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UNEMPLOYMENT COMPENSATION IN LABOR DISPUTES

STIMSON BULLITT*

THIS ARTICLE will discuss the labor dispute section of the Washington State Unemployment Compensation Act¹ and especially the advantages of an insurance coverage test as the most satisfactory approach by which this section may be applied.

The United States levies a tax on employers (with specified exceptions) of eight or more persons of .3 per cent (after credits) of the payroll.² Part of the proceeds of this tax is used as a subsidy for the total administrative costs of the unemployment compensation system of every state, and part is held as a back log for state funds to make advances to them when they run low.

The state of Washington levies a similar payroll tax of up to 2.7 per cent on all employers (with specified exceptions).³ This tax, in effect, is an insurance premium to protect against the risks of short-term unemployment. The receipts are kept in a fund administered by the State Employment Security Department.

Each employer is allowed a tax credit based on the relationship ("experience rating") which the degree of payroll fluctuations over the preceding three years bears to the fluctuations of all payrolls within the state system.⁴ The more stable the payroll the larger the credit. The maximum credit theoretically possible is 1.08 per cent of the year's payroll, or a reduction of about one-third in the full amount of taxes to be paid into the state and federal unemployment compensation funds.

After his first week of unemployment, a worker covered by the plan may receive benefits from the state fund. Depending upon the total wages he has earned the preceding year, he may receive from \$10 to \$25 per week during his unemployment for a period of from fifteen to twenty-six weeks.⁵

A worker is declared ineligible for benefits for five weeks if the cause of his unemployment was his misconduct, his voluntary quit

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¹ Wash Laws 1945, c. 35, § 77; REM. REV. STAT. § 9998-215 (Supp. 1945).

² 49 STAT. 639 (1935), 53 STAT. 183, 1387 (1939), 26 U.S.C. § 1600, 1601 (1944).

³ Wash. Laws 1949, c. 214, § 18; REM. REV. STAT. § 9998-227 (Supp. 1949).

⁴ Wash. Laws 1949, c. 235, § 3; REM. REV. STAT. § 9998-246b (Supp. 1949).

⁵ Wash. Laws 1949, c. 214, § 16; REM. REV. STAT. § 9998-218 (Supp. 1949).

without good cause, or his refusal to accept work not unsuitable; also he is disqualified for a year for misrepresenting his claim.⁶ If the unemployment is due to a labor dispute work stoppage, the disqualification lasts for the duration of the stoppage.⁷

FUNCTIONS OF UNEMPLOYMENT INSURANCE

The primary aim of unemployment compensation is to alleviate hardship suffered by industrial workers and their families during periods of unemployment. This is done by spreading the risks. Secondary purposes are the promotion of stable employment and labor mobility and the maintenance of consumer purchasing power.

The unemployment compensation systems are not directed at the deep troughs of the business cycle. An insurance plan is financially inadequate to protect against such a risk, and a cash dole has been discredited as unsound public policy. Other remedies are more appropriate for long-term mass unemployment. The unemployment compensation systems are designed to insure the risk of short-term unemployment due to such causes as moderate fluctuations in business activity, breakdown of machinery, retooling, taking inventory, lack of orders, finances, raw materials, or shipping facilities.⁸

All of the unemployment compensation acts embody the experience rating principle for several reasons: to encourage employers to maintain stable employment by the offer of a tax incentive; to assess the premiums according to the degree of risk as between industries and as between competitors within an industry; to encourage employers to police the system; and to maintain the fund at about the same size by adjustment of the rate of flow in and out—*i.e.*, when the payments of benefits increase, the experience ratings go down and there is a consequent increase in premium rates.

Experience rating involves the problem of relating the burden of contributions to responsibility for causing unemployment. The payroll tax is based on an assumption that unemployment is connected with business operations and thus that unemployment costs should be borne by business as a whole. And it is assumed that the particular tax-paying unit is in part responsible for its employees' short-term unemployment of the sort covered by unemployment insurance.

⁶ Wash. Laws 1949, c. 214, §§ 12-15; REM. REV. STAT. §§ 9998-211-214 (Supp. 1949).

⁷ Note 1 *supra*.

⁸ Marsile J. Hughes, *Principles Underlying Labor-Dispute Disqualification 1*, Attachment to Unemployment Compensation Letter No. 000.

Prior to July 31, 1949, the experience rating was not affected by a payroll decline due to a labor dispute stoppage. This exception has been removed.⁹ The change is in line with the view that the effects of such a stoppage (upon the economy, not upon the employees) are part of the cost of the business and to be borne as such, like other causes of short-term unemployment or like industrial accidents. The new rule bears no logical relationship to the fund. There is no actuarial basis for reducing the experience rating for a cause which takes nothing from the fund. The ground for the change (if not merely inadvertent) was to remove the pressure of temptation to bring about a labor dispute stoppage when a payroll reduction is planned, in order to avoid the drop in experience rating and to reduce the incentive to resist the payment of benefits to employees where there is an issue of a labor dispute stoppage as the cause of their unemployment.

THE LABOR DISPUTE DISQUALIFICATION

In the decisions by commissioners and courts which have applied the labor dispute disqualification, there have been sharp conflicts of rationale, although there has not been a striking diversity of results. One source of confusion is that the fields of organized labor and social insurance are so new in this country that they have not yet acquired a set of legal concepts of their own; therefore transplanted images are applied to functions and relationships in these fields, and the reflection which they supply is cloudy or distorted.

But a greater cause of confusion has been the conflict of beliefs as to the legislative purpose of the Act and of this disqualifying section:

§ 77 LABOR DISPUTE DISQUALIFICATION. An individual shall be disqualified for benefits for any week with respect to which the Commissioner finds that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed: *Provided*, That this section shall not apply if it is shown to the satisfaction of the Commissioner that

(a) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(b) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute: *Provided*, That if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted as separate

⁹ Note 4 *supra*.

departments of the same premises, each such department shall, for the purposes of this subdivision, be deemed to be a separate factory, establishment, or other premises.¹⁰

The main conflict has arisen between the theories of "volition" or "blame" and that of "insurance coverage"—whether eligibility is to depend upon whether the claimant's behavior merits a reward or whether the circumstances are such that the claimant is covered by the terms of the insurance policy.

It may be that the act as a whole should be freely interpreted, but Section 77 demands a strict construction. The tests based on volition or moral blame are subjective and indeterminate as applied to systems of social insurance, while the test of insurance coverage¹¹ permits greater certainty and more precise obedience to the terms of the section and to the legislative intent. This test is the objective measurement, beside the terms of Section 77, of the circumstances of individual and group action, drained of descriptive coloration of legality, morality, motive, or free choice.¹²

In this country there is no federal act except for the taxing statute, and there are no records of debate which might throw light on the legislative intent behind Section 77. But the American acts are derived from the British, and most of them, including the Washington act, are modeled closely on the revised British act.¹³ The discussion in Parliament of the bill which became the National Insurance Act of 1911 indicated an intent to insure against "fluctuations in trade." The reasons given for the British theory were the belief that the state should remain impartial in specific labor disputes and that the actuarial risk should be limited. By this theory, the merits of the dispute or the parties to it have no bearing; the question is merely whether the situation is covered by the terms of the insurance. And it has been thus construed.¹⁴

¹⁰ Note 1 *supra*.

