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Pennsylvania's Lockout Exception to the Labor Dispute Disqualification from Unemployment Compsenation Benefits: Federal Challenges and Issues

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COMMENTS

Pennsylvania's Lockout Exception to the Labor Dispute Disqualification from Unemployment Compensation Benefits: Federal Challenges and Issues*

I. Introduction

An increasingly important dimension has been added to the labor-management bargaining process: the availability of public benefits to employees during labor disputes. Although availability of public benefits during labor disputes can be traced to the 1930's,[1] analysis of this state action has only recently been undertaken through court challenges.[2] These challenges allege that payment of welfare and unemployment benefits to strikers distorts collective bargaining and disrupts the labor-management balance established by federal labor laws. Payment of unemployment compensation to strikers is even a greater evil because the benefits paid to striking employees are

* *Editor's note.*—Immediately before the final printing of this comment, the *Hawaiian Telephone* case, *see* notes 77-81 and accompanying text *infra*, was decided on the merits. The federal district court declared illegal any construction of Hawaii's unemployment compensation law that allowed benefits to strikers. In an opinion by Chief Judge Pence the court found, *inter alia*, that the availability of unemployment benefits tends to prolong strikes and force employers to settle when they otherwise would not. Therefore, the Hawaii statute palpably affected labor relations between Hawaiian Telephone and its employees' union. Indeed, the court found that the statute's detrimental effect pervades every Hawaiian collective bargaining conflict. The case will be analyzed and related to this comment in the Winter 1976 issue of the *Dickinson Law Review*.

1. The Federal Emergency Relief Administration, under the direction of Harry Hopkins, authorized relief in 1933-34 to "needy unemployed" regardless of their participation in labor disputes. This policy met strenuous opposition from employers. A. THIEBLOT & R. COWIN, WELFARE AND STRIKES: THE USE OF PUBLIC FUNDS TO SUPPORT STRIKERS 34-36 (1972) [hereinafter cited as THIEBLOT & COWIN].

2. Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir. 1973); ITT v. Minter, 435 F.2d 989 (1st Cir. 1970); Hawaiian Tel. Co. v. Hawaii Dep't of Labor & Indus. Rel., 378 F. Supp. 791 (D. Hawaii 1974); Dow Chem. Co. v. Taylor, 57 F.R.D. 105 (E.D. Mich. 1972); Almacs, Inc. v. Hackett, 312 F. Supp. 964 (D.R.I. 1970); Borger Steel Co. v. Smith, Civil No. 74-636 (M.D. Pa., filed Aug. 5, 1974); Holland Motor Express, Inc. v. Michigan Employ. Sec. Comm'n, 42 Mich. App. 19, 201 N.W.2d 308 (1972); Unemployment Comp. Bd. of Review v. Sun Oil Co., — Pa. Commonwealth Ct. —, 338 A.2d 710 (1975).

provided by struck employers.[3] These employer challenges also contend that a state's payment of benefits is an unconstitutional intrusion into an area of exclusive federal jurisdiction.

This comment will examine the availability of unemployment compensation benefits in labor disputes, federal and state unemployment compensation statutes, and decisions interpreting those laws. Next, recent court challenges to payment of public benefits to strikers and locked out employees will be explored. Finally, issues and arguments involved in these challenges will be discussed. Although this comment focuses primarily on Pennsylvania law, its scope encompasses other states with similar statutory provisions.

II. The Statutory Background

In response to the Great Depression, a comprehensive social insurance program was adopted by Congress in 1935.[4] One of the areas addressed was unemployment compensation. The states, however, were reluctant to enact similar legislation, partially from fear that industry in states without such legislation would gain a competitive edge.[5] As an incentive title III of the Social Security Act[6] provided federal monies to states for administration of those unemployment insurance programs approved by the Secretary of Labor. Title IX of the Federal Unemployment Tax Act[7] imposed an excise tax on certain employers. Computed by a percentage of total wages paid by the employer, this tax granted credits for sums the employer had already paid into an approved state fund. As a further incentive to states to enact programs of unemployment insurance, the Committee on Economic Security[8] prepared several draft bills[9] to guide state

3. Although welfare assistance is provided by state and federal taxes, only employers pay unemployment compensation tax. PA. STAT. ANN. tit. 43, § 781 (Supp. 1975).

4. Act of Aug. 14, 1935, ch. 531, 49 Stat. 620.

5. STATUTORY HISTORY OF THE UNITED STATES: INCOME SECURITY 31-32 (R. Stevens ed. 1970); *see generally* SOCIAL SECURITY BOARD, SOCIAL SECURITY IN AMERICA (1937). As a result of this reluctance, Wisconsin was the only state to enact such legislation before 1935: WIS. STAT. ANN. §§ 108.01-.24, Spl. S. 1931, ch. 20, § 2.

6. Act of Aug. 14, 1935, ch. 531, tit. III, §§ 301-04, 49 Stat. 626.

7. Act of Aug. 16, 1954, ch. 736, 68A Stat. 438.

8. The Economic Security Committee was created by President Roosevelt in June 1934 to study problems and make proposals relating to economic security. STATUTORY HISTORY OF THE UNITED STATES: INCOME SECURITY 64-65 (R. Stevens ed. 1970).

9. For an examination of the draft bills see Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification,* 17 U. CHI. L. REV. 194, 195 (1950) [hereinafter cited as Shadur].

legislation. These efforts proved successful since all forty-eight states had enacted unemployment compensation statutes by mid-1937.[10]

A. Definition of Labor Disputes and Lockouts

The draft bills formulated by the Economic Security Committee and subsequent state legislation looked to the British program of unemployment insurance, the National Health Insurance Act of 1911,[11] as a model. The British statute disqualified an employee to receive unemployment compensation benefits if he was unemployed because of a labor dispute. Every American state copied this labor dispute disqualification in its unemployment compensation statute, but different definitions for its terms were developed.

The majority of states currently provide that an employee is ineligible to receive unemployment benefits during a work stoppage due to a labor dispute.[12] Most states define labor dispute as a strike, lockout, or other controversy between employer and employee without regard to the merits of the dispute.[13] British authority[14] and a leading American case[15] disqualify employees in a labor dispute from benefits regardless of which side is responsible for the work stoppage.

The term "lockout" is almost universally included in the definition of labor dispute.[16] Section 787 of the Restatement of Torts defines lockout as an employer's withholding of work from employees in order to gain economic concessions and as the employer's counterpart of a strike.[17] Federal labor legislation, specifically the Norris-LaGuardia Act[18] and the Labor Management Relations Act (LMRA),[19] defines labor dispute as a controversy concerning the terms and conditions of employment. By implication this definition covers lockouts as well as strikes. Other federal legislation is even clearer. The Federal Unemployment Insurance Tax Act[20] provides

10. Haggart, *Unemployment Compensation During Labor Disputes*, 37 NEB. L. REV. 668, 670 (1958).

11. 1 & 2 Geo. 5, c. 55.

