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Leading Articles

Unemployment Compensation During Labor Disputes

Virgil J. Haggart, Jr.*

The recent business recession, which in some areas of the country has caused rather severe unemployment,¹ has once again focused both private and official attention upon the nation's unemployment compensation program.² It is the purpose of this article to consider only one segment of this program: the payment of unemployment compensation to wage earners whose loss of work is due to a labor dispute at the place where they were last employed. Attention will be directed particularly to the propriety of such payments in circumstances where the worker has some degree of identification with the labor dispute which caused his unemployment.

I. SURVEY OF FEDERAL AND STATE LEGISLATION

The United States was not the first nation to adopt a comprehensive program of unemployment compensation legislation; such programs were in existence in most European countries at

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¹ As, for example, in Detroit, Michigan, where unemployment reached 200,000, or 12½% of the working force during the first week of February, 1958. U. S. News & World Report, February 14, 1958, p. 43. As of the middle of March, 1958, at least 6% of the labor force was unemployed in 70 of 149 of the nation's major employment areas. New York Times, March 28, 1958, p. 15, cols. 3-4.

² On March 19, 1958, President Eisenhower held a conference with nine state governors to discuss an emergency plan to extend unemployment compensation coverage to workers not covered by state acts, and extend the maximum benefit program period from 26 to 39 weeks. Both of these objectives would be realized by a loan of Federal funds to the states. New York Times, March 18, 1958, p. 1, col. 1; Id., March 20, 1958, p. 1, col. 2; Id., March 23, 1958, p. 49, col. 1. As this article goes to press, legislation is pending in Congress which would realize this purpose.

the time the Social Security Act was enacted by Congress in 1935.³ The first American state to adopt unemployment compensation legislation was Wisconsin, which established a program in 1932.⁴ Other states were reluctant to follow Wisconsin's lead however, primarily because of a fear that imposition of an unemployment tax upon employers within the state would place them at a competitive disadvantage with employers in other states where no such tax existed.⁵

It remained, therefore, for the federal government to provide the impetus for enactment of state unemployment compensation legislation on a broad scale; this was done as a part of the comprehensive social insurance program adopted by Congress on August 14, 1935, popularly known as the Social Security Act.⁶ Two parts of this legislation were particularly effective in inducing the states to enact their own unemployment compensation programs.

One of these, Title IX of the original Social Security Act, was the Federal Unemployment Tax Act,⁷ which imposed upon every employer an excise tax equal to three per cent of the total wages paid to his employees,⁸ but provided for credits against this tax up to ninety per cent thereof if the employer was making payments to a state unemployment insurance fund pursuant to state unemployment compensation legislation which had been approved by the Secretary of Labor.⁹ The other, Title III of the original Social Security Act,¹⁰ provided for the payment of federal grants for the administration of state unemployment compensation funds, if the state's unemployment compensation legislation had been ap-

³ For a brief discussion of foreign unemployment compensation programs in effect prior to 1935, see Millis and Montgomery, *Labor's Risks and Social Insurance*, 122-137 (1938).

⁴ Wis. Sess. Laws, Spec. Sess. c. 20 p. 57 (1932).

⁵ H.R. Rep. No. 615, 74th Cong., 1st Sess. 8 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 11, 13 (1935); Douglas, *Social Security in the United States* 20 (1936); Gagliardo, *American Social Insurance* 232 (rev. ed. 1955); Millis and Montgomery, *op. cit. supra* note 3, at 145. New Hampshire and New York had enacted legislation in 1935 prior to adoption of the Social Security Act.

⁶ Act of August 14, 1935, c. 531, 49 Stat. 620 (codified in scattered sections of 26, 42 U.S.C.).

⁷ 49 Stat. 639 (1935), U.S.C. § 3301-3306 (Supp. IV, 1957).

⁸ The original act imposed a tax of one per cent on employers' 1936 payrolls, two per cent on 1937 payrolls, and three per cent on payrolls in 1938 and thereafter. 49 Stat. 639 (1935), 26 U.S.C. § 3301 (Supp. IV, 1957).

⁹ 49 Stat. 643 (1935), 26 U.S.C. §§ 3302-3304 (Supp. IV, 1957).

¹⁰ 49 Stat. 626 (1935), 42 U.S.C. §§ 501-503 (1953).

proved by the Secretary of Labor. The requirements which the state legislation had to meet in order to be approved for purposes of the tax credit provisions of Title IX and the administrative grant provisions of Title III were established in the Act.¹¹

Response by the several states to this stimulus of federal legislation was both rapid and unanimous. By June 30, 1937, every jurisdiction in the nation had adopted a comprehensive scheme of unemployment legislation.¹² The Nebraska Unemployment Security Law became law upon May 17, 1937.¹³ All of the state acts, having of course undergone some amendment in the interim, remain on the books today.¹⁴ In view of the fact that all of the state laws had to comply with certain federal standards in order to qualify for the tax credit and administrative grant provisions of the Social Security Act already mentioned, and in view of the additional fact that federal agencies actively cooperated in the drafting of state legislation,¹⁵ it is to be expected that there was some substantial uniformity among the state laws in their most important provisions. This same degree of uniformity continues to prevail at the present time.

It is not within the scope of this article to present a comprehensive analysis of the features of state unemployment compensation legislation.¹⁶ It is sufficient for our purposes to observe that after a statutory waiting period, an unemployed worker covered

¹¹ 49 Stat. 626 (1935), 42 U.S.C. § 503 (1953); 49 Stat. 640 (1935), 26 U.S.C. §§ 3303-3304 (Supp. IV, 1957).

¹² The years in which legislation was enacted are as follows: Wisconsin (1932); Alabama, California, District of Columbia, Massachusetts, New Hampshire, New York, Oregon (1935); Arizona, Colorado, Connecticut, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia (1936); Arkansas, Delaware, Florida, Georgia, Illinois, Kansas, Missouri, Montana, Nebraska, Nevada, North Dakota, Washington, Wyoming (1937). For statutory citations, see table, *infra*, pp. 696-702.

¹³ Neb. Laws c. 108, p. 369 (1938).

¹⁴ The Nebraska Employment Security Law now appears as Neb. Rev. Stat. §§ 48-601—48-669 (Reissue 1952).

¹⁵ Gagliardo, *op. cit. supra* note 5 at 253; Hughes, *Principles Underlying Labor-Dispute Disqualification* (1946) p. 3; H.R. Doc. No. 81, 74th Cong., 1st Sess. 17-19 (1935).

¹⁶ For a general discussion of the original Nebraska Act, see Orfield, *The Nebraska Unemployment Compensation Law*, 16 Neb. L. Bul. 148 (1937). Texts on the subject include Millis and Montgomery, *op. cit. supra*, note 3; Gagliardo, *op. cit. supra*, note 5, pp. 250-307.

by the Act may make a claim for benefits; that if funds are available, and if the administrators of the fund find that the claimant is not disqualified from receiving benefits for one of the reasons enumerated in the statute, payments commence; that payments continue until the claimant returns to his former job or obtains other suitable employment, as defined by the statute, but never for a period of more than thirty weeks; that maximum benefits range from twenty-five dollars to sixty dollars per week. The statutes create administrative tribunals and prescribe procedures for the hearing and determination of disputed claims, and provide for judicial review of these determinations.

In Nebraska and in most other states, the unemployment compensation trust fund is maintained solely by the contributions of employers covered by the Act, no contribution being exacted from the wage earners.¹⁷ In some states, contributions are required of both employers and employees.¹⁸ Generally speaking, the amount of an employer's contribution is determined by applying a percentage factor to the wages paid by him to covered employees; the percentage factor varies from zero to four, depending upon the volume of claims paid out of the fund on account of unemployment in the employer's own business enterprise in past periods. In most states, all payments are made into a single pooled fund; in a few, a separate account is maintained for each covered employer, contributions being credited to that account, and benefit payments charged against it.

II. OBJECT AND PURPOSE OF UNEMPLOYMENT COMPENSATION LEGISLATION

A. FEDERAL LEGISLATION

As stated above,¹⁹ the Federal Unemployment Tax Act was enacted as a part of a comprehensive social insurance program. That such a program was necessary was suggested to Congress by President Franklin D. Roosevelt in his message of January 17, 1935.²⁰ With respect to the unemployment insurance aspect of the program, it had been pointed out that much of the economic dis-

¹⁷ Neb. Rev. Stat. § 48-648 (Reissue 1952).

¹⁸ States in which employee contributions are required for unemployment benefit purposes are Alabama and New Jersey. California, New York and Rhode Island require employee contributions only for disability benefit purposes.