¹¹ Insurance: A contract to compensate another for a loss upon occurrence of a specified contingent event.

¹² "This is one of the oldest fallacies of the law. The difference between the two is the difference between an act and no act. The distinction is well settled in the parallel instance of duress by threats, as distinguished from overmastering physical force applied to a man's body and imparting to it the motion sought to be attributed to him. In the former case there is a choice and therefore an act." Holmes, J., *Eliza Lines*; 199 U.S. 129, 133 (1905).

¹³ 10-11 GEO. V, c. 30 (1920); 14-15 GEO. V, c. 30 (1924); 25 GEO. V, c. 8 (1935); 9-10 GEO. VI, c. 67 (1946). The labor dispute section of the acts of the many states, including Washington, is modeled on S.S.B. "DRAFT BILL," § 5(d).

¹⁴ "It is important, therefore, to ascertain the construction placed upon the British acts in construing our own. For it is a general rule of statutory construction that a

CONSTRUCTION

The terms of Section 77 embody no requirement of volition.¹⁵ In this respect it is inconsistent with the preamble to the Act which speaks of "involuntary unemployment."¹⁶ By the accepted rule of construction the specific provision may be expected to control as an exception to the general rule.¹⁷

In the same way, Section 77 properly stands alone in respect to the four other grounds for disqualification, all of which are based upon volition.¹⁸ The five grounds for disqualification—voluntary quit, misconduct, misrepresentation, refusal to work, labor dispute—are listed in consecutive sections in the Act. But Section 77 is sharply inconsistent with the others and demands a different approach for its application.¹⁹ For example, "good cause" applies to "voluntary quit" but not to Section 77, which is not conditioned upon blame or choice. These two sections of the Act give recognition to the marked difference between an individual quit and a collective work stoppage which does not bring to an end the employment relationship. Confusion comes from failure to recognize the distinction drawn by the legislature between idleness as a bargaining tool and idleness for its own sake.

There are more economic, social, and psychological pressures brought to bear upon the decision to undertake a work stoppage in the course

statute adopted from another state or country is presumed to have been taken with the construction there placed upon it." *In re North River Logging Co.*, 15 Wn. (2d) 204, 208; 130 P.(2d) 64 (1942).

¹⁵ *Midvale Co. v. U.C. Bd. of Rev.*, 165 Pa. Super. 359, 67 A.(2d) 380 (1949).

¹⁶ ". . . for the compulsory setting aside of unemployment reserve to be used for the benefit of persons unemployed through no fault of their own, and that this act shall be liberally construed for the purpose of reducing involuntary unemployment and suffering caused thereby to the minimum." REM. REV. STAT. § 9998-102 (Supp. 1940) [P.P.C. § 923-3].

¹⁷ *In re North River Logging Co.*, note 14 *supra*; *Midvale Co. v. U. C. Bd. of Rev.*, note 15 *supra*; "Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed." *Aragon v. U.C.C.*, 149 F.(2d) 447, 449 (C.C.A. 9th 1945), quoting from *Phillips v. Walling*, 324 U.S. 490, 493 (1945).

¹⁸ § 12 ". . . An individual who has left work voluntarily without good cause shall be disqualified. . . ." § 13 ". . . An individual who has been discharged or suspended for misconduct connected with his work shall be disqualified. . . ." § 14 ". . . An individual shall be disqualified for benefits for the calendar week with respect to which he has willfully made a false statement or representation or willfully failed to report a material fact to obtain any benefits under the provisions of this act and for the fifty-two next following weeks." § 15 ". . . An individual shall be disqualified for benefits, if the Commissioner finds that he has failed without good cause, either to apply for available, suitable work . . . or to accept suitable work when offered him, or to return to his customary self-employment (if any). . . ."

¹⁹ *In re Employees Pac. T. & T. Co.*, 31 Wn. (2d) 659, 198 P.(2d) 675 (1948, en banc, unanimous), in holding that section 78 (suitable work factors) did not apply to section 77, the court declared that section 77 "sets up one item of disqualification for benefits. It is titled 'Labor Dispute Disqualification.' It is separate and distinct from the other sections."

of collective bargaining than there are for an individual quit. One's range of choice on a specific issue continues to grow even more narrow with the tendency to conduct collective bargaining on an ever widening scale.²⁰ If volition is to be used as the basis for applying Section 77, where the chance to make a choice is more constricted than in the situations for which the other disqualifying sections provide, then, to be consistent with these others and to be fair, the claimant should be allowed to show "good cause." But to do so would nullify Section 77 because then all cases could be solved under other sections. Yet if Section 77 were removed from the act, the "voluntary quit" provision would have no rational application to labor dispute stoppages because the meaning of "voluntary" is indeterminate in respect to them. And even by its own rationale, the "voluntary quit" provision does not apply to those disqualified by the terms of Section 77 who took no action whatever, either as individuals or through a union.

Another contrast between the foundations of Section 77 and other disqualifications is that a job vacancy due to a labor dispute is "unsuitable work" for an individual claimant who consequently may draw benefits despite his refusal to enter the vacancy,²¹ yet the same stoppage, under the terms of Section 77, disqualifies the group which it throws out of work.

The relief provision of Section 77 indicates a legislative intent to make the disqualification far reaching, since it permits payment of benefits to persons who have no interest or concern with the dispute but who would be disqualified but for the relief provision. Such extensive scope suggests that the purpose of the section is not that it be a repetition of one of the voluntary act disqualifications and not a penalty, but that it merely designate an uninsured risk.

An inarticulate premise of moral blame seems to underlie some of the decisions which have applied to this section.²² In the minds of many as they approach Section 77 is a remnant of the Anglo-Saxon belief that

²⁰ ". . . It is always to the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." Holmes, J., *Union Pacific Railroad Co. v. Public Service Commission*, 248 U.S. 67, 70 (1918).

²¹ ". . . no work shall be deemed to be suitable. . . . If the position offered is vacant due directly to a strike, lockout, or other labor dispute. . . ." Wash. Laws 1945, c. 35, § 79a; REM. REV. STAT. § 9998-217a (Supp. 1945).

