jobs in area). But cf., 8:9352-N.J. A. (union closed to Negro applicant); AA 475.97-1 (N.Y. A 1950) (same as to alien; union operating closed shop illegal under federal law).

Held unavailable: 7:8807-Cal. R. (most jobs in area unionized); 6:8082-Cal. R. (same); 6:7932-Cal. A. (applicant left nonunion community for locality where her trade was unionized); SW 475.75-7 (Ind. B 1953) (dictum; if restriction forecloses too much work); AA 475.5-3 (N.M. A 1955), aff'd, *Com'n Dec. No. 88* (unpub.) (market 100% unionized); 6:7747-Wash. A. (same).

¹³² 3:4803-Ind. A. (prior to enactment of right-to-work law).

agreement rather than by the applicant who puts the limitation on his availability.¹³³ Of course, union security has a history of lack of public acceptance, which is currently reflected in the enactment of state right-to-work laws. But the applicable statutory policy toward union security is not much in evidence in the availability cases.¹³⁴

Cases applying the work refusal disqualification to a turndown of union security take much the same approach. Most of the decisions, with little discussion, hold that the refusal of a job requiring union membership is not a refusal of suitable work.¹³⁵ Quite often the result is predicated on a misapplication of the clause in the labor standards provision allowing the applicant to refuse a job when he would be forced to join a "company" union.¹³⁶ By analogy to the National Labor Relations Act, a "company" union under this clause would be one that is dominated or assisted by the employer and that, accordingly, does not have an independent status.¹³⁷ These cases, however, apparently interpret the provision to mean a union established in a "company."

Reference to the personal "liberty" of the applicant to refuse a job requiring union membership also appears.¹³⁸ In these cases there are more frequent attempts to reconcile unemployment compensation with labor relations policy than in the cases in which the applicant seeks to uphold the union. Especially since the reference may be to state rather than federal labor policy, the consequences may be unfavorable to the

¹³³ 5:7512-Ore. A, an interesting case in which the applicant, in part, based her objection to joining on religious grounds. Many of the jobs in her occupation in the area were not unionized.

¹³⁴ But cf., 8:9047-Ga. R. Among other restrictions, the applicant refused to take a job in a union shop. He was found unavailable. Membership in the union was not required. In view of the "constructive" union work of fifty years, work in a union shop was not held unsuitable per se. But the same rule was applied to an open shop position, because the unemployment compensation act dictates an attitude of neutrality toward the union movement.

¹³⁵ 9:10864-Kan. A (work unsuitable); 9:10552-N.J. A, appeal dismissed, Bd. Rev. No. BR-6090 (unpub.) (applicant has good cause to refuse); 10:11729-Ohio A (no "offer" of work if applicant must join union). Cf., 7:8994-Mont. A (applicant could not afford union dues and expected re-employment at nonunion job paying more).

In some of the cases there is an element of abuse of union security, either by the union or by the employer. 11:12590-Ky. R (applicant not given reasonable time to pay back dues); 3:2508-N.Y. A (union closed to applicant); 5:7040-Ohio A, aff'd, Bd. Rev. No. 474-BR-42 (unpub.) (discrimination against nonunion employee); 3:3943-Wis. A (union security agreement signed over heads of employees).

¹³⁶ 10:11452-Colo. A (dictum); 5:7367-Iowa A; 10:12042-Mont. A; 11:12527-Ohio A; 3:3720-Pa. A. In some cases the labor standards provision is admittedly applied by analogy only. 2:2045-Ind. A, modified, 2:2318-Ind. R (employer cannot compel resignation from union and so cannot compel membership either); 8:9374-Tenn. R. Appendix A lists a few states in which the labor standards provision has been amended to make the job unsuitable if the applicant is compelled to join any union, company or otherwise. These provisions would authorize the work refusal. SW 475.75-3 (Minn. B 1951); 10:11235-Minn. A.

¹³⁷ 16 NLRB Ann. Rep. 155-159 (1952).

¹³⁸ Levinson v. Unemployment Comp. Comm'n, 6:8193-Mo. Ct. D (Circuit Ct.); 2:2045-Ind. A, modified, 2:2318-Ind. R (voluntary leave found); 7:8845-N.C. R; 8:9374-Tenn. R.

union position. When a right-to-work law outlaws union security, a decision permitting the applicant to reject a job calling for union affiliation has easily been reached.¹³⁹ Even in the absence of such a statute the employee is upheld on the ground that the compensation act does not require of him "positive acts" of union affiliation.¹⁴⁰ In other contexts many positive acts are required as a condition of eligibility, not the least of which is the active search for work.¹⁴¹ If the recognition of union security agreements is in accord with legitimate public policy, then positive acts relating to union membership might be required as well.

