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Unemployment Compensation - Labor Dispute Disqualification - Workers Unemployed by a Mult-Employer Lockout

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UNEMPLOYMENT COMPENSATION — LABOR DISPUTE DISQUALIFICATION — WORKERS UNEMPLOYED BY A MULTI-EMPLOYER LOCKOUT — Two unions of restaurant employees voted to strike the local restaurant industry in order to obtain a more favorable master contract with a restaurant owners' association. The unions executed this program by strategically calling strikes on only a few key restaurants. The association retaliated by notifying its members to lay off their employees in accordance with its previously announced policy to consider a called strike against one member a called strike against all members. The California Unemployment Insurance Appeals Board held that the union employees laid off in response to the association's notice were "voluntarily" out of work and therefore were disqualified from receiving unemployment benefits in view of the statutory disqualification of any worker who "left his work because of a trade dispute."[1] In a mandamus proceedings brought by the union employees, the superior court reversed the appeals board. On appeal to the California Supreme Court, *held,* reversed, one judge dissenting. Having first used a work stoppage as an economic weapon, the union employees were responsible for the foreseeable reprisals and were therefore disqualified from unemployment benefits for having voluntarily left their work because of a trade dispute. *Gardner v. State Director of Employment,* 53 Cal.2d 23, 346 P.2d 193 (1959).

In the majority of states the statutory labor dispute disqualification provision is applied as a blanket disqualification to disqualify from unemployment benefits all workers whose unemployment is the result of a

[1] CAL. UNEMP. INS. CODE §1262 states: "An individual is not eligible for unemployment compensation benefits, and no such benefits shall be payable to him, if he left his work because of a trade dispute."

labor dispute.[2] Generally, no distinction is made between unemployment resulting from employee strikes and unemployment resulting from employer lockouts. In eleven states,[3] however, some attempt has been made to remedy the inequities of blanket disqualification by granting benefits during a labor dispute when the responsibility for the unemployment can be traced to the employer. But there is diversity of opinion among these eleven states with regard to the proper method of determining such responsibility. For example, the Minnesota courts attempting to determine whether a particular work stoppage was caused by a strike or by a lockout look only to the final act which immediately caused the unemployment.[4] The Connecticut,[5] Kentucky,[6] Ohio,[7] and West Virginia[8] courts, on the other hand, look to whether the employer or the workers were attempting to change the *status quo*, that is, the existing terms or conditions of work, by the use of a work stoppage as economic pressure.[9] The approach which has developed in California toward this problem is somewhat unique. The California labor dispute disqualification provision does not specifically distinguish between unemployment resulting from employee strikes and unemployment resulting from employer lockouts. Nevertheless, the California Supreme Court has established a method of fixing the responsibility for the unemployment in a labor dispute by interpreting the statutory disqualification phrase, "left his work because of a trade dispute," to mean that the determinative ques-

2 The draft bill of the Federal Social Security Board, initially adopted by most states, provides that an individual will be disqualified ". . . for any week with respect to which . . . his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute. . . ." SOCIAL SECURITY BOARD, DRAFT BILLS FOR STATE UNEMPLOYMENT COMPENSATION OF THE POOLED FUND AND EMPLOYER RESERVE ACCOUNT TYPES §5(d) (rev. ed. 1937). This provision has been generally interpreted as a blanket disqualification. See, *e.g.*, Depaoli v. Ernst, 73 Nev. 79, 309 P.2d 363 (1957); Buchholz v. Cummins, 6 Ill.2d 382, 128 N.E.2d 900 (1955). In Arizona, District of Columbia, Massachusetts, and New York, unemployment resulting from employer lockouts as well as unemployment resulting from employee strikes is expressly included in the disqualification provision.

3 Arkansas, California, Colorado, Connecticut, Kentucky, Minnesota, New Hampshire, Ohio, Pennsylvania, Utah, and West Virginia.

4 *E.g.*, Bucko v. J. F. Quest Foundry Co., 229 Minn. 131, 38 N.W.2d 223 (1949).