¹⁹ *Supra*, p. 669.

²⁰ H.R. Doc. No. 81, 74th Cong., 1st Sess. v-vii (1935).

trous which befell wage earners during the depression of the 1930's could have been alleviated had an adequate unemployment compensation program been in operation during the 1920's.²¹ Needless to say, the unemployment compensation program proposed by the President in 1935 was intended by him to combat the consequences of widespread unemployment and hardship brought to the nation by the severe depression of the 1930's.²² He hoped and expected that enactment of federal unemployment compensation legislation containing the tax credit and administrative grant provisions already referred to²³ would induce the states to adopt suitable programs of their own.²⁴ He also professed that so long as state legislation conformed with the requirements established in the federal act, the administration of the unemployment insurance funds and the determination of eligibility of claimants should be left in the hands of state executive and judicial instrumentalities.²⁵

The President's recommendations concerning the social insurance program were supported by the report of the Committee on Economic Security;²⁶ the committees which reported the proposed legislation to the floor of the House and Senate likewise approved it.²⁷ The reports of all three committees contained the following findings and recommendations with respect to the Unemployment Tax Act:

That the cyclical characteristics of the economy required that unemployment insurance funds be accumulated during periods of prosperity, so that they would be readily available during periods of depression for relief of the consequences of unemployment;²⁸

That if unemployment insurance had been in operation during the 1920's, much of the economic hardship resulting from unem-

²¹ *Infra*, note 29.

²² H.R. Doc. No. 81, 74th Cong., 1st Sess. vii (1935).

²³ *Supra*, p. 669.

²⁴ H.R. Doc. No. 81, 74th Cong., 1st Sess. vi (1935).

²⁵ *Ibid.*

²⁶ This was a special committee appointed by the President in 1934 to analyze problems affecting federal social insurance legislation. For an account of the makeup and activities of this committee, see Douglas, *op. cit. supra*, note 5, at 26-83; H. R. Rep. No. 615, 74th Cong., 1st Sess. 2-3 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 2-3 (1935). The report and recommendations of the committee are found in H.R. Doc. No. 81, 74th Cong., 1st Sess. 8-19 (1935).

²⁷ H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935); S. Rep. No. 628, 74th Cong., 1st Sess. (1935).

²⁸ 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).

ployment during the depression of the 1930's could have been relieved;²⁹

That the tax credit and administrative grant provisions of the program were intended primarily to induce the states to adopt unemployment insurance programs of their own;³⁰

That administration of the program, insofar as possible, should be left to the states.³¹

The federal unemployment insurance legislation, together with the remainder of the proposed social insurance program, was speedily approved by both houses of Congress, and the measure became law on August 14, 1935.³²

It seems evident from the committee reports presented at the time the federal unemployment insurance legislation was enacted that the overriding purpose of Congress was to provide a means of combating the severe hardships and distress of unemployment resulting from cyclical depression.³³ The Courts have so interpreted the federal act.³⁴

To what extent were the framers of the federal unemployment insurance legislation concerned with the payment of benefits when unemployment was in some way related to a labor dispute or to the principles of trade unionism? Title IX³⁵ provided that the state acts could not be approved by the Secretary of Labor if compensation were to be denied to any otherwise eligible individual for refusing to accept new work, if the position offered was vacant due directly to a strike, lockout, or other labor dispute³⁶ or if, as

²⁹ H.R. Doc. No. 81, 74th Cong., 1st Sess. 10 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess. 8 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 10, 15 (1935).

³⁰ H.R. Doc. No. 81, 74th Cong., 1st Sess. 11, 19 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess. 8-9 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935).

³¹ 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).

³² Act of August 14, 1935, c. 531, 49 Stat. 620 (classified in scattered sections of 26, 42 U.S.C.).

³³ *Supra*, notes 22, 28 and 29.

³⁴ *Stows v. United States*, 55 F.Supp. 230 (E.D.Pa. 1943); *Fahs v. Tree-Gold Co-op Growers of Florida*, 166 F.2d 40 (5th Cir. 1948); *Schwing v. United States*, 165 F.2d 518 (3rd Cir. 1948); *Personal Finance Co. of Braddock v. United States*, 86 F.Supp. 779 (Del. 1949); *Hearst Publications v. United States*, 70 F.Supp. 666 (N.D. Cal. 1946), *aff'd* 168 F.2d 751 (9th Cir. 1948).

³⁵ 49 Stat. 640 (1935), 26 U.S.C. § 3304 (a) (5) (Supp. IV, 1957).

³⁶ *Ibid.*

a condition of being re-employed, the individual would be required to join a company union or resign from or refrain from joining any bona fide labor organization.³⁷ Thus Congress forbade the withholding of benefits as an economic sanction to force a worker to become a "scab" or "strike-breaker", or to force him to join or refrain from joining a labor union. Further than this the legislators did not go, and if the absence of legislation and the absence of any discussion in the committee reports relating to this legislation are indicative, Congress did not anticipate in detail the problems which would arise when workers claimed benefits when their own unemployment was related either directly or indirectly to a labor dispute.

B. STATE LEGISLATION

The paucity of written reports containing the history of enactment of state unemployment compensation legislation renders it difficult to ascertain the legislative intent surrounding the adoption of these acts. Little help is found in court decisions, beyond the observation that the state acts were adopted to combat the effects of unemployment due to depression.³⁸

Undoubtedly many of the same factors which induced the federal legislators to enact the Federal Unemployment Tax Act also influenced state lawmakers. As suggested above, some of these conditions were wide-spread unemployment during the 1930's; realization that some of the severe consequences of the depression of the 1920's could have been alleviated had an unemployment insurance program then been in effect; acceptance of a cyclical theory of employment and of the necessity of providing a fund to cushion the effects of future unemployment.³⁹

But it is probably erroneous to ascribe the adoption of the state acts entirely to concern of the lawmakers for the plight of the wage

³⁷ *Ibid.*

³⁸ *E.g.*, *Rivard v. Bijou Furniture Co.*, 61 R.I. 251, 21 A.2d 563 (1941), conformed to 68 R.I. 358, 27 A.2d 853 (1941); *Lion Oil Refining Co. v. McCain*, 204 Ark. 995, 166 S.W.2d 249 (1942); *Bogue Electric Co. v. Board of Review of Division of Employment Security*, 21 N.J. 431, 122 A.2d 615 (1956); *Beaman v. Safeway Stores*, 78 Ariz. 195, 277 P. 2d 1010 (1954); *T.R. Miller Mill Co. v. Johns*, 261 Ala. 615, 75 So.2d 675 (1955); *Duteau v. Salvucci*, 330 Mass. 531, 115 N.E.2d 726 (1953); *New Haven Market Exchange v. Administrator, Unemployment Compensation Act*, 139 Conn. 709, 97 A.2d 262 (1953); *Com. Life & Acc. Ins. Co. v. Board of Review*, 414 Ill. 475, 111 N.E.2d 345 (1953).

³⁹ *Supra*, p. 672.

earner in times of unemployment; on the contrary — adoption of the legislation was politically expedient. Valid federal legislation had been enacted which imposed a tax upon employers within a state, but allowed a credit equal to ninety per cent of that tax if payments were made into a state fund; and federal funds were available which would in large measure defray the costs of administration of the fund. Under these circumstances — when the tax could be so painlessly imposed; when the administration of the fund could so easily be kept in the hands of the state government at little, if any, additional expense to the electorate; when the desire to “keep the money at home” instead of “sending it to Washington” could be so effectively gratified — it is hardly surprising that the state legislatures fell into line with alacrity.

As in the case of the federal legislation, there is very little in the background surrounding enactment of the state unemployment compensation acts to indicate that their framers were possessed of any particular conviction as to whether a claimant should be paid benefits when his unemployment was in some way related to a labor dispute or to adherence to the principles of trade unionism. In contrast to the federal legislation, the state acts do contain provisions specifically relating to these problems. The courts have been obliged to construe these provisions notwithstanding the lack of meaningful indicia of legislative intent. The nature and scope of these provisions, and the judicial construction placed upon them, are discussed in the next section of this article.

III. LABOR DISPUTE DISQUALIFICATION PROVISIONS

As previously stated, the central problem to be treated in this article is: To what extent should unemployment compensation benefits be available to employees when their unemployment is due to a labor dispute; or, to state the problem somewhat differently, what degree of identification with the labor dispute should be permitted an employee before he is held to be ineligible for benefits?