²² *Bucko v. J. F. Quest Foundry Co.*, Minn., 38 N.W. (2d) 223 (1949); *McKinley v. Calif. Empl. Stab. Comm.*, Cal., 209 P.(2d) 602 (1949); *Bunny's Waffle Shop v. Cal. E. Comm.*, 24 Cal. (2d) 735, 151 P.(2d) 224 (1944); *Queener v. Magnet Mills*, 179 Tenn. 416, 167 S.W. (2d) 1 (1942); *Bd. of Rev. v. Hix*, 126 W. Va. 538, 29 S.E. (2d) 618 (1944).

in any dispute at least one party is morally wrong, and justice decrees that he be made to suffer. There is a hint of the early treatment of a strike as a criminal conspiracy, and an attitude that benefits are compulsory wages, a penalty imposed upon the employer; that a man out of a job is not entitled to receive work benefits unless he enters the Employment Security office with clean hands; that the claim for benefits is a suit against the employer for a liquidated sum. When management has not been negligent and its conduct has been a model of rectitude, the commissioners and courts are reluctant to allow benefits regardless of the precise limits of the pattern of eligibility under the Act.

The provisions for misconduct, misrepresentation, "good cause," and suitability of work involve personal responsibility and the merits of the claimant's position. By contrast, Section 77, by its terms, disqualifies all those within its scope regardless of their "innocence" and without regard to whether the stoppage may have been brought about by the unlawful act of management or some third party.

The section concerning exceptions to "suitable work" provides that a job vacancy due to a labor dispute is not "suitable work."²³ The inference is that it is not improper conduct (fault) to be unemployed as a result of such dispute. Certain types of stoppages (economic strikes) have been expressly sanctioned by national legislation since 1935.²⁴ The good-man-bad-man approach is of dubious value as a tool for the solution to current problems of industrial employment and it stands in contradiction to the terms of Section 77.

The unemployment compensation systems were not established as a substitute for any former procedure. But even the workmen's compensation systems, established to replace the procedure of personal injury suits by servant against master, retain no element of fault on the part of either party.

Although its effect as a standard of interpretation is not as important as the concepts of volition or fault, the "neutrality of the State" theory is held by some.²⁵ The state cannot be neutral as to eligibility in labor disputes. Whichever choice was made, one side would be assisted.²⁶ To omit the disqualification would increase the relative bargaining

²³ Note 21 *supra*.

²⁴ 49 STAT. 457 (1935), 29 U.S.C. 163 (1947).

²⁵ *Matson Terminals v. Cal. E. Comm.*, 24 Cal. (2d) 695, 151 P.(2d) 202, 209 (1944).

²⁶ "The withholding of unemployment compensation in such cases is a help to the industry, just as the payment of compensation is an aid to labor." *Boyertown Burial Casket Co. v. U.C. Bd.*, 162 Pa. Super. 98, 56 A.(2d) 390, 392 (1948).

power of labor. Its inclusion is a positive advantage to management inasmuch as while unemployed due to a labor dispute work stoppage employees suffer loss of wage credit for unemployment compensation, and to those employees, otherwise eligible for benefits under the relief provision, there is an incentive to refrain from taking any positive part in the dispute. The state can be impartial toward specific controversies, but it no more can be neutral toward the labor-management relationship than it can toward the community of nations.

The neutrality theory is in conflict with the terms of the section when the section disqualifies persons who do nothing to assist the progress of the dispute but do not meet the terms of eligibility under the relief provision, or where management has acted in breach of obligation, legal or moral; statutory or contractual.²⁷ Here the idea of neutrality involves a subjective standard by which what is onerous to one side is fair to the other. It has little meaning when applied to one who tips the scales, rather than one who holds them.

The patterns of modern industrial life at times allow some people to be dropped into a condition where they are unable to provide for their own basic needs. To overcome this problem two policies now compete: tax-supported grants from public treasuries to those who prove themselves "needy" by means such as a pauper's oath versus self-sustaining systems of public insurance whose premiums are paid by those who are protected and with broad enough coverage to eliminate the necessity under the other scheme for an annual appropriation of a share of the public budget. The insurance coverage test is in accord with the latter approach.

CASES

The first instance in which the Washington Supreme Court considered the meaning of Section 77 was *In re St. Paul & Tacoma Lumber Co.*²⁸ The members of a union local struck when the company refused to negotiate. Picket lines were established by the strikers, and all employees, except for some maintenance men, stayed away from work. Claimant employees were denied benefits as disqualified under Section 77. A labor dispute was held to exist.²⁹ In accordance with the

²⁷ "We both alike know that into the discussion of human affairs the question of justice arises only where the pressure of necessity is equal, that the strong take what they can and the weak grant what they must." THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR, Book V, § 89 fin.

²⁸ 7 Wn. (2d) 580, 110 P.(2d) 877 (1941, en banc).

²⁹ The court declared that there was no basis for distinction between whether or not negotiations had commenced. The same conclusions could have been reached by the fact

insurance coverage test, the refusal to negotiate, although an unfair labor practice, did not affect the operation of the disqualification, as the merits of the dispute had no bearing.

By the fact of their failure to cross the picket line, the shingle mill employees—members of a different union from the strikers—were held to have failed to meet the no-participation requirement of the relief provision.³⁰ The labor dispute caused the picket line which in turn caused the work stoppage. A labor dispute was the cause, even though secondary, of the work stoppage as to these claimants. Thus they were disqualified under Section 77. Their failure to act (go to work when their jobs were available)³¹ was a form of negative participation, so that they were not excepted from the disqualification by the terms of the relief provision. After recognition of the fact of participation,³² however, the court went on to base its decision on the voluntary nature of the claimants' omission rather than on the mere fact of the omission.³³

A man confronted by a picket line between himself and his job is subject to strong pressures to deter him from crossing it—fear of possible violence,³⁴ respect for the principles of organized labor,³⁵ risk of loss of union membership,³⁶ terms of union contract,³⁷ fear of social ostracism, risk of liability for tort or crime in case of violence. Following a free will construction, a court or commissioner may be called upon to make a tactical estimate of the picket line and its members,

that the mere existence of the strike, by definition an act in furtherance of a labor dispute, conclusively presumes a labor dispute.

³⁰ *Accord*, *Bodinson Mfg. Co. v. Cal. Emp. Comm.*, 17 Cal. (2d) 321, 109 P.(2d) 935 (1941); *Brown v. Md. U. C. Bd.*, Md., 55 A.(2d) 696 (1947); *McGann v. U. C. Bd.*, 163 Pa. Super. 379, 62 A.(2d) 87 (1948); *Matson Terminals v. Calif. E. Comm.*, 53 Cal. App. (2d) 541, 128 P.(2d) 63 (1942); *Phillips v. U. C. Bd. of R.*, 163 Pa. Super. 374, 62 A.(2d) 84 (1948); *Stillman v. U. C. Bd.*, 161 Pa. Super. 569, 56 A.(2d) 380 (1948); *Aitken v. Bd. of R.*, 136 N.J.L. 372, 56 A.(2d) 587 (1948).

³¹ To hold that failure to cross a picket line, if the job behind it were unavailable, constituted participation would be to make participation out of a failure to perform a futile act.