12. Manpower Administration, U.S. Dep't of Labor, Comparison of State Unemployment Insurance Laws 4-41 (3d rev. ed., Sept. 1, 1973).

13. Lewis, *The Concept of Labor Dispute in State Unemployment Insurance Laws*, 8 B.C. IND. & COM. L. REV. 29, 30-31 (1966).

14. *See* Wagner, *Unemployment Benefits in Labor Disputes*, 53 DICK. L. REV. 187, 192 n.21 (1949).

15. *In re* North River Logging Co., 15 Wash. 2d 204, 130 P.2d 64 (1942).

16. *See* note 13 and accompanying text *supra*.

17. RESTATEMENT OF TORTS § 787, comment *a* (1939).

18. 29 U.S.C. § 113(c) (1970).

19. *Id.* § 152(9). The Norris-LaGuardia Act provides,

> The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

The Taft-Hartley Act is identical, except for the addition of tenure as an area of controversy.

20. 26 U.S.C. § 3304(a)(5)(A) (1964).

that no state shall deprive an otherwise eligible individual of unemployment benefits if he refuses to accept new work when the position offered is vacant because of a strike, lockout, or other labor dispute. Pennsylvania labor statutes follow these federal definitions closely.[21] Furthermore, Pennsylvania courts have adopted the *Restatement of Torts* definition of lockout: the counterpart of a strike.[22]

B. Pennsylvania's Lockout Exception

Pennsylvania's unemployment compensation law phrases its labor dispute disqualification as follows:

> An employee shall be ineligible for compensation for any week —. . . (d) 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.[23]

The original act[24] used the term "industrial dispute." The act was amended in 1945 to allow an employee to receive compensation after a four week waiting period even though he voluntarily stopped working.[25] Another amendment in 1947 repealed the waiting period provision and substituted "labor dispute" for "industrial dispute."[26] The parenthetical words "other than a lockout" became part of the unemployment compensation law through a further amendment in 1949.[27]

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21. Pennsylvania's unemployment compensation law, like those of most other states, Shadur, *supra* note 9, at 300, defines suitable work to exclude a position offered that has been vacated by a strike, lockout, or other labor dispute. PA. STAT. ANN. tit. 43, § 753(1)(t) (1964). Moreover, the Pennsylvania Anti-Injunction Law, PA. STAT. ANN. tit. 43, § 206(c) (1964), uses a definition of labor dispute virtually identical to that used in the Norris-LaGuardia Act, 29 U.S.C. § 113(c) (1970).

22. *E.g.*, Glen Alden Corp. v. Unemployment Comp. Bd. of Review, 189 Pa. Super. 286, 291, 150 A.2d 591, 594 (1959); Byerly v. Unemployment Comp. Bd. of Review, 171 Pa. Super. 303, 308, 90 A.2d 322, 325 (1952); Hogan v. Unemployment Comp. Bd. of Review, 169 Pa. Super. 554, 560, 83 A.2d 386, 390 (1951).

23. PA. STAT. ANN. tit. 43, § 802(d) (1964).

24. Act of December 5, 1936 (2d Exec. Sess.), P.L. 2897, No. 1, § 402.

25. Act of May 29, 1945, P.L. 1145, No. 408, § 9.

26. Act of June 30, 1947, P.L. 1186, No. 493, § 2. For a discussion of these amendments and the waiting period provision see MacPhail, *Meaning of the Term Labor Dispute in the Pennsylvania Unemployment Compensation Law*, 54 DICK. L. REV. 205 (1950).

27. Act of May 23, 1949, P.L. 1738, No. 530, § 11. The definition of labor dispute was examined in Midvale v. Unemployment Comp. Bd. of Review, 165 Pa. Super. 359, 67 A.2d 380 (1949). The superior court found that the 1947 amendment included both strikes and lockouts and that employees were disqualified regardless of who initiated the work stoppage. The 1949 amendment was inapplicable to *Midvale* because the dispute arose before its enactment. The court supported its definition of labor dispute by reasoning that the 1949 amendment would have been unnecessary had lockouts not previously been included. *Id.* at 367-68, 67 A.2d at 384-85.

Part of the controversy over Pennslyvania's definition of labor dispute involves the question of fault. "The fundamental idea of the Act is to provide a reserve fund to be used for the benefit of persons unemployed through no fault of their own."[28] Fault is not determined by objectively examining the merits of the dispute between the parties.[29] Rather, fault is placed on the party whose behavior was the *final* cause of the work stoppage.[30] Injection of this subjective fault standard into the determination of eligibility for benefits requires the unemployment compensation authorities to make an individual resolution of each claim.[31]

Supporters of Pennsylvania's distinction between strikes and lockouts for determining eligibility label it a "distinct step forward because it promotes rational rather than a power-dominated approach to the problem."[32] Others assert that failure to distinguish between strikes and lockouts enhances employers' bargaining strength by adding another weapon to their arsenal.[33] One commentator claims that the lockout-strike distinction is a natural one, that unemployment compensation benefits are not strike or lockout benefits but payments to alleviate the burdens of unemployment, and that a state that denies benefits by refusing to make the distinction is not remaining neutral in the labor-management power relationship.[34]

Opponents of the Pennsylvania approach argue that the unwillingness of American courts, based partially on the British experience, to allow benefits when a worker is in any way connected with a labor dispute accords with the basic purpose of compensation for involuntary unemployment.[35] Others claim that differentiating strikes and lockouts and evaluating fault are impossible tasks and that states attempting to make such distinctions acquire an artificial definition of

28. Miller v. Unemployment Comp. Bd. of Review, 152 Pa. Super. 315, 321, 31 A.2d 740, 743 (1943).

29. Ostensibly states that pay unemployment benefits when a lockout is determined do not examine the merits of the dispute that caused the work stoppage. These states allegedly look only to the final cause of the work stoppage. This allows them to argue that they are not interfering with the bargaining process. *See* Comment, *Unemployment Compensation—Effects of the Merits of a Labor Dispute on the Right to Benefits*, 49 MICH. L. REV. 886 (1951).

30. Morris v. Unemployment Comp. Bd. of Review, 169 Pa. Super. 564, 568, 83 A.2d 394, 297 (1951).

31. For a discussion of the changing position of the Board of Review on the subjective fault test and on evolution of the present test, see Wagner, *Unemployment Benefits in Labor Disputes*, 53 DICK. L. REV. 187, 188-89 (1949); Dep't of Labor & Indus. v. Unemployment Comp. Bd. of Review, 164 Pa. Super. 421, 426-27, 65 A.2d 436, 439, *rev'd on other grounds*, 362 Pa. 342, 67 A.2d 114 (1949).