It is appropriate first to survey the several types of statutory provisions for disqualification when unemployment is due to a labor dispute. Thereafter, because of the lack of judicial construction of legislative intent relating to this central problem, it will become necessary to examine some of the extraneous circumstances which existed at the time this legislation was enacted, and from such examination to attempt to ascertain whether any such intent properly may be imputed. Finally, we shall consider the applicability of this legislation to present-day collective bargaining and labor relations conditions.

A. SURVEY OF LABOR-DISPUTE DISQUALIFICATION PROVISIONS

It can be seen by reference to the table on the following pages,⁴⁰ that the labor-dispute disqualification provisions of the Nebraska Employment Security Law are substantially identical in all or most respects to those of about three-fourths of the other jurisdictions in the country.⁴¹ It is therefore appropriate to consider the Nebraska provisions as typical, and to refer to provisions of other states only when they are significantly different.

1. "Stoppage of Work"

The disqualification provisions stipulate that a claimant's unemployment must be the result of a "stoppage of work" at the place where he was last employed. It is obvious that where operations in an employer's plant or establishment are completely halted as a result of a labor dispute, there is a "stoppage of work" within the meaning of the statute.⁴² But some courts have construed the term to have a broader meaning. The Nebraska Supreme Court, for example, has held that a "substantial curtailment of work" is sufficient to satisfy the requirements of the statute,⁴³ and that such curtailment may occur in three ways: (1) by the cessation of work by all or a part of the employees; (2) by the cessation of work by a part of the employees which disables the employer from utilizing the services of other employees; (3) by a diminution

⁴⁰ *Infra*, pp. 696-702.

⁴¹ The labor-dispute disqualification provision of the Nebraska Employment Security Law (Sec. 48-628 [d]) provides that a claimant shall be ineligible for benefits:

For any week with respect to which the commissioner finds that his total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed; *Provided*, that this subsection shall not apply if it is shown to the satisfaction of the commissioner that (1) he is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work, and (2) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; *Provided*, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment or other premises.

⁴² Courts are seldom called upon to construe the term, because in most cases the stoppage of work is complete, at least within the claimant's particular plant or department.

⁴³ *Magner v. Kinney*, 141 Neb. 122, 2 N.W.2d 689 (1942).

of patronage by customers or the public of the employing establishment which produces a compensating unemployment of workers.⁴⁴ Moreover, it has been held that the term refers to a cessation or curtailment of work at the plant or establishment where the claimant is employed, and not to a cessation of work by the claimant himself.⁴⁵ Thus, even if the claimant himself is willing to continue work, but is unable to do so because of the action of others, he is not saved from disqualification by virtue of the "work stoppage" provision of the statute.

2. "Labor Dispute"

The stoppage of work which causes a claimant's unemployment must be due to a "labor dispute" if the claimant is to be held disqualified under the relevant provisions of the statute. Clearly a strike is a "labor dispute" within the meaning of the statute. Whether particular species of disagreements, such as jurisdictional disputes, organizational controversies between unions, representation disputes between unions, and controversies over hours and other conditions of work are "labor disputes" are questions which the courts are seldom called upon to decide; these disagreements usually culminate in a strike or a lockout, which is the immediate cause of the work stoppage.⁴⁶

When the work stoppage is due to a lockout,⁴⁷ there is considerable variance among the jurisdictions as to whether or not a claimant will be disqualified. In some states, lockouts are classi-

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* Cf. *Board of Review v. Mid-Continent Petroleum Corp.*, 193 Okla. 36, 141 P.2d 69 (1943).

⁴⁶ The term "labor dispute" has been defined as any controversy concerning wages, hours, working conditions or terms of employment. *Local Union No. 222 v. Gordon*, 406 Ill. 145, 92 N.E.2d 739 (1950); *Amory Worsted Mills v. Riley*, 96 N.H. 162, 71 A.2d 788 (1950); *Ablondi v. Board of Review*, 8 N.J. Super. 71, 73 A.2d 262 (1950). It has been held that jurisdictional disputes between unions are "labor disputes." *Westinghouse Electric Corp. v. Unemployment Comp. Board of Review*, 165 Pa. Super. 385, 68 A.2d 393 (1949); *In re Deep River Timber Co. Employees*, 8 Wash. 2d 179, 111 P.2d 575 (1941). Cf. *Board of Review v. Hix*, 126 W.Va. 538, 29 S.E. 2d 618 (1944). Likewise, a controversy between employees and their union or bargaining agency has been held a "labor dispute," if it affects terms or conditions of employment. *Duquesne Brewing Co. v. Unemployment Comp. Board of Review*, 359 Pa. 535, 59 A.2d 913 (1948).

⁴⁷ The term "lockout" is used herein in the limited sense of a temporary closing down of his plant by an employer during a dispute for the purpose of forestalling economic loss, or for the purpose of achieving an economic or other purpose not declared unlawful by federal or state labor relations laws.

fied as labor disputes by the express language of the statute.⁴⁸ In others, the statutes specifically state that a lockout shall not be deemed a labor dispute,⁴⁹ and it usually follows that the unemployed claimant is not disqualified. In still other states, the statutes simply state that a claimant shall not be disqualified from receiving benefits when his unemployment is due to a lockout,⁵⁰ thus reaching the same result by a more direct route. In jurisdictions where the question of lockouts is not specifically provided for in the statutes, the authorities are not in harmony.⁵¹

It is submitted that in these latter jurisdictions, the better considered decisions are those in which an employee is disqualified from receiving benefits when unemployed because of a lockout due to a dispute between an employer and his employees. In recent years there has been increasing judicial recognition that in some circumstances the lockout is an instrument of coercive economic power co-ordinate with the strike,⁵² and that the right of employers to use this weapon for the furtherance of their legitimate objectives in collective bargaining is co-ordinate with that of the union to utilize the strike for similar purposes.⁵³ This proposition has recently received limited approval by the United States Supreme Court.⁵⁴ Moreover, there is nothing in the language of the labor-dispute disqualification provisions of most statutes which justifies differentiation in eligibility for benefits on the basis of the cause of the work stoppage, *so long as the stoppage is due to a labor dis-*

⁴⁸ E.g., Neb. Rev. Stat., §48-628 (c) (2) (i) (Supp. 1955), refers to "a strike, lockout, or other labor dispute."

⁴⁹ See statutory provisions of Kentucky and Ohio cited in table, pp. 697, 700, *infra*.

⁵⁰ See statutory provisions of Arkansas, Connecticut, Minnesota, New Hampshire and West Virginia cited in table, pp. 696-702, *infra*.

⁵¹ Where there is no statutory provision to the contrary, a lockout is held to constitute a "labor dispute." *Adkins v. Indiana Employment Security Division*, 117 Ind.App. 132, 70 N.E.2d 31 (1946); *In Re North River Logging Co.*, 15 Wash.2d 204, 130 P.2d 64 (1942).

⁵² *Leonard v. N.L.R.B.*, 205 F.2d 355 (9th Cir. 1953); cf. *American Brake Shoe Co.*, 116 N.L.R.B. 820 (1956); enforcement denied *American Brake Shoe Co. v. N.L.R.B.*, 244 F.2d 489 (7th Cir. 1957). See also *Morand Bros. Beverages Co. v. N.L.R.B.*, 204 F.2d 529 (7th Cir. 1953).

⁵³ *Ibid.*

⁵⁴ *N.L.R.B. v. Teamsters Local 449*, 353 U.S. 87 (1957). But the Court stated: "We thus find it unnecessary to pass upon the question whether, as a general proposition, the employer lockout is the corollary of the employees' statutory right to strike." 353 U.S. 93, n. 19.

pute;⁵⁵ courts which hold claimants not disqualified in the event of lockouts, are therefore, reading into the statute a requirement that the act which proximately precipitates the work stoppage must be voluntary so far as the employees are concerned. This construction would seem to be contrary to the tradition of neutrality of the state in labor disputes which is implicit in most state unemployment compensation acts.⁵⁶

Most statutes do not require that the labor dispute be between the employer and the claimant himself. Indeed, in view of the typical statutory provisions for exception from disqualification, the only reasonable construction would seem to be that there is no such requirement.⁵⁷

3. *Removal of Disqualification*

If it is found that the work stoppage which caused the claimant's unemployment is due to a labor dispute at the premises where he was last employed, the claimant is disqualified from receiving benefits. Whether or not this disqualification can be removed depends upon the provisions of the applicable statute.