Unfortunately, those cases refusing to accept a work refusal on the ground that the job requires union membership are also inadequately reasoned. Some recognition is given to state and federal statutory sanction of union collective activity, which is extended to include a union security provision of a collective bargaining contract.¹⁴² Other cases are usually content with the observation that the statute provides no explicit excuse for rejecting the offered position.¹⁴³ Few attempts are made fully to reconcile the policies of the unemployment compensation and labor relations statutes.

SOME CONCLUDING THOUGHTS

Work refusal tests permeate the law, private and public, governing employer-employee relations. But in spite of their all-pervasiveness the interpretive treatment of this requirement has been indecisive. A final instance in which the role of the work refusal requires definition is illustrated in a new area of litigation that blends the policies of the National Labor Relations Act and the common law. Wrongfully expelled union members may be able to sue the union for damages under state law, and recent United States Supreme Court decisions permit judicial enforcement of the Taft-Hartley Act in state courts by employees who suffer a discriminatory discharge,¹⁴⁴ whether employer- or union-instigated.¹⁴⁵

¹³⁹ 8:9987-Fla. AG. A similar result was achieved under the declaration of policy of the applicable little Norris-LaGuardia act in SW 475.75-7 (Ind. B 1953). The statute states that it is against public policy for the employer to force the employee either to join or not to join the union. But the statute was later interpreted not to outlaw union security clauses, even though it had been applied to outlaw picketing for a closed shop on the ground that this activity was indirectly coercive of the employees. *Smith v. General Motors Corp.*, 143 N.E.2d 441 (Ind. App. 1957).

¹⁴⁰ 3:4890-Ohio R (act requires policy of neutrality toward union membership).

¹⁴¹ *Supra* note 53, at 84.

¹⁴² *Beckert v. Administrator*, 20 Conn. Super. 9, 119 A.2d 122 (1955) (noting local refusal to enact right-to-work law); 6:8073-Iowa R (dictum; but union must be open to applicant).

¹⁴³ 6:7958-Cal. A.; 4:6690-Ill. R.; 6:7909-Ind. A.; 3:4228-Ind. A (union security clause negotiated by employee's own union); 9:10645-Mich. A.; 5:7708-Mich. R (refusal not permitted by labor standards provision); SW 475.75-1 (Pa. B 1949). Cf., 10:11569-N.Y. A (good cause for rejecting job not found under the facts); 5:7043-Ore. A (applicant would not be required to join union).

¹⁴⁴ Under the federal law an employer is authorized, under section 8(a)(3), to discharge

So far, the few cases that treat the damages issue have been brought against the union by former members whose expulsion has deprived them of job opportunities, though not all of the decisions have involved employees subject to the federal law.

Potentially conflicting substantive law analogies confuse the role of the work refusal test in the litigation of union expulsions. To the extent that the union attempts to secure a discriminatory discharge in violation of the Taft-Hartley Act, the policies of that law might be applicable. When the action is brought under state substantive law an initial decision must be made to determine whether the action sounds in tort or in contract,¹⁴⁶ although mitigation is required in either case and the status of the union as a wrongdoer has influenced the courts to apply common law principles favorable to the employee.¹⁴⁷ Furthermore, in one lower court case brought prior to the Taft-Hartley amendments, the court held that although the employee might have obtained employment in an open shop she had a "right" to insist on the retention of her status as a union member.¹⁴⁸

Judicial handling of work refusals in actions brought by expelled union members against their unions typifies the mixture of principles of privilege, fault, and right that underly this area of the law. Thus, poor relief is a "privilege" given to "sturdy beggars" whose unemployment has

an expelled union member only if his membership has been revoked for nonpayment of dues and initial fees. It is also an unfair labor practice under section 8(b)(2) for the union to attempt to induce a discriminatory discharge by the employer. Consider also the provisions of a state right-to-work law which grants a cause of action in damages to the employee who is discharged or denied employment under any form of union security. E.g., Ind. Ann. Stat. § 40-2706 (Burns Supp. 1959).

¹⁴⁵ *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958), discussed in Lynch and Mandelker, "Private Enforcement of Taft-Hartley: A New Horizon in Federal Preemption," 11 Okla. L. Rev. 406 (1958). Even though interstate commerce is involved, the state cause of action is held not to be preempted, in part because it affords a remedy different from that available under the federal act.