³² "By so refusing to work, the persons are adding their strength to the cause of the strikers, who are then put in a better bargaining position when the entire plant is shut down than when their branch of it has stopped only a portion of the operations." See note 28 *supra* at 595.

³³ "The mere fact that the passage through the picket lines was contrary to their union conviction was not enough to make their refusal involuntary, since they had a legal right to pass the lines if they so desired." *Ibid.* at 595.

³⁴ *In re Employees Pac. T. & T. Co.*, note 19 *supra*; *McGann v. U. C. Bd.*, note 30 *supra*.

³⁵ *Baldassarri v. Egan*, 135 Conn. 695, 68 A.(2d) 120 (1949); *Brown v. Md. U. C. Bd.* note 30 *supra* (forbidden to cross by union constitution); *In re St. Paul & Tacoma Lumber Co.*, note 28 *supra*.

³⁶ *Stillman v. U. C. Bd.*, note 30 *supra*.

³⁷ *Andreas v. Bates*, 14 Wn. (2d) 322, 128 P.(2d) 300 (1942).

the ferocity of their demeanor, the weight of their clubs. The resolution of such subjective forces may be avoided by the insurance coverage test which merely draws the line between act and no act.³⁸

One month after this decision, in *In re Deep River Timber Co.*,³⁹ the court again had occasion to apply Section 77. In this instance management was not directly involved in the dispute. The NLRB had certified local *A* to the company as bargaining agent for the employees. Clark, a donkey engineer and member of local *B* whose members were mingled with those of local *A* in the logging operations, refused to join local *A* at its request, so local *A* told the company to discharge Clark or it would call a strike. He was discharged, and as a result and to compel his reinstatement local *B* called a strike which caused his reinstatement. Then local *A* called a strike for the reason that its members refused to work with Clark. Claimants, members of local *B*, reported for work but were told there were not enough men to operate. Claims were made for the period of the second stoppage, and benefits were denied. In following the universal rule that a jurisdictional dispute is a labor dispute within the meaning of the act⁴⁰ (aside from the

³⁸ Some of the maintenance men, members of the striking union, continued to work for some time after the strike began. Their union granted them work permits to go through the picket lines. They were laid off when work for them ran out, due to the stoppage. It was held that they failed to meet the no-participation requirement of the relief provision and thus did not escape disqualification. They were held to have participated by reason of membership in the striking union and because "the mere fact that these individuals saw fit to get permits from the union during the strike period showed that they recognized the existence of the strike." Under the circumstances, they had little choice but to accept work permits as tickets to enter the plant. What else could they do? An examination of their alternatives and rights would be futile. It is hard to say they participated when they were laid off. The same result could have been reached by resting the decision on the ground of direct interest or membership in the same grade or class.

Ten of the boommen and rafters, not members of the striking union, were told by the company not to return to work until called. Eight others were told to report to work but refused to cross the picket line. All were disqualified, the ten as "being engaged in the same work as that of the men who refused to pass through the lines," and thus in the same grade or class as the eight who participated. This decision uses the "work classification" criterion of grade or class. *Accord*, *Johnson v. Pratt*, 200 S. C. 315, 20 S.E. (2d) 865 (1942); *Kieckhefer Container Co. v. U.C.C.*, 125 N.J.L. 52, 13 A.(2d) 646 (1940); *Auker v. Rev. Bd.*, 117 Ind. App. 486, 71 N.E. (2d) 629 (1947); *Members of Iron Workers' Union v. Ind. Comm.*, 104 Utah 242, 139 P.(2d) 208 (1943); *U.C.C. v. Martin*, 228 N.C. 277, 45 S.E. (2d) 385 (1947); *Westinghouse Elec. Corp. v. U.C. Bd. of Rev.*, Pa., 68 A.(2d) 393 (1949); this is more widely used than the other criteria: union affiliation, *Queener v. Magnet Mills*, 179 Tenn. 416, 167 S.W. (2d) 1 (1942); *Johnson v. Pratt*, *supra*; *Outboard Marine & Mfg. v. Gordon*, 403 Ill. 523, 87 N.E. (2d) 610 (1949); *Copen v. Hix*, 43 S.E. (2d) 382 (W. Va. 1947) ("grade or class" held to be coextensive with jurisdiction of national union); prospect of gain, *Queener v. Magnet Mills*, *supra*; see 51 W. VA. L. Q. 137; and the nature of the issues of the dispute. It appears to be the test followed in Washington. *In re Deep River Timber Co.*, 8 Wn. (2d) 179, 184, 111 P.(2d) 575 (1941).

³⁹ 8 Wn. (2d) 179, 111 P.(2d) 575 (1941).

⁴⁰ *Badgett v. Dept. of Ind. Relations*, 243 Ala. 538, 10 S.(2d) 880 (1942); *Westinghouse Elec. Corp. v. U. C. Bd. of R.*, note 38 *supra*.

conclusive presumption from the fact of the strike), the court held that the claimants had participated in the dispute through the agency of their union local. If the strike had been directed at the employer, rather than the claimants' union local, they would have met the non-participation requirement. However, they were held here also to have been "directly interested" and of the "same grade or class."

In a later case, *In re North River Logging Co.*,⁴¹ the employer in order to enforce a violation of the terms of the employment contract, locked out its logging crews for five weeks, during which time the men were willing and able to work.⁴² In its decision that a lockout is a manifestation of a labor dispute (so that benefits were denied) the court applied the objective test of scope of insurance coverage. Although the result seems unfair from any standpoint, it followed the law. The decision is consistent with the apparent legislative intent of the section and is in unison with the cases on this point in other jurisdictions,⁴³ except for those states whose statutes expressly exclude a lockout from their definition of a labor dispute.⁴⁴

In the case of *In re Polson Lumber & Shingle Mills*,⁴⁵ a secondary boycott which, in effect, was a sympathy strike, was declared to be a labor dispute at the mills in question. The controversy concerned not the terms of employment but the policy to be taken by the mills toward the participants in an entirely separate industrial dispute.

A union local was the bargaining agent for loggers employed by companies not involved in this case. The loggers struck May 9 and stayed out five weeks. On May 19 the employers involved here—three lumber mill companies—entered a union shop agreement with the local, recognizing it as sole bargaining agent for its employees. On May 22 the local told the mill companies that the logs stored in booms await-

⁴¹ Note 14 *supra*.

⁴² Since the allowance of tax credit on the basis of experience rating was not embodied in the act until 1947, the purpose of the company in causing the stoppage could not have been to use the tag of a labor dispute in order to avoid a drop in experience rating which would result from a shutdown due to some other cause.

