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## History of the Strike-Lockout Distinction of Pennsylvania's Unemployment Compensation Law

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### I. INTRODUCTION

In 1936, in response to federal incentives<sup>1</sup> and the economic conditions of the Great Depression, Pennsylvania enacted an unemployment compensation law, the general purpose of which is to grant unemployment compensation to unemployed persons who are "unemployed through no fault of their own."<sup>2</sup> In establishing

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1. These federal incentives were in Title IX of the Social Security Act of 1935, 42 USC § 1101 (1987). For a brief review of the federal incentives, see Virgil J. Haggart, Jr., *Unemployment Compensation During Labor Disputes*, 37 Neb L Rev 668, 668-74 (1958). For a brief review of the draft bills prepared by the Committee on Economic Security, see Milton L. Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U Chi L Rev 294, 295 (1950). More than one commentator has noted that states enacted unemployment compensation laws under federal pressure and "without giving any real consideration to their provisions." Edwin E. Witte, *Development of Unemployment Compensation*, 55 Yale L J 21, 33 (1945); Shadur, 17 U Chi L Rev at 294 (cited within this note).

2. Section 3 (Declaration of Public Policy) of the Unemployment Compensation Law, Act of Dec 5, 1936, Pub L No 2897 (1937), 43 Pa Stat § 752, states:

Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of the Commonwealth. Involuntary unemployment and its

qualifying and eligibility<sup>3</sup> standards, the Pennsylvania legislature has frequently amended the Unemployment Compensation Law (hereinafter "the Law"). These amendments, over sixty of them during the past fifty-six years, reflect legislative and societal attitudes about the nature of unemployment compensation.

One of the least understood but most bitterly contested eligibility standards involves Section 402(d) of the Law,<sup>4</sup> the labor dispute section.<sup>5</sup> This article will explore the legislative history of Section 402(d), culminating in the enactment in 1949 of the lock-out exception, and the judiciary's subsequent attempts to distinguish strikes and lockouts as required by the 1949 amendment. Those attempts have resulted in a highly refined body of law in the two contexts in which the strike-lockout distinction has arisen, i.e.,

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resulting burden of indigency falls with crushing force upon the unemployed worker, and ultimately upon the Commonwealth and its political subdivisions in the form of poor relief assistance. Security against unemployment and the spread of indigency can best be provided by the systematic setting aside of financial reserves to be used as compensation for loss of wages by employees during periods when they become unemployed through no fault of their own. The principle of the accumulation of financial reserves, the sharing of risks, and the payment of compensation with respect to unemployment meets the need of protection against the hazards of unemployment and indigency. The Legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this Commonwealth require the exercise of the police powers of the Commonwealth in the enactment of this act for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

Id.

3. Section 401 of the Law, 43 Pa Stat § 801 (1991), is entitled "Qualifications Required to Secure Compensation." Section 402 of the Law, 43 Pa Stat § 802 (1991), is entitled "Ineligibility For Compensation." The eligibility requirements that have produced the most litigation are Section 402(b), the voluntary-quit section, and Section 402(e), the discharge section.

4. Section 402(d) of the Law, 43 Pa Stat 802(d) (1991), presently provides:

An employee shall be ineligible for compensation for any week . . . in which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lockout) at the factory, establishment or other premises at which he is or was last employed: Provided, That this subsection shall not apply if it is shown that (1) he is not participating in, or directly interested in, the labor dispute which caused the stoppage of work, and (2) he is not a member of an organization which is participating in, or directly interested in, the labor dispute which caused the stoppage of work, and (3) 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 directly interested in, the dispute.

Id. This section has remained unchanged since 1949.

5. For a detailed analysis of all provisions of Section 402(d), see Sydney Reuben and Daniel R. Schuckers, *The Labor Dispute Disqualification of the Pennsylvania Unemployment Compensation Law*, 50 Temple L Q 211 (1977).

work stoppages<sup>6</sup> that occur at the expiration of a collective bargaining agreement and work stoppages that occur during a collective bargaining agreement. This body of law, which has developed during the past four decades, however, is not totally consistent and uniform.

## II. STANDARDS PRIOR TO 1949

The Pennsylvania legislature enacted the lockout exception in 1949, thirteen years after the enactment of the original unemployment compensation law. The original law required a three-week waiting period for employees who were unemployed due to a "voluntary suspension of work resulting from an industrial dispute."<sup>7</sup> The initial law and subsequent pre-1949 amendments<sup>8</sup> did not contain the words "strike" or "lockout." Accordingly, much of the litigation during this period concerning this disqualification<sup>9</sup> involved the definition of "voluntary suspension of work"<sup>10</sup> and the defini-

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6. Numerous commentators have noted that a work stoppage refers to the status of production at the employer's premises rather than to the individual claimant's cessation of work. Abraham Abramowitz, "Stoppage of Work Due to a Labor Dispute" as Defined by the Unemployment Compensation Laws, 10 Geo Wash L Rev 604, 607-08 (1942); Herbert A. Fierst & Marjorie Spector, *Unemployment Compensation in Labor Disputes*, 49 Yale L J 461, 483 (1940). See also Willard A. Lewis, *The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence*, 45 J Urban L 319, 326 (1967); Bullitt, *Unemployment Compensation in Labor Disputes*, 25 Wash L Rev 50, 63 n 52 (1950); Leonard Lesser, *Labor Disputes and Unemployment Compensation*, 55 Yale L J 167, 168 n 4 (1945). Although the Pennsylvania Commonwealth Court did not apply this definition in *Unemployment Comp. Bd. of Rev. v Tickle*, 19 Pa Commw 550, 339 A2d 864 (1975), the Pennsylvania Superior Court had applied the definition in *Conroy Unemployment Comp. Case*, 215 Pa Super 83, 257 A2d 65 (1969); *Pulver Unemployment Comp. Case*, 207 Pa Super 112, 215 A2d 269 (1965); *Mattson Unemployment Comp. Case*, 194 Pa Super 307, 167 A2d 321 (1961).

7. Section 401(e) of the Law, 43 Pa Stat § 801(e) (1991). New York and Rhode Island are the only states that have retained this type of eligibility in cases involving labor disputes. Amy E. Ault, *Judicial Interpretation: The Pennsylvania Right of Strikers to Receive Unemployment Compensation*, 7 J L & Commerce 125, 126 n 5 (1987).

8. The 1942 amendment, Act of April 23, 1942, Sp Sess Pub L 60, moved the industrial dispute disqualification from Section 401(e) of the Law to Section 402(d). The 1945 amendment, Act of May 29, 1945, Pub L 1145, primarily added the phrase "at the factory establishment or other premises at which he is or was last employed." The 1947 amendment, Act of June 30, 1947, Pub L 1186, is discussed at note 16 and accompanying text.

9. One commentator noted in 1950 that "the doctrine that the right to benefits should be gauged by the 'involuntary' nature of unemployment must be recognized as the most influential theory in current case law." Shadur, 17 U Chi L Rev at 296 (cited in note 1). See also Lesser, 55 Yale L J at 171 (cited in note 6).

10. See, for example, *Bonner v Unemployment Comp. Bd. of Rev.*, 156 Pa Super 367, 40 A2d 106 (1944) (initially employee voluntarily suspended work but subsequent employer action converted the voluntary separation to an involuntary separation); *Barnas v Unemployment Comp. Bd. of Rev.*, 152 Pa Super 429, 33 A2d 258 (1943) (sympathy strikers must

tion of "industrial dispute."<sup>11</sup>

These definitional problems were further complicated by conceptual problems involving uncertainty about whether Section 3 of the Law (Declaration of Public Policy),<sup>12</sup> which twice refers to the eligibility of employees who are unemployed through "no fault of their own,"<sup>13</sup> should be utilized in analyzing the eligibility of employees who were unemployed as a result of an industrial dispute. From 1936 to 1947, these problems were important only for the limited purpose of denying benefits during an initial waiting period. That benefits were mandatory after the initial waiting period was evident in *Urda Unemployment Comp. Case*,<sup>14</sup> a case in which members of the United Mine Workers of America were eligible for benefits after the initial waiting period under the 1945 Act even though they had initiated a work stoppage based on their traditional bargaining position of "no contract—no work."

In 1947, the legislature deleted the waiting period and extended

be considered voluntarily unemployed); *Miller v Unemployment Comp. Bd. of Rev.*, 152 Pa Super 315, 31 A2d 740, 743 (1943) ("To call a suspension of work and act in concert to prevent a continuance of operation, without resorting to the legal measures open to determine the rights of the parties, amounts to a voluntary suspension of work, with the necessary consequences provided in the Act"); *Phillips v Unemployment Comp. Bd. of Rev.*, 152 Pa Super 75, 30 A2d 718 (1943) (sympathy strikers must be considered voluntarily unemployed).

11. See, for example, *Barnas v Unemployment Comp. Bd. of Rev.*, 152 Pa Super 429, 33 A2d 258 (1943) (sympathy strike deemed to be an industrial dispute); *Miller v Unemployment Comp. Bd. of Rev.*, 152 Pa Super 315, 31 A2d 740, 742 (1943) ("Such a dispute does not have to be between employer and employees. It may be between the employees and their Union or bargaining agency, provided it involves the employer and affects the terms or conditions of employment").

12. 42 Pa Stat § 752 (1937). See note 2 for the text of Section 3. For example, in *Miller*, 31 A2d 740 (1943), the court specifically referred to Section 3 in analyzing the "voluntary suspension of work" provision; in *Bonomo Unemployment Comp. Case*, 161 Pa Super 622, 56 A2d 288 (1948), the court, however, specifically stated that Section 3 must yield to the specific provisions of Section 402(d). This uncertainty continues today. Compare *Gladieux Food Servs., Inc. v Unemployment Comp. Bd. of Rev.*, 479 Pa 324, 388 A2d 678, 682 (1978) ("A claimant should not be denied benefits unless he is excluded by the plain and unambiguous language of the law"), and *Jones v Unemployment Comp. Bd. of Rev.*, 513 Pa 45, 518 A2d 1150, 1151 (1986) ("Section 3 has repeatedly been held to supply an independent basis for denying unemployment compensation benefits where a claimant's loss of employment resulted from some voluntary activity which related to his ability to perform the work required"). For a review of the bureaucratic indecision concerning the use of Section 3, see Richard H. Wagner, *Unemployment Benefits in Labor Disputes*, 53 Dickinson L Rev 187, 188-89 (1949).

13. For a discussion of Section 3, see Daniel R. Schuckers and James K. Bradley, *The Proper Use of the Declaration of Public Policy Section of the Pennsylvania Unemployment Compensation Law*, 87 Dickinson L Rev 507 (1983).

14. 161 Pa Super 594, 56 A2d 393 (1948).

the disqualification for the length of the work stoppage.<sup>15</sup> The legislature also deleted the phrase "voluntary suspension of work resulting from an industrial dispute" and substituted the phrase "unemployment is due to a stoppage of work, which exists because of a labor dispute."<sup>16</sup> The superior court interpreted these amendments to mean that the legislature in utilizing the phrase "stoppage of work" did not envision an analysis of the claimants' volition and included all stoppages of work regardless of fault.<sup>17</sup> The Pennsylvania Superior Court specifically rejected the argument of the claimant and the Unemployment Compensation Board of Review<sup>18</sup> (hereinafter "the Board") that "stoppage of work" applies only to stoppages due to the fault of the employees and held that the phrase "stoppage of work" in the 1947 amendment included both strikes and lockouts.

### III. ENACTMENT OF THE 1949 LOCKOUT EXCEPTION

In 1949, the legislature amended Section 402(d) to include the lockout exception: "unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lockout)."<sup>19</sup> Surprisingly, very little legislative history and no legislative debates accompany this historic change in Section 402(d).<sup>20</sup> The 1949

15. The legislative history of the 1947 amendment is sparse. The authors believe, however, that the 1947 amendment was a legislative reaction to the dilemma set forth in *Urda*, i.e., a reaction to the grant of benefits (after an initial waiting period) to claimants whose unemployment was obviously the result of their own actions. The work stoppage in *Urda* began in 1946 and the unemployment compensation referee's grant of benefits was affirmed by the Unemployment Compensation Board of Review and the superior court under the 1945 amendment.