5 This approach is provided by statute in Connecticut: ". . . any individual whose unemployment is due to a lockout shall not be disqualified, unless the lockout results from demands of the employees, as distinguished from an effort on the part of the employer to deprive employees of some advantage they already possess. . . ." CONN. GEN. STAT. REV. §31-236(3) (1958).

6 *E.g.*, Barnes v. Hall, 285 Ky. 160, 146 S.W.2d 929 (1940).

7 *E.g.*, Zanesville Rapid Transit, Inc. v. Bailey, 168 Ohio St. 351, 155 N.E.2d 202 (1958).

8 Under the West Virginia statute there is no disqualification "if an employer shuts down his plant or operation or dismisses his employees in order to force wage reduction, changes in hours or working conditions." W. VA. CODE ANN. §2366(78)(4) (1955).

9 Pennsylvania courts have also applied the *status quo* test. *E.g.*, McGraw Wool Company v. Unemployment Compensation Board of Review, 176 Pa. Super. 9, 106 A.2d 652 (1954). But recent decisions indicate that this test will not be determinative in every case. *E.g.*, The Punxsutawney Co. v. Unemployment Compensation Board of Review, 188 Pa. Super. 569, 149 A.2d 683 (1959). The Arkansas and New Hampshire statutes explicitly exclude lockouts from the disqualification provision but, so far, no cases are available which indicate what test or tests the Arkansas and New Hampshire courts will apply to determine the existence of a lockout.

tion is whether the worker *voluntarily* left his work because of a trade dispute.[10] The principal case is an example of the California approach extended to the multi-employer lockout situation.

The present diversity of opinion concerning the proper method of determining the responsibility for the unemployment during a labor dispute, together with the probability of more extensive use of the multi-employer lockout,[11] warrants a reappraisal of the labor dispute disqualification problem in terms of the basic purposes of unemployment compensation. The primary purpose is to provide some measure of subsistence to workers involuntarily out of work;[12] a secondary purpose is to provide a buffer to cyclical economic declines by assuring continued purchasing power to one segment of the population.[13] It would seem that a proper corollary of these purposes is the encouragement of the peaceful settlement of employer-employee differences.[14] Weighed against these purposes and this corollary is the legal sanction of the use of strikes and lockouts as economic weapons in the collective bargaining arena. Consequently, the major difficulty encountered by the courts in attempting to fix the responsibility for unemployment for labor dispute disqualification purposes is to avoid interfering with the collective bargaining process without making unemployment compensation subservient to collective bargaining. This difficulty can be appreciably minimized without submitting to the inequities of the blanket disqualification if the labor dispute disqualification is directed *only* to situations in

10 The "volitional" test was first enunciated in Bodinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 109 P.2d 935 (1941). See also Chrysler Corp. v. California Employment Stabilization Commission, 116 Cal. App.2d 8, 253 P.2d 68 (1953); McKinley v. California Employment Stabilization Commission, 34 Cal.2d 239, 209 P.2d 602 (1949); Bunny's Waffle Shop v. California Employment Commission, 24 Cal.2d 735, 151 P.2d 224 (1944). The McKinley case is noted in 35 CORNELL L.Q. 657 (1950); 63 HARV. L. REV. 716 (1950); 2 STAN. L. REV. 427 (1950). For a thorough discussion of the California court and board decisions, see Feldman, *Unemployment Insurance: Its Effect on Trade Disputes in California,* 5 U.C.L.A. L. REV. 604 (1958). Interpreting a statute which disqualifies workers who are unemployed because of a "strike," Utah adopted the California test. See Olof Nelson Construction Co. v. Industrial Commission, 121 Utah 525, 243 P.2d 951 (1952). Colorado, however, applies the *status quo* test to a similar "strike" disqualification provision. See Sandoval v. Industrial Commission, 110 Colo. 108, 130 P.2d 930 (1942).

11 The use of the multi-employer lockout to preserve the multi-employer bargaining basis has been recently approved by the United States Supreme Court in NLRB v. Local 449, Teamsters Union, 353 U.S. 87 (1957).