⁴³ *Bucko v. J. F. Quest Foundry Co.*, note 22 *supra*; *Midvale Co. v. U. C. Bd. of R.*, note 15 *supra*; *Bankston Creek Collieries v. Gordon*, 399 Ill. 291, 77 N.E. (2d) 670 (1948); *Adkins v. Ind. Empl. Sec. Div.*, 117 Ind. App. 132, 70 N.E. (2d) 31 (1946), citing *North River* case, note 14 *supra*; *Latham v. State U.C.C.*, 167 Ore. 371, 117 P. (2d) 971 (1941); *BRITISH UMPIRE*, case No. 5117, pp. 364, 365. Rulings by administrative officers of all states except Md. and those excepting lockout by statute from disqualification. 1 UIS, 27164 (Prentice-Hall, 1942).

⁴⁴ PAGE'S OHIO GEN. CODE ANN., § 1345-6 (d) (Supp. 1948); KY. REV. STAT. 1948, § 341, 360 (1); ARK. ST. 1947 ANN., § 81-1106 (d); W. VA. 1947 SUPP. TO CODE OF 1943 ANN., § 2366 (78) (4); CONN. GEN. ST. REV. OF 1949, § 7808 (3); MISS. GEN. LAWS 1944, c. 288, § 1; MINN. M.S.A., § 268.09, subd. 1 (6).

⁴⁵ 19 Wn. (2d) 467, 143 P. (2d) 316 (1943).

ing consumption by the mills were "hot" and that any mill which undertook to saw them would be declared unfair, with the implication that work would stop if sawing these logs were begun. The logs had been cut, rafted, and stored before the start of the loggers' strike. The union placed pickets on the booms, none of whom was a mill employee. The mills sawed the logs in their ponds and then shut down for the duration of the loggers' strike. There were enough logs in the booms to have enabled the mills to keep going for the duration of the loggers' strike. The mill employees made no expression of their attitude toward this dispute. Their union spokesmen were the only speakers. The claimants—mill employees—were all members of the local. Benefits were denied on the ground that claimants were "directly interested" in the dispute which caused the stoppage. By a test of chance of gain or loss, the factor of "direct interest" might have been shown here since the loggers' cause was of such importance to the strength of the local as a whole. The issue of the dispute bore directly upon their interests. It was not as though the union had taken up a minority grievance.

But here the relief provision requirement of lack of participation, through the agency of the union, would have been even more difficult to overcome. The leadership of a large union local assisted the cause of its members engaged in an economic strike in progress at one set of establishments (logging camps) by enforcing a boycott upon another set of establishments (sawmills) for which the local was bargaining agent. The boycott, which caused the stoppage in question, was enforced by a threat to call out the employees on a sympathy strike. Both the companies and the leadership of the local expected these employees to be impelled by obedience or loyalty to walk out if so ordered. The threat was made to stick. Thus claimants participated in the dispute through the medium of the authority which they permitted their bargaining agent to exercise.

The usual rule is to some degree, depending on the nature of the issues of the dispute, to impute to its members the acts of a union involved in a labor dispute.⁴⁶ The agency relationship of union mem-

⁴⁶ *Burns v. U. C. Bd. of R.*, 164 Pa. Super. 470, 65 A.(2d) 445 (1949); *McKinley v. Calif. Empl. Stab. Comm.*, note 22 *supra*; *Copen v. Hix*, note 38 *supra*; *Badgett v. Dept. of Ind. Rel.*, note 40 *supra*; *Prentice v. U. C. Bd. of R.*, 161 Pa. Super. 630, 56 A.(2d) 295 (1948); "The union, then, is agent and attorney for the employees. . . ." *North Electric Mfg. Co. v. NLRB*, 123 F.(2d) 887, 889 (C.C.A. 6th 1941); 29 U.S.C., § 159a; direct interest established by union agency: *Chrysler Corp. v. Smith*, 297 Mich. 438, 298 N.W. 87, 135 A.L.R. 900 (1941); *Chrysler Corp. v. App. Bd.*, 301 Mich. 351, 3 N.W. (2d) 302 (1942); *Wasyluk v. Mack Mfg. Corp.*, 68 A.(2d) 264 (N.J. 1949); *Local No. 658 v. Brown Shoe Co.*, 403 Ill. 484, 87 N.E. (2d) 625 (1949).

bership alone may be sufficient to show participation if the union itself participates as such. The union veil is not pierced to see how or whether one voted or took a stand in any other manner on the proposed action. Section 77 is aimed at collective action. The direction taken by the organized group as such is determinative, without regard to the individual who may take an independent course. For participation it is not essential that a union member perform an overt act himself, since union activities tend to be carried on by officials and committees rather than by the membership as a whole. Union membership is only *evidence* of participation, however, and is not conclusive, its weight depending on the subject matter of the controversy.

The integration, both horizontal and vertical, of units of labor unions has become developed to the point where, for the problem at hand, some limits should be put on the agency chain.⁴⁷ Section 77 gives no clue to where the line should be drawn. Where the threat of departure from the job is not used as a means to cause the stoppage, union members should not be held to have taken part in a dispute where the stoppage is brought about by acts of the leadership of a unit which includes in its membership persons employed at other establishments as well as their own.

In *Andreas v. Bates*,⁴⁸ a corporation owned in one area installations consisting of several units, among which were two sawmills and a shingle mill. The shingle mill "was a department of the general operations of the company." It could be operated independently from the sawmills and other units and often had been so operated. The sawmill employees were members of one union, and claimants, who worked in the shingle mill, belonged to another whose contract provided that "no member of the union shall be required to . . . go through a legitimate picket line." The sawmill workers struck and picketed the entrances to the area. Claimants did not report for work, apparently unwilling to cross the picket line. The Commissioner's denial of benefits was upheld.

If Section 77 is to be applied according to its terms, it did not exclude the claimants from coverage. Their unemployment was due to a stoppage which existed because of a labor dispute at an establishment other than the one (shingle mill) where they were last employed, so

⁴⁷ "But participation by the international union in a labor dispute on behalf of a local union is not participation of every local represented by the international in such a local dispute. This would be an unwarranted extension of the principles of agency." See *Chrysler Corp. v. Smith*, note 46 *supra*, at 100.

⁴⁸ Note 37 *supra*.

that the terms of the section⁴⁹ did not apply to these claimants who availed themselves of the clause in their employment contract which exempted them from the duty to go to work when it entailed crossing a legitimate picket line. There was no labor dispute "at" the establishment where they were employed.⁵⁰ The shingle mill was an establishment separate from the sawmills under any one of the commonly used tests.⁵¹ The personnel policies of the shingle mill were not an issue of the dispute. The striking union, by placing its pickets before the entrances to the whole area, extended its line of attack to the shingle mill. This was an extension of the stoppage, not of the dispute.⁵²

⁴⁹ ". . . unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed."

⁵⁰ *Aragon v. U.C.C.*, 329 U.S. 143 (1946). In contrast to the situation in the *Polson* case, where the dispute concerned the policy to be taken toward the loggers' strike by the establishment where claimants were employed.