32. T. BRODEN, LAW OF SOCIAL SECURITY AND UNEMPLOYMENT INSURANCE § 9.03, at 368 (1962).

33. Fierst & Spector, *Unemployment Compensation in Labor Disputes*, 49 YALE L.J. 461, 480-81 (1940).

34. Lesser, *Labor Disputes and Unemployment Compensation*, 55 YALE L.J. 167, 172-76 (1945).

35. Haggart, *Unemployment Compensation During Labor Disputes*, 37 NEB. L. REV. 668, 695 (1958).

lockout.[36] One author concludes that exclusion of lockouts from the definition of labor dispute is "distortion rather than definition."[37]

Pennsylvania has adopted a position both difficult to understand and difficult to justify. While ostensibly not exploring the merits of a labor dispute when determining eligibility for benefits,[38] administrative personnel[39] using the fault standard to distinguish strikes from lockouts must examine carefully both sides of a labor dispute unless the distinction is to be mechanically and irrationally applied.[40]

Possibly in response to this anomalous situation and the criticism of its minority position, Pennsylvania has refined its fault test:

> 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 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?[41]

This offer-and-acceptance test, which has been consistently followed since its enunciation,[42] may appear to be easily applied. The redefined fault standard, however, still requires a determination of the merits of a labor dispute by state administrative agencies.[43] It is exactly this state involvement in collective bargaining and labor disputes that has led employers to challenge the lockout exception.

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36. Williams, *The Labor Dispute Disqualification - A Primer and Some Problems*, 8 VAND. L. REV. 338, 366-67, 369 (1955).

37. Shadur, *supra* note 9, at 302. The Manpower Administration of the United States Department of Labor has found that the labor dispute disqualification is not intended to penalize workers whose unemployment is voluntary. On the contrary, labor dispute participants are excluded from unemployment benefits to maintain the neutrality of the state and to avoid large incursions in unemployment compensation funds. Manpower Administration, U.S. Dep't of Labor, Comparison of State Unemployment Insurance Laws 4-10 (3d rev. ed., Sept. 1, 1973).

38. *See* notes 28-31 and accompanying text *supra*; Wagner, *Unemployment Benefits in Labor Disputes*, 53 DICK. L. REV. 187, 193-94 (1949).

39. Under the Pennsylvania statute the local Bureau of Employment Security office makes initial determinations of eligibility; claimants have a right of appeal to an unemployment compensation referee and the Unemployment Compensation Board of Review. PA. STAT. ANN. tit. 43, §§ 821-32 (Supp. 1975).

40. *See* Comment, *Unemployment Compensation—Effects of the Merits of a Labor Dispute on the Right to Benefits*, 49 MICH. L. REV. 886 (1951).

41. Erie Forge & Steel Corp. v. Unemployment Comp. Bd. of Review, 400 Pa. 440, 444-45, 163 A.2d 91, 93 (1960).

42. Philco Corp. v. Unemployment Comp. Bd. of Review, 430 Pa. 101, 104, 242 A.2d 454, 455 (1968); United States Steel Corp. v. Unemployment Comp. Bd. of Review, 14 Pa. Commonwealth Ct. 6, 8, 321 A.2d 399, 400 (1974); Toma v. Unemployment Comp. Bd. of Review, 4 Pa. Commonwealth Ct. 38, 42, 185 A.2d 201, 204 (1971).

43. *See* note 39 and accompanying text *supra*.

III. Federal Challenges

Fifteen states including Pennsylvania exclude lockouts from the labor dispute disqualification in their unemployment compensation laws.[44] In addition, two states grant unemployment benefits after a prescribed waiting period to otherwise eligible persons who are unemployed because of a strike or other labor dispute.[45]

Rhode Island's statutory provision was the first to be challenged for granting unemployment benefits to strikers;[46] although the first two challenges[47] proved unsuccessful, it has remained a fertile source of litigation. In *Almacs, Inc. v. Hackett*[48] the court decided that the statute was not intended to impinge directly or indirectly on federal bargaining rights. Rather, the act was found to be an exercise of the police power to promote general welfare.[49] The court discerned no intent to override state welfare statutes in the congressional allocation of power between labor and management in the National Labor Relations Act (NLRA).[50] Moreover, the effects on collective bargaining of granting unemployment benefits to strikers were said to be "speculative and limited."[51]

The third challenge to the Rhode Island provision, *Grinnell Corp. v. Hackett*,[52] alleged that the statute conflicted with policies expressed in the LMRA and, thus, violated the supremacy clause[53] of the Constitution. The district court in *Grinnell*, relying partially on *Almacs*[54] and partially on *ITT v. Minter*,[55] found the issue proper for resolution by Congress and not the courts. It then dismissed the complaint, following the police power-general welfare rationale used in *Almacs*.[56] The First Circuit reversed the district court, however, and remanded the case for further proceedings.[57] Chief Judge Coffin, author of the *Minter* opinion, found that the preemption issue was

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44. Arkansas, California, Colorado, Connecticut, Georgia, Kentucky, Maryland, Michigan, Minnesota, Mississippi, New Hampshire, Ohio, Pennsylvania, Utah, and West Virginia.

45. N.Y. LABOR LAW § 592(1) (McKinney 1965); R.I. GEN. LAWS ANN. § 28-44-16 (1968). New York provides benefits after seven weeks, Rhode Island six.

46. ITT v. Carter, Civil No. 3770 (D.R.I., Apr. 6, 1967). The district court refused the employer's prayer for injunction and dismissed the complaint after superficially examining the employer's preemption and interference with collective bargaining contentions.

47. Almacs, Inc. v. Hackett, 312 F. Supp. 964 (D.R.I. 1970); ITT v. Carter, Civil No. 3770 (D.R.I., Apr. 6, 1967).

48. 312 F. Supp. 964 (D.R.I. 1970).

49. *Id.* at 967-68.

50. Act of July 5, 1935, ch. 372, §§ 151-68, 49 Stat. 449.

51. 312 F. Supp. at 968.

52. 344 F. Supp. 749 (D.R.I. 1972).

53. U.S. CONST. art. VI, cl. 2.

54. 312 F. Supp. 964 (D.R.I. 1970).

55. 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971); *see* notes 70-76 and accompanying text *infra*.

56. 344 F. Supp. at 754.

57. 475 F.2d 449 (1st Cir. 1973).

justiciable[58] and that Congress was not the only forum for its resolution.[59] Although stating that a detailed evidentiary foundation would be necessary to treat this complex preemption issue,[60] the court found the employer's complaint a valid claim for relief.[61]

In *Dow Chemical Co. v. Taylor*[62] employees laid off from interim employment during a strike against Dow were awarded benefits charged to Dow's unemployment compensation account.[63] The court refused to leave resolution of the case to Congress. It recognized that the gravamen of the complaint was infringement of federal collective bargaining rights by the state.[64] The defendants were ordered to refrain from charging benefits paid against Dow's unemployment compensation account. Discovery and other trial preparations were allowed to proceed.[65]

The Michigan unemployment compensation law was assailed again in *Holland Motor Express, Inc. v. Michigan Employment Security Commission.*[66] The employer in this case contended that the state's distinction between lockouts and strikes violated equal protection; its inconsistency with the legislative intent of the NLRA was said to violate the supremacy clause. The state court found a rational basis for the classification and held that the employer had failed to meet its burden of showing an irrational classification to overcome the statute's presumed validity.[67] On the preemption issue the court upheld the statute, reasoning that (1) unemployment compensation payments are not made by the employer, but by the state; (2) lockouts are not expressly protected by the NLRA; and (3) the NLRA