¹⁴⁶ See *International Printing Pressmen v. Smith*, 145 Tex. 399, 198 S.W.2d 729 (1946) (sounds in contract). Most of the state courts that have permitted the employee suit in cases involving interstate commerce have proceeded on a tort theory. Lynch and Mandelker, *supra* note 145, at 414. None of these has considered mitigation problems.

¹⁴⁷ *Harris v. National Union of Marine Cooks and Stewards*, 116 Cal. App. 2d 759, 254 P.2d 673 (1953) (any uncertainties in the application of the mitigation rule were to be resolved against the union as wrongdoer). In California the action clearly sounds in contract. *Smetherham v. Laundry Workers' Union, Local 75*, 44 Cal. App. 2d 131, 111 P.2d 948 (1941) (although the court applied the majority common law rule on mitigation, it also held that the employee should have kept a job in a nonunion laundry which, because of inadequate wages, had been found objectionable. However, no comparison was made with her wages in her previous employment). *Williams v. Master, Mates & Pilots of America*, 384 Pa. 413, 120 A.2d 896 (1956) (the plaintiff was not compelled to go to another city to seek work. The court also placed on the defendant union the burden to prove that the plaintiff had failed to mitigate. These are the traditional common law views).

¹⁴⁸ *Cheatham v. Local 222, United Garment Workers*, 55 D. & C. 28 (Pa. C.P. 1945). The decision appears predicated on the employee's financial interest in the union as well as on her personal desire to maintain her union affiliation. The decision also appears influenced by the court's characterization of the union as a "wrongdoer."

often been thought to be their moral "fault." Unemployment insurance compensates "involuntary" unemployment only, and common law mitigation contains presumptions working against the employer because of his "wrongdoing" and because of the employee's "right" to continue in his previous employment. As courts and administrators apply the fault characterization to the employee or to the employer they tend to limit or expand the area of discretion accorded employees in refusing offers of new work. Perhaps the basic difficulty in those situations in which a work refusal test is used is this failure to agree on which characterization should be accepted, and this failure is in turn reflected in conflicting reactions to employee rejections of new work for reasons related to union affiliation.

Cases involving work rejections for union-related reasons have arisen infrequently under the Taft-Hartley Act, but conflicts in unemployment compensation between union policies and the statutory work refusal requirement have developed over a wide range of issues. A resolution of these conflicts in either context first requires a decision on the place accorded employee discretion through the acceptance or rejection of union objectives in the statutory scheme. Since the provisions of the National Labor Relations Act are protective of union activity, the administration of the work refusal requirement as part of the reinstatement remedy afforded by that statute requires attention to this underlying statutory purpose. From this perspective, concerted activities protected by the statute ought not to lead to a finding of willful refusal to accept work, so that a striking employee would be allowed to picket and collect back pay. A job offer should also be refusible if it is vacant because of a protected strike or because of employer unfair labor practices, as where vacancies have been created following an unjustified employer lockout.¹⁴⁹

How far the statute should protect the employee outside those areas in which the statutory provisions are directly involved is open to question. However, the entire statutory scheme favors the job refusal that is union-oriented. For example, statutory recognition of the union shop¹⁵⁰ would arguably support an employee rejection of a job not subject to union security on the ground that the refusal is in furtherance of the statutory objective. The statute also gives a preferred position to collective bargaining,¹⁵¹ so that a sliding scale should not be applied to the employee to the extent that the job offered pays less than the wage prevailing for

¹⁴⁹ For the status of employer lockouts under Taft-Hartley see *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957).

¹⁵⁰ 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a) (3) (1952).

¹⁵¹ 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1952).

similar positions under collective bargaining agreements negotiated in the area.

The handling of union-based work refusals in unemployment compensation presents more difficult decisions, since the compensation laws are directed primarily to the fulfillment of other aims.¹⁵² To some extent, statutory objectives disfavor the union member's position. Many feel that unemployment compensation, like poor relief, should only provide aid at a subsistence level, without regard to previous employment. Work refusal requirements are also important in the prevention of fraud,¹⁵³ and union-oriented refusals that have only a personal basis must be viewed from this perspective. The role of the work refusal requirement in forcing wage and occupational adjustments must also be considered.¹⁵⁴ If the program is intended to force the unemployed into the job market regardless of prior work history, the protective mantle of union contracts and union demands arising out of a prior job should not merit consideration.