⁵¹ Geographical isolation, *Walgreen Co. v. Murphy*, 386 Ill. 32, 53 N.E. (2d) 390 (1944); functional integration whereby the operations of one unit depend upon those of the other, *Spielman v. Ind. Comm.*, 236 Wis. 240, 295 N.W. 1 (1940); *Chrysler Corp. v. Smith*, note 46 *supra*; *Chrysler Corp. v. App. Bd.*, note 46 *supra*; or a rule of thumb or common understanding, *Tenn. Coal, Iron v. Martin*, 251 Ala. 153, 36 S.(2d) 547 (1948); *Tucker v. American Smelting & Refining Co.*, Md., 55 A.(2d) 692 (1947); *General Motors Co. v. Mulquin*, 134 Conn. 118, 55 A.(2d) 732 (1947); "a distinct physical place of business"—construction of term "establishment" in the Fair Labor Standards Act "as normally used in business and government," *Phillips v. Walling*, note 17 *supra* at 496; "single units," *BRITISH UMPIRE DEC. 1807* (1926), 4943 (1936). This was a situation similar to that in the case of *Carpenters and Joiners Union of America v. Ritter's Cafe*, 315 U.S. 722 (1942), where a picket line was set up in front of one establishment in the course of furthering the progress of a labor dispute at another establishment.

⁵² *Local No. 658 v. Brown Shoe Co.*, note 46 *supra*.

The words of the court ("... the stoppage of work of the shingle weavers . . .") indicate a construction of the term "work stoppage" to apply it to the activity of the employee, while the weight of authority construes the term to refer to operations at the place of employment. *Accord*, *Sakrisson v. Pierce*, 66 Ariz. 162, 185 P.(2d) 528, 173 A.L.R. 480 (1947); *Lawrence Baking Co. v. Michigan U.C.C.*, 308 Mich. 198, 13 N.W.(2d) 260, 154 A.L.R. 660 (1944), *cert. den.* 323 U.S. 738; *Radice v. New Jersey Dept. of Lab. & Ind.*, 4 N.J. Super. 364, 67 A.(2d) 313 (1949); *M. F. Ferst, Ltd. v. Huiet*, 78 Ga. App. 855, 52 S.E. (2d) 336 (1949); *Walgreen Co. v. Murphy*, note 51 *supra*; *Magner v. Kinney*, 141 Neb. 122, 2 N.W. (2d) 689 (1942); *In re Steelman*, 219 N.C. 306, 13 S.E. (2d) 544 (1941); *Saunders v. Md. U. C. Bd.*, 188 Md. 677, 53 A.(2d) 579 (1947); *Carnegie-Ill. Steel Corp. v. Rev. Bd.*, 117 Ind. App. 379, 72 N.E. (2d) 662 (1947); *Deshler Broom Factory v. Kenney*, 140 Neb. 889, 2 N.E. (2d) 332 (1942). *Contra*, *Bd. of Rev. v. Mid-Continent Petroleum Corp.*, 193 Okla. 36, 141 P.(2d) 69 (1943). The general rule is that the term "stoppage" refers to an empty and silent factory rather than being concerned with an idle group of individuals. This is in accord with the settled construction given the British Act (1-2 Geo. V, c. 55, § 87, *as am.* 1924 by § 4 (1), c. 30, 14-15 Geo. V) by the time of enactment of the Washington Act and those of most of the other states which were modeled on it and which borrowed the same term. The British Umpire (no court appeal) has held that "stoppage" refers primarily not to cessation of an employee's labor but to stoppage of work at the premises in consequence of the dispute. *UMPIRE'S DEC.*, 609, 3809, 4830 (1926), and that for a stoppage to exist there must be work available which would be done but for the dispute. *BENEFIT SERIES, GEN. SUPP. NO. 1, B. U. 496.* If the term were applied to the employees rather than to plant operations, the result of this construction would conflict with the "voluntary quit" section and with the legislative intent in that it might penalize interminably a person who quit work because of a labor dispute where there was no

In *Wicklund v. Commissioner*,⁵³ the court's concentration on the equities allowed a hard case to make bad law. Two cases were consolidated. The NLRB had certified to the employer logging company a local of the IWA as exclusive bargaining agent for all employees. A contract was in force between company and local, governing terms of employment for all employees. Claimants were trainmen who operated the company's railroad which carried logs from the company's camps to its booming grounds. They did not belong to the local but were members of the Railroad Brotherhoods. They had failed in their attempt to get the NLRB to recognize the Brotherhoods as bargaining agents for themselves.

In Case No. 1, the local asked claimants to join it. Reluctant to transfer their allegiance from a union to which they were loyal to another less well-established union which offered fewer advantages, and faced with the prospect of forfeiture of their pensions, the railroad men refused to join, so the local refused to load logs on the cars handled by them. The resultant stoppage caused their unemployment for a month and a half until they gave in and joined the local. In the meantime they were willing to work, and as long as it was available they reported for work.

As in the *Deep River* case, a strike was called by a union local to compel other persons to change their union affiliations. Yet in its sympathy for the plight of the railroad men, the court did not follow the rationale of the *Deep River* case. Over-ruling the determination of the commissioner, the court held that claimants were eligible for benefits as having met all the requirements of the relief provision. As in *Andreas v. Bates*, participation in the stoppage was confused with participation in the dispute which it brings about. Without explanation, it was held that claimants had not participated in the labor dispute which was admitted to exist. This left the paradox of the local as the sole party to the controversy.

In holding that claimants were not "directly interested in" the dispute, the court declared that this term is limited in its application "to those employees directly interested in furtherance of the dispute by participation and activity therein."⁵⁴ The test of "direct interest" fol-

cessation of plant operations, yet would disqualify for only a limited period one who quit without "good cause."

⁵³ 18 Wn. (2d) 206, 138 P. (2d) 876 (1943).

⁵⁴ *Id.* at 214, 222. Following this rationale in the subsequent *Polson* case, it was held that claimants were "directly interested in the labor dispute, made so by the acts of their designated bargaining agent. . . ."

lowed by the weight of authority is whether the outcome of the dispute stood to affect the terms of claimants' employment (wages, hours, conditions, union security, union membership, etc.—all the points which may be at issue either in the collective bargaining process or in some other source of labor dispute).⁵⁵ In the *Deep River* case, claimants were held to be directly interested, since the outcome would affect the security and bargaining power of their own union. The use of this objective standard—chance of gain or loss—is a far easier task of determination than the criterion of mental or emotional interest.

The matter at stake in this controversy affected claimants vitally. The outcome governed whether or not they were to have a voice in the union which represented them as their bargaining agent, whether or not they were to pay an initiation fee and monthly dues. The question of union membership affects not only one's terms of employment but also status and conditions of life as a union member and the degree to which one has a voice in the organization which so deeply affects his life. Consider the diversity of life as a working member of the ILWU, ILGWU, or Teamsters.⁵⁶

Since "participation" and "direct interest" are stated as separate requirements in the relief provision, the inference is that there may be interest where participation is absent.⁵⁷ This holding, that an employee is not directly interested in the dispute unless he engages in participation and activity therein, nullifies the direct interest requirement, despite the presumption that the legislature intended to give significance to every word.