In several jurisdictions, disqualification is absolute so long as the unemployment remains due to a labor dispute in active progress.⁵⁸ In New York, disqualification appears to be absolute, but is removed if the claimant's unemployment lasts for a period of more than seven weeks.⁵⁹ In Rhode Island, the statute provides for the same exceptions from disqualification as appear in the Nebraska and similar statutes, but removes the disqualification if unemploy-

⁵⁵ Accord: *Fash v. Gordon*, 398 Ill. 210, 75 N.E.2d 294 (1947); *Local Union No. 222 v. Gordon*, 406 Ill. 145, 92 N.E.2d 739 (1950).

⁵⁶ *Infra*, pp. 685-689.

⁵⁷ If the construction were otherwise, provisions such as those found in Sec. 48-628 (d) (1), (2), note 41, *supra*, would be superfluous; if a claimant were personally engaged in a labor dispute with his employer, he would be unable to make a showing that he was not "participating" or "directly interested" in such dispute.

⁵⁸ This appears to be true in Alabama, California, Delaware, Kentucky, Minnesota, Ohio and Wisconsin. But in Kentucky and Minnesota the claimant is not disqualified if his unemployment is due to a lockout. See table, *infra*, pp. 696-702. In California, the courts have developed a "volitional" test, the effect of which is to remove disqualification when the claimant's unemployment is found to be "involuntary." *Bodinson Mfg. Co. v. California Employment Commission*, 17 Cal.2d 321, 109 P.2d 935 (1941); *Bunny's Waffle Shop v. California Employment Commission*, 24 Cal.2d 735, 151 P.2d 224 (1944); *McKinley v. California Employment Commission*, 34 Cal.2d 239, 209 P.2d 602 (1949).

⁵⁹ N.Y. Consol. Laws, Art. 18, Ch. 31, §592.

ment lasts more than six weeks beyond the claimant's statutory waiting period.⁶⁰

In Nebraska and most other jurisdictions, disqualification is not absolute, and can be removed upon a showing that the claimant was not "participating" in, "financing," or "directly interested" in the labor dispute which caused his unemployment, and that he did not belong to the same "grade or class" as workers who were so "participating," "financing," or "directly interested."⁶¹ These terms have been the subject of extensive judicial construction, which will be discussed in subsequent sections of this article.

It should be pointed out that the language of the statutes requires that a showing must be made that the claimant is within *all* of the exceptions before his disqualification is removed.

It is usually held that the burden is upon the claimant to prove that he satisfies all of the statutory requirements for exception from disqualification.⁶² To place the burden of making such a showing upon the claimant seems entirely proper, because the evidentiary facts relating to questions of participation, financing, and direct interest are usually exclusively within the knowledge of the claimant and his union representatives; to hold otherwise would impose upon the employer the difficult and sometimes impossible burden of extricating these facts from witnesses often hostile, uncooperative, or evasive. Moreover, once it has been established that the claimant's unemployment is due to a labor dispute, it would seem more in accord with the tradition of state neutrality implicit in

⁶⁰ R.I. Gen. Laws 1938, Ch. 284, §7.

⁶¹ Not all of the quoted terms are contained in every statute of the Nebraska type. See table, *infra*, pp. 696-702.

⁶² *A. Borchmann Sons v. Carpenter*, 166 Neb. 322, 35 S.C.J. 322, 89 N.W.2d 123 (1958); *Lanyon v. Administrator, Unemployment C. Act*, 139 Conn. 20, 89 A.2d 558 (1952); *Brown Shoe Co. v. Gordon*, 405 Ill. 384, 91 N.E.2d 381 (1950); *Auker v. Review Board*, 117 Ind.App. 486, 71 N.E.2d 629 (1947); *Lloyd E. Mitchell, Inc. v. Maryland Employment Sec. Bd.*, 209 Md. 237, 121 A.2d 198 (1956); *Martineau v. Director of Div. of Employment Sec.*, 329 Mass. 44, 106 N.E.2d 420 (1952); *Producers Produce Co. v. Industrial Commission*, 365 Mo. 996, 291 S.W.2d 166 (1956); *Schooley v. Bd. of Rev.*, 43 N.J. Super. 381, 128 A.2d 708 (1957); *State ex rel. Employment Security Commission v. Jarrell, et al.*, 231 N.C. 381, 57 S.E.2d 403 (1950); *Kontner v. Unemployment Comp. Bd. of Rev.*, 148 Ohio St. 614, 76 N.E.2d 611 (1947); *Westinghouse Electric Corp. v. Unemployment Compensation Board of Review*, 165 Pa.Super. 385, 68 A.2d 393 (1949); *Re Appeals of Employees of Polson Lumber and Shingle Mills*, 19 Wash.2d 467, 143 P.2d 316 (1943); *Copen, et al. v. Hix, et al.*, 130 W.Va. 343, 43 S.E.2d 382 (1947). In some states the burden of proof is placed upon the claimant by the express provisions of the statute. In Michigan, however, the statute places the burden upon the employer. *Mich. Comp. Laws 1948, §421.29.*

the statutes⁶³ to require the claimant to show that he was not identified with the dispute, rather than to require the employer to show that he was.

4. "Participating" in Labor Dispute

In order to escape disqualification under most statutes, the claimant must show that he was not "participating" in the labor dispute, within the meaning of the statute. If the labor dispute is accompanied by picketing of the employer's premises, and the claimant himself engages in the picketing, he is obviously "participating" in the dispute, and is disqualified from receiving benefits.

If a picket line is established at the premises where the claimant was employed, and the claimant refuses to cross the picket line, he is likewise held to be disqualified.⁶⁴ This is true even though the picket line has been established by some union other than the claimant's,⁶⁵ and even though the claimant personally has no dispute with his employer, and has no interest whatever in the outcome of the dispute.⁶⁶ It is not entirely clear from the cases whether there must be an overt refusal upon the part of the claimant to cross the picket line, in order that he be held disqualified. It is submitted that no overt act should be required for a finding of participation, and that a mere failure to cross the picket line is sufficient. That the members of one union shall honor the picket line of another established at their place of work is a principle of trade unionism so well known that it is a proper subject of judicial notice.⁶⁷ Likewise, it has been held that claimants who refuse to cross picket lines solely because of their belief in this principle or their adherence to it are disqualified from receiving benefits.⁶⁸

⁶³ *Infra*, pp. 685-689.

⁶⁴ *Baldassaris v. Egan*, 135 Conn. 695, 68 A.2d 120 (1949); *American Brake Shoe Co. v. Annunzio*, 405 Ill. 44, 90 N.E.2d 83 (1950); *Abshier v. Review Board*, 122 Ind. App. 425, 105 N.E.2d 902 (1952); *Andreas v. Bates*, 14 Wash.2d 322, 128 P.2d 300 (1942); *Brown v. Maryland Unemployment Compensation Board*, 189 Md. 233, 55 A.2d 696 (1947). Likewise, refusal to cross a picket line is held not to be "involuntary" unemployment under the California statute. *Bodinson Mfg. Co. v. California Employment Commission*, 17 Cal.2d 321, 109 P.2d 935 (1941).

⁶⁵ Each of the cases cited in note 64, *supra*, is authority for this statement.

⁶⁶ *Baldassaris v. Egan*, *supra*, note 64; *American Brake Shoe Co. v. Annunzio*, *supra*, note 64.

⁶⁷ See *Bodinson Mfg. Co. v. California Employment Commission*, *supra*, note 64; *Baldassaris v. Egan*, *supra*, note 64; *American Brake Shoe Co. v. Annunzio*, *supra*, note 64.

⁶⁸ *Ibid.*

In most instances, there is in fact no overt refusal upon the part of non-striking workers to cross the picket line—they simply do not appear at the premises until the pickets have been withdrawn. Moreover, to require proof of an overt refusal would be in effect to place the burden of proving disqualification upon the employer; it has already been seen that in most jurisdictions the burden is upon the claimant to except himself from disqualification,⁶⁹ and to shift the burden to the employer would be contrary to the tradition of neutrality of the state implicit in most statutes.⁷⁰

In situations where it has been shown that the claimant was ready and willing to cross the picket lines, but did not do so because of a fear of violence or bodily harm, it has been held that the refusal to do so did not constitute "participating" in the dispute.⁷¹

5. "Financing" the Labor Dispute

In order to escape disqualification, the claimant must also prove that he was not "financing" the labor dispute. Very little judicial construction of this term is to be found in the cases. Presumably the legislators had in mind at the time the legislation was enacted that one who contributed pecuniary support to the prosecution of a labor dispute in which his employer was involved should not be eligible for benefits in the event that the dispute resulted in his unemployment.