58. *Id.* at 453.
59. *Id.* at 453-54.
60. *Id.* at 459. Required evidence was said to include statistical data showing the relationship between receipt of public benefits and length and cost of strikes, size and nature of affected industries, past labor-management relations and prior strike history, cost of living, and other "economic peculiarities" in affected areas. The court also felt it would have to consider secondary economic and social effects of the payment of benefits or their absence, such as violence in labor disputes and economic stagnation, and expert testimony and statistics on the impact of benefits on industry pricing, competitiveness, and consumer demand. *Id.* at 461.
61. *Id.* at 460-61.
62. 57 F.R.D. 105 (E.D. Mich. 1972).
63. Michigan provides the lockout exception to its labor dispute disqualification. MICH. STAT. ANN. § 17.513 (1968). In this case the Michigan Employment Security Commission determined that interim employment terminated disqualification of the employees. *See* Great Lakes Steel Corp. v. Michigan Employ. Sec. Comm'n, 381 Mich. 249, 161 N.W.2d 14 (1968).
64. 57 F.R.D. at 107.
65. *Id.* at 108-09.
66. 42 Mich. App. 19, 201 N.W.2d 308 (1972).
67. 42 Mich. App. at 31, 201 N.W.2d at 312.

evidences no congressional intent to invalidate state statutes promoting public health and safety.[68] Although the court's equal protection rationale is sound, its analysis of the supremacy issue begs the question. To say that the employer suffers no financial detriment from payment of benefits because the state makes the payments is only semantic footwork: the state payments are funded by employers' taxes.[69] Furthermore, the absence of clear congressional intent does not indicate positive congressional approval.

In *ITT v. Minter*[70] employers sued to enjoin state welfare officials from paying benefits to striking employees.[71] The First Circuit affirmed the district court's denial of injunctive relief on grounds that the plaintiffs failed to establish irreparable harm to themselves by payment of benefits and failed to demonstrate sufficient probability of success on the merits.[72] After noting kinds of data that might be determinative of the preemption question,[73] the circuit court declared Congress to be the preferable forum for its resolution.[74] Judge Coffin claimed not to attribute significant weight to congressional silence. He also doubted that the Massachusetts welfare scheme significantly frustrated federal bargaining policy.[75] The court concluded by distinguishing unemployment and welfare benefits, declaring that the supposed unavailability of the former to strikers in Massachusetts had no bearing on the availability of the latter.[76]

Payment of unemployment benefits to strikers also has been challenged in *Hawaiian Telephone Co. v. Hawaii Department of Labor and Industrial Relations*.[77] An employer sought to enjoin enforcement of the state unemployment compensation law,[78] which Hawaiian courts had interpreted to allow payment of benefits to strikers when their employer's business was not totally shut down by the strike.[79] The federal district court recognized the possibility of a supremacy clause violation in the state's interference with a labor

68. 42 Mich. App. at 28-31, 201 N.W.2d at 313-14.
69. MICH. STAT. ANN. § 17.513 (1968).
70. 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971); *see* Clark, *Welfare for Strikers: ITT v. Minter*, 39 U. CHI. L. REV. 79 (1971).
71. Although the case dealt with welfare benefits, not unemployment compensation, it is included because of its similarity to other cases discussed and because the *Grinnell* court relied on it. Grinnell Corp. v. Hackett, 344 F. Supp. 749, 751 (D.R.I. 1970).
72. 435 F.2d at 991.
73. The court stated that its determination would rest on several factors: the impact of benefits paid to strikers on collective bargaining; the number of states paying welfare benefits to strikers; the effect of benefits on strike duration; the effect of benefits on strikers' resolve; the amount of welfare benefits vis-à-vis strike benefits; "and a host of other factors." *Id.* at 993.
74. *Id.* at 993-94.
75. *Id.* at 994.
76. *Id.* at 994-95.
77. 378 F. Supp. 791 (D. Hawaii 1974); *see* editor's note p. 70 *supra*.
78. HAWAII REV. STAT. § 383-29 (1968).
79. Meadow Gold Dairies v. Wiig, 50 Hawaii 225, 437 P.2d 317 (1968).

dispute. The employer's prayer for a preliminary injunction was granted,[80] the court placing considerable emphasis on *Super Tire Engineering Co. v. McCorkle*.[81]

Employers in *Super Tire* brought an action in New Jersey for declaratory and injunctive relief against state welfare officials to end payment of welfare benefits to strikers.[82] The district court, relying on *Minter*,[83] held that Congress was the appropriate forum for resolution of the plaintiffs' claims and dismissed the complaint.[84] The court of appeals remanded without reaching the merits and instructed the district court to dismiss for mootness because the strike had ended.[85] The Supreme Court, however, granted certiorari[86] on the mootness issue, reversed the court of appeals, and remanded the case for further proceedings.[87] Finding that the employers' claim that New Jersey welfare laws interfered with the LMRA policy of free collective bargaining deserved a hearing, the Court said, "The judiciary must not close the door to the resolution of the important questions these concrete disputes present."[88]

In light of this decision it appears that the courts in *Hawaiian Telephone*[89] and *Dow Chemical*[90] were correct in hearing the employers' claims. At the same time, however, Judge Coffin's empirical evidence requirement stated in *Grinnell*,[91] although a distinct step forward from *Minter*,[92] effectively insures that employers will not prevail on the merits. A recent decision of the Commonwealth Court of Pennsylvania, *Unemployment Compensation Board of Review v. Sun Oil Company of Pennsylvania*,[93] in which a challenge based on the lockout-strike distinction and federal preemption was decided adversely to the employer, supports this view.

Negotiations between Sun Oil's Marcus Hook refinery and the Refinery Workers Union failed to produce a new agreement before

80. 378 F. Supp. at 797-98.
81. 416 U.S. 115 (1974).
82. General assistance is provided by N.J. STAT. ANN. § 44:8-107 (1974), aid to families with dependent children (AFDC) by N.J. STAT. ANN. § 44:10-1 (1974). Interpretive regulations can be found at 416 U.S. 118 n.4 (1974).
83. 435 F.2d 989 (1st Cir. 1970).
84. *See* 469 F.2d 911, 913 (3d Cir. 1972).
85. *Id.* at 922.
86. 414 U.S. 817 (1973).
87. 416 U.S. at 127.
88. *Id.*
89. 378 F. Supp. 791 (D. Hawaii 1974).
90. 57 F.R.D. 105 (E.D. Mich. 1972).
91. 475 F.2d 449 (1st Cir. 1973).
92. 435 F.2d 989 (1st Cir. 1970).
93. — Pa. Commonwealth Ct. —, 338 A.2d 710 (1975).