The purpose of the direct interest requirement is to establish the coverage of the section where evidence of participation is conflicting or scant. Under current conditions of industrial labor it is almost futile to try to show what, by his own actions, an individual union member

⁵⁵ *Accord*, *Huet v. Boyd*, 64 Ga. App. 564, 13 S.E. (2d) 863 (1941); *Chrysler Corp. v. Smith*, note 46 *supra*; *Chrysler Corp. v. App. Bd.*, note 46 *supra*; *Nobes v. Michigan U.C.C.*, 313 Mich. 472, 21 N.W. (2d) 820 (1946); *Auker v. Rev. Bd.*, note 38 *supra*; *Kemiel v. Rev. Bd.*, 117 Ind. App. 357, 72 N.E. (2d) 238 (1947); *State v. Luncford*, 229 N.C. 570, 50 S.E. (2d) 497 (1948). *Contra*, *Kieckhefer Container Co. v. U. C. Comm.*, note 38 *supra*. By the chance of gain test of direct interest, where an employer and another party are engaged in a labor dispute in reference to the establishment in question, as in *Gassam v. Bldg. Service Employees' Union*, 29 Wn. (2d) 488, 188 P. (2d) 97 (1947), the employees fail to meet the exception even if they take no part, since they are directly interested in the outcome, as the subject of the dispute is their terms of employment or association. (In such an instance, there remains the problem as to whether the stoppage is "because of" a labor dispute when the immediate cause is a falling off of business.)

⁵⁶ International Longshoremen & Warehousemen's Union, International Ladies Garment Workers Union, International Brotherhood of Teamsters.

⁵⁷ *Local No. 658 v. Brown Shoe Co.*, note 46 *supra*.

has done to promote or avert a labor dispute stoppage. The individual can do little or nothing to manifest his wishes. From an evidentiary standpoint, it is much more easy for direct interest to be shown. It depends upon the issues of the dispute and is thus a more objective standard than that of participation and a factor more simple to determine. The direct interest requirement supplements that of participation and is the more important because of its broader scope and easier proof. (And in the same way that direct interest backs up participation, "grade or class" backs up direct interest.)

In Case No. 2 (the events of which preceded those of Case No. 1), the local, as bargaining agent, struck for an improvement in terms of employment. Claimant trainmen were unsympathetic and offered to work. The strike resulted in concessions which accrued to all employees, including claimants. They were held to have met all requirements of the relief provision and thus to be eligible for benefits. The chance of gain test was rejected, and the requirement of direct interest was again submerged in that of participation. The two cases seem to stand for the proposition that the state shall penalize those who take part in the encouragement of industrial change, yet grant a subsidy to those who stand pat.⁵⁸

The most recent application of Section 77 was In re *Employees Pacific Telephone & Telegraph Co.*,⁵⁹ the only case not concerned with the logging and lumber industries. There was a strike at the premises

⁵⁸ Separate Branch Proviso: The opinion uses the "separate branch" proviso ("... Provided, That if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purpose of this subdivision, be deemed to be a separate factory, establishment, or other premises") at the end of Section 77 as a definition of the term "factory, establishment or other premises" in the initial statement of disqualification in the section ("... the railroad department... was a separate branch of work... and thus to be deemed a separate establishment"). By its position in the section and by the purpose of the other terms of the section, this proviso seems intended to modify the grade or class provision immediately preceding it, rather than the establishment provision. Since the implication of the relief provision is that the disqualification extends to all who participate or are directly interested, such a legislative intent is more likely than to have the proviso apply to establishment without regard to the individual's participation, interest, grade, or class. The apparent function of the separate branch proviso is to limit the extension of "class," to bound the area of the phrase which otherwise tends to be extended indefinitely where there is an integrated series of operations. This proviso might have been the controlling factor in Case No. 2 if the local had been in a controversy over loggers' conditions only (so no direct interest). Then the proviso might have served to put the employees of the railroad department beyond the limits of the class engaged in the dispute. Without the proviso, the railroad workers, engaged in an integrated operation with the loggers so that when one group stopped work the other was forced to stop, might have been declared to be in the same class with the strikers. Washington was the first state to embody this proviso in its labor dispute disqualification section. Since then most other states have followed.

⁵⁹ Note 19 *supra*.

of the telephone company. Picket lines were maintained at the entrances, and claimant telephone operators did not cross them. They were held to have failed to meet the requirements of the relief provision and thus to be ineligible for benefits.

In upholding the determination of the commissioner, the opinion quoted with approval a passage from the decision in the *Polson* case:⁶⁰

We are of the opinion that the legislature deliberately failed to define that term [labor dispute] for the reason that it realized that any attempt to define that term might result in a definition which would not meet conditions arising in the future. The legislature therefore left this question to be determined by the commissioner.

It appears that the court is authorizing the legislature to delegate its legislative discretion to an administrative officer. The meaning of the term "labor dispute" is of the essence of the statute. A commissioner who was hostile to the section by making up his own definition of the phrase could contract it as far as the court has contracted the meaning of the same phrase under the state anti-injunction act.⁶¹ He could do so even more easily, since no definition is provided as it is in the anti-injunction act.

The legislature may define the term, or it may set up other standards to be followed by the commissioner in his application of it. Judicial review may determine whether the administrative decision has been confined to the limits of the standard, but the commissioner, if he has the power to expand or contract these limits, is exercising both legislative and judicial functions, for he is in effect making substantive law in deciding what cases come within the act or fall without it. He makes his own definition, applies it, and determines whether his application met his definition. For the court to say that the commissioner will work out a definition in the course of his administrative decision is to abdicate its own function.⁶²

⁶⁰ *In re Polson Lbr. & Shingle Mills*, note 45 *supra*, at 662.

⁶¹ REM. REV. STAT. § 7612-13 (c) (Supp. 1939) [P.P.C. § 695-25c]. *Safeway Stores v. Retail Clerks' Union*, 184 Wash. 322, 51 P.(2d) 372 (1935); *Adams v. Bldg. Service Employees' Etc. Union*, 197 Wash. 242, 84 P.(2d) 1021 (1938); *Fornili v. Auto Mechanics' Union*, 200 Wash. 283, 93 P.(2d) 422 (1939); *United Union Brewing Co. v. Beck*, 200 Wn. 474, 93 P.(2d) 772 (1939); *Bloedel Donovan Lbr. M.v. Int. Woodworkers*, 4 Wn. (2d) 62, 102 P.(2d) 270 (1940); *Shively v. Garage Emps. L. U. No. 44*, 6 Wn. (2d) 560, 108 P.(2d) 354 (1940); *Swenson v. Seattle Central Labor Council*, 27 Wn. (2d) 193, 177 P.(2d) 873, 170 A.L.R. 1082 (1947); *Gazzam v. Bldg. Service, Etc.*, note 55 *supra*; *A. E. Hanke v. International Brotherhood of Teamsters*, 133 Wash. Dec. 625, 207 P.(2d) 206 (1949); *Pacific Navigation and Trading v. National Organization of Masters, Mates and Pilots*, 133 Wash. Dec. 653, 207 P.(2d) 221 (1949).