Undoubtedly one of the reasons why the term "financing" has not received much judicial consideration is that in most instances claimants who might be financing the dispute by virtue of their payments of union dues or of contributions to their union's strike fund are held to be disqualified on other grounds, usually on the ground that because of their membership in the bargaining unit involved in the dispute, they are "directly interested" therein.⁷²

It is to be noted that in several states specific statutory provisions have been adopted which provide that payment of regular dues to a union involved in a labor dispute shall not constitute "financing" the dispute.⁷³

⁶⁹ *Supra*, note 62.

⁷⁰ *Infra*, pp. 685-689.

⁷¹ *Lanyon v. Administrator, Unemployment Compensation Act*, 139 Conn. 20, 89 A.2d 558 (1952); *Meyer v. Industrial Commission of Missouri*, 240 Mo.App. 1022, 223 S.W.2d 835 (1949).

⁷² *Infra*, pp. 683, 684.

⁷³ Such provisions have been adopted in Florida, Massachusetts, and Michigan. For citations to statutes, see table, *infra*, pp. 696-702.

6. "Directly Interested" in the Labor Dispute

In order to relieve himself from disqualification, the claimant must also show that he was not "directly interested" in the labor dispute which caused his unemployment. Of all the exceptions to disqualification, this term has been the subject of the most extensive judicial interpretation; this is true probably because of its adaptability to so many different fact situations.

The definition usually given is that a claimant is "directly interested" in a labor dispute when his wages, hours, or conditions of work will be affected favorably or adversely by the outcome.⁷⁴ It has been held that he is nonetheless directly interested even though he does not know until after the settlement of the dispute whether his wages will be affected.⁷⁵ Moreover, it has been held that this interest is not of a remote, contingent, or speculative nature, but rather must be considered "direct" within the meaning of the statute.⁷⁶

It is therefore apparent that all members of a collective bargaining unit are directly interested in a dispute which develops between their employer and their bargaining representatives during negotiations which will affect their wages, hours, or conditions of work.⁷⁷ This is true even of individuals who are not members of the union acting as the collective bargaining agent;⁷⁸ even if they are not members of any union;⁷⁹ and even if they do not approve of the demands which their bargaining agent made, and which are the basis of the dispute.⁸⁰ Moreover, it is immaterial that the claimant may not approve of strike action taken by his bargaining agent,⁸¹

⁷⁴ *A. Borchman Sons v. Carpenter*, 35 S.C.J. 322, 166 Neb. 322, 89 N.W.2d 123 (1958); *Martineau v. Director of Division of Employment Security*, 329 Mass. 44, 106 N.E.2d 420 (1952); *Chrysler Corporation v. Smith*, 297 Mich. 438, 298 N.W. 87 (1941); *Auker v. Review Board*, 117 Ind.App. 486, 71 N.E.2d 629 (1947).

⁷⁵ *Chrysler Corporation v. Smith*, *supra*, note 74.

⁷⁶ *A. Borchman Sons v. Carpenter*, *supra*, note 74, *Chrysler Corporation v. Smith*, *supra*, note 74.

⁷⁷ *Huiet v. Boyd*, 64 Ga.App. 564, 13 S.E.2d 863 (1941); *Auker v. Review Board*, *supra*, note 74; *Local No. 658 v. Brown Shoe Co.*, 403 Ill. 484, 87 N.E.2d 625 (1949).

⁷⁸ *Auker v. Review Board*, *supra*, note 74.

⁷⁹ *Nobes v. Michigan Unemployment Compensation Commission*, 313 Mich. 472, 21 N.W.2d 820 (1946).

⁸⁰ *Huiet v. Boyd*, *supra*, note 77.

⁸¹ *Ibid.*

and may even have voted against the strike.⁸² Likewise, it has been held that an individual whose wages would be affected by the outcome of a strike conducted by a union of which he was not a member was disqualified because he was "directly interested."⁸³

In a few jurisdictions it has been held that an individual is not "directly interested" in a labor dispute unless he is actively financing or participating in it.⁸⁴ The effect of this interpretation is to render the "financing" and "participating" terms of the statute meaningless, and these minority decisions have been criticized for that reason.⁸⁵ In any event, the usual judicial approach is to give each of the three terms a separate and independent meaning, and this approach seems better calculated to effectuate the intention of the framers of the legislation.

7. *Same "Grade or Class"*

Having successfully hurdled the three foregoing barriers to eligibility for benefits, it remains for the claimant to show that he is not of the same "grade or class" as workers who are participating in, financing, or directly interested in the labor dispute which caused his unemployment.

The courts have evolved a number of interpretations of this term. Some look to the claimant's membership in the union or other cohesive group involved in the dispute. Under this interpretation, it has been held that a claimant is disqualified because of the same "grade or class" (1) when he is a member of the same international union, although not of the same local, as the one participating in the dispute;⁸⁶ (2) when he is a member of the same local union.⁸⁷

Other courts have concluded that the nature of the work performed or of the skill possessed is determinative of "grade or class,"

⁸² *Ibid.*

⁸³ *Auker v. Review Board*, *supra*, note 74; *Nobes v. Michigan Unemployment Compensation Commission*, *supra*, note 79.

⁸⁴ *Kieckhefer Container Co. v. Unemployment Compensation Commission*, 125 N.J.L. 52, 13 A.2d 646 (1940); *Wickland v. Commissioner of Unemployment Compensation and Placement*, 18 Wash.2d 206, 138 P.2d 876 (1943).

⁸⁵ *Huiet v. Boyd*, 64 Ga.App. 564, 13 S.E.2d 863 (1941).

⁸⁶ *Copen v. Hix*, 130 W.Va. 343, 43 S.E.2d 382 (1947). This case was one in which different units of the United Mine Workers Union were involved. Conceivably the rationale of this case could be used as justification for a finding that all members of the A.F.L.-C.I.O. are of the same grade or class. The language of the opinion indicates that no such sweeping application was anticipated by the West Virginia court; certainly such an application would be outlandish.

⁸⁷ *Queener v. Magnet Mills*, 179 Tenn. 416, 167 S.W.2d 1 (1942).

holding that workers performing similar tasks or possessing similar skills are of the same "grade or class."⁸⁸ In addition, it has been held that workers in different departments are not necessarily of different grades or classes,⁸⁹ and that all persons engaged in the same process of manufacture are of the same grade or class.⁹⁰ It has also been held that workers in a continuous, integrated production process, where the performance of one step in the process is dependent upon the completion of the preceding step, are of the same "grade or class,"⁹¹ regardless of the exact nature of the work performed by each, and regardless of differences in the degree of skill required.⁹²

Still other courts hold that all persons who are members of the collective bargaining unit participating in the dispute are of the same "grade or class."⁹³ It is suggested that this interpretation of the term, as well as the interpretation which holds that membership or non-membership in a union or other cohesive group is determinative, adds little to the meaning of the statute. The definition of "grade or class" adopted by these courts is difficult to distinguish from the definition of "directly interested" subscribed to in most jurisdictions.⁹⁴ The two terms were probably intended to have different meanings by the legislatures.

B. TRADITION OF NEUTRALITY OF THE STATE IN LABOR DISPUTES

1. *British Legislation and Experience*

Prior to the adoption of federal and state unemployment compensation legislation in this country, much had been written about the British experience with the unemployment insurance program which was first adopted in England in 1911.⁹⁵ Undoubtedly many

⁸⁸ *In re Deep River Timber Co's Employees*, 8 Wash.2d 179, 111 P.2d 575 (1941).

⁸⁹ *Queener v. Magnet Mills*, supra, note 87; *Local No. 658 v. Brown Shoe Co.*, 403 Ill. 484, 87 N.E.2d 625 (1949).

⁹⁰ *Brown Shoe Co. v. Gordon*, 405 Ill. 384, 91 N.E.2d 381 (1950).

⁹¹ *Adams v. Review Board*, 121 Ind.App. 273, 98 N.E.2d 681 (1951); *Unemployment Compensation Commission v. Lunceford*, 229 N.C. 570, 50 S.E.2d 497 (1948).

⁹² *Johnson v. Pratt*, 200 S.C. 315, 20 S.E.2d 865 (1942).

⁹³ *Brown Shoe Co. v. Gordon*, supra, note 90; *Local No. 658 v. Brown Shoe Co.*, 403 Ill. 484, 87 N.E.2d 625 (1949).

⁹⁴ *Supra*, p. 683.