16. Act of June 30, 1947, Pub L 1186. The 1947 amendments also added for the first time the three provisos that remain in the law today. See note 4 where this is quoted in full. That these provisos must be read as conjunctive tests was established in *Curcio Unemployment Comp. Case*, 165 Pa Super 385, 68 A2d 393 (1949).

17. *Midvale Co. v Unemployment Comp. Bd. of Rev.*, 165 Pa Super 359, 67 A2d 380 (1949). The superior court specifically stated:

In our opinion the elimination of the words "voluntary suspension of work" contained in the amendment of 1945 and the substitution therefor of the words "stoppage of work" in the amendment of 1947 is most significant and clearly evinces an intent on the part of the Legislature to remove from consideration in determining eligibility, and to render immaterial, any question as to the voluntary or involuntary nature of or the blame or fault for the stoppage.

*Midvale Co.*, 67 A2d at 363.

18. The Board's position is set forth in *Wagner*, 53 Dickinson L Rev at 187 (cited in note 12).

19. Act of May 23, 1949, Pub L 1738.

20. The authors believe that the 1949 amendment was a legislative reaction to the application of the 1947 amendment to the facts of *Midvale*. The 2,270 employees of the

amendment to Section 402(d) clearly reintroduced the concept of fault<sup>21</sup> in Section 402(d).<sup>22</sup>

#### IV. THE 1950S: GROPING FOR STANDARDS

In the 1950s, the Pennsylvania Superior Court<sup>23</sup> analyzed the 1949 amendment on numerous occasions and tried, with some success, to develop definite standards for distinguishing strikes and lockouts for unemployment compensation purposes.

Although the 1949 amendment did not define a strike or a lock-out, the superior court had little difficulty in providing definitions. For example, in the 1951 *Hogan Unemployment Comp. Case*,<sup>24</sup> the superior court stated:

A strike is a concerted refusal by employees to do any work for their employer . . . until the object of the strike is attained, that is, until the employer grants the concession demanded. . . . The core of a lock-out is the act of an employer in withholding work, which includes the physical closing of the place of employment, . . . but is not limited to the existence of that condition. An employer may impose a lock-out without physically closing his plant or without forbidding access to it by his employees.<sup>25</sup>

The superior court, however, recognized that the application of the definition of a lockout was often difficult and that "a lock-out may be present in varying factual situations, and no definition can comprehend all its manifestations."<sup>26</sup> Thus, a lockout for purposes of Section 402(d) could be a physical lockout or a constructive lock-

Midvale Company offered to continue working under the terms and conditions of the expiring collective bargaining agreement and to submit the issue of wage reductions to arbitration. The employer rejected this offer and notified the union of a general and uniform cut in pay, effective in five days. The next day the employees began a work stoppage. The Unemployment Compensation Board of Review's grant of benefits (totalling approximately \$1,000,000) was reversed by the superior court.

21. Richard H. Wagner, *1949 Amendments to the Unemployment Compensation Law*, 54 Dickinson L Rev 177, 179 n 6 (1949-50).

22. Pennsylvania is one of fourteen states that grants benefits if a work stoppage is deemed a lockout instead of a strike. Ault, 7 J L & Commerce at 126-27 (cited in note 7). As indicated in note 7, two states (New York and Rhode Island) have retained durational standards, i.e., denial of benefits for an initial period only.

23. Prior to 1970, unemployment compensation cases were appealed from the Unemployment Compensation Board of Review to the Pennsylvania Superior Court and then, upon an application for allocatur, to the Pennsylvania Supreme Court. With the creation of the Pennsylvania Commonwealth Court in 1970, jurisdiction over such appeals was transferred from the superior court to the commonwealth court, with the appeal to the Pennsylvania Supreme Court by way of petition for allowance of appeal remaining unchanged. See 42 Pa Con Stat §§ 724, 763(a) (1991).

24. 169 Pa Super 554, 83 A2d 386 (1951).

25. *Hogan*, 83 A2d at 390 (emphasis in original, citations omitted).

26. *Id.*

out.<sup>27</sup> Much of the litigation in this area since 1949 has involved the argument that while the employer's conduct did not constitute a physical lockout, it did constitute a constructive lockout.

Three concepts emerged in the 1950s as the superior court analyzed the strike-lockout distinction contained in the 1949 amendment. First, the cases are replete<sup>28</sup> with references to concepts of fault and responsibility for the work stoppage. The party that was at fault within the meaning of the public policy section of the Law<sup>29</sup> bore the responsibility for the resulting work stoppage.

Second, the cases are replete<sup>30</sup> with references to a party's actions being the final cause of the work stoppage or its equivalent. The terminology often differed. For example, in *Morris Unemployment Comp. Case*,<sup>31</sup> the court referred to "the final and effective

27. *Duer Spring and Mfg. Co. v Department of Labor and Industry*, 906 F2d 968, 971 (3d Cir 1990). As noted in *Wagner*, 53 Dickinson L Rev at 191 (cited in note 12): "The idea that a lockout necessarily involves a padlock or an unconditional withholding of work by the employer, if ever popularly entertained, lost favor during the revolution of the 1930's."

28. For example, see *Hogan*, 83 A2d 386 (1951) (claimants, by adopting a "no contract, no work" position, caused the work stoppage and became unemployed through their own fault within the meaning of Section 3 which is the "lode star" by which all provisions of the Law are construed); *Leto v Unemployment Comp. Bd. of Rev.*, 176 Pa Super 9, 106 A2d 652 (1954) (responsibility for the work stoppage is used in the sense of "fault" within the meaning of the public policy section of the Law); *Hughes Unemployment Comp. Case*, 187 Pa Super 252, 144 A2d 685 (1958) (the actions of the employer and employees must be subjected to the test of a reasonable desire to maintain the employment status; if the fault is attributable to only one, the result is either a lockout or a strike; if the fault is attributable to both, compensation must be denied because the Law was enacted for the benefit of persons "unemployed through no fault of their own"); *Accurti Unemployment Comp. Case*, 187 Pa Super 391, 144 A2d 673 (1958) (the fundamental idea of the Law is to provide a reserve fund to be used for the benefit of persons unemployed through no fault of their own); *Parise Unemployment Comp. Case*, 188 Pa Super 569, 149 A2d 683 (1959) (the duty of the compensation authorities is to determine whether the employees are unemployed through no fault of their own, i.e., if the employees have acted consistent with the desire to remain employed, they are entitled to compensation).

29. 43 Pa Stat § 752.

30. For example, see *Hogan*, 83 A2d 386 (1951) (the Board is to ascertain the direct, immediate, final and effective cause of, the potent and activating reasons for, the work stoppage); *Morris Unemployment Comp. Case*, 169 Pa Super 564, 83 A2d 394 (1951) (employees struck in order to gain a concession from employer, which was the final and effective cause of the work stoppage); *Leto v Unemployment Comp. Bd. of Rev.*, 176 Pa Super 9, 106 A2d 652 (1954) (refusal of the employer to maintain the status quo for even a short period of time precipitated the work stoppage and was the final cause); *McGinnis v Unemployment Comp. Bd. of Rev.*, 184 Pa Super 95, 132 A2d 749 (1957) (the shutdown of the plant was the final step in the plan of the employer to strengthen its bargaining position and the final responsibility for the work stoppage rested upon it); *Hutchins Unemployment Comp. Case*, 187 Pa Super 109, 144 A2d 588 (1958) (the final cause of the work stoppage was the refusal of the union members to work without a contract).

31. 169 Pa Super 564, 83 A2d 394 (1951).



cause of the work stoppage"<sup>32</sup> whereas in *Hogan* (decided the same day), the court referred to "the direct, immediate, final and effective cause of, the potent and activating reasons for, the stoppage."<sup>33</sup> The party that was the final cause of the work stoppage bore the unemployment compensation consequences.

The third concept, which apparently was first advanced in 1951 by the Board in *Morris* and which ultimately became the standard in Pennsylvania, was a "freeze-the-status-quo" test.<sup>34</sup> In *Morris*, the superior court specifically approved the Board's conclusion that:

In all work stoppage cases, the first question, therefore, must be whether the employees might, had they so desired, have continued working under the existing terms and conditions of employment. If they have the opportunity to do so, but instead choose to suspend work with the view to improving their working conditions, the responsibility for their unemployment rests on them and the stoppage which ensues is not a "lockout" within the meaning of the Law.<sup>35</sup>

Three years later in *Leto Unemployment Comp. Case*,<sup>36</sup> the superior court for the first time specifically adopted the "freeze-the-status-quo" test when it stated, "The refusal of the employer to maintain the status quo for even a short period of time precipitated the work stoppage. . . ."<sup>37</sup> That the "freeze-the-status-quo" test was not the sole test is evident when the superior court immediately added the phrase "and was the final cause thereof."<sup>38</sup>

The superior court, in the most difficult and bitterly contested<sup>39</sup> case of the 1950s, utilized all three concepts when it analyzed the

32. *Morris*, 83 A2d at 397.

33. *Hogan*, 83 A2d at 390.

34. *Id.* at 394.

35. *Id.* at 397. This type of analysis is also found in *Burleson Unemployment Comp. Case*, 173 Pa Super 527, 98 A2d 762, 766 (1953) ("Where, as here, the plant remains open, the employees are requested to return to work, and full employment is available to all employees at the wages and on the terms of employment prevailing at the time the work stoppage occurred, a labor dispute or a strike is not transformed into a lock-out").

36. 176 Pa Super 9, 106 A2d 652 (1954).

37. *Leto*, 106 A2d at 655.

38. *Id.*

39. The bitterness of this dispute involving 23,000 claimants and \$9,500,000 is outlined in the subsequent case of *Pennsylvania State Chamber of Commerce v Torquato*, 386 Pa 306, 125 A2d 755 (1956). The plaintiffs successfully sought to enjoin the Secretary of Labor and Industry from paying benefits prior to judicial review. It must be noted that in light of *California Dept. of Human Resources Development v Java*, 402 US 121 (1971), payment of unemployment compensation must now be made "at the earliest stage of unemployment . . . after giving both the worker and the employer an opportunity to be heard." *Java*, 402 US at 131. Accordingly, *Torquato* has been implicitly overruled.

work stoppage involving Westinghouse Electric's facilities throughout the Commonwealth.<sup>40</sup> At issue in *McCracken Unemployment Comp. Case*<sup>41</sup> was a work stoppage which took the form of a strike beginning in October of 1955. On December 19, 1955, the Governor of Pennsylvania sent a telegram to the employer and the union urging both parties to "submit their dispute to final and binding arbitration."<sup>42</sup> The Governor also stated that the employees would return to work while arbitration proceeded. The union accepted the Governor's proposal without reservation whereas the employer rejected the proposal. The work stoppage continued until March, 1956, when the dispute was settled. At issue was the eligibility of the claimants for the period from December 19, 1955, to March 1956. Utilizing concepts of fault,<sup>43</sup> final cause,<sup>44</sup> and freezing the status quo,<sup>45</sup> the superior court reversed the Board's grant of benefits for the period from December through March. Of particular importance was the court's rejection of the union's argument that its agreement to binding arbitration and the employer's rejection of binding arbitration was sufficient to convert the strike into a lockout; the court specifically noted that the employer was under no obligation, contractual or otherwise, to submit the labor dispute to binding arbitration.

#### V. *Vrotney Unemployment Compensation Case* (1960)

In 1960, the Pennsylvania Supreme Court for the first time analyzed the strike-lockout distinction and established a definitive, objective test. In *Vrotney Unemployment Comp. Case*,<sup>46</sup> the employees, after giving notice that a strike would take place, offered to continue working on the basis of the existing collective bargaining agreement for an indefinite period (with a five-day cancellation notice by either party) whereas the employer, a steel manufacturer, continued to hold its plant open for its employees but only under the terms set forth in the employer's last offer. The ensuing work

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40. For example, one of the four Westinghouse Electric cases involved 10,000 employees at East Pittsburgh, Trafford, Linhart, Turtle Creek, and Homewood; 6,000 employees at Sharon; and 200 employees in Philadelphia. *McCracken Unemployment Comp. Case*, 187 Pa Super 403, 144 A2d 679, 680 (1958). This case is also referred to as *Westinghouse Elec. Corp. v Unemployment Comp. Bd. of Rev.* (No. 2).