Most important, the basic statutory tension on the issue of union neutrality remains to be resolved in view of the conflicting implications of the labor disputes and labor standards provisions. Not only has the intent of the labor standards provision sometimes been frustrated, but its usefulness is questionable in view of the considerably more complex policy of today's National Labor Relations Act. On the other hand, the fact that the labor standards provision is federally required indicates that some accommodation with federal labor policy is in order. This article's review of current judicial and administrative decision has pro-

¹⁵² A parallel to the conflicting treatment of statutory labor policy in unemployment compensation may be found in conflicting attitudes regarding the extent to which the benefits of one program should be offset against the other. Unemployment compensation benefits are not deductible from Taft-Hartley back pay awards. *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951) (compensation benefits paid to advance collateral social purpose). Many unemployment compensation statutes require deductions for workmen's compensation or Federal Old Age and Survivor's Insurance benefits. *Supra* note 53, at 110-115.

Unemployment compensation payments have been held non-deductible from the employee's recovery in his common law action. *Billetter v. Posell*, 94 Cal. App. 2d 858, 211 P.2d 621 (1949); *Bang v. Internat'l Sisal Co.*, 212 Minn. 135, 4 N.W.2d 113 (1942). Some statutes prohibit the giving of poor relief to unemployment compensation recipients. Mich. Stat. Ann. § 16.455(2)(c) (Supp. 1957). Compensation benefits are usually counted as income under the prevailing administrative practice. Piffard, "Determining Eligibility for General Relief," 80-100 (unpublished thesis in N.Y. School of Social Work, Columbia University 1941).

¹⁵³ See, generally, Becker, "The Problem of Abuse in Unemployment Benefits," 205-267 (1953).

¹⁵⁴ Burns, *Social Security and Public Policy* 76 (1956). A general examination of the work refusal test would also have to consider the relatively residual role of the state employment services, to which compensation claimants are referred. A recent study indicates that the services do not get the better jobs, with the result that referrals made by it were bound to be downgrading. Becker, *op. cit. supra* note 153, at 78-80. See also Altman, *Availability for Work* 55-73 (1950).

ceeded on this assumption, and has indicated some dissatisfaction with current interpretations.

A more satisfactory statutory structure is difficult to construct. If work refusals in unemployment compensation were to be governed exclusively by the National Labor Relations Act then the implementation of statutory labor policy would take precedence over the other statutory objectives of the work refusal requirement that have been outlined above. Short of fully incorporating the federal labor law, however, the compensation statutes could defer to it in a limited number of instances in which a decision can be made that the unemployment compensation law should give way. In all other cases the consideration of federal labor policy would be put on a permissive basis.

Any change in this direction would probably have to proceed on the assumption that the labor dispute disqualification is an accepted part of the unemployment compensation scheme. The status of work refusals arising out of strikes or in a context of union-management conflict that have escaped the labor disputes disqualification can be clarified by amendments to this section. Their immunity may either be continued or abrogated. For example, the exemption from the disqualification of the striker whose strike has been lost could be written into law. When the labor disputes section is not made applicable, the law should clearly qualify the applicant who is engaging in concerted strike activities that have the sanction of the federal labor law. While the employee may get a double recovery if he is also entitled to reinstatement with back pay, this possibility can only be obviated by a change in back pay policy that might be willing to offset the unemployment benefit once the compensation statutes took better account of the federal labor law.

Outside the area of labor-management conflict the federal statute could amend the labor standards provision to require a consideration of the National Labor Relations Act. In addition, this provision could require the consideration of union objectives applicable to work referrals, to the extent that they have the sanction of federal law. Although this task is made difficult by the ambivalence toward work refusal policies evident in decisions reached under the NLRA itself, a congressional rewriting of the labor standards clause would at least put the decision at the federal level where it belongs.

Of the present state unemployment insurance statutes, the New York law most incorporates these suggestions. Under the labor standards provision of that statute a job may be refused as unsuitable if its acceptance will "interfere" with the retention of union membership or if it pays a

rate that tends "to depress wages or working conditions."¹⁵⁵ The statute sanctions the claimant who rejects a job offer because the union will expel him if he accepts it, and it has been construed to authorize the rejection of a job that pays a prevailing local wage that nevertheless is substandard in terms of industry or state-wide employment levels.¹⁵⁶ However, it leaves uncovered many of the situations discussed in this article.