⁹⁵ *National Insurance Act*, 1-2 Geo. V, Ch. 55 (1911). For treatises and articles on the British legislation, see Cohen, *Insurance Against Unemployment* (1921); Douglas and Director, *The Problem of Unemployment* (1931); Gilson, *Unemployment Insurance in Great Britain* (1931).

of the provisions found in American laws were patterned after their British counterparts, or were framed with a view to meeting problems which had arisen during more than two decades of administration of the British Act.⁹⁶

At the outset, the administrators of the British unemployment insurance laws maintained an official position of neutrality with respect to unemployment which occurred as a result of a labor dispute.⁹⁷ Under the English law, the cause of the dispute and the merits of the dispute were immaterial. If unemployment was the result of a labor dispute, it was not compensable.⁹⁸ At least two reasons have been suggested for this policy: (1) it was not considered wise to permit the fund to be used to finance or subsidize workers engaged in trade disputes, because it was feared that if benefits were available to all workers unemployed as a result of a trade dispute, they would be encouraged to suspend work in furtherance of their position in the dispute, thereby imposing an unfair burden upon the employer, and working injury upon the national economy and upon the public at large; (2) because there had been no previous experience, it was feared that payment of benefits when unemployment was due to a labor dispute might cause a severe drain upon the funds available, thereby defeating the primary purpose for which the fund was created—the payment of benefits when unemployment was due to “fluctuations in trade.”⁹⁹

Upon the accession of a Labor Ministry in 1924, the Act was amended to incorporate certain exceptions to the blanket disqualification when unemployment was due to a labor dispute. Legislative recognition was accorded to the fact that there are some circumstances in which a worker may be unemployed because of a labor dispute even though he has no identification whatever with the dispute. English lawmakers decided that when such circumstance existed, the claimant should receive benefits. If a showing could be made that the claimant was not “participating” or “directly interested” in the labor dispute, and was not of the “same grade or class” as workers who were directly participating or interested in the dispute, he was entitled to receive benefits.¹⁰⁰ These statutory ex-

⁹⁶ Hughes, *Principles Underlying Labor-Dispute Disqualification*, p. 2 (1946); Report of Committee on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. (1935).

⁹⁷ Hughes, *op. cit. supra*, note 96.

⁹⁸ National Insurance Act, 1-2 Geo. V, Ch. 55 (1911).

⁹⁹ Hughes, *op. cit. supra*, note 96.

¹⁰⁰ National Insurance Act, 14-15 Geo. V, Ch. 30 (1924).

ceptions to the general labor-dispute disqualification were so framed that it was still theoretically possible for the administrators of the fund not to consider the merits of the dispute, thereby preserving the state's traditional policy of neutrality.¹⁰¹

The 1924 amendment to the British act also provided that a worker was eligible for benefits if he was on strike because of his employer's violation of the trade agreement with his employees.¹⁰² But this change in the act was short-lived. In 1927, upon the recommendation of the Unemployment Insurance Committee, the provision was repealed.¹⁰³ The Committee, in support of its recommendation, stated that collective bargaining as well as the authority and usefulness of associations of employers and employees would be strengthened by repeal of the amendment. It has been suggested that the Committee thus subscribed to the belief that collective bargaining agreements should carry their own sanction instead of depending upon the government for enforcement through the payment of unemployment compensation benefits, and that this was a reiteration of the policy of state neutrality that the administrators should not be required to decide the issues nor determine the merits of a labor dispute in order to determine the right to benefits.¹⁰⁴

It was in this condition that American legislators found the British Unemployment Compensation Act when they looked to it for guidance in the middle 1930's. Assuming that the policy of the British legislation can properly be imputed to American legislation patterned upon it, what was that policy?

It has already been seen that the original British legislation made no provision whatever for the payment of benefits when unemployment was due to a labor dispute, and it is submitted that the omission of this provision was consistent with the overriding, and perhaps exclusive, purpose of the original legislation—that of protecting workers from the effects of fluctuations in trade caused by cyclical economic conditions entirely beyond the control of the individual.

It follows that the insertion in 1924 of a provision allowing benefits when unemployment was due to a labor dispute—restrictive as that provision was—was a departure from the original legislative policy. Unemployment due to a labor dispute has none of

¹⁰¹ Hughes, *op. cit. supra*, note 96.

¹⁰² National Insurance Act, 14-15 Geo. V, Ch. 30 (1924).

¹⁰³ Hughes, *op. cit. supra*, note 96.

¹⁰⁴ *Ibid.*

the cyclical characteristics of unemployment due to economic depression or recession. Neither does it have the same "impersonal" characteristic. The history of the labor movement is replete with the ideology of conflict and class strife, and much of that same ideology permeates collective bargaining negotiations between employers and employee representatives even today.¹⁰⁵ It is conceded that unemployment due to a labor dispute may seem "impersonal" to the individual worker when he has no selfish interest in the outcome of the dispute; but so long as he realizes economic benefits as a member of a militant labor movement whose leaders espouse the causes of economic strife and class conflict in their dealings with management, he must also accept the concomitant burdens inherent in the espousal of such causes. It is therefore suggested that the insertion of the labor-dispute provision, which occasioned the entry of the unemployment compensation program into an area foreign to that contemplated by the original legislative policy, was inappropriate, if not improvident.

It is not for the courts to question the propriety of legislative policy when clearly expressed, but it is not improper for them to consider extraneous circumstances such as those suggested in the preceding paragraph when they are called upon to apply that policy to situations not provided for in the statute and probably not envisioned by the legislators. It is suggested, therefore, that the exception to the general legislative policy of the unemployment compensation act—that of allowing benefits in certain circumstances when unemployment is due to a labor dispute—should be strictly construed.

2. *Doctrine of Neutrality of the State in the United States*

What has been said of the labor-dispute provisions of the British legislation in the preceding subsection of this article is relevant to legislation enacted in approximately three-fourths of the American states, which have patterned their labor-dispute provisions upon the British act.¹⁰⁶ The derivation of American legislation from the British act has been acknowledged by the courts in several of these jurisdictions.¹⁰⁷ Likewise, the doctrine of neutrality of the state has

¹⁰⁵ See Millis and Montgomery, *Organized Labor* (1945), pp. 354-360.

¹⁰⁶ The "participating," "financing," and "directly interested" exceptions to disqualification are derived from the British act. Hughes, *op. cit. supra*, note 96. See table, *infra*, pp. 696-702.

¹⁰⁷ *Chrysler Corporation v. Smith*, 297 Mich. 438, 298 N.W. 87 (1941); *Saunders v. Maryland Unemployment Compensation Bd.*, 188 Md. 677, 53 A.2d 579 (1948).

been approved by American courts,¹⁰⁸ which have held that the legislative purpose underlying state unemployment compensation acts was not to provide benefits when the worker was without employment because of his own fault or by his own consent;¹⁰⁹ that the legislation was not intended to compel employers to finance their employees when they are engaged in coercive action against them;¹¹⁰ and that it was not intended to coerce employers to submit to the demands of their striking employees.¹¹¹

It is erroneous to assume that conduct and tactics of both employers and employee representatives in collective bargaining negotiations are not influenced by the labor-dispute provisions of applicable unemployment compensation legislation and the judicial construction thereof. It must be remembered that in almost all states,¹¹² unemployment compensation funds are supported solely by employer contributions and every dollar paid out to claimants during unemployment due to a labor dispute must be replaced by a dollar from an employer's pocket. Therefore, it is clearly in the employer's pecuniary interest to avoid a work stoppage due to a labor dispute when there is any possibility that some of his employees will be found eligible for benefits. To avoid the stoppage, the employer may be inclined to make concessions which he would otherwise refuse to make. On the other hand, the willingness of employee collective bargaining representatives to undertake strike action or other action precipitating a work stoppage is undoubtedly influenced by whether or not at least some of the employees will be eligible for benefits. In the absence of legislation or judicial authority to prevent its use as such, the value of an employer-supported unemployment compensation fund as a "strike fund" is immense. Thus it is apparent that the labor-dispute provisions of state unemployment compensation legislation are of very real importance to both labor and management as they plan and carry out their collective bargaining strategy.

¹⁰⁸ *Unemployment Compensation Commission v. Lunceford*, 229 N.C. 570, 50 S.E.2d 497 (1948).

¹⁰⁹ *Jones v. California Employment Security Comm.*, 120 Cal.App.2d 770, 262 P.2d 91 (1953); *Baker v. Powhatan Mining Co.*, 146 Ohio St. 600, 67 N.E.2d 714 (1946); *Local Union No. 11 v. Gordon*, 396 Ill. 293, 71 N.E.2d 637 (1947).

¹¹⁰ *Deshler Broom Factory v. Kinney*, 140 Neb. 889, 2 N.W.2d 332 (1942); *Bodinson Mfg. Co. v. California Employment Commission*, 17 Cal.2d 321, 109 P.2d 935 (1941); *Saunders v. Maryland Unemployment Compensation Bd.*, 188 Md. 677, 53 A.2d 579 (1948).