41. 187 Pa Super 403, 144 A2d 679 (1958).

42. *McCracken*, 144 A2d at 681.

43. *Id* at 682, 683.

44. *Id* at 682.

45. *Id* at 682, 684.

46. 400 Pa 440, 163 A2d 91 (1960).

stoppage was deemed to be a lockout by the Board. The superior court reversed on the basis that the employees' conditions were unreasonable and on the basis that the "freeze-the-status-quo test" was not the sole test for distinguishing strikes from lockouts.<sup>47</sup>

The Pennsylvania Supreme Court rejected the superior court's analysis, reversed the denial of benefits, and set forth a definitive, objective standard for distinguishing strikes from lockouts. The court stated that the sole test under Section 402(d) of whether a work stoppage is a strike or a lockout is the following:

Have the employees offered to continue working for a reasonable time under the pre-existing terms and conditions of employment so as to avert a work stoppage pending the final settlement of the contract negotiations; and has the employer agreed to permit work to continue for a reasonable time under the pre-existing terms and conditions of employment pending further negotiations? If the employer refuses to so extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a "lockout" and the disqualification for unemployment compensation benefits in the case of a "stoppage of work because of a labor dispute" does not apply.<sup>48</sup>

This test is strikingly similar to the test set forth by the Board in *Morris* in 1951 and *Leto* in 1954.

Despite the definitive and mandatory nature of this test, the supreme court, after adopting the above test as the sole test under Section 402(d), proceeded to refer to the "final cause" analysis.<sup>49</sup> This gratuitous afterthought was also evident in the superior court's analysis in *Leto*.<sup>50</sup> Thus, the supreme court, while saying that it was adopting a single test, failed to definitely resolve the issue of whether the superior court's analysis from the 1950s involving "fault" and "final cause" should be abandoned. Nevertheless, *Vrotney* has remained the single most important case in Pennsylvania for distinguishing strikes from lockouts.

## VI. REFINING THE *Vrotney* STANDARDS

Having established the definitive standard for distinguishing strikes and lockouts for unemployment compensation purposes, the Pennsylvania Supreme Court has recognized that the standard is "most difficult to apply to any given set of facts."<sup>51</sup> Defining the

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47. *Vrotney Unemployment Comp. Case*, 188 Pa Super 405, 146 A2d 751 (1958).

48. *Vrotney*, 163 A2d at 93-94 (1960).

49. *Id* at 94.

50. See the analysis accompanying notes 37 and 38.

51. *Philco Corp. v Unemployment Comp. Bd. of Rev.*, 430 Pa 101, 242 A2d 454, 455

status quo and reasonable time has been difficult in many cases. Such difficulties have raised questions about the appellate courts' willingness to exclude the concepts of "fault" and "final cause" when analyzing the strike-lockout distinction.

### A. *Status Quo*

The *Vrotney* test requires the parties to offer to continue the existing status quo, i.e., the pre-existing terms and conditions of employment. In other words, a party must agree to extend the terms and conditions of employment that existed at 11:59 p.m. on the last day of the existing collective bargaining agreement or face the unemployment compensation consequences. The party that fails to make the initial "peace" move of offering to continue the status quo will lose the subsequent unemployment compensation case.<sup>52</sup> If the work stoppage takes the form of a strike, the burden is on the employees to show that they offered to continue the status quo.<sup>53</sup> Conversely, if the work stoppage takes the form of a lockout, the burden is on the employer to show that it offered to continue the status quo.<sup>54</sup>

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(1968). There were relatively few appellate court cases in the 1960s involving the strike-lockout distinction; this would appear to be the result of the economic prosperity that existed during that decade.

52. *Philco Corp.*, 242 A2d at 456. Occasionally, both parties will refuse to offer to continue the existing status quo in which case benefits must be denied in light of the purpose of the Unemployment Compensation Law, which is to benefit faultless employees. *Toma v Unemployment Comp. Bd. of Rev.*, 4 Pa Commw 38, 285 A2d 201 (1971).

53. *Philco Corp.*, 242 A2d at 456. It should be noted that the Pennsylvania Supreme Court has been very willing to expand its traditional scope of review in strike-lockout cases. For example, in *Philco Corp.*, 242 A2d at 456 n 2, the court stated "that the question of whether a work stoppage was caused by the union or by management is not a pure question of fact, but is, at most, a mixed question of fact and law." Although the desire to expand the traditional scope of review is understandable in light of the number of claimants, the amount of benefits and the depth of emotions that these cases often engender, this expanded scope of review is contrary to the statutory scope of review. See Reuben and Schuckers, 50 Temple L Q at 228 (cited in note 5) and Willard A. Lewis, *The Lockout Exception: A Study in Unemployment Insurance Law and Administrative Neutrality*, 6 Cal W L Rev 89, 104 n 70 (1969). The lack of clarity as to the supreme court's scope of review remains a constant in strike-lockout cases. Compare *Borello v Unemployment Comp. Bd. of Rev.*, 490 Pa 607, 417 A2d 205, 207 (1980) ("Our scope of review [in Section 402(d) cases] is limited to a determination as to whether any errors of law were committed and, 'absent fraud,' that the Board's findings are supported by the evidence"), and *Norwin School Dist. v Belan*, 510 Pa 255, 507 A2d 373, 378 (1986) ("Thus, in reviewing [the question of whether a work stoppage was caused or perpetuated by the union or by management], the appellate court must make an independent determination").

54. *Miceli v Unemployment Comp. Bd. of Rev.*, 519 Pa 515, 549 A2d 113, 116 (1985); Comment, *Employer's Economic Justifications for Rejecting Union's Return to Work Offer Irrelevant to Reasonable Time Analysis*, 64 Temple L Rev 313, 317 (1991).

Of critical importance is the timing of the offer to continue the status quo. Although no appellate court cases specifically address this issue,<sup>55</sup> the offer must be made in sufficient time before 11:59 p.m. on the last day of the existing collective bargaining agreement to allow the other party to consider the offer and to respond. Such a "sufficient response time" requirement is implicit in *Vrotney*. Moreover, an offer to revoke a change in the status quo and to offer to continue the status quo may satisfy *Vrotney* if made the evening prior to the proposed 8:30 a.m. changes in the employer's schedule and if the other party is not available, as promised, for further negotiations.<sup>56</sup>

Also of critical importance is how the offer to continue the status quo is manifested, i.e., is an oral offer sufficient under *Vrotney* or can the offer be inferred from conduct? Most appellate court cases stress the bargaining position of the parties at 11:59 p.m., particularly when an oral offer to continue the status quo has been made. The Pennsylvania Supreme Court, however, has stated: "In determining the workers' right to unemployment benefits, entitlement must turn on the actual conduct of the respective sides and not upon the rhetoric of the negotiations."<sup>57</sup> Accordingly, the offer to continue the status quo under *Vrotney* may manifest itself orally and/or by conduct. However, if an offer to continue the status quo is inconsistent with a party's conduct, the other party may reject the offer as not being made in good faith.<sup>58</sup>

The "status quo" requirement set forth in *Vrotney* is intended to freeze the position of the parties while they continue to negotiate. As stated by the Pennsylvania Supreme Court:

The underlying rationale for the status quo requirement is that during the interim period between contracts, the employer may continue operations

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55. See, however, *Kerner v Unemployment Comp. Bd. of Rev.*, 68 Pa Commw 132, 448 A2d 666 (1982), wherein the union, two weeks prior to the expiration of existing contract, twice offered to extend the existing contract and the employer, in rejecting these offers, stated that an extension could be discussed a couple of days prior to the expiration of the existing contract. The union's failure to renew its offer just prior to the expiration of the existing contract resulted in the court's conclusion that the work stoppage was a strike.

56. *Colonial School Dist. v Unemployment Comp. Bd. of Rev.*, 53 Pa Commw 29, 416 A2d 1152 (1980).

57. *Borello*, 417 A2d at 209 (court in stressing the conduct of the parties noted that assertions, demands, and threats of the parties immediately prior to the commencement of the work stoppage are to be anticipated).

58. *McKeesport Area School Dist. v Unemployment Comp. Bd. of Rev.*, 40 Pa Commw 334, 397 A2d 458 (1979) (union members had good reason to know that school district's letter did not involve a good faith offer in light of school district's repeated refusal during the same day of the union's offer to continue working).

and the employee may continue working, while the parties are free to negotiate on an equal basis in good faith. Maintenance of the status quo is merely another way of stating that the parties must continue the existing relationship in effect at the expiration of the old contract.<sup>59</sup>

The Pennsylvania appellate courts have on numerous occasions stated that the status quo involves the identical terms and conditions that existed under the previous collective bargaining agreement; no "de minimis" deviation will be accepted for unemployment compensation purposes.<sup>60</sup>

Although the status quo is easily defined, the Pennsylvania appellate courts have had considerable difficulty in applying the concept to the numerous factual variations of work stoppages that have arisen since *Vrotney*. The authors have identified several problems in the application of the status quo concept. The appellate courts have satisfactorily addressed some of the problems; others, however, have not been addressed with consistency and uniformity.

### 1. *Shifting Status Quo*

The most difficult problem of the "status quo" requirement has involved the question of a shifting "status quo," i.e., does the status quo refer to: (1) the terms and conduct at the expiration of the collective bargaining agreement, (2) the terms and conduct that existed just prior to the work stoppage, (3) the terms and conduct during the week in which benefits are claimed? In other words, can the applicable "status quo" shift for purposes of *Vrotney*? This problem arose in the 1970s and 1980s in two factual contexts.

First, the parties may at the expiration of the collective bargaining agreement agree to extend the prior agreement while negotiations continue and this interim agreement may slightly vary from the terms of the prior agreement. If a work stoppage later occurs, does the "status quo" refer to the terms of the prior written agreement or to the terms of the interim agreement? Although the Pennsylvania Supreme Court has not specifically addressed this is-

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59. *Fairview School Dist. v Unemployment Comp. Bd. of Rev.*, 499 Pa 539, 454 A2d 517, 521 (1982).

60. *Chichester School Dist. v Unemployment Comp. Bd. of Rev.*, 53 Pa Commw 74, 415 A2d 997 (1980) (court specifically declined to adopt a de minimis rule of deviation that would allow one party to agree to work or agree to permit work under "substantially the same" preexisting terms and conditions of employment pending further negotiations). *Accord Grandinetti v Unemployment Comp. Bd. of Rev.*, 87 Pa Commw 133, 486 A2d 1030 (1985); *Quaker Oats Co. v Unemployment Comp. Bd. of Rev.*, 65 Pa Commw 72, 442 A2d 369 (1982).

sue of a shifting status quo in this context, the commonwealth court has rejected it unless a written, complete interim agreement "covering all points in contest" had been reached.<sup>61</sup> The court specifically stated that it is "unwise to regard a preliminary incomplete oral agreement as a new status quo for purposes of Section 402(d)."<sup>62</sup> Thus, absent a written, all-inclusive, interim agreement, the operative status quo is that which existed at the expiration of the collective bargaining agreement.

The commonwealth court's reluctance to accept the shifting "status quo" concept even with a complete written extension was evident in *Unemployment Comp. Bd. of Rev. v Haughton Elevator Co.*<sup>63</sup> At the expiration of the prior agreement on March 23, the parties agreed to extend it upon two conditions: (1) any new agreement would be applied retroactively to March 23, and (2) both parties had the right to terminate the interim agreement upon twenty-four hours notice.<sup>64</sup> On March 29, the company notified the union that it was exercising its right to terminate the interim agreement; the union then advised its members to cease work on March 30. Was the ensuing work stoppage a strike or a lockout? The commonwealth court, reversing the Board's award of benefits, rejected the Board's argument that "a new or moving status quo result[ed]"<sup>65</sup> when the parties entered the interim agreement, and held that the work stoppage on March 30 was a strike. Thus, the operative status quo was that which existed at the expiration of the collective bargaining agreement (March 23) and not that which existed at the expiration of the agreement to extend that contract (March 29).

Rejection of the shifting status quo concept is not consistent with the objectives of *Vrotney*, especially when the parties reduce the interim agreement to writing as in *Haughton Elevator*. Once the interim agreement has been reduced to writing, the "pre-ex-

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61. *Morysville Body Works, Inc. v Unemployment Comp. Bd. of Rev.*, 29 Pa Commw 297, 370 A2d 820, 822 (1977).