Further amendment of the present minimal federal labor standards provision might first differentiate between those cases in which the implementation of federal labor policy is thought to require a mandatory finding of unsuitability and those cases in which the consideration of union objectives can be left to the discretion of the state unemployment compensation agency. In either event, of course, the provision would be applicable to a determination of availability as well as to the specific work refusal disqualification. At first, mandatory unsuitability could be limited to those cases presently within the clause—jobs open because of a strike, jobs paying less than the prevailing wage, and jobs requiring the employee to abandon his union membership. As administrative experience is gained with the newer and non-mandatory factors affecting suitability, they might be elevated to the mandatory list. At the outset, however, some alteration of the present provision relating to union membership is in order. The statute should be expanded to add those cases in which union expulsion would result regardless of what the employer requires. While this step would give the union the right of veto, it can be justified as being in line with federal statutory sanction of union membership. A fair interpretation would permit the employee to abide by organizational requirements once he has made the decision to join. To avoid the difficult problem of projecting the unemployment compensation agency into a dispute on union rules, this clause might compromise with a caveat authorizing disregard of a union expulsion when-

¹⁵⁵ N.Y. Labor Law § 593(2)(a) (Supp. 1958). As originally introduced in the House, the labor standards clause apparently contained language identical to the New York law. Statement of Dr. E. E. Witte, Executive Director, Committee on Economic Security, in Hearings on H.R. 4120 Before the House Committee on Ways and Means, 74th Cong., 1st Sess. 138 (1935). The change to the "condition" language lends support to decisions finding a refusal of suitable work when only the union would insist on expulsion.

¹⁵⁶ In the reported administrative decisions the "depress wages" standard has not usually been given independent consideration. E.g., SW 500.7-45 (N.Y. A 1955), aff'd, Bd. Dec. No. UCFE-6 (unpub.); 8:9928-N.Y. R; 1:624-N.Y. A (seemingly equated with "prevailing wage" standard). But a prevailing wage was held unsuitable because it paid less than the state statutory minimum and would therefore "depress" wages. 6:7765-N.Y. R. Cf., SW 500.7-7 (N.Y. A 1949) (less than federal minimum; wage offered apparently considered "depressing" and less than "prevailing"). See also SW 500.7-53 (N.Y. A 1957). A wage that was prevailing for the claimant's segment of the industry was apparently considered "depressing" because it was lower than the wages earned by half of the employees working in the entire industry.

ever the union member involved would be authorized to seek reinstatement under applicable state law.

Among the non-mandatory union considerations affecting suitability, the state unemployment agencies would be authorized to consider the extent to which a job vacancy shows an employer violation of the National Labor Relations Act,¹⁵⁷ such as discrimination based on union affiliation, bad faith bargaining, or an interference with union concerted activities. In view of the federal statutory sanction of collective bargaining, no job would be suitable if it were offered in an area that was substantially unionized for the job in question and, whether organized or not, if it imposed conditions that were inconsistent with local contract provisions arrived at through the process of collective bargaining. This standard would modify the sliding scale to the extent that it would authorize compensation claimants to reject jobs paying less than the union rate. However, it would sanction a rejection of a job in an unorganized shop only to the extent that it imposed conditions less favorable than those gained in the organized segment of the industry. This is an arguable compromise. Employees under the National Labor Relations Act now have the right to refuse to engage, as well as to engage, in concerted union activity, although the Act remains firm in imposing the duty to bargain when there is a union representative. Looking at substantial unionization in the job area as a type of majority employee decision to engage in collective bargaining, the statute would at least be justified in taking the terms of the typical collective agreement as a proper test of suitability under these circumstances.

Under this approach, a job not subject to a union shop clause would not be suitable if a majority of the contracts affecting similar jobs in the area contained such provisions. Inasmuch as the union shop has also been validated by the federal law, a job offered subject to a union shop provision should be deemed suitable unless a permitted state right-to-work law¹⁵⁸ is applicable.¹⁵⁹ A final saving clause should be included, making the labor standards provision inapplicable in any case in which the union has gone out on strike, and in which the labor dispute dis-

¹⁵⁷ The state or federal statute, if this approach is adopted, will have to resolve the interstate commerce problem. If a congressional rewriting of the labor standards provision is attempted, the new standards would be applied to all industries subject to the unemployment compensation program. Since the unemployment insurance title of the federal law is an exercise of the taxing and not the interstate commerce power, no constitutional problems would be present. Any other approach might have to attempt a differentiation between businesses affecting and businesses not affecting interstate commerce. The difficulties inherent in this distinction give additional force to demands from some quarters for the imposition of federal standards throughout the unemployment insurance program.

¹⁵⁸ 49 Stat. 457 (1935), as amended, 29 U.S.C. § 164(b) (1952).