¹¹¹ *Deshler Broom Factory v. Kinney*, 140 Neb. 889, 2 N.W.2d 332 (1942).

¹¹² The exceptions are Alabama and New Jersey. See note 18, *supra*.

C. APPLICATION OF LABOR-DISPUTE DISQUALIFICATION PROVISIONS TO MODERN COLLECTIVE BARGAINING CONDITIONS

During the two decades that unemployment compensation legislation has been in force, collective bargaining techniques utilized by both employers and employee bargaining agents have undergone considerable evolution. Whether the framers of the original legislation could have foreseen this evolution is improbable. Even if they did envision it, it is doubtful that they hesitated long, in their haste¹¹³ to enact legislation acceptable to federal authorities, to contemplate its implications. Generally speaking, the labor-dispute provisions of the state acts have undergone very little significant legislative revision since they were originally adopted.¹¹⁴

It has therefore remained largely for the courts, working without the benefit of much meaningful legislative history, to construe and interpret the provisions so that they would have some rational application to ever-changing collective bargaining conditions. In discharging this responsibility, they have developed a substantial body of precedent. In concluding this article, it is appropriate to summarize the application of this precedent to some of the common collective bargaining situations, and to note the manner in which the courts have disposed of a few of the more complex problems which have arisen in connection with multi-employer and multi-union bargaining arrangements.

1. *Summary of Application of Labor-Dispute Provisions*

Assuming that there is a stoppage of work due to a labor dispute at the premises where he was last employed, there is authority for holding a claimant disqualified from receiving benefits under the following circumstances:

(1) If he is a member of the bargaining unit, and the outcome of the dispute will affect his wages, hours or conditions of work, on the ground that he is "directly interested";

(2) If he is not a member of the bargaining unit, but the outcome of the dispute will nevertheless affect his wages, hours, or conditions of work, on the same ground;

(3) If he is not a member of the bargaining unit, and even if his wages, hours, or conditions of work will not be affected, if he engages in a strike, slow-down or other action evidencing sym-

¹¹³The reader will recall that unemployment compensation acts were adopted in 47 states within a period of about 2 years. *Supra*, note 12.

¹¹⁴The Nebraska labor-dispute disqualification provisions have undergone only technical amendments since their original adoption.

pathy with those engaged in the dispute, on the ground that he is "participating" in the dispute;

(4) If he fails or refuses to cross a picket line established by those engaged in the dispute, on the ground that he is "participating" in the dispute, unless such failure or refusal is due to a reasonable apprehension of violence or physical injury;

(5) If he leaves his work after a picket line has been established by those engaged in the dispute, on the ground that he is "participating" in the dispute;

(6) If the nature of his work is the same as those actively engaged in the dispute, on the ground that he is of the same "grade or class";

(7) If he is working in the same process of manufacture as those actively engaged in the dispute, on the same ground;

(8) If he works in a continuous, integrated production process, in which his work is dependent upon that of persons actively engaged in the dispute, on the same ground.

2. *Special Problems*

It is to be noted that most of the decisions involve circumstances in which the employees are organized into "industrial" unions. The typical industrial union includes as members all workers (sometimes with the exception of foremen, watchmen, supervisory personnel or office employees) employed within the employer's plant or a department thereof. Thus the collective bargaining authority of an industrial union usually extends to all of the workers within the plant or department, and the bargaining unit typically is more or less coextensive with membership in the union. When a labor dispute develops, it involves all or most of the workers at the plant. Evidence of participation or direct interest is clear under these circumstances, and the application of the labor-dispute provision is relatively uncomplicated.

A considerably more complex situation exists, however, when employees are organized on a "craft" basis, i.e., on the basis of the skills they possess and the mechanical nature of the work they perform. In most cases members of a single union are employed by several different employers at different plants or establishments. Thus the union is obliged to deal with several different employers when it negotiates collective bargaining contracts for its members. On the other hand, it is likely that an employer in an industry which is organized on a craft basis will have members of several different craft unions working for him in a single plant. It is readily apparent that this difference in form of union organization may

call for a different result when the labor-dispute provisions of state unemployment compensation acts are applied. This is especially true in the case of the typical "directly interested" provision, as can be seen by this example: Employer R has working for him at a single establishment members of craft unions A, B, and C. A labor dispute develops between R and union A concerning wages, and the members of union A go on strike against R to enforce their collective bargaining demands. The members of union A are clearly "directly interested" in the dispute, and are therefore disqualified from receiving benefits. But what of the members of unions B and C? Their wages, hours, and working conditions are not affected by the dispute between R and A, and consequently they are probably not "directly interested."

If union A places pickets on the job, and the members of unions B and C refuse to cross the picket line, they will be disqualified from receiving benefits because they are "participating" in the dispute. But in many instances R will be forced to close down his establishment even though union A is not picketing, because he cannot continue to operate it in an efficient manner without the services of the members of union A. In this latter case, members of union B and C will probably be eligible for benefits, to the economic detriment of R.

One industry in which situations similar to those outlined in the foregoing example frequently arise is the building construction industry. Building construction workers are organized almost exclusively on a craft basis; members of a single union work for many different contractors, and each contractor employs members of several different unions on a single project. In order to facilitate collective bargaining under these circumstances, and for other reasons, the contractors frequently organize themselves into employers associations which are designated as collective bargaining agents for all members. Likewise, the several craft unions frequently associate themselves together into building trades councils,¹¹⁵ which may act as collective bargaining agent for its members, and which in any event often serve as the central clearing house for strategy

¹¹⁵ At the national level, the Building and Construction Trades Department is a duly constituted branch of the A.F.L.-C.I.O. Its membership consists of 19 international unions whose members are employed in the construction industry. U.S. Department of Labor, Bureau of Labor Statistics, Directory of National and International Labor Unions in the United States (1957), p. 21. The existence of local councils is provided for in the A.F.L.-C.I.O. Constitution, and membership at the local level usually consists of all unions active in the construction industry in the trade area.

and tactics, thus providing the central vehicle through which the unions maintain their cohesiveness and solidarity in collective bargaining.¹¹⁶

It was against this background of collective bargaining conditions that the Supreme Court of Nebraska interpreted the labor-dispute provisions of the state unemployment compensation act. Collective bargaining negotiations were undertaken between the contractors' employers association and several craft unions, all of which were members of the local building trades council. Each union, however, acted as collective bargaining agent for its own members, and customarily executed separate agreements with the employers association. The contracts between the several unions and the employers association had expired when union A went on strike against members of the employers association, placing pickets on some projects being operated by its members. Thereupon all of the members of the employers association closed down all of their projects. Members of union B and C claimed unemployment compensation benefits. It was shown that no pickets had been placed on the jobs on which the claimants were employed, but that it was impossible for the contractors to continue work in an efficient manner without the services of the members of union A. It was further shown that membership in the local building trades council united unions A, B, and C in a compact body, with a common interest, to promote that which was advantageous for the common good of all. The court found that by virtue of their membership in their respective central organizations, both employers and unions were in a position to use their combined strength to enforce economic sanctions against the other. The court held that claimants, members of unions B and C, were disqualified from receiving benefits because they had failed to sustain the burden of proving that they were not "directly interested" in the labor dispute between the employers association and union A.¹¹⁷

A third claimant in the same case was a member of union D. Union A had placed pickets on the project upon which he was employed, and the claimant left the job. Without deciding whether the claimant was "participating" in the dispute by refusing to work behind a picket line, the court held that this claimant was also

¹¹⁶ In addition to assisting their members in collective bargaining, the local building trades councils attempt to mediate jurisdictional disputes among members, secure the payment of union-scale wages on all work, etc.

¹¹⁷ *A. Borchman Sons v. Carpenter*, 35 S.C.J. 322, 166 Neb. 322, 89 N.W.2d 123 (1958).

disqualified because he had not shown that he was not "directly interested" in the dispute between the employers association and Union A.¹¹⁸

The court does not elaborate upon the rationale of its decision, but it seems reasonable to infer that because of their common membership in the local building trades council, through which they were able to exert vast coercive economic pressure upon the employers association, the claimants were found to have something more than a remote or speculative interest in the dispute. Moreover, in view of the fact that collective bargaining contracts between the employers association and unions B and C were in the process of negotiation at the time the work stoppage occurred, the court must have concluded that the wages, hours and conditions of work of members of these unions would be affected by the outcome of the dispute.