62. *Morysville Body Works, Inc.*, 370 A2d at 822.

63. 21 Pa Commw 307, 345 A2d 297 (1975).

64. *Haughton Elevator Co.*, 345 A2d at 298.

65. *Id.* at 300. The authors submit that this opinion was improperly decided and that the court confused the employer's right to terminate the interim agreement with the unemployment compensation consequences of exercising that right. For example, the court in rejecting the shifting status quo concept concluded that the employer "has merely exercised its right to terminate that agreement, a right fully exercisable as a condition of the agreement. And, as such a condition, the right to terminate must also be treated as part of the status quo." *Id.* Such a conclusion implicitly accepted the shifting status quo concept yet misapprehended its unemployment compensation consequences.

isting terms and conditions of employment” under *Vrotney* should include the expired collective bargaining agreement and the interim written agreement. Any other interpretation would ignore the intent of the parties and the supreme court’s statement in *Vrotney* that “all parties must be sincere in their desire to maintain the continued operation of the employer’s enterprise.”<sup>66</sup> Of crucial importance in terms of the status quo is “the continued operation of the employer’s enterprise” and not the continued efficacy of the expired collective bargaining agreement. Thus, the status quo should include the expired collective bargaining agreement and any interim written agreement.<sup>67</sup>

The most difficult problem involving the shifting status quo concept has involved the issue of whether a party’s acquiescence in a unilateral change by the other party constitutes acceptance of a new or shifting status quo. In one of the most bitterly contested unemployment compensation cases since 1936, the Pennsylvania Supreme Court in *Unemployment Comp. Bd. of Rev. v Sun Oil Co.*<sup>68</sup> failed to address the question of whether the union’s acquiescence in the employer’s unilateral changes constituted a new or shifting status quo. In *Sun Oil*, the collective bargaining agreement expired January 6. The agreement was extended on a day-to-day basis, but in mid-February the employer notified the union that it was terminating the day-to-day extension of the agreement on February 17 and, absent a new agreement, it would implement some of its proposals. No agreement was reached and the employer unilaterally implemented several of its proposals. The union members continued to work and did not strike, even though the employer had clearly altered the status quo. On March 14, the employer announced its intention to implement additional changes on March 25. On March 18, the union voted to strike and 1,700 union members went on strike on March 19.

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66. *Vrotney*, 163 A2d at 93.

67. In *Philco Corp.*, the court implicitly recognized the shifting status quo concept as: the test of whether a work stoppage resulted from a strike or a lockout requires us to determine which side, union or management, first refused to continue operations under the status quo after the contract had technically expired, but while negotiations were continuing.

*Philco Corp.*, 242 A2d at 455.

68. 476 Pa 589, 383 A2d 519 (1978). The Pennsylvania Supreme Court’s opinion was very short and failed to address the substantial issues raised in this case. Although the opinion and result are correct, the lack of depth of analysis is unfortunate. For a more complete analysis of the strike-lockout issue and of the federal preemption issue, see *Unemployment Comp. Bd. of Rev. v Sun Oil Co.*, 19 Pa Commw 447, 338 A2d 710 (1975).



Was the operative status quo the state of affairs on January 6, February 17, or March 18? Without specifically addressing the issue, the court in affirming the grant of benefits merely stated, "It cannot be disputed that Sun Oil's actions constituted a refusal to further extend the expiring contract and maintain the status quo."<sup>69</sup> Certainly the status quo had been changed by the employer on February 17, but had the union acquiesced for three and one-half weeks in the employer's unilateral changes? It would seem so. When the union struck on March 19, wasn't this merely a reaction to the employer's action of March 14, i.e., the announcement of the implementation of additional changes? It would seem so.

The failure of the Pennsylvania Supreme Court in *Sun Oil* in 1978 to address the acquiescence aspect of the shifting status quo problem resulted in further confusion in this area in the 1980s. This confusion was most evident in *Local 730 v Unemployment Comp. Bd. of Rev.*,<sup>70</sup> where the collective bargaining agreement expired on April 5 and the parties continued to work under the terms and conditions of the expired agreement. On June 19, the employer unilaterally increased wages and benefits. The union worked under those terms and conditions until July 20. On July 21, the union voted to reject the employer's terms and conditions and to go on strike. Did the union's failure to object to the employer's unilateral increases for thirty-three days constitute acquiescence in a new status quo? Was the operative status quo that which existed on June 18 or on July 20?

Implicitly accepting the shifting status quo argument<sup>71</sup> but rejecting the "acquiescence" theory based on the applicable facts, the court stated:

We must therefore conclude that there was a disruption of the status quo as a result of the Employer's actions on June 18. We also are satisfied that this disruption was of the type envisioned by the *Vrotney* rule. Moreover, the

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69. *Sun Oil*, 383 A2d at 522.

70. 505 Pa 480, 480 A2d 1000 (1984). The acquiescence issue was also evident in *Burk v Unemployment Comp. Bd. of Rev.*, 119 Pa Commw 360, 547 A2d 497 (1988), where the employees, after a nine-month period of unemployment due to a fire after the expiration of the prior agreement, returned to work on March 12 (under the employer's unilaterally implemented final offer) and then on March 25 refused to work. The court concluded that the employer's action of imposing its final offer resulted in a lockout and that the time lapse (thirteen days) was insufficient to establish an agreement by the employees with the employer's final offer.

71. The shifting status quo concept is evident in the following: "While a modification by mutual agreement of terms and conditions of employment pending the outcome of ongoing negotiations would not be inconsistent with the objectives of *Vrotney*, the instant record does not support the existence of such an agreement." *Local 730*, 480 A2d at 1004.

unilateral character of the Employer's action of June 18 was not transformed into a mutual agreement simply because the Union waited thirty-three days before the work stoppage.<sup>72</sup>

The court, in affirming the grant of benefits, also rejected the employer's argument that a change in the status quo envisioned under *Vrotney* necessarily requires a detriment to the other party.<sup>73</sup> The irony of *Local 730* cannot be overemphasized; the employer, instead of maintaining the status quo, unilaterally increased wages and benefits and bore the unemployment compensation consequences!

The dissent, relying upon the fault concept found in Section 3 of the Law, implicitly accepted the employer's acquiescence theory and harshly criticized the rigid application of *Vrotney*:

The majority's holding that the Employer's implementation of superior terms and conditions of employment was, constructively, a lockout, simply because that action disturbed the status quo ante, undermines the purposes for which our General Assembly enacted the Unemployment Compensation Law and ignores the legislative intent underpinning Section 402(d). The majority's application of the *Vrotney* rule to the facts of this case shows once again how the insensible extension of a per se rule, adopted for the convenience of courts, can lead to an inappropriate result when applied in a mechanical and arbitrary fashion. The *Vrotney* rule, with its emphasis on the disturbance of the status quo ante to separate strikes from lockouts, may sometimes be a valuable aid to reasoning. It is not a substitute for reasoning. The world of collective bargaining is not comfortably encased in a clockwork universe.<sup>74</sup>

The dissent, however, missed an opportunity to address the precise issue presented by the shifting status quo concept: did the employees' acceptance of increased pay during a thirty-three-day period result in a new status quo, i.e., a new agreement concerning the terms and conditions of employment?

Therefore, while the Pennsylvania Supreme Court has implicitly adopted the shifting status quo concept under *Vrotney*, the Pennsylvania appellate courts have been reluctant to apply the concept absent a written, complete interim agreement or absent an extended period (certainly more than thirty-three days!) of acquiescence in unilaterally implemented changes.

The second factual context arises after the expiration of the col-

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72. *Id.* at 1006.

73. A similar argument was rejected in *All American Gourmet Co. v Unemployment Comp. Bd. of Rev.*, Pa Commw , 598 A2d 1351 (1991) (employer's grant of amnesty for those who had violated the employer's attendance policy disrupted the status quo).

74. *Local 730*, 480 A2d at 1007 (Hutchinson dissenting).

lective bargaining agreement when the parties alter their positions and attempt to argue that such a change converts a strike into a lockout or a lockout into a strike. Is the operative "status quo" to be measured at the expiration of the collective bargaining agreement or during the week in which benefits are claimed?

The Pennsylvania Supreme Court specifically addressed this issue in *High v Unemployment Comp. Bd. of Rev.*,<sup>75</sup> a case in which the parties "switched" positions. When the collective bargaining agreement expired on June 30, the parties continued to negotiate. On October 26, however, the employees did not report to work because the employer demanded that the employees work a longer day. Two days later, the parties "switched" positions when the employer offered to resume operations under the terms and conditions of the expired agreement and the employees rejected the offer. The supreme court held that the lockout of October 26 and 27 became a strike on October 28 when the parties "switched" positions. The court rejected the initial-responsibility test in this context and adopted a week-to-week test. The court quoted from *McCracken*:

Each week of unemployment is the subject of a separate claim, the validity of which is determined by a consideration of conditions existing within that week; consequently, a work stoppage which is initially a strike may subsequently be converted into a lockout.<sup>76</sup>

The court, relying upon the fault provisions of Section 3, affirmed the denial of benefits for the period after October 28.<sup>77</sup> Thus, for purposes of *Vrotney* the initial-responsibility test is inapplicable if the parties switch positions. In such cases, the courts apply the week-to-week test<sup>78</sup> of *High*.<sup>79</sup>

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75. 505 Pa 379, 479 A2d 967 (1984). The supreme court affirmed the commonwealth court's denial of benefits; the commonwealth court, however, had premised its denial on a final cause analysis. *High v. Unemployment Comp. Bd. of Rev.*, 67 Pa Commw 472, 447 A2d 701 (1982).

76. *High*, 479 A2d at 969. In *McCormick Dray Lines, Inc. v Unemployment Comp. Bd. of Rev.*, 74 Pa Commw 181, 459 A2d 74, 76 (1983), the court specifically stated that the week-to-week test has not been questioned subsequent to *McCracken* in 1958.

77. The three-member dissent relied upon *Philco Corp.*, 242 A2d 454 (1968), for the proposition that the party responsible for the work stoppage is the party which first refused to continue the status quo, i.e., the dissent applied the initial-responsibility test.

78. It must be noted that claimants who are ineligible for any portion of a week under Section 402(d) must lose benefits for the entire week. *Jehn v Unemployment Comp. Bd. of Rev.*, 110 Pa Commw 209, 532 A2d 57 (1987); *Demoss v Unemployment Comp. Bd. of Rev.*, 71 Pa Commw 83, 454 A2d 1146 (1983).

79. *Hoffman v Unemployment Comp. Bd. of Rev.*, 524 Pa 470, 514 A2d 57 (1990) (strike of August 6 was converted into a lockout because employees' offer on October 23 to

## 2. *Precise Terms of the Status Quo*

During the 1980s, four identifiable problems arose concerning the precise contents<sup>80</sup> of the status quo under *Vrotney*. The courts have had considerable difficulty analyzing these problems and their decisions were not entirely consistent. The supreme court's definition of status quo as "the last, actual, peaceable and lawful noncontested status which preceded the controversy"<sup>81</sup> is well-accepted. The application of this definition, however, to specific factual situations is difficult.

A particularly difficult problem is whether "status quo" refers to the terms of the expired collective bargaining agreement or to the conduct of the parties under that agreement. This problem has usually arisen when the expired agreement gives one of the parties a choice of conduct. For example, in *Miceli v Unemployment Comp. Bd. of Rev.*,<sup>82</sup> the expired agreement contained a provision allowing for voluntary overtime. The employees' unilateral substantial reduction of voluntary overtime did not change the status quo in light of the provisions of the expired agreement allowing for such conduct. The "status quo" was changed by the employer when it later unilaterally instituted a mandatory overtime policy. In other words, the "status quo" refers to the terms of the expired agreement and if those terms give one of the parties a choice of conduct, such as with a voluntary overtime provision, the exercise of that choice does not alter the "status quo."<sup>83</sup>

Another problem has arisen when the expired agreement gives a party the choice of A or its equivalent. For example, if an expired

continue working under the preexisting terms and conditions was for a reasonable period of time for purposes of *Vrotney*; a two-member dissent applied the initial-responsibility test and would have denied benefits throughout the work stoppage); *Effort Foundry, Inc. v Unemployment Comp. Bd. of Rev.*, 125 Pa Commw 505, 558 A2d 571 (1989) (lockout of December 14 was not converted into a strike because employer's offer on January 12 to make work available at the same wage rate contained various conditions); *Jehn*, 532 A2d 57 (1987) (strike of August 15 was not converted into a lockout because employees' offer on September 6 to return to work contained an unreasonable period of time for purposes of *Vrotney*).