¹⁵⁹ Cf., SW 475.75-5 (N.Y. A 1952) (applicant has good cause to refuse job subject to union security clause that does not meet conditions of Taft-Hartley Act).

qualification would be imposed, even though the policy of the federal law may be frustrated. So drawn, the statute would strike the best balance possible between the policies of the federal labor relations act and the accepted statutory disqualification of the striking employee engaged in concerted activities protected by the NLRA.

In another context in which the work refusal requirement is potentially applicable, a trial judge remarked that to use a program of public aid to force a man to take an "unusual occupation" would constitute involuntary servitude.¹⁶⁰ Since the employee faced with a decision between working at a distasteful occupation and forfeiting reinstatement rights or unemployment benefits cannot really be said to have a choice free from external compulsion, perhaps no limitations should be placed on employee decisions to reject job offers unless compelling public necessity demands it to be otherwise.¹⁶¹ At least when the job offer runs contrary to union objectives that have been given statutory sanction, room should be made for the acceptance of employee job refusals that are predicated on this orientation. Under Taft-Hartley, the protection of union aims has been found to predominate. In unemployment compensation the proposals that have been advanced¹⁶² would permit the state agencies to classify as unsuitable the most common job offers that run contrary to union objectives that have received federal statutory sanction. Detailed statutory prescription, however, may go only so far. In the other instances, an employee decision to reject a job offer for union-connected reasons will probably have to trust to a more favorable interpretation of statutory "good cause."¹⁶³

¹⁶⁰ *Hommel v. Hommel*, 22 N.Y.S.2d 977 (Dom. Rel. Ct. 1940). The plaintiff had sued for support from his child under the applicable family support provision in the local poor law. The court considered a contention that the plaintiff was not entitled to support because he had refused work. Cf., 3:2755-Ind. A (claimant contended he did not have to take job that was humiliating to him).

¹⁶¹ This discussion has assumed that the denial of unemployment compensation is a factor affecting the individual's choice of job. This assertion has been both affirmed, "Labor Looks at Unemployment Insurance" 18 (Report of the Conference Workshop of Organized Labor on Employment Security 1946), and denied, Becker, *op. cit. supra* note 153, at 293-298. One observer claims that the evidence on this point is simply not available. Altman, *op. cit. supra* note 154, at 251, 252.

¹⁶² There is congressional precedent for a similar work refusal policy in the provisions of the Federal Railroad Unemployment Insurance Act quoted at note 55, *supra*, and which are incorporated in somewhat altered form in the writer's suggestions.

¹⁶³ Another perspective on the problems discussed in this article is provided by Great Falls Employers' Council, Inc., 123 N.L.R.B. No. 109 (1959). After contract negotiations between the union and the Council broke down, the union decided to use "whipsaw" tactics, striking each of the employers one at a time. Immediately, the non-struck members of the Council locked out their employees. As the locked out employees might have been eligible for unemployment compensation, the non-struck employers offered temporary intermittent employment sufficient to disqualify them.

In a 3-2 decision the Board held these tactics unjustified and found the non-struck employers guilty of unfair labor practices, in part under section 8(a)(3). The majority opinion held the combined lockout and temporary rehire unjustified by the fact that unemployment benefits would be charged back to the employers, who would thus be

APPENDIX A

STANDARD AND NON-STANDARD WORK REFUSAL PROVISIONS IN
UNEMPLOYMENT COMPENSATION

1. *Availability.* Except for the New Jersey law, none of the statutes relate the availability requirement specifically to the union context. The New Jersey law provides that an employee is still available though on vacation, provided the vacation is not due to his "own action" but rather to "collective action of a collective bargaining agent or other action beyond his individual control." N.J. Rev. Stat. § 43:21-4(c) (Supp. 1958).

2. *Refusal to Work Disqualification.* Wisconsin has enacted the sliding scale into law. Wis. Stat. Ann. § 108.04(8)(d) (1958). There are no other explicit modifications of the work refusal disqualification that are applicable to union problems.

3. *Labor Standards Provision.* This provision is required in state laws by Int. Rev. Code of 1954, § 3304(a)(5), which provides in full text:

"Compensation shall not be denied in such state to any otherwise eligible individual 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."

Some of the state laws modify the federal statute by expanding or contracting the applicability of this section to jobs that result in the loss of union membership:

Del. Code Ann. tit. 19, § 3315(3) (1953): ". . . would be denied the right by the employer to retain membership in and observe the lawful rules of any such organization."