12 This purpose is stated in the declaration of policy section of most statutes. *E.g.,* CAL. UNEMP. INS. CODE §100. See also DOUGLAS, STANDARDS OF UNEMPLOYMENT INSURANCE 59 (1933). Many writers, however, have doubted that this is actually the underlying theme. See, *e.g.,* Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification,* 17 U. CHI. L. REV. 294 (1950); Lesser, *Labor Disputes and Unemployment Compensation,* 55 YALE L.J. 167 (1945). Nevertheless, the courts have not disputed it. See, *e.g.,* Alamada v. Administrator, 137 Conn. 380, 77 A.2d 765 (1951). The difference of opinion, however, seems to be more one of semantics than of basic disagreement. See Sanders, *Disqualification for Unemployment Insurance,* 8 VAND. L. REV. 307, 316 (1955).

13 See Williams, *Labor Dispute Disqualification—A Primer and Some Problems,* 8 VAND. L. REV. 338, 368 (1955).

14 See the penetrating analysis of Justice Crockett concurring in Olof Nelson Construction Co. v. Industrial Commission, *supra* note 10.

which the workers have placed themselves outside of the purposes of unemployment compensation, that is, when the workers are voluntarily unemployed. If this is to be the test, "voluntary" must be accorded a workable meaning. It should be recognized that the voluntary nature of the workers' actions can be objectively and practically determined only if proper recognition is given to the legal status of the authorized collective bargaining agent of the workers and if the voluntary nature of the workers' actions is accordingly fixed by reference to the acts of the collective bargaining agent performed in their behalf. But how far into the facts of the labor dispute itself the courts should look in order to make an objective determination of voluntary or involuntary unemployment seems to be an area of basic disagreement among the courts. The California courts, as demonstrated in the principal case, assess the responsibility against the party who first takes the dispute away from the bargaining table by applying economic pressure. In this way the courts can seek the party who was willing to assume the responsibility for the immediate unemployment and the risk of reprisals which produce further unemployment. The workers are denied benefits only if they are this party. Such a determination provides an objective answer to the question of voluntary or involuntary unemployment with a minimum of interference with collective bargaining. It fosters the peaceful settlement of differences without arbitrarily denying benefits to the workers if peaceful negotiations break down. The other tests in use do not achieve such satisfactory results. The "final act" test of the Minnesota courts, excluding blindly all but the final act from consideration, fails to produce any realistic determination of voluntary or involuntary unemployment. Further, it is particularly objectionable because it tends to encourage wasteful tactical maneuvering by both parties in an attempt to place the other party in the position of responsibility for the final act.[15] The *"status quo"* test, too, is inadequate for it causes the determination to turn on the question of which party was attempting to change the *status quo,* a criterion which may well be completely unrelated to whether the workers were involuntarily unemployed.[16] A final alternative, decision on the merits of the labor dispute itself, has been suggested by some writers as the ultimate test.[17] But such a test would, in effect, place the administrative agency or the court in the position of an arbitrator in every dispute. The tribunal would have to

[15] See Note, 35 CORNELL L.Q. 657 (1950).

[16] See Shadur, *supra* note 12, at 306.

[17] See, *e.g.,* Shadur, *supra* note 12. But the courts have generally held that the statute prohibits examination of the merits. *E.g.,* The Punxsutawney Co. v. Unemployment Compenastion Board of Review, *supra* note 9. Two writers have advocated a limited determination of the merits in order to grant benefits when the employer has acted unlawfully or has breached his contract and the employees walk out. Williams, *The Labor Dispute Disqualification—A Primer and Some Problems,* 8 VAND. L. REV. 338 (1955); Comment, 49 MICH. L. REV. 886 (1951). The determination of the merits approach referred to in the text of this note is that advocated in a general case where the employer has not acted unlawfully or breached his contract.

decide in each case whether the workers were justified in their actions and therefore entitled to unemployment benefits. Such a decision interferes with the collective bargaining process and goes beyond what is required for labor dispute disqualification purposes. In addition, it may not be possible in every case to decide whether the workers are justified in their actions since, in many cases, the answer will depend upon subjective opinion. Of all these approaches, the one used by the California Supreme Court in the principal case appears to adhere best to the purposes of unemployment compensation in a manner which is sound and workable in theory and practice.

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