80. The phrase "terms and conditions of the expired contract" includes not only wages but also fringe benefits such as medical coverage, dental coverage, and life insurance. *Bethlehem Area School Dist. v Unemployment Comp. Bd. of Rev.*, 45 Pa Commw 498, 405 A2d 1026, 1029 (1979).

81. *Fairview School Dist.*, 454 A2d at 520.

82. 519 Pa 515, 549 A2d 113 (1988). The supreme court's order reversed the commonwealth court which had ruled that the employees' unilateral substantial reduction of voluntary overtime constituted a change in the status quo. *Miceli v Unemployment Comp. Bd. of Rev.*, 93 Pa Commw 502, 502 A2d 297 (1985).

83. This scenario, however, should not be confused with a situation in which a party exercises a contractual provision allowing for the termination of the contract. See note 65.

agreement requires the employer to provide Blue Cross and Blue Shield coverage or equivalent coverage, the unemployment compensation authorities must ascertain whether the employer's shift to non-Blue Cross, non-Blue Shield coverage is equivalent coverage. If such a shift did not involve equivalent coverage, the employer by making such a shift must bear the unemployment compensation consequences.<sup>84</sup>

A third problem has arisen when the expiring collective bargaining agreement contains terms that become effective in the future, i.e., beyond the expiration date of the agreement. For example, if an agreement provides for a step-up in pay based on additional years of service, does the extension of that agreement require the employer, for purposes of preserving the status quo, to pay the next yearly increment?

In *Fairview School Dist. v Unemployment Comp. Bd. of Rev.*<sup>85</sup> and *Union City School Dist. v Unemployment Comp. Bd. of Rev.*,<sup>86</sup> the Pennsylvania Supreme Court mistakenly answered in the negative and mistakenly engrafted concepts of labor relations law into the definition of status quo for unemployment compensation purposes. The court favorably quoted New York<sup>87</sup> and Maine<sup>88</sup> cases for the proposition that the status quo includes the expiring terms and conditions of employment but does not include any term that becomes effective after the expiration of the collective bargaining agreement. This analysis not only freezes the terms and conditions of employment at 11:59 p.m. on the last day of the expiring agreement, it also freezes reality as of 11:59 p.m. on the last day of the expiring agreement, i.e., it ignores the fact that some employees (those with an additional year of service) were entitled to a bargained-for increase in pay after the collective bargaining agreement had expired and after it had been extended by mutual agreement. The Pennsylvania Supreme Court ignored the

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84. *Norwin School Dist.*, 507 A2d 373 (1986) (Board's finding of nonequivalency was supported by substantial evidence and the employer's unilateral implementation of alternative coverage was deemed a change in the status quo). For a pre-*Norwin* case in which the court improperly failed to review the employer's unilateral change when the expired agreement allowed for such a change, see *Grandinetti v Unemployment Comp. Bd. of Rev.*, 87 Pa Commw 133, 486 A2d 1040 (1985) (employer's unilateral change of insurance carriers was deemed a change in the status quo as a matter of law).

85. 499 Pa 539, 454 A2d 517 (1982).

86. 499 Pa 548, 454 A2d 522 (1982).

87. *Board of Co-Op Educ. Servs. v New York State Pub. Employment Relations Bd.*, 41 NY2d 753, 363 NE2d 1174 (1977).

88. *M.S.A.D. No. 43 Teachers' Assoc. v M.S.A.D. No. 43 Bd. of Directors*, 432 A2d 395 (Me 1981).

intentions of the parties as reflected in the expired agreement and its extension. As noted by the dissent in *Fairview School Dist.*, the "school district's failure to increase the teachers' salaries to reflect an additional year of service constituted a refusal to maintain the status quo."<sup>89</sup> Until the court reexamines the logic of these decisions, demand for or implementation of prospective terms of an expired collective bargaining agreement is risky.

A fourth problem, which is the converse of the third problem, has arisen when an offer to continue the status quo also contains a retroactivity provision, i.e., a provision that any new agreement be made retroactive to the date of the expiration of the existing agreement. Such an offer is inconsistent with *Vrotney* in that the status quo makes no allowance for retroactivity.<sup>90</sup>

In summary, the status quo for purposes of *Vrotney*, absent any concerns pertaining to a shifting status quo, refers to the terms and conditions of employment that existed at 11:59 p.m. on the last day of the expiring agreement. If the expiring agreement gives one of the parties a choice of conduct, the exercise of that choice does not alter the status quo.<sup>91</sup> If the expiring agreement gives one of the parties a choice of A or its equivalent, the choice of the equivalent does not alter the status quo.<sup>92</sup> If the expiring agreement contains terms that become effective in the future, i.e., beyond the expiration date of the expiring agreement, the refusal to implement those terms does not alter the status quo.<sup>93</sup> Similarly, if the proposed agreement contains a retroactivity provision, the refusal to accept the retroactivity provision does not alter the status quo.<sup>94</sup>

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89. *Fairview School Dist.*, 454 A2d at 522. The Pennsylvania Supreme Court reversed the commonwealth court, which had properly concluded that the employer's failure to comply with all the terms of the expired agreement constituted a refusal to maintain the status quo. *Fairview School Dist.*, 434 A2d 884 (1981).

90. *Loftus v Unemployment Comp. Bd. of Rev.*, 54 Pa Commw 271, 420 A2d 1351 (1980) (employees' offer to continue working if the employer would agree to make provisions in the new agreement retroactive to the date on which the existing agreement expired did not satisfy *Vrotney*). See also *Gladioux Food Services, Inc. v Unemployment Comp. Bd. of Rev.*, 27 Pa Commw 142, 365 A2d 889 (1976), rev'd on other grounds, 479 Pa 324, 388 A2d 678 (1978).

91. *Miceli*, 549 A2d 113 (1985).

92. *Norwin*, 507 A2d 373 (1986).

93. *Fairview School Dist.*, 454 A2d 517 (1982); *Union City School Dist.*, 454 A2d 522 (1982). As indicated above, the authors believe that these cases were improperly decided, i.e., these cases failed to reflect the terms and conditions upon which the parties had agreed.

94. *Loftus*, 429 A2d 1351. See note 90.

### 3. *Exceptions to the Status Quo Test*

Since adoption of the *Vrotney* test, three arguments have been advanced suggesting exceptions to *Vrotney*. One of these, the futility doctrine, has been completely accepted and applied by the appellate courts. Another, the economic necessity doctrine, has been completely rejected by the supreme court after apparently being accepted by the commonwealth court. The third, the impasse doctrine, has been mysteriously mentioned by the Pennsylvania Supreme Court but later specifically rejected by the commonwealth court.

The one deviation from the status quo analysis of *Vrotney* that has been accepted by the appellate courts is the futility doctrine, which was first enunciated by the superior court in 1962 in *Irvin Unemployment Comp. Case*<sup>95</sup> and later recognized by the supreme court in *Philco Corp. v Unemployment Comp. Bd. of Rev.*<sup>96</sup> The essence of the futility doctrine is that a party should not be required to do a futile thing, i.e., should not be required to offer to continue the status quo if the conduct of the other party clearly demonstrates that such an offer would be futile.<sup>97</sup>

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95. 198 Pa Super 308, 181 A2d 854, 858 (1962) ("We do not believe that our Supreme Court [in *Vrotney*] intended to require the Union to do a futile thing. . . . There is sufficient [evidence] in this record as a whole to support the Board's position that the union attempted to request a further extension of the contract in an attempt to resolve the economic issue, and that this effort was thwarted by [the employer's] ultimatum"; the employer's ultimatum was that work was available but only on the employer's terms).

96. 430 Pa 101, 242 A2d 454, 457 (1968) (although recognizing the futility doctrine, the supreme court found it inapplicable to a situation where the employer's position prior to the expiration of the collective bargaining agreement was that the employer's plant's "ultimate survival" was at stake and that the employer's business would be a "waste of time, money and effort" without a new contract; the court refused to apply the futility doctrine, reasoning that the employer's position did "not approach the threatening tone of the speech delivered by management in *Irvin*").

97. *Irvin*, 181 A2d at 858. The commonwealth court has adopted and applied the futility doctrine in numerous cases. See *Grimm v Unemployment Comp. Bd. of Rev.*, 127 Pa Commw 368, 561 A2d 1286 (1989) (Board committed no error in its conclusion that it would not have been futile for the union to have made an offer to continue the status quo); *Effort Foundry, Inc. v Unemployment Comp. Bd. of Rev.*, 125 Pa Commw 505, 558 A2d 571 (1989) (union had no duty to have its membership vote on a contract extension and then present a formal offer to management because the employer had already rejected even the suggestion of an extension); *Burk v Unemployment Comp. Bd. of Rev.*, 119 Pa Commw 360, 547 A2d 497 (1988) (it would have been futile for claimant to make an offer to return to work under the terms of the expired contract, particularly in view of employer's announcement that it was unilaterally implementing its changes); *Odgers v Unemployment Comp. Bd. of Rev.*, 89 Pa Commw 439, 492 A2d 808 (1985), aff'd, 514 Pa 378, 525 A2d 359 (1987) (it would have been futile for the claimants to make an offer to return to work under the terms of the expired contract because of the school board's unilateral modification of the collective bargaining agreement and the implementation of its modified budget); *Bishop v Unemploy-*

One of the most difficult conceptual problems with the futility doctrine is distinguishing in hindsight an ultimatum as in *Irvin* and the typical posturing and rhetoric of the negotiations as in *Borello v Unemployment Comp. Bd. of Rev.*<sup>98</sup> and in *Philco*. For the practicing bar, which does not have the advantage of hindsight, this problem is particularly acute.

Although the Pennsylvania Supreme Court has accepted the futility doctrine, it has specifically rejected any argument that the failure to satisfy the *Vrotney* test can be based on economic necessity. This argument was advanced several times in the 1980s by employers who faced increasing international competition and sought to reduce labor costs. In this era of economic "give backs,"<sup>99</sup> several employers sought to develop an exception to *Vrotney*, i.e., the economic-necessity exception. This argument was specifically rejected by the Pennsylvania Supreme Court in 1990 in *Hoffman v Unemployment Comp. Bd. of Rev. and Joy Manufacturing*.<sup>100</sup>

The *Vrotney* standard is simple and easy to apply on an administrative level. . . . It is not necessary to make inquiries into issues of good faith and economic justification as the Board and the Commonwealth Court have done here. These inquiries have led the Board and Commonwealth Court to deviate from the maxim of simplicity and unduly complicate the question of who bears responsibility for the continuation of the work stoppage.<sup>101</sup>

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*ment Comp. Bd. of Rev.*, 90 Pa Commw 553, 496 A2d 110 (1985) (futility doctrine was applicable but the case was remanded for further findings with respect to whether the employer would have allowed the claimants to continue working under the terms and conditions of the expired agreement while negotiations continued); *Kerner v Unemployment Comp. Bd. of Rev.*, 68 Pa Commw 132, 448 A2d 666 (1982) (futility doctrine was inapplicable because if the union had seriously wished to avoid a strike, it should have proposed an extension to the contract in the last minutes of negotiations); *Unemployment Comp. Bd. of Rev. v Sun Oil*, 19 Pa Commw 447, 338 A2d 710 (1975), aff'd, 476 Pa 589, 383 A2d 519 (1978) (court noted the futility doctrine but did not rely upon it because the union had offered to extend the status quo and had actually worked under the status quo for several weeks before the employer changed it).

98. 490 Pa 607, 417 A2d 205, 209 (1980). See note 57.