This decision is of considerable significance, not only in the building construction industry, but in all other industries where collective bargaining negotiations are carried on through employer associations and central union organizations. In these circumstances the interest of the union members in a labor dispute may be more circuitous and more difficult of recognition, but it is probably no more speculative nor remote. The existence of a complex structure of union organizations, affiliations, and associations, by virtue of which workers realize many advantages in collective bargaining, should not be permitted to conceal their identification with the labor dispute. The recent decision of the Supreme Court of Nebraska is one of the first in which this proposition has received judicial approval.¹¹⁹

IV. CONCLUSION

Available indicia of legislative purpose and intent surrounding the adoption of state unemployment compensation legislation plainly show that the primary purpose of such legislation was to

¹¹⁸ *Ibid.*

¹¹⁹ See also *Olaf Nelson Construction Co. v. Division of Employment Security*, 121 Utah 525, 243 P.2d 951 (1953), in which the court, interpreting disqualification provisions somewhat different from the Nebraska-type provisions, reached a similar conclusion on similar facts. Another case involving a multi-employer bargaining unit, and presenting an interesting study in collective bargaining tactics, is *McKinley v. California Employment Stabilization Commission*, 34 Cal.2d 239, 209 P.2d 602 (1949).

relieve workers and their families from some of the consequences of unemployment due to cyclical economic depression. The causes of such unemployment are entirely beyond the control of the individual worker and are therefore entirely "impersonal" to him. Moreover, a worker's unemployment, when due to these causes, is devoid of any volitional element, and is therefore entirely "involuntary" as far as he is concerned.

Provisions for the payment of benefits when unemployment is due to a labor dispute, even under strictly limited conditions, are somewhat anomalous when the primary object and purpose of unemployment compensation programs are considered, because such unemployment is neither "involuntary" nor "impersonal" in the same sense as when due to economic depression. There has therefore developed in the American judiciary, partly as a result of British experience and partly because of independent recognition of the anomaly of the labor-dispute provisions, a reluctance to allow benefits to a worker whose interests can in any way be identified with the labor dispute which caused his unemployment. This conservatism, arrived at through a process of legitimate judicial construction and interpretation, is in accord with the fundamental purpose of unemployment compensation programs.

The unemployment compensation acts were adopted as an integral part of a comprehensive federal-state social insurance program. In addition to its unemployment compensation features, this program was designed to relieve the social evils attendant upon old age, disability, and dependency among children, which are now generally conceded to be proper subjects for remedial governmental action; likewise many would concede that the relief of widespread unemployment when due to a depression such as the one which the nation endured in the 1930's is a proper governmental function. But it is not yet agreed that the payment of benefits to workers whose unemployment is attributable to disputes between labor and management, as they vie with one another in the continuing contest for relative economic advantage, is a proper function of the state. The doctrine of neutrality of the state is therefore valid and timely. It is well that the courts of the nation have been astute in the recognition and application of that doctrine.

**LABOR-DISPUTE DISQUALIFICATION PROVISIONS
OF STATE UNEMPLOYMENT COMPENSATION LAWS**

State	"Participating"	"Financing"	"Directly Interested"	"Same Grade or Class"	Other Provisions
Alabama Ala. Code 1940, Tit. 26, Art. 4, Sec. 214					When stoppage "directly due to labor dispute still in active progress."
Arizona Ariz. R.S. 1955, Sec. 23-777	X	X	X	X	
Arkansas Ark. Stat. 1947, Sec. 81-1106 (d)	X	X	X	X	No disqualification when stoppage is due to a lockout.
California Cal. Unemployment Insurance Code, Sec. 1262					Employee ineligible if he left work because of a trade dispute; remains ineligible for period during which he continues out of work by reason of the fact that trade dispute is still in active progress.
Colorado Col. R.S. 1953, Sec. 82-4-11	X	X	X	X	Disqualification only in event work stoppage is due to a "strike."
Connecticut Conn Gen. Stat. 1949, Ch. 374, Sec. 7508	X	X	X	X	No disqualification when stoppage due to lockout by employer intended to deprive employees of "advantages they already possess."
Delaware Del. Code 1953, Title 19, Ch. 33, Sec. 3315					Disqualification whenever stoppage results from labor dispute; no exceptions.

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District of Columbia Dist. of Columbia Code, Title 46, Sec. 310	X	X	X	X	
Florida Fla. Stat. 1957, Sec. 443.06	X	X	X	X	Payment of regular union dues not "financing,"
Georgia Ga. Employment Security Law, Title 54, Sec. 610	X	X	X	X	
Idaho Idaho Code, Tit. 72, Sec. 1366	X	X	X	X	
Illinois Ill. Unemployment Comp. Act, Ch. 48, Sec. 434	X	X	X	X	
Indiana Ind. Employment Security Act, Title 52, Sec. 1539c, Burn's Indiana Statutes	X	X	X	X	
Iowa Iowa Code 1954, Sec. 96.5	X	X	X	X	
Kansas Kan. Gen. Stat. 1949, Sec. 44-706	X	X	X	X	
Kentucky Ky. R.S. 1956, Sec. 341.360					Disqualification when stoppage due to "strike or other bona fide labor dis- pute" which caused claimant to leave or lose his employment. Lockout not a "strike or other bona fide labor dis- pute."

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**LABOR-DISPUTE DISQUALIFICATION PROVISIONS
OF STATE UNEMPLOYMENT COMPENSATION LAWS**

State	"Participating"	"Financing"	"Directly Interested"	"Same Grade or Class"	Other Provisions
Louisiana La. R.S. 1950, Tit. 23, Ch. 11, Sec. 1600					Disqualification when work stoppage due to labor dispute in which claimant "interested."
Maine Me. R.S. 1954, Ch. 29, Sec. 15, IV	X	X	X	X	
Maryland Md. Code Anno., 1957 ed, Art 95A, Sec. 6(e)	X	X	X	X	
Massachusetts Mass. Employment Sec. Law; Gen. Laws, Ch. 151A, Sec. 25	X	X	X	X	Payment of regular union dues not "financing."
Michigan Comp. Laws Mich. 1948, Title 17, Sec. 531	X	X	X		No disqualification if claimant not "directly involved." Must be shown affirmatively that claimant is "participating," "financing," or "directly interested" in the labor dispute or that he has voluntarily stopped work in concert with one or more other workers, or that he voluntarily stopped working in sympathy with employees in other establishments or departments, there being no labor dispute in his own department or establishment. Payment of regular union dues not "financing."

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Minnesota Minn. Stat. 1950, Sec. 268.09					Disqualification if work stoppage due to "strike or other labor dispute." Lockout or dismissal by employer during bargaining negotiations does not disqualify.
Mississippi Miss. Code 1942, Vol. 5A, Récomp. 1952, Tit. 26, Ch. 5, Sec. 7379	X	X	X	X	No disqualification if stoppage due to "unjustified lockout"; i.e., one not occasioned by claimant acting alone or in concert with others.
Missouri Mo. R.S. 1949, Sec. 288.040	X	X	X	X	
Montana Rev. Code Mont. 1947, Sec. 87-106	X	X	X	X	No disqualification if stoppage results from employer's violation of any state law or of federal labor relations or wage-hour laws.
Nebraska Neb. Rev. Stat., Sec. 48-628 (1943)	X	X	X	X	
Nevada Nev. R.S., Sec. 612.395	X	X	X	X	
New Hampshire N.H.R.S. 1955, Sec. 282.4 (D)	X	X	X	X	No disqualification if stoppage "due solely to a lock-out" or the failure of an employer "to live up to the provisions of any agreement or contract of employment."

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**LABOR-DISPUTE DISQUALIFICATION PROVISIONS
OF STATE UNEMPLOYMENT COMPENSATION LAWS**

State	"Participating"	"Financing"	"Directly Interested"	"Same Grade or Class"	Other Provisions
New Jersey N.J.R.S. 1937, Sec. 43:21-5	X	X	X	X	
New Mexico N.M. Stat. 1953, Sec. 59-9-5	X		X	X	
New York N.C. Gen. Stat. 1943, N.Y. Consol. Laws, Art. 18, Sec. 592	X	X	X	X	Benefits suspended for seven weeks or for term of unemployment, whichever period is shorter, when unemployment is due to "strike, lockout, or other industrial controversy." No exceptions.
North Carolina Sec. 96-14					
North Dakota N.D. Rev. Code 1943, Sec. 52-0602	X		X	X	
Ohio Ohio Rev. Code, Sec. 4141.29					Disqualification when unemployment due to "labor dispute other than a lockout."
Oklahoma Okla. Stat. 1951, Tit. 40, Ch. 6, Sec. 215	X		X	X	
Oregon Ore. R.S. 1953, Tit. 51, Ch. 657, Sec. 200	