expiration of the existing contract. The parties then agreed to continue working on a day-to-day basis. Five weeks later a bargaining impasse was certified by the federal mediator, at which time the company began implementing its contract proposals.[94] The union notified its members that a better offer had been rejected by Sun Oil employees at another refinery, a strike vote was taken, and a work stoppage resulted. Both the Board[95] and the court[96] found that a lockout had occurred, reasoning that the union's agreement to a day-to-day contract extension was a peace gesture that the company upset by implementing its contract proposals. The court held that the reasonableness of continuing the status quo, rather than the length of its continuance, was controlling.[97] Sun Oil did not show that implementation of its proposals was essential to continued operation.[98] Therefore, its action was declared unreasonable and the work stoppage a lockout.[99]

The court neatly sidestepped the crucial issue of federal preemption. Although it recognized lockouts as legitimate bargaining weapons,[100] the court nevertheless cited cases[101] decided prior to *Super Tire*[102] as authority for its conclusion that "persuasive evidence" is required to show preemption.[103] Language in *Super Tire* stating that preemption claims of this nature must be afforded a judicial hearing and the proper application of *Super Tire* in *Hawaiian Telephone*[104] were ignored by the commonwealth court, which found Sun Oil's argument plausible but lacking evidentiary support.[105] The police power rationale and the act's declaration of public policy[106] led the court to conclude that "the Pennsylvania Unemployment Compensation Law is not designed or intended to restrict or to regulate labor activity developed under the federal law."[107] Unfortunately, the crux

94. Proposals implemented concerned vacation pay, service, seniority, and distribution of overtime. *Id.* at —, 338 A.2d at 712.

95. Sun Oil Co., No. B-122198 (Unemployment Comp. Bd. of Review, June 21, 1974).

96. — Pa. Commonwealth Ct. at —, 338 A.2d at 713.

97. *Id.* at —, 338 A.2d at 713.

98. *See* Hershey Estates v. Unemployment Comp. Bd. of Review, 400 Pa. 446, 163 A.2d 535 (1960).

99. — Pa. Commonwealth Ct. at —, 338 A.2d at 714.

100. *Id.* at —, 338 A.2d at 715.

101. Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir. 1973); ITT v. Minter, 435 F.2d 989 (1st Cir. 1970).

102. 416 U.S. 115 (1974).

103. — Pa. Commonwealth Ct. at —, 338 A.2d at 717.

104. 378 F. Supp. 791 (D. Hawaii 1974).

105. — Pa. Commonwealth Ct. at —, 338 A.2d at 717.

106. PA. STAT. ANN. tit. 43, § 752 (1964).

107. — Pa. Commonwealth Ct. at —, 338 A.2d at 714. A similar challenge was raised recently in Borger Steel Co. v. Smith, Civil No. 74-636 (M.D. Pa., filed Aug. 5, 1974). On facts like those in *Sun Oil*, an employer is seeking to have Pennsylvania's lockout exception declared unconstitutional. The complaint alleges as follows: the exception deprives the employer of its federally guaranteed right to bargain collective-

of the preemption question, the *effect* of the act on federal labor policy, was overlooked.

IV. Issues and Arguments

The overriding congressional purpose in enacting unemployment insurance legislation was to combat the severe hardships of unemployment during cyclical depressions.[108] Pennsylvania and other jurisdictions[109] have interpreted this purpose to include a voluntariness test: the law is intended to benefit only *involuntarily* unemployed persons.[110] This construction required Pennsylvania courts to read the introductory fault provisions of the act[111] into the labor dispute disqualification provision,[112] an interpretation not originally intended. The state's police power allows it to make appropriate regulations for the health, safety and welfare of its people;[113] unemployment compensation laws fall into this category. Moreover, such laws were designed to be state administered.[114] Nevertheless, a question arises: Consistent with employers' federal rights and with congressional intentions in enacting federal labor laws, may the state make fault (*i.e.*, lockout-strike) determinations in administration of unemployment compensation statutes?

A. The Neutral State

The labor dispute disqualification is often said to allow the state to remain neutral.[115] This rationale presumably was derived from Great Britain's National Health Insurance Act of 1911,[116] which

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ly with its employees; it contravenes the supremacy clause; and it deprives the employer of a legitimate bargaining tool, the lockout. Plaintiff's Complaint at 4-5.

108. H.R. DOC. NO. 81, 74th Cong., 1st Sess. 8 (1935); H.R. REP. NO. 615, 74th Cong., 1st Sess. 3, 7 (1935); S. REP. NO. 628, 74th Cong., 1st Sess. 11 (1935).

109. *See* note 44 *supra* for other jurisdictions that apply the lockout exception.

110. *See* Department of Labor & Indus. v. Unemployment Comp. Bd. of Review, 148 Pa. Super. 246, 248, 24 A.2d 667, 668 (1942).

111. PA. STAT. ANN. tit. 43, § 752 (1964):

> 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.

112. PA. STAT. ANN. tit. 43, § 802(d) (1964).

113. Mugler v. Kansas, 123 U.S. 623 (1887).

114. H.R. DOC. NO. 81, 74th Cong., 1st Sess. 11 (1935); H.R. REP. NO. 615, 74th Cong., 1st Sess. 8 (1935); S. REP. NO. 628, 74th Cong., 1st Sess. 12-13 (1935).

115. Shadur, *supra* note 9, at 196-97; Haggart, *Unemployment Compensation During Labor Disputes*, 37 NEB. L. REV. 668, 688 (1958).

116. 1 & 2 Geo. 5, c. 55.

served as a model for many American social security laws.[117] Just as payment of unemployment benefits to strikers is labeled a wrongful subsidy of employees in a labor dispute,[118] so is denial of benefits said to confer a considerable advantage upon management.[119] Both are thought to violate state neutrality. A theoretical lack of neutrality, however, does not justify the state's support of one side in a labor dispute at the expense of the other. A primary motive for federal labor legislation has been to foster equality of bargaining strength between labor and management, with the hope that equality will foster industrial peace.[120] Once this equality has been achieved or approximated, the state must not interfere in the collective bargaining process. Indeed, one argument raised in recent challenges declares such state action preempted by federal laws governing labor-management relations.

B. Preemption

Preemption has its roots in the supremacy clause of the Constitution[121] and is a necessary adjunct to federalism in the adjustment of power between the states and the national government. This judicially created doctrine[122] is designed "to avoid conflicting regulations of conduct by various official bodies which might have some authority over the subject matter."[123] Preemption in the area of federal versus state labor statutes was first formulated into a rule of general application in *San Diego Building Trades Council v. Garmon.*[124] In that case the Supreme Court harmonized several previous labor preemption decisions[125] and established the rule that when activities are "arguably protected" by section 7 of the NLRA[126] or "arguably prohibited" by

117. *See In re* North River Logging Co., 15 Wash. 2d 204, 208, 130 P.2d 64, 66 (1942), which states the general rule of statutory construction that a statute adopted from another jurisdiction presumably carries the construction given it in the other jurisdiction.

118. Holland Motor Express, Inc. v. Michigan Employ. Sec. Comm'n, 42 Mich. App. 19, 28, 201 N.W.2d 308, 312 (1972).

119. Lesser, *Labor Disputes and Unemployment Compensation*, 55 YALE L.J. 167, 175 (1946).

120. 29 U.S.C. § 151 (1970).