99. In *Portec, Inc. v Unemployment Comp. Bd. of Rev.*, 104 Pa Commw 629, 522 A2d 1180 (1987), the court refused to deviate from *Vrotney* in the era of economic "give backs":

The employer argues that *Vrotney* is inapplicable . . . because this case involves a so-called "give-back" that is, a situation where the employer seeks to reduce wages and benefits, not merely to negotiate over the amount of any increase. Due to depressed conditions in the Commonwealth's "smoke stack" industries, it is not uncommon for an employer to seek reduction in employee wages and benefits. . . . Our Supreme Court has determined that *Vrotney* is the law and that any change in the status quo by the employer constitutes a lockout.

*Portec, Inc.*, 522 A2d at 1181-82.

100. 524 Pa 470, 574 A2d 57 (1990).

101. *Hoffman*, 574 A2d at 63 (citation omitted).



Acceptance of the employer's economic necessity theory but rejection of the employer's economic necessity evidence as insufficient was evident in numerous commonwealth court cases in the late 1980s.<sup>102</sup> In *Hoffman*, however, the supreme court declared that an employer's economic justification is of no legal consequence whereas the commonwealth court had previously rejected the employer's economic justification evidence as inadequate.<sup>103</sup>

Thus, the employer is precluded from introducing evidence that continuation of the status quo would result in economic ruin or that concessions are necessary to improve competitive standing. In an era of economic concessions or economic givebacks, an employer must be aware that the "pre-existing terms" prong of *Vrotney* is not satisfied by introduction of evidence concerning economic necessity or economic justification.

A third exception to *Vrotney* that has arisen is contained in a gratuitous and even mysterious footnote in *Local 730* in 1984. Footnote 5 states:

Nor can it legitimately be argued that the *Vrotney* rule is unfair to the Employer in that it could conceivably require the employer to continue under the terms of the preexisting contract into perpetuity. *Vrotney* by its express language qualified the length of time during which this status quo must be maintained by stating: "has the employer agreed to permit work to continue for a reasonable time under the preexisting terms and conditions

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102. *Grinnell Corp. v Unemployment Comp. Bd. of Rev.*, 127 Pa Commw 298, 561 A2d 843 (1989) (employer did not contend that maintenance of the status quo for a reasonable time would cause economic ruin or that its proposed extension was essential to its continued operations); *Orr v Unemployment Comp. Bd. of Rev.*, 120 Pa Commw 45, 548 A2d 360 (1988) (employer's bargaining position was to substantially decrease production costs by reducing labor costs; employer disrupted the status quo when it would allow work only under its final offer); *Teledyne Vasco v Unemployment Comp. Bd. of Rev.*, 119 Pa Commw 583, 547 A2d 841 (1988) (record failed to support employer's argument that impasse and economic losses were the reasons for employer's unilateral implementation of final offer); *Babcock & Wilcox Co. v Unemployment Comp. Bd. of Rev.*, 119 Pa Commw 566, 547 A2d 850 (1988) (employer's implementation of its final offer altered the status quo in light of employer's failure to prove reduction in wages and benefits as contained in final offer was essential to continued operation); *General Tel. Co. v Unemployment Comp. Bd. of Rev.*, 100 Pa Commw 81, 514 A2d 264 (1986) (employer's alteration of an agreed-upon extension constituted a lockout unless the employer demonstrated that the action was essential to continued operations).

103. In a recent analysis of *Hoffman* in Comment, 64 Temple L Rev at 323 (cited in note 54), the author stated that the Pennsylvania Supreme Court "failed to explain why courts should evaluate economic justifications when applying the 'pre-existing terms' prong of the *Vrotney* test, but should disregard economic justifications when applying the 'reasonable time' prong." The author properly cited an anomaly under *Vrotney* and *Hoffman*, but got it backwards; economic justification is not to be evaluated under the "pre-existing terms" prong of *Vrotney*, but is to be evaluated under the "reasonable time" prong of *Vrotney*. The anomaly, however, is evident.

of employment. . . ." *Vrotney Unemployment Compensation Case*, 400 Pa 440, 444, 163 A2d 91, 93 (1960). Where it is evident that an impasse has been reached or good faith bargaining is impossible, *Vrotney* by its own terms is inapplicable.<sup>104</sup>

No authority for this proposition is cited and it is difficult to understand the supreme court's need to insert this footnote. Furthermore, the "impasse" analysis of footnote five has been specifically rejected by the commonwealth court.<sup>105</sup>

#### 4. *School Districts and the Status Quo Test*

In 1977, the legislature for the first time specifically provided unemployment compensation coverage to those employed in the public schools of the Commonwealth.<sup>106</sup> Numerous cases involving the strike-lockout distinction and public school employees have arisen since 1977. Most of these cases have involved the straightforward application of *Vrotney*. In a few cases, however, certain issues have arisen that involve the unique nature of public school employment. The courts have refused to alter the *Vrotney* standards to accommodate this unique employment situation.

Of particular importance are the school calendar cases. Most, if not all, public school districts in Pennsylvania adopt a school calendar that provides for the necessary days of instruction and begins shortly before or shortly after Labor Day and ends shortly after Memorial Day. If the school calendar is delayed from Labor Day to, say, September 15, who is to bear the unemployment compensation consequences? If the original school calendar establishes September 15 as the first day of school, the public school employees' unemployment between Labor Day and September 15 is not the result of a lockout<sup>107</sup> and benefits will be denied between Labor Day and September 15. If, however, the starting date is established and then unilaterally moved to September 15 as a result of the

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104. *Local 730*, 480 A2d at 1005 n 5.

105. See *Grinnell Corp.*, 561 A2d 843 (1989), and cases cited therein. In *Grinnell*, the commonwealth court specifically stated that it "has repeatedly considered the argument of impasse and has consistently rejected it, refusing to deviate from the rule announced in *Vrotney*." *Id* at 846.

106. Act 22 of July 6, 1977, Pub L 41, effective January 1, 1978.

107. *Nawrocki v Unemployment Comp. Bd. of Rev.*, 97 Pa Commw 121, 508 A2d 1311 (1986) (court emphasized that Section 1504(a) of the Public School Code of 1949, Act of March 10, 1949, Pub L 30, as amended, 24 Pa Stat § 15-1504(a), empowers the school district to fix the date for the start of the school year; the school calendar was established in May and was never altered).

labor dispute, a lockout<sup>108</sup> results for the period from the original starting date to September 15.

Similarly, the argument that the public school employees must be denied benefits from Labor Day to September 15 under the "between two successive academic years" provisions of Section 402.1 of the Unemployment Compensation Law<sup>109</sup> has been rejected.<sup>110</sup> Acceptance of such an argument would mean "the [school] district could indefinitely impede claimant's eligibility."<sup>111</sup> If, however, the school employees were locked out from Labor Day to September 15 and yet received pay for this period,<sup>112</sup> benefits must be denied in light of the fact that the employees were not technically unemployed<sup>113</sup> during this period, i.e., they received remuneration during the period at issue.<sup>114</sup>

The commonwealth court, in a series of cases in the late 1970s and early 1980s, rejected the unusual argument by various school districts that they were precluded from offering a continuation of the fringe benefit provisions of the expired collective bargaining agreement.<sup>115</sup> The argument that payment of such fringe benefits was violative of Pennsylvania's Public Employe Relations Act<sup>116</sup> was determined to be without merit for collective bargaining pur-

108. *Lehigh County Community College v Unemployment Comp. Bd. of Rev.*, 81 Pa Commw 348, 473 A2d 727 (1984) (lockout occurred when employer conditioned its adoption of a new school calendar upon the employees' ratification of a new agreement); *Mountain View School Dist. v Unemployment Comp. Bd. of Rev.*, 59 Pa Commw 510, 436 A2d 1225, 1226 (1981) (lockout occurred because employer on August 23 stated that "the school calendar would be approved when the teachers contract was finalized"); *Centennial School Dist. v Unemployment Comp. Bd. of Rev.*, 56 Pa Commw 86, 424 A2d 569 (1981) (lockout occurred when employer on August 17 passed a "no-new-contract-no-work" resolution delaying the start of school indefinitely until a new contract was signed).

109. 43 Pa Stat § 802.1.

110. See *McKeesport Area School Dist. v Unemployment Comp. Bd. of Rev.*, 40 Pa Commw 334, 397 A2d 458 (1979).

111. *Mountain View School Dist. v Unemployment Comp. Bd. of Rev.*, 59 Pa Commw 510, 436 A2d 1225, 1227 (1981).

112. Such an arrangement is not uncommon; the school employees work approximately 180 to 190 days per year; some receive pay throughout the year on a weekly or bi-weekly basis.

113. Sections 401 and 4(u), 43 Pa Stat §§ 801, 753(u).

114. *Bennett v Unemployment Comp. Bd. of Rev.*, 89 Pa Commw 1, 491 A2d 314 (1985).

115. *Elizabeth Forward School Dist. v Unemployment Comp. Bd. of Rev.*, 54 Pa Commw 194, 420 A2d 785 (1980); *School Dist. of Erie v Unemployment Comp. Bd. of Rev.*, 48 Pa Commw 460, 409 A2d 982 (1980); *Bethlehem Area School Dist. v Unemployment Comp. Bd. of Rev.*, 45 Pa Commw 498, 405 A2d 1026 (1979).

116. Act of July 23, 1970, Pub L 563, 43 Pa Stat §§ 1101.101-1101.2301 (1991).

poses<sup>117</sup> and also for purposes of continuing the status quo under *Vrotney*.<sup>118</sup>

### B. Reasonable Time

*Vrotney* requires the parties to offer to continue the status quo for a reasonable time. In a case decided the same day as *Vrotney*, *Lerch Unemployment Comp. Case*,<sup>119</sup> the supreme court determined that reasonable time depends upon the nature of the employer's business. In *Lerch* the employer "consist[ed] mainly of service industries, i.e., a hotel, laundry, department store, community inn. . . ."<sup>120</sup> The court specifically rejected the union's argument that a day-to-day extension satisfied the *Vrotney* test and stated:

The nature of these industries is such that it would be almost impossible to operate them adequately on a day to day basis. There was, therefore, more than enough justification under these circumstances for the Employer to take the position that it would be impractical to operate such service establishments on a twenty-four hour basis.<sup>121</sup>

Accordingly, benefits were denied because the union's offer did not satisfy the "reasonable time" prong of *Vrotney*.

There are three situations in which the definition of reasonable time is crucial under Section 402(d) of the Unemployment Compensation Law. The first involves a shutdown in anticipation of a strike and the question of how much time an employer should be afforded to take protective measures in anticipation of a strike. The second involves the application of *Vrotney* as discussed in *Lerch*. The third involves a resumption of the employer's operations after a work stoppage and the issue of how much time an employer should be afforded after a strike to resume operations. Each situation involves ascertaining the definition of reasonable time and the question of the deference the courts are going to give to an employer's honest judgment.

Reasonable time is important in the context of anticipatory shutdowns before a strike and resumptions of operations after a

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117. *In re Appeal of Cumberland Valley School Dist.*, 483 Pa 134, 394 A2d 946 (1978) (public employer violated its duty to bargain under the Public Employe Relations Act by unilaterally discontinuing payment of various fringe benefits that were provided in the expired collective bargaining agreement).

118. *Elizabeth Forward School Dist.*, 420 A2d 785 (1980).

119. 400 Pa 446, 163 A2d 535 (1960).

120. *Lerch*, 163 A2d at 537.

121. *Id.*

strike because an employer should not have to pay unemployment compensation for the period in which unemployment is caused by the employees' actions. A highly refined body of law concerning reasonable time has developed in this area with the lead cases being *Lavelly Unemployment Comp. Case*<sup>122</sup> and *Bako Unemployment Comp. Case*.<sup>123</sup> *Lavelly* dealt with reasonable time in the context of an anticipatory shutdown and the superior court concluded:

When a strike is imminent, when an employer has been officially notified that a strike will occur, and has reasonable grounds for a belief that the strike will actually take place, he may, prior to and in anticipation thereof, take reasonably necessary measures to protect his property during the pendency of the strike. The nature and extent of such measures depend upon the kind of work and the circumstances in which it is conducted, and ordinarily the Board will not overrule the honest judgment of an employer.<sup>124</sup>

*Bako* dealt with reasonable time in the context of a resumption of operations and the superior court concluded:

The rationale of the second *Lavelly* case is applicable also during the time reasonably required to put the plant in normal operation after the strike ends. What is a reasonable period will always "depend upon the kind of work and the circumstances in which it is conducted." In a department store, for instance, resumption of employment might follow the strike's termination in the course of a few hours. Perhaps a textile mill would require a longer time. In an industry, such as Bethlehem Steel, operating several departments which are dependent for power upon a central plant, with equipment to be repaired, machinery cleaned, and other preparatory steps to be taken, a longer time must necessarily be allowed. Possibly, the duration of the strike becomes a relevant factor. At all events, the Board will consider all the circumstances and override the management only when it finds that it failed to exercise honest judgment.<sup>125</sup>

Thus, the definition of reasonable time in *Lavelly* and *Bako* was dependent upon judicial deference to the employer's honest judgment.