⁶² "The complete separation of governmental powers into the legislative, the executive, and the judicial is impossible. In order to cope effectively with many complex

However, the section is not necessarily invalid for lack of a standard for the meaning of the term labor dispute. A legislative intent may be implied that the commissioner use as a guide the definitions of the term given by the federal labor legislation.

The three major acts of national labor legislation—Norris-LaGuardia, Wagner, and Taft-Hartley—as well as most of the state anti-injunction acts, embody definitions of the phrase labor dispute which in the latter two are identical and contain one word added to the definition of the earlier act.⁶⁴ This consistency may imply a purpose to make uniform this definition in federal law.

As one of the requirements of the Social Security Act, setting up standards for state acts as conditions to the allowance of contribution credits against the federal tax, the state laws must not deny benefits to an otherwise eligible individual for his refusal to accept a job which is vacant “due directly to a strike, lockout or other labor dispute. . . .”⁶⁵ All the state laws have repeated this provision verbatim as an exception to their “suitable work” provision.⁶⁵ Since Congress did not define the term labor dispute, the intent may be implied that it have the meaning given in the above mentioned definitions. The same meaning would apply to the phrase incorporated in the state acts as copied from the Social Security Act. Then when the states did not provide a special definition for its use in Section 77, the intent may be implied to use the same definition as intended for Section 79, the “suitable work” exceptions provision.

This rationale is given weight by precedent. Most American decisions have tended to follow the broad limits of the definitions given by the federal acts and the state anti-injunction acts.⁶⁶ The one uniform

relations created by modern society, it is necessary to vest in administrative officials or bodies powers partaking of any two or all of these functions. The legislature manifestly cannot delegate the power to make purely substantive law, but may delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action dependent, provided it has enunciated a standard by which such administrative body must be guided.” *State ex rel Toll Bridge Authority v. Yelle*, 195 Wash. 636, 643, 81 P. (2d) 818 (1938); *Wheeler School District v. Hawley*, 18 Wn. (2d) 37, 47, 137 P. (2d) 1010 (1943); *Schecter v. U.S.*, 295 U.S. 495 (1935).

⁶⁴ “The term ‘labor dispute’ includes any controversy concerning terms, tenure [word “tenure” omitted in Norris-La Guardia Act definition] or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.” 47 STAT. 73, 29 U.S.C., 113 (1932) (Norris-La Guardia); 49 STAT. 450 (1935), 61 STAT. 137 (1947), 29 U.S.C. 152 (9) (Wagner and Taft-Hartley).

⁶⁴ 49 STAT. 640 (1935), 26 U.S.C. 1603 (a) (5) (A) (1946).

⁶⁵ Note 21 *supra*.

⁶⁶ *Barnes v. Hall*, 285 Ky. 160, 146 S.W. (2d) 929 (1940), *cert. denied* 314 U.S. 628 (Norris-LaGuardia definition followed); *Dallas Fuel Co. v. Horne*, 230 Iowa

exception has been that in unemployment compensation cases the term has been applied only where the controversy involves a group of employees.⁶⁷ Other sections of the act are applied where there is a dispute between an individual employee and his employer.⁶⁸

CONCLUSION

One of the settled points appears to be that jurisdictional disputes and lockouts, as well as economic strikes, constitute a labor dispute within the meaning of the act; that active participation in either the stoppage or the dispute is a condition of the existence of the relief provision's element of direct interest; that a failure to cross a picket line is participation in the dispute regardless of the relationship of the claimant to the issues of the dispute. Section 77 has been applied seven times, four times in 1942 and 1943, when labor dispute stoppages were looked upon with more disfavor than during peacetime. The treatment by the court of the problems arising under this section cannot be predicted with certainty. As the lines of the past are blurred, so are those of the future. But it can be expected that a concern for the equities will be a dominant factor in each case.

It may be assumed that Section 77 was enacted in the light of the public interest. Extension of coverage to labor dispute stoppages would affect the public interest both by the consequences of the labor-management contest and increased payroll taxes to provide adequate reserves to cover the added risk. The competition for public funds, of which payroll taxes are a source, is already keen, as exemplified by the current struggle between pensions and schools. A plan of social insurance cannot be considered as standing alone but must be taken in its relation to other systems of public insurance—workmen's compensation, old age pensions, survivors' and blind benefits, disability insurance—and kept in balance with them.

1148, 300 N.W. 303 (1941), (Wagner Act definition followed); *Miners in General Group v. Hix*, 123 W. Va. 637, 17 S.E. (2d) 810 (1941) (definitions given in the federal statutes followed as "persuasive"); federal statutory definitions to be considered by way of illustration but have no binding force and effect for this section, *Ex Parte Pesnell*, 240 Ala. 457, 199 S. 726 (1940); *Block Coal & Coke Co. v. UMW*, 177 Tenn. 247, 148 S.W. (2d) 364 (1941); *Dept. of Ind. Relations v. Drummond*, 30 Ala. App. 78, 1 S. (2d) 395, cert. denied 241 Ala. 142, 1 S. (2d) 402 (1941) (federal definitions held not applicable—federal statutory definition inserted in state act immediately after this decision); *Badgett v. Dept. of Ind. Rel.*, note 40 *supra* (construction of statutory embodiment of Wagner Act definition).

⁶⁷ Alabama, 26 CODE 1940, § 214A, expressly excludes it from application to a dispute between an individual worker and his employer.

⁶⁸ Note 6 *supra*.

The state was faced with a choice—a stronger bargaining position for management, coupled with the hardships stemming from loss of wages with no benefits, or a stronger position for employees with less hardship during the stoppage and a heavier burden of premium payments upon industry. Unjust results in specific cases are inevitable, whether or not this risk is covered. The legislature has chosen the former, on the ground that the secondary consequences of covering this risk were sufficiently important incidents of the unemployment insurance plan, and sufficiently against the public interest, that the scope of the system should not be extended to cover it. Therefore the statutory exception of this risk is to be applied.

Because the insurance coverage test follows the legislative intent and the statutory terms with more precise obedience, because it depends on objective criteria which are more susceptible of exact determination, and which minimize value judgments, because it does not call on the court to pass upon the merits of a dispute, and because it operates on the assumption that public insurance coverage is a contractual right rather than charity to the deserving poor, this test is the most satisfactory standard which may be applied.