Mass. Ann. Laws c. 151A, § 25(c)(3) (1957): ". . . would abridge or limit his right to join or retain membership in any bona fide labor organization or association of workmen."

Ohio Rev. Code § 4141.29(D)(1) (Supp. 1957): ". . . would be denied the right to retain membership in and observe the lawful rules of any such organization."

Kansas and South Dakota have substituted the words "labor organization" for the word "company union" in clause C. Kan. Gen. Stat. § 44-706(c) (1949); S.D. Laws 1955, c. 62. Minnesota has substituted the word "union."

financing the strike indirectly. They reasoned that responsibilities under the federal labor law could not be made contingent on state unemployment compensation provisions. The minority vigorously disagreed, finding that the possible payment of unemployment benefits to strikers was relevant to the position of the lockout under Taft-Hartley.

Since the offer of temporary employment constitutes an unfair labor practice under these circumstances, it could be refused under the type of unemployment insurance statute suggested in this article. While this case raises a chicken-and-egg type of problem that is difficult to resolve, the minority opinion at least recognizes the necessity of accommodating statutory policies in those areas where the two laws touch.

Minn. Stat. Ann. § 268.09(1)(5)(b)(3) (West 1947). These statutes have adopted the interpretation which allows a non-union claimant to reject a job requiring union membership.

Finally, two states have generalized the labor standards section by adding provisions additionally protective of the claimant:

Ky. Rev. Stat. Ann. § 341.100 (Baldwin 1955): ". . . if the acceptance of such work would be prejudicial to the continuance of an established employer-employee relationship to which the worker is a party."

N.Y. Labor Law § 593(2): ". . . (a) acceptance of such employment . . . would interfere with his joining or retaining membership in any labor organization . . . [or] (d) the wages or compensation or hours or conditions offered . . . are such as tend to depress wages or working conditions."

APPENDIX B

DESCRIPTION OF THE UNEMPLOYMENT COMPENSATION BENEFIT SERIES

1. *Pre-1950: Bound Volumes.* Prior to 1950 the Benefit Series was issued monthly and bound annually in a series of twelve volumes. The cases were numbered serially, and were published without the names of the parties. A set of symbols was used to indicate the body making the decision. These symbols were as follows:

AG—Attorney General

Ct. D—court decision

A—lower appeal tribunal

D—higher appeal body making decision considered as initial determination

R—highest appeal body

The following form of citation has been used: 8:9928-N.Y. R. The reference is to a decision of the highest New York appeal body, which is case number 9928 in volume 8. Since the decision volumes were issued between 1938 and 1950 the date of the decision has been omitted as it can be calculated from the volume number.

2. *Post-1950: Loose Leaf Service.* Since 1950 the Benefit Series has been published as a loose leaf service. Decisions for the current and preceding years are kept in the service, while decisions from prior years are removed to annual transfer binders. The service is arranged by categories. Cases are still published without the names of the litigants, and each decision is placed within the category that is most applicable. Each case is cited by the identifying category symbol, category section, and page number. Thus the citation, AA 475.05-13 (W. Va. 1958) refers to a case on page 13 of section 475.05 of the Able and Available category. The symbol for Suitable Work cases is SW; these include the work refusal disqualification decisions. Labor dispute disqualification cases are carried under the symbol LD. Dates are given for post-1950 cases since the citation does not indicate whether the case can be found in the current service or in a transfer binder.

The symbols identifying the body making the decision are substantially the same as in the pre-1950 series, with the following changes:

1. The symbol B has replaced the symbol R to indicate the highest appeal body.

2. The symbol D has been dropped.
3. The symbol I is used to indicate an administrative interpretation. No symbol was used by the pre-1950 series in this instance.

Since the conversion to the loose leaf service the number of cases reported has dropped considerably.

APPENDIX C

QUESTIONNAIRE TO STATE UNEMPLOYMENT COMPENSATION AGENCIES

Several cases raising problems of union objectives and responsibilities were included in a questionnaire sent to twenty-five state compensation agencies. These states are as follows: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington, and Wisconsin. Replies were received from the following thirteen states:

- Alabama: William A. Major, Director, Unemployment Compensation Agency (January 16, 1959).
- California: Maurice P. McCaffrey, Principal Counsel, Department of Employment (January 2, 1959).
- Connecticut: Joseph J. Gibbons, Executive Director, Employment Security Division, Labor Department (December 15, 1958).
- Florida: Charles M. Mann, Director, Unemployment Compensation Division, Industrial Commission (December 23, 1958) (two staff members prepared answers).
- Indiana: C. J. Martz, Chief of Benefits, Employment Security Division (December 12, 1958) (answering case #1 only).
- Iowa: Don G. Allen, General Counsel, Iowa Employment Security Commission (December 12, 1958).
- Michigan: Max M. Horton, Director, Employment Security Commission (January 9, 1959).
- New Jersey: Clarence F. McGovern, Counsel, Board of Review, Division of Employment Security, Department of Labor and Industry (April 14, 1959).
- New York: Stephen Mayo, Director, Field Operations Bureau, Division of Employment, Department of Labor (December 12, 1958).
- Ohio: Beman S. Pound, Director, Bureau of Unemployment Compensation (December 31, 1958) (questions referred to legal section).
- Pennsylvania: John M. Clark, State Director, State Employment Service, Bureau of Employment Security, Department of Labor and Industry (December 11, 1958).
- South Dakota: Allan Williamson, Commissioner, Employment Security Department (December 16, 1958).
- Utah: Fred E. Dremann, General Counsel, Department of Employment Security, Industrial Commission (January 29, 1959).

Although the responding states are primarily industrial, the geographic representation is fair and some non-industrial states are included. In addition, the responding states had 58% of total average weekly insured unemployment in

December, 1958. Current Operating Statistics, Social Security Bulletin, Vol. 22, No. 3, p. 30 (March, 1959).

Letter-Questionnaire to State Unemployment Compensation Agencies

At present I am conducting a study of the availability and refusal of suitable work provisions of state unemployment compensation laws. My primary interest is the treatment that has been given to refusals by claimants on the ground that to take the offered job would interfere with their responsibilities and obligations to their union and to the union movement. While I have had access to the administrative decisions reported in the Benefit Series, I am also interested in obtaining from a selected number of states a sampling of agency policy.

To ascertain how your agency would handle the work refusal and availability provisions in this area of interpretation I have constructed a series of hypothetical fact situations, which follow. Would it be possible for members of your staff to prepare a brief and informal "opinion" on each of these, indicating how the case might be handled and giving reasons why? I am interested primarily in how the case would be handled on the administrative level. Applicable appeals determinations, if any, are of interest, but in the absence of precedent I would appreciate an assessment of current agency policy.

Availability, Work Refusals and Union Relations: Hypothetical Cases

Note: Different individuals are involved in each case.

1. (*Pending NLRB charge*). Claimant has worked for several years at the X Company which has not been organized. Recently the Y Union has started an organizing campaign in the plant. Claimant, who was active in the campaign, was fired. He claims that the firing is an illegal discharge for union activities under the federal Taft-Hartley Act. He has filed an unfair labor practice charge with the National Labor Relations Board, which is pending. The company says that he was discharged for incompetence. Claimant applies for unemployment compensation and is offered a job at another, non-union plant. He refuses it as unsuitable on the ground that to take *any* job will jeopardize his case before the NLRB and will, in effect, destroy the purposes of the federal labor relations act.

2. (*Employer union history*). Claimant is offered a job with the X Company. He refuses it as unsuitable on the ground that the employer has a negative union history. Specifically, he has in the past been found guilty of several unfair labor practice charges under the federal statute, including a failure to bargain with the certified union in the plant, and a lockout which was found to be an interference with the employees' right to organize.

3. (*Availability; union restrictions*). Claimant is a member of the X union. In registering for work he restricts his availability to employers having union contracts. He will not take a job in a non-union shop even though it pays the union scale. About half the jobs in his occupation are unionized in his locality. Is claimant available?

4. (*Claimant on strike*). Claimant, together with his fellow unionized employees, has struck the X Company for higher wages and better working conditions. During the strike he was permanently

replaced and the plant has re-opened and is operating at full capacity. Claimant and many other members of the union are still on strike and are still picketing. The employer then offers the claimant another job in the plant which is the equivalent of his old job, but that carries the same terms and conditions that were in effect before the strike. Claimant refuses the job as unsuitable.

5. (*Claimant active in union affairs*). Claimant has a long history of activity in union affairs. However, most of the jobs in his occupation in this locality are not unionized. He has been working for the X Company for some time. Together with his fellow employees he struck the company for recognition. While on strike he has been an active leader on the picket line and in other strike activities. He has registered for work, and the union has indicated that strikers are free to take other jobs. However, employers to whom the claimant has been referred refuse to talk with him after learning who he is and that he has been an active union organizer. Is the claimant available?