Nonetheless, judicial reluctance to defer to the employer's honest judgment in defining reasonable time pursuant to *Vrotney* is evident in several cases involving work stoppages in which school districts were the employers.<sup>126</sup> In several cases in the late 1970s and early 1980s involving school districts, the employees' offers to

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122. 166 Pa Super 481, 72 A2d 300 (1950).

123. 171 Pa Super 222, 90 A2d 309 (1952).

124. *Lavelly*, 72 A2d at 302.

125. *Bako*, 90 A2d at 312.

126. As noted in note 107 and accompanying text, school employees were first covered by the Unemployment Compensation Law in 1978.

continue the status quo on a daily basis were rejected by the school districts. In each case,<sup>127</sup> the ensuing work stoppage was determined to be a lockout with the commonwealth court, relying upon *Lerch*, stating that reasonable time under *Vrotney* depends upon the circumstances of each case. Of particular importance is the commonwealth court's statement in *Elizabeth Forward School Dist. v Unemployment Comp. Bd. of Rev.*:<sup>128</sup>

We have never categorically classed a day-to-day extension as unreasonable in the school context, but have always held that a reasonable time depends upon the circumstances. . . . Here the district has offered no more than conclusory statements concerning the alleged difficulties of such an arrangement.<sup>129</sup>

Rejection of the employer's conclusory statements is not consistent with *Lavelly* and *Bako*. Adoption of a reasonable time, honest judgment test in the *Vrotney* context would be consistent with the reasonable time, honest judgment test under *Lavelly* and *Bako* in the anticipatory shutdown and resumption of operations contexts.<sup>130</sup>

While case law has developed no definite standard concerning offers to continue working on a day-to-day basis, it has clearly rejected offers involving annual extensions of the collective bargaining agreement. For example, offers of one-year extensions<sup>131</sup> and three-year extensions<sup>132</sup> have been determined as not involving reasonable time under *Vrotney*. Such offers have been considered as offers for new annual or multi-year contracts and not as offers to continue the status quo during negotiations.<sup>133</sup>

Reasonable time has been held to encompass forty-eight

127. *Bethlehem Area School Dist.*, 405 A2d 1026 (1979) (union's offer to extend the expired contract on a day-to-day basis with a forty-eight hour termination notice was for a "reasonable time"); *McKeesport Area School Dist.*, 397 A2d 458 (1979) (employer failed to show that day-to-day extension was unreasonable under the circumstances of the case). See also *Mountain View School Dist.*, 436 A2d at 1227 (without relying upon *Lerch*, the court stated that it could not regard "as insufficient the union's offer to work 'on a day to day basis . . . while negotiations continue'").

128. 54 Pa Commw 194, 420 A2d 785 (1980).

129. *Elizabeth Forward School Dist.*, 420 A2d at 788 (citation omitted, emphasis added). Particularly troublesome although not yet addressed by the courts is the issue of whether a school district may insist for unemployment compensation purposes upon more than a day-to-day extension if the history of labor relations between the parties has involved "sporadic" strikes by the school employees.

130. For a more expansive discussion of this issue, see Reuben and Schuckers, 50 Temple L Q at 226 n 89 (cited in note 5).

131. *Jehn*, 532 A2d 57 (1987); *Bishop*, 496 A2d 110 (1985).

132. *Bedow v Unemployment Comp. Bd. of Rev.*, 97 Pa Commw 192, 510 A2d 152 (1986).

133. *Bishop*, 496 A2d at 113.

hours,<sup>134</sup> five days,<sup>135</sup> one month<sup>136</sup> and ninety days.<sup>137</sup> More importantly, the courts have been extremely receptive to the argument that a multi-period offer satisfies the reasonable time requirement of *Vrotney*. For example, in *Klima Unemployment Comp. Case*,<sup>138</sup> the superior court determined that the employees' offer to extend the expiring contract for thirty, sixty, or ninety days was for a reasonable time. Similarly, in *Leto*, the superior court determined that the employees' offer to continue working under the existing contract for fifteen days, one month, or one year was for a reasonable time. Adherence to the approaches set forth in *Klima* and *Leto* may avoid unnecessary work stoppages and unnecessary litigation. Such approaches are consistent with *Vrotney* in that they "allow additional time for negotiation."<sup>139</sup>

## VII. CONSTITUTIONAL CHALLENGE TO THE LOCKOUT EXCEPTION

Since the adoption of unemployment compensation laws in the mid-1930s, commentators<sup>140</sup> have noted that state neutrality is an important theme in the administration of the unemployment compensation system, particularly in the area of labor disputes. This requires that unemployment compensation authorities ignore both the reasonableness or unreasonableness of the parties' demands and the underlying merits of the labor dispute.<sup>141</sup>

Beginning in the early 1970s, various employers challenged Pennsylvania's lockout exception as violative of the state neutrality principle. They argued that the state's payment of unemployment compensation to employees who are locked out (physically or

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134. *Teledyne Vasco v Unemployment Comp. Bd. of Rev.*, 119 Pa Commw 583, 547 A2d 841 (1988) (employer engaged in manufacturing); *Watkins v Unemployment Comp. Bd. of Rev.*, 61 Pa Commw 249, 433 A2d 594 (1981) (employer operated a bus line).

135. *Vrotney*, 163 A2d at 91.

136. *Centennial School Dist. v Unemployment Comp. Bd. of Rev.*, 56 Pa Commw 86, 424 A2d 569 (1981).

137. *Crile Machine Co. v Unemployment Comp. Bd. of Rev.*, 110 Pa Commw 150, 531 A2d 1191 (1987) (employer operated a machine company).

138. 205 Pa Super 489, 211 A2d 23 (1965).

139. *Leto*, 106 A2d at 653.

140. Annotation, *Unemployment Compensation: Application of Labor Dispute Disqualification to Locked Out Employee*, 62 ALR3d 437, 443 (1975); Shadur, 17 U Chi L Rev at 297 (cited in note 1); Lesser, 55 Yale L J at 175 (cited in note 6).

141. Shadur, 17 U Chi L Rev at 297 (cited in note 1), citing *Bankston Creek Collieries, Inc. v Gordon*, 399 Ill 291, 77 NE2d 670, 675 (1948); Wagner, 53 Dickinson L Rev at 193-94 (cited in note 12) ("The 'fault' to be determined . . . relates not to the merits of the dispute and the positions of the parties therein, but rather to the responsibility for resorting to a stoppage of operations or work because of the dispute").

constructively) altered the balance between management and labor prescribed by the National Labor Relations Act<sup>142</sup> and therefore was invalid under the Supremacy Clause of the federal Constitution.<sup>143</sup> The Pennsylvania courts have rejected this challenge.<sup>144</sup>

This preemption issue was initially rejected by the Pennsylvania Supreme Court in *Sun Oil* in 1978, one year prior to the United States Supreme Court's landmark decision in *New York Tel. Co. v New York State Dept. of Labor*,<sup>145</sup> in which a plurality of the Court concluded that "there was no evidence that the Congress that enacted the National Labor Relations Act in 1935 intended to deny the States the power to provide unemployment benefits for strikers."<sup>146</sup> The Third Circuit Court of Appeals, in *Duer Spring and Mfg. Co. v Department of Labor and Industry*<sup>147</sup> in 1990, put this challenge to rest in Pennsylvania when it specifically applied the rationale of *New York Tel.* to Pennsylvania's lockout exception and concluded that, "Pennsylvania has chosen to make the strike/lock-out distinction on the basis of the status quo, a neutral objective standard which does not tilt the scale in either direction."<sup>148</sup>

#### VIII. AVAILABILITY OF ALTERNATIVE REMEDIES DOCTRINE

Work stoppages that occur during a collective bargaining agreement require an analysis totally different from the *Vrotney* analysis. These cases have usually involved an employer's unilateral action that precipitates action by the employees resulting in a work stoppage.

In the 1950s, the superior court developed the "availability of alternative remedies" doctrine to analyze this type of case. The clearest statement of this doctrine was set forth in *Accurti Unem-*

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142. 29 USC § 151 et seq.

143. United States Const, Art VI, cl 2.

144. *Penflex, Inc. v Bryson*, 506 Pa 274, 485 A2d 359 (1984); *Gladieux Food Services, Inc.*, 388 A2d 678 (1978); *Sun Oil*, 383 A2d 519 (1978); *Babcock & Wilcox Co.*, 547 A2d 850 (1988); *Unemployment Comp. Bd. of Rev. v Borger Steel Co.*, 30 Pa Commw 75, 372 A2d 969 (1977).

145. 440 US 519 (1979). The plurality opinion, written by Justice Stevens and joined by Justices White and Rehnquist, concluded that Congress "decided to tolerate a substantial measure of diversity," *New York Tel. Co.*, 440 US at 520, in the administration of unemployment compensation programs. Justice Brennan concurred in a separate opinion as did Justice Blackmun, joined by Justice Marshall.

146. *Id.* at 540. At issue was the New York statute which, unlike Section 402(d) of the Pennsylvania Unemployment Compensation Law, grants benefits to striking employees after an initial eight-week waiting period.

147. 906 F2d 968 (1990).

148. *Duer Spring*, 906 F2d at 972.



*ployment Comp. Case*:<sup>149</sup>

Employees who cease work because of an alleged breach of contract by the employer are not entitled to compensation where the collective bargaining agreement provides a grievance procedure for settlement of such disputes, . . . or where there are legal or equitable remedies available. . . .<sup>150</sup>

*Accurti* illustrates the proper utilization of the "availability of alternative remedies" doctrine. The employer during the collective bargaining agreement unilaterally instituted a work survey that was opposed by the union. The subsequent work stoppage took the form of a strike and resulted in the denial of benefits.

During the 1950s and 1960s, the superior court also utilized this doctrine to deny benefits to claimants who initiated a work stoppage because of the employer's alleged failure to comply with provisions of the collective bargaining agreement<sup>151</sup> or because of the employer's alleged failure to comply with state law<sup>152</sup> or federal law and regulations.<sup>153</sup> Although the doctrine was sparingly utilized in the 1960s and 1970s, the commonwealth court in the 1980s rejected the argument that the "availability of alternative remedies" doctrine is no longer viable in Pennsylvania.<sup>154</sup>

## IX. EXCEPTIONS TO THE AVAILABILITY OF ALTERNATIVE REMEDIES DOCTRINE

While recognizing the viability of the "availability of alternative remedies" doctrine, the appellate courts have noted an exception to the doctrine and have recently created a second exception.

In 1963, the superior court created the first exception when, in *Southerland Unemployment Comp. Case*,<sup>155</sup> it did not apply the

149. 187 Pa Super 391, 144 A2d 673 (1958).

150. *Accurti*, 144 A2d at 676 (citations omitted).

151. *Arbechesky Unemployment Comp. Case*, 174 Pa Super 217, 100 A2d 396 (1953) (employer failed to contribute to the Health and Welfare Fund as required by the collective bargaining agreement); *Ross Unemployment Comp. Case*, 192 Pa Super 190, 159 A2d 772 (1960) (employees disagreed with employer's interpretation of overtime provision of collective bargaining agreement).

152. *Crucible Steel Co. v Unemployment Comp. Bd. of Rev.*, 183 Pa Super 629, 133 A2d 581 (1957) (employer allegedly violated state and federal laws on mine safety).

153. *Cassell Unemployment Comp. Case*, 167 Pa Super 440, 74 A2d 809 (1950) (employer allegedly failed to comply with the federal War Labor Board's directive concerning retroactive payments; denial of benefits was based on the 1945 statute that denied them to those unemployed because of a "voluntary suspension of work resulting from an industrial dispute"). *Cassell*, 74 A2d at 812-13.