121. U.S. CONST. art. VI, cl. 2, which reads,

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

122. Amalgamated Ass'n of St. Employees v. Lockridge, 403 U.S. 174, 186 (1971).

123. *Id.* at 285-86.

124. 359 U.S. 236 (1959).

125. The prior cases, their background, and a thorough analysis of preemption in this context are found in Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972) [hereinafter cited as Cox].

126. 29 U.S.C. § 157 (1970).

section 8(b),[127] only the National Labor Relations Board (NLRB) may deal with them.[128] This test was questioned by members of the Court in 1970,[129] but was reaffirmed one year later in *Amalgamated Association of Street Employees v. Lockridge.*[130] The continuing validity of the *Garmon* test[131] is unimportant to this discussion because the issues raised in recent cases place them outside the *Garmon* rule. This fact was recognized in *Minter,*[132] the first case in which preemption was raised in the context of granting public benefits to labor dispute participants.[133] Administration of state unemployment compensation laws does not "arguably" fall within section 7 or 8 of the NLRA; thus the preemption issue must be decided in a non-*Garmon* context.

The starting point for finding preemption is congressional intent. Concerning payment of unemployment benefits in labor disputes, however, no clear evidence of congressional intent to preempt state action exists. In 1947 the House passed the Hartley bill,[134] which redefined employee to exclude strikers that accepted unemployment benefits. A House resolution declared that a state law allowing payments to strikers after a waiting period was "clearly a perversion of the purposes of the Social Security Laws."[135] This statement, however, was dropped without explanation in conference committee.[136] In 1969 President Nixon proposed to Congress that states deny unemployment benefits to strikers.[137] The Ways and Means Committee deleted the provision[138] and the House passed a substitute bill without additional discussion.[139] Senate debate on the bill did not mention the

127. *Id.* § 158(b).
128. 359 U.S. at 244-46.
129. Chief Justice Burger and Justices White and Stewart questioned its validity in Longshoremen's Local 1416 v. Ariadne Ship. Co., 397 U.S. 195 (1970), and Taggart v. Weinacker's, Inc., 397 U.S. 223 (1970).
130. 403 U.S. 274 (1971).
131. *Lockridge* was a five-four decision; two members of the majority, Justices Harlan and Black, are deceased.
132. 435 F.2d 989, 992 (1st Cir. 1970).
133. *Id.* at 991.
134. H.R. 3020, 80th Cong., 1st Sess. (1947).
135. H.R. REP. No. 353, 80th Cong., 1st Sess. 12 (1947).
136. CONF. REP. No. 510, 80th Cong., 1st Sess. (1947).
137. Message from President Nixon, *Hearings on H.R. 12625 Before the House Comm. on Ways and Means,* 91st Cong., 1st Sess. 12 (1969).
138. Chairman Mills said, "If the state wants to do it, we believe they ought to be given latitude to enable them to write the program they want." 115 CONG. REC. 34106 (1969).
139. H.R. 14705, 91st Cong., 1st Sess. (1969).

issue; neither the conference report[140] nor final debate[141] raised the question.

On the other hand, support for payment of unemployment benefits to strikers and, by inference, for the right of states to make a lockout-strike distinction is found in the Railroad Unemployment Insurance Act,[142] which allows payment of unemployment benefits to strikers. Under this act employees are disqualified from benefits only when they are engaged in an unlawful strike against carriers.[143] Additionally, the program,[144] whose eligibility standards are established by the Secretary of Health, Education, and Welfare,[145] permits unemployment assistance to strikers in the twenty-four participating states.[146]

Congressional intent in this area is unclear. Although Congress can specifically provide for preemption,[147] no action has been taken and none is likely. Changes in federal labor law are always controversial and are enacted only after substantial public pressure has been exerted.[148] The lack of clear congressional intent, however, should not prevent courts from deciding important questions raised by introduction of public benefits into labor disputes.

Even without clear congressional intent to preempt state action, courts will invalidate state laws whose administration "palpably infringes" upon federal labor policy.[149] To make this finding the First Circuit in *Minter*[150] and *Grinnell*[151] has required presentation of empirical data. This demand is said to be justified because these cases attempt to apply preemption in a "most unusual circumstance."[152] On the other hand, the *Dow Chemical*[153] court did not raise the empirical evidence requirement. Rather, it viewed the supremacy issue as a mixed question of law and fact.[154]This latter view has gained some ascendancy over the stringent empirical requirements established by the First Circuit and followed in Pennsylvania in *Sun Oil*.[155] The Supreme Court in *Super Tire*[156] indicated that the

140. CONF. REP. NO. 1037, 91st Cong., 2d Sess. (1970).
141. House: 116 CONG. REC. 15608-17 (1970).
Senate: 116 CONG. REC. 27305-23 (1970).
142. 45 U.S.C. §§ 351-67 (1970).
143. *Id.* § 354(a-2)(iii).
144. 42 U.S.C. §§ 601-44 (1970).
145. *Id.* § 602.
146. *See* THIEBLOT & COWIN, *supra* note 1, at 240-51.
147. Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 275 (1943).
148. Cox, *supra* note 125, at 1377.
149. Southern Pac. Term. Co. v. Arizona, 325 U.S. 761, 766 (1945).
150. 435 F.2d 989, 994 (1st Cir. 1970).
151. 475 F.2d 449 (1st Cir. 1973).
152. *Id.* at 461.
153. 57 F.R.D. 105 (E.D. Mich. 1972).
154. *Id.* at 108.
155. — Pa. Commonwealth Ct. —, 338 A.2d 710 (1975).
156. 416 U.S. 115 (1974).

empirical data requirement may be avoided by taking judicial notice of the effect of public benefits on labor disputes and the bargaining process. The Court stated,

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract.[157]

This principle applies equally to the availability of unemployment benefits in a labor dispute. Relying on *Super Tire*, the court in *Hawaiian Telephone*[158] adopted this view and granted an employer preliminary relief by enjoining operation of a state law granting unemployment benefits to strikers.[159] Similarly, Pennsylvania's payment of benefits to employees declared to be locked out pervades every collective bargaining contract and the bargaining process itself.[160]

Professor Archibald Cox[161] has suggested a broader test of preemption than the "arguably prohibited or protected" test of *Garmon*.[162] His test applies federal preemption to employee organization, collective bargaining, and use of economic weapons to secure bargaining objectives.[163] Cox sees two fundamental tenets in national labor policy: freedom of employees to organize and voluntary private adjustment of conflicts over wages, hours, and conditions of employment through administration and negotiation of collective bargaining contracts.[164] Interplay of these forces leads to strikes, boycotts, lockouts, and other forms of economic pressure. Any state restriction on the objectives or forms of these pressures tips the scale toward one side or the other, upsetting the balance carefully established by Congress.[165] Cox's expanded preemption test was acknowledged by the First Circuit in *Grinnell* and found to be similar to the preemption test used by that court in non-*Garmon* cases.[166] The expanded preemption test, however, would not relieve the court's heavy empirical data requirement.[167]

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157. *Id.* at 124.
158. 378 F. Supp. 791 (D. Hawaii 1974).
159. *Id.* at 798.
160. *See* notes 186-201 and accompanying text *infra.*
161. Samuel Williston Professor of Law, Harvard University.
162. 359 U.S. 236 (1959).
163. Cox, *supra* note 125, at 1339.
164. *Id.* at 1352.
165. *Id.* at 1352-53.
166. 475 F.2d 449, 461 n.13 (1st Cir.1973).
167. *Id.*

A preemption test that fails to recognize that public benefits are a critical factor in labor disputes and collective bargaining is unnecessarily restrictive and unfair to employers. Federal labor laws have made adjustments in the power relationship between labor and management. If states engage in a similar balancing and weighing process in determining whether unemployment benefits should be provided or denied, they encroach on the federal domain. The labor dispute disqualification in unemployment compensation laws harmonizes that area of state law with federal labor statutes. By redefining labor dispute to exclude lockouts, as in Pennsylvania, and then determining whether a strike or lockout has occurred in each case, the state destroys the balance struck by Congress by further burdening the employer.

> A state cannot add to an employer's federal bargaining obligations in collective bargaining even though nothing in Section 7 protects any employer activities and N.L.R.B. decisions conclusively demonstrate that the particular conduct which the state would regulate is not arguably prohibited by Section 8(a).[168]

Depriving employers of lockouts as bargaining tools—and that is the effect of unemployment statutes that provide benefits to locked out employees—clearly adds to their bargaining obligations. Moreover, a requirement of substantial empirical data or persuasive evidence to find preemption effectively denies employers the judicial hearing on the merits mandated by *Super Tire*.[169]

C. *Deprivation of Federal Rights*

To argue that Pennsylvania's statutory scheme of unemployment compensation deprives employers of a legitimate economic weapon, the lockout, one must show that the lockout is a federally protected right, that it is "the corollary of the strike."[170] At common law the lockout was a legitimate economic weapon.[171] Senator Wagner originally intended to make the lockout an unfair labor practice under section 8(1) of the Wagner Act,[172] but this effort failed. Indeed, the equality of strikes and lockouts was recognized during debate.[173] Even if strikes and lockouts did not enjoy equality before 1947, the Taft-Hartley Act[174] made them equal in its effort to restore equality between employers and employees.[175] This view received support by its

168. Cox, *supra* note 125, at 1365.
169. 416 U.S. 115 (1974).
170. *See* Lewis, *The "Lockout as Corollary of Strike" Controversy Reexamined*, 23 LAB. L.J. 659 (1972).
171. Iron Molders Union v. Allis-Chalmers Co., 166 F. 45, 50 (7th Cir. 1908); "[E]mployers may lock out (or threaten to lock out) at will . . . ."
172. S. 2926, 73rd Cong., 2d Sess. § 5 (1934).
173. 79 CONG. REC. 7673 (1935) (remarks of Senator Walsh).
174. Act of June 23, 1947, ch. 120, 61 Stat. 136.
175. Denbo, *Is the Lockout the Corollary of the Strike?*, 14 LAB. L.J. 400, 402-03 (1963).

adoption in the *Restatement of Torts*.[176] Yet, the NLRB consistently held that lockouts during negotiations infringed upon section 7 rights of employees, violated section 8(a)(1), and constituted discrimination prohibited by section 8(a)(3).[177]

In 1956 permissible use of lockouts was expanded in *Buffalo Linen*.[178] One member of a multiemployer bargaining unit had been struck; others in the unit locked their employees out. The Supreme Court held that this lockout was not a violation of section 8(a)(1) or (a)(3), since it was used to defend against pressure that would result in employer capitulation if each member were struck individually.[179] A 1965 case not only expanded coverage of legal lockouts, but also invalidated the Board policy of nonrecognition of single employer bargaining lockouts. In *American Ship Building Co. v. NLRB*[180] the Court held that an employer violates neither Section 8(a)(1) nor Section 8(a)(3) when it temporarily locks out employees after a bargaining impasse[181] to pressure them in support of a legitimate bargaining position.[182] Although the Court did not declare the lockout the corollary of a strike, its decision lends support to the concept of equality between the two actions. In fact, since the *American Ship* decision, the Sixth Circuit has taken this final step by holding the lockout to be the corollary of employees' right to strike.[183]

Under federal law, therefore, an employer may use a lockout after a bargaining impasse without committing an unfair labor practice if it seeks only to support a bargaining position and is not motivated by antiunion animus.[184] Under Pennsylvania law, however, an employer that resorts to the lockout must pay its employees unemployment benefits to engage in such activity. In most state

176. RESTATEMENT OF TORTS § 787, comment *a* (1939).

177. Quaker State Oil Ref. Corp., 121 N.L.R.B. 334, 337 (1958). Certain exceptions, in which lockouts were permitted, were carved from this general rule: to prevent plant seizure by sitdown strike, Link-Belt Co., 26 N.L.R.B. 227 (1940); to prevent repeated disruption by quickie strikes, International Shoe Co., 93 N.L.R.B. 907 (1951); to prevent spoilage of materials that would result from an unannounced strike, Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943); to prevent customer dissatisfaction, Betts Cadillac Olds, Inc., 96 N.L.R.B. 168 (1951).

178. NLRB v. Truck Drivers' Local 449, 353 U.S. 87 (1957).

179. *Id.* at 97.

180. 380 U.S. 300 (1965).

181. For the importance and construction of the term "impasse" in negotiations and disputes, see Epstein, *Impasse in Collective Bargaining*, 44 TEXAS L. REV. 769 (1966).

182. 380 U.S. at 318.

183. Detroit News. Pub. Ass'n v. NLRB, 372 F.2d 569, 572 (6th Cir. 1967).

184. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311-12 (1965); NLRB v. Brown, 380 U.S. 278, 286 (1965).

unemployment compensation plans the labor dispute disqualification includes both lockouts and strikes. The federally created labor-management relationship is not affected by these laws. Contrast the effect of Pennsylvania's statute and others that exempt lockouts from the labor dispute disqualification. Should the employer decide to lock out its employees after a good faith effort at compromise fails, it is charged with the amount of unemployment compensation paid during the dispute and its future contributions to the fund are increased. In short, these states greatly limit employers' exercise of nonproscribed activity and effectively prohibit lockouts altogether for those employers unable or unwilling to pay the benefits awarded. The former Board policy of treating lockouts as illegal arguably may have justified state restrictions on lockouts. In light of Supreme Court decisions rejecting that view,[185] however, such legislation cannot stand.

D. Effect on the Bargaining Process

The effect on the collective bargaining process of state unemployment compensation laws that grant benefits to strikers or make a lockout-strike distinction and award benefits to locked out employees provides another compelling reason for invalidating this type of statutory provision. The state has an interest in free and untrammeled collective bargaining for both employers and employees.[186] At the heart of the federal plan for unfettered collective bargaining in the use of economic sanctions.[187] The right to bargain collectively "does not entail a 'right' to insist on one's position free from economic disadvantage."[188] On the contrary, collective bargaining is a power relationship between employers and employees.[189] Congress has attempted to insure equality between the opposing sides as the starting point for bargaining[190] and has made necessary adjustments.[191] Both sides being equal, therefore, any agreement should be reached through bargaining strength of the parties, not through government interference.[192] Federal labor policy is not designed to compel agreement,

185. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311-12 (1965); NLRB v. Brown, 380 U.S. 278, 286 (1965).

186. Local 24, Int'l Bhd. of Teamsters v. Oliver, 352 U.S. 283, 295 (1959); Hogan v. Unemployment Comp. Bd. of Review, 169 Pa. Super. 554, 561, 83 A.2d 386, 390 (1951).

187. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970).

188. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 309 (1965).

189. *See* Livernash, *The Relation of Power to the Structure and Power of Collective Bargaining*, 8 J. LAW & ECON. 10 (1963).

190. This goal is evident in the purpose of the Wagner Act and the Taft-Hartley Act, 29 U.S.C. § 151 (1970).

191. *See* NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (1948).

192. H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970).

only good faith bargaining.[193] Freedom in bargaining necessarily includes the right to reject offers made by the other side. Implied in that right is a freedom to resort to economic pressures—strikes, lockouts, and picketing.[194] "To restrict either the objectives for which economic pressure can be applied or the forms of pressure which are permissible tips the scale toward management or union."[195]

The bargaining attitude of each side has been defined as follows:

$$X\text{'s bargaining attitude} = \frac{\text{Cost of disagreeing with Y}}{\text{Cost of agreeing on Y's terms}}$$[196]

The availability of unemployment benefits in a work stoppage[197] reduces an employee's cost of disagreeing with the employer, hardens his resolve to strike and to stay out, and makes him less likely to negotiate seriously on the employer's proposals.[198] From the employer's side, the availability of unemployment benefits increases the cost of disagreeing with the union in bargaining; settlement will likely be closer to union demands. Employees get a double advantage of anticipated benefits during bargaining and actual benefits in the event of a work stoppage. A union that knows the employer cannot pay for a lockout can afford to be intransigent at the bargaining table. Additionally, in lockout exception jurisdictions there is a possibility that a strike may be declared a lockout by the administrative agency that pays unemployment benefits.

As counterpart to strikes, employers should have full use of lockouts to support legitimate bargaining objectives[199] and to temper unreasonable union demands. If that employer action is withdrawn or made so expensive that its use is effectively curtailed, employers lose their ultimate bargaining weapon and the bargaining process is fundamentally altered in favor of labor. Alteration of the labor-management relationship should be effected only by direct congressional action, not through administration of state unemployment compensation laws. "Administration is greater than a means of regulation;

193. 29 U.S.C. § 158 (1970); NLRB v. Burns Sec. Serv., 406 U.S. 272, 283 (1972).
194. Cox, *supra* note 125, at 1353.
195. *Id.*
196. THIEBLOT & COWIN, *supra* note 1, at 25 n.31. The equation is taken from CARTTER, THEORY OF WAGES AND EMPLOYMENT 117 (1959).
197. *See* THIEBLOT & COWIN, *supra* note 1, app. B.
198. Clark, *Welfare for Strikers: ITT v. Minter*, 39 U. CHI. L. REV. 79, 105 (1971).
199. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965).

administration is regulation."[200] Clearly Congress does not intend that states regulate labor relations.[201]

E. Mootness

Apart from the allegation of nonjusticiability[202] of the issues presented in recent cases, a mootness argument based on the case or controversy requirement of federal court jurisdiction[203] has been raised. In *Super Tire*[204] the Third Circuit vacated the district court's decision on the merits and instructed the lower court to dismiss the case for mootness because the strike that prompted the action had been settled.[205] The Supreme Court found that the issue was not moot, however, since petitioners were seeking declaratory as well as injunctive relief.[206] Furthermore, the Court found the possibility of state action not remote,[207] but rather, from the employers' viewpoint, "immediately and directly injurious to [their] . . . economic positions."[208] The test employed was whether the issues were "capable of repetition, yet evading review;"[209] governmental actions adverse to employers could be taken "without a chance of redress."[210] Since most strikes are relatively short, the Court found it sufficient that a "litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest."[211]

Because the mootness issue is closely tied to that of justiciability, this Supreme Court decision reinforces the conclusion that cases challenging the lockout exception and payment of unemployment benefits to strikers should be heard and decided by the courts. To do otherwise will "preclude challenge to state policies that have had their impact and that continue in force, unabated and unreviewed."[212]

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200. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959).
201. Amalgamated Ass'n of St. Employees v. Lockridge, 403 U.S. 274, 285-89 (1972).
202. *See* notes 55-61 and accompanying text *supra.*
203. U.S. CONST. art. III, § 2, cl. 2.
204. 416 U.S. 115 (1974).
205. 469 F.2d 911, 922 (3d Cir. 1972).
206. 416 U.S. at 121-22.
207. Two cases relied upon by the court of appeals, Oil Workers Union v. Missouri, 361 U.S. 363 (1960), and Harris v. Battle, 348 U.S. 803 (1954), were dismissed by the Supreme Court as moot because the strikes that prompted suit had ended. These cases were distinguished by the *Super Tire* majority on the basis that reoccurrence of government action in those cases was so remote and speculative that no subject matter existed upon which the Court could render judgment, unlike the operation of New Jersey law in the *Super Tire* case. 416 U.S. at 122-24.
208. 416 U.S. at 125.
209. *Id.* at 122, 125.
210. *Id.* at 122.
211. *Id.* at 125-26.
212. *Id.* at 126.

V. Conclusion

When the Wagner Act was adopted in 1935,[213] organized labor was not a significant economic force. The act adjusted the labor-management balance to achieve equality between the parties. Later, Congress found that too great a shift had been made in labor's favor. The Taft-Hartley Act was passed in 1947[214] to readjust the balance.

State unemployment compensation laws all contain eligibility provisions dealing with labor disputes. The great majority exclude participants in strikes, lockouts, and even jurisdictional disputes from benefits. This approach comports with the supremacy clause of the Constitution and causes minimum conflict between state and federal statutes. Pennsylvania and some other states, however, exclude lockouts from the definition of labor dispute. In so doing, they have overstepped the bounds of the police power and run afoul of the supremacy clause. Their action has disrupted the careful balance between labor and management established by Congress. Regardless of their altruistic purpose these state laws must yield to federal preemption of labor relations.

Economic, political, and social conditions have changed since the 1930's and 1940's: the power wielded by organized labor is now as concentrated as that of large corporations. Congress has continued to monitor and adjust the equality of bargaining strength first addressed by the Wagner Act. Although some may argue that equality has not been achieved, it is not the province of state legislatures in any event to alter the balance.

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213. Act of July 5, 1935, ch. 372, §§ 151-68, 49 Stat. 449.
214. Act of June 23, 1947, ch. 120, 61 Stat. 136.