154. *Murdoca v Unemployment Comp. Bd. of Rev.*, 122 Pa Commw 303, 551 A2d 1157, 1162 (1988); *Odgers*, 492 A2d at 815.

155. 202 Pa Super 149, 195 A2d 138 (1963).

doctrine to a situation in which the employees had "an honest and sincere belief [that a newly implemented work procedure] constituted a genuine and immediate peril to life and limb."<sup>156</sup> The court, in affirming the grant of benefits to those who had initiated a work stoppage, reasoned that the employer's new work procedure "created an imminent and immediate peril to the workmen therein and a situation that was more than a mere dispute to be settled under grievance procedures."<sup>157</sup> Thus, in situations involving work safety, the courts have been willing to recognize an exception to the "availability of alternative remedies" doctrine; however, as in *Southerland*, the striking employees should be prepared to prove that the new working conditions were unsafe and constituted an immediate danger.

In 1988, the commonwealth court established a second exception to the "availability of alternative remedies" doctrine. In *Murdoca v Unemployment Comp. Bd. of Rev.*,<sup>158</sup> the employer unilaterally reduced the employees' hourly wage from \$4.90 to \$4.20. The subsequent work stoppage resulted in a denial of benefits by the Unemployment Compensation Board of Review on the theory that "the Union failed to follow the grievance procedure provided for in the agreement for the settlement of such disputes."<sup>159</sup> In reversing the denial of benefits, the court specifically refused to apply the "availability of alternative remedies" doctrine and stated that the employer's "unilateral retroactive reduction in wages constituted so egregious a breach of the agreement that [the employer] must bear the responsibility for the work stoppage."<sup>160</sup> Whether the courts will continue to apply and even expand this "egregiousness" exception to the doctrine is problematical. It must be noted, however, that in *Murdoca* an employer representative agreed that the employer's unilateral wage reduction was "improper and clearly a violation of the agreement."<sup>161</sup>

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156. *Southerland*, 195 A2d at 139. For analysis of *Southerland* and a comparison with *King Unemployment Comp. Case*, 133 A2d 581 (1957), see Lewis, 6 Cal W L Rev at 110-11 (cited in note 53).

157. *Southerland*, 195 A2d at 141.

158. 122 Pa Commw 303, 551 A2d 1157 (1988).

159. *Murdoca*, 551 A2d at 1160.

160. *Id* at 1161.

161. *Id* at 1158.

## X. THE ANOMALY OF THE AVAILABILITY OF ALTERNATIVE REMEDIES DOCTRINE

Several commentators<sup>162</sup> have observed that the unemployment compensation standards differ for those claimants who are not covered and those who are covered by a collective bargaining agreement when the employer engages in unreasonable conduct, breaches a contract or violates the law. For example, a claimant who is not covered by a collective bargaining agreement would be granted benefits after quitting the job if the employer engaged in unreasonable conduct<sup>163</sup> or substantially breached a contract<sup>164</sup> or violated the law.<sup>165</sup> In each of these situations, the claimant who had quit would be granted benefits.

The anomaly arises when several employees engage in concerted action to protest the employer's unreasonable or illegal conduct. In such situations, benefits are denied if the "availability of alternative remedies" doctrine is applied. Yet in each of these situations the employees did not quit their jobs; rather they temporarily suspended work, i.e., they engaged in a work stoppage to protest the employer's conduct.

One possible resolution of this anomaly is for the appellate courts to abandon the "availability of alternative remedies" doctrine and to adopt the "informative communication/reasonable accommodation" doctrine. This doctrine requires an employee who voluntarily quits a job to inform the employer of the objectionable

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162. Reuben and Schuckers, 50 Temple L Q at 229 (cited in note 5); Jerre S. Williams, *The Labor Dispute Disqualification—A Primer and Some Problems*, 8 Vand L Rev 338, 371 (1955); Shadur, 17 U Chi L Rev at 304 (cited in note 1); Lesser, 55 Yale L J at 170 (cited in note 6).

163. See *Tucker v Unemployment Comp. Bd. of Rev.*, 14 Pa Commw 262, 319 A2d 195 (1974) ("Normally, when any person is employed, he is employed to do a particular task at an assigned time, and at an assigned place. It does not follow that the employer agrees never to modify or change the task, the time, or the place. If the employer should decide to modify or change any of these and the change is reasonable, the employee must abide by the employer's decision at the risk of being ineligible for unemployment compensation if he refuses").

164. *Monaco v Unemployment Comp. Bd. of Rev.*, 523 Pa 41, 565 A2d 127, 130 (1989) ("employees are permitted to collect unemployment benefits after they have voluntarily ceased employment on the grounds that the wages or working conditions have substantially changed, to the point that voluntary termination is necessary").

165. *Zinman v Unemployment Comp. Bd. of Rev.*, 8 Pa Commw 649, 305 A2d 380 (1973) (claimant was required to record telephone communications, which is a misdemeanor if without the permission of all parties; claimant quit and benefits were granted); *Share v Unemployment Comp. Bd. of Rev.*, 99 Pa Commw 119, 512 A2d 794 (1986) (claimant, an accountant, was requested to enter inaccurate financial information on the employer's books and records; claimant quit and benefits were granted).

condition and to allow the employer a reasonable period of time to correct the condition. The origins of this doctrine for unemployment compensation purposes are contained in the Pennsylvania Supreme Court opinion in *Genetin v Unemployment Comp. Bd. of Rev.*:<sup>166</sup>

Once [an employee] has communicated his medical problem to the employer and explained his inability to perform the regularly assigned duties, an employee can do no more. . . . As long as the employee is available where a reasonable accommodation is made by the employer, that is not inimicable to the health of the employee, the employee has demonstrated the good faith effort to maintain the employment relationship required under the Act. To insist upon the employee's initiating the quest for an alternative position, would require a meaningless ritual that does not further the objectives of the Act. . . . [S]ince [the employee] notified the employer of the physical malady and his inability to perform his regular duties, it was then incumbent upon the employer to provide suitable work.<sup>167</sup>

This "informative communication/reasonable accommodation" analysis is applicable to claimants who voluntarily quit for reasons involving sexual harassment,<sup>168</sup> transportation difficulties,<sup>169</sup> or the employer's repeated failure to pay the employee on a timely basis.<sup>170</sup>

In each of these situations, individual employees would be granted benefits if they followed the "informative communication/reasonable accommodation" doctrine. The authors believe that there is no reason that this analysis should not be applied to concerted action by employees. Consistency and uniformity require such an application.

## XI. CONCLUSION

The labor dispute disqualification of the Pennsylvania Unemployment Compensation Law is one that the legislature and the courts have struggled to define in a way that properly implements

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166. 499 Pa 125, 451 A2d 1353 (1982).

167. *Genetin*, 451 A2d at 1356.

168. *St. Barnabas, Inc. v Unemployment Comp. Bd. of Rev.*, 106 Pa Commw 191, 525 A2d 885 (1987) (denial of benefits to claimant who failed to make employer aware of incidents involving immediate supervisor).

169. *Frable v Unemployment Comp. Bd. of Rev.*, 53 Pa Commw 137, 416 A2d 1164 (1980) (denial of benefits to claimant who did not report to new office for new assignment).

170. *Emgee Engineering Co. v Unemployment Comp. Bd. of Rev.*, 30 Pa Commw 290, 373 A2d 779 (1977). For a case in which the employee voluntarily quit after not receiving one paycheck and failed to ask the employer to assure a rigid payment schedule, see *Koman v Unemployment Comp. Bd. of Rev.*, 61 Pa Commw 604, 435 A2d 277 (1981) (benefits denied).

the goal of providing security for the worker unemployed through no fault of his own while not disrupting the labor peace essential to the economic stability sought by the general community. The labor dispute disqualification has undergone legislative change since its inception, culminating with the adoption of the lockout exception in 1949. That exception, which is still in effect, reintroduced the concept of fault by requiring the denial of benefits to those engaged in a labor dispute other than a lockout. Since 1949, the labor dispute disqualification has not been amended and case law continues to refine the issues. In 1960, the supreme court in *Vrotney* provided a definitive test for determining whether workers engaged in a labor dispute were entitled to benefits. The underlying rationale of the maintenance of the status quo requirement therein was to foster good faith bargaining while the employer continued operations and the employees continued working. This philosophical concept is fundamental to the proper application of Section 402(d) to any given set of facts. Unfortunately, in a few instances this concept has been ignored by the appellate courts. The employers, employees, and the public of this Commonwealth are entitled to consistency and uniformity with resulting precedent upon which they can rely and act in the future.

Areas of controversy and litigation are better understood within an historical framework. This article has attempted to provide an historical analysis while at the same time focusing on areas of possible controversy and litigation pertaining to the labor dispute disqualification. Each area was discussed and specific changes in the Law were suggested where warranted. The purpose of these suggestions is to foster uniformity, thereby hopefully reducing the number of labor disputes, while at the same time forming a body of law upon which the interested parties may ultimately rely.

The suggestions briefly reiterated below are offered to promote an interpretation that is more consistent with the policy considerations underlying the Law and the underlying rationale of *Vrotney*. For the above reasons, these suggestions should be implemented and/or continued to be followed:

1. The appellate courts' hesitancy in accepting the shifting status quo concept is unfounded. Rejection of the shifting status quo concept is not consistent with the objectives of *Vrotney*, i.e., to foster good faith bargaining while work continues. Therefore, the shifting status quo concept should be accepted particularly when the parties reduce an interim agreement to writing.
2. Similarly, where the parties agree to and work pursuant to

changed conditions, they acquiesce to the same, thereby creating a new status quo that must be maintained under *Vrotney* for unemployment compensation purposes.

3. An offer to maintain the status quo must be made with the only exception to *Vrotney* being when it would have been futile for the party to make such an offer. The futility doctrine is correct and should be followed. The courts, however, should recognize the difficulty parties have with the application of the futility doctrine in light of the posturing that is typical in last minute negotiations. Attempts to carve out exceptions to *Vrotney* should be rejected outright as the supreme court has done pertaining to economic necessity,<sup>171</sup> and the commonwealth court has done pertaining to impasse.<sup>172</sup>

4. The maintenance of the status quo requirement under *Vrotney* is applicable to all employers and the *Vrotney* analysis is controlling in matters involving school districts, even though the uniqueness of the employment relationship must be recognized.

5. For purposes of anticipating shutdowns and resumptions of operations, the definition of reasonable time is properly dependent upon judicial deference to an employer's honest judgment.<sup>173</sup> This deference should also be extended to cases defining reasonable time pursuant to *Vrotney*. Adoption of a reasonable time, honest judgment test in the *Vrotney* context would be consistent with the reasonable time, honest judgment test under *Lavelly* and *Bako*.

6. The appellate courts should recognize that the "availability of alternative remedies" doctrine creates an anomaly in the Law vis-a-vis Section 402(b) and should consider replacing it with the "informative communication/reasonable accommodation" doctrine<sup>174</sup> that allows the employee to establish eligibility by fully informing the employer of the employee's concerns and allowing the employer the opportunity to correct the problem before the employee takes further action by striking or quitting.

Most importantly, the practicing bar should be particularly aware of the fact that the courts have been very receptive to the argument that multiperiod offers satisfy the *Vrotney* reasonable time requirement. An offer to extend an expiring contract thirty, sixty, or ninety days has been held to be for a reasonable time,<sup>175</sup>

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171. *Hoffman*, 574 A2d at 57.

172. *Grinnell*, 561 A2d at 843.

173. *Lavelly*, 72 A2d 300 (1950); *Bako*, 90 A2d 309 (1952).

174. *Genetin*, 451 A2d 1353 (1982).

175. *Klima*, 211 A2d 23 (1965).

as has an offer of fifteen days, one month, or one year.<sup>176</sup> Multiperiod offers effectuate the philosophy of maintaining the bargaining process while work continues to the benefit of all parties involved. The making of such offers should prevent frivolous labor disputes with the commensurate benefit to the public at large and should, if necessary, place the party in a formidable position for purposes of ascertaining a worker's eligibility for unemployment compensation.

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176. *Leto*, 106 A2d 652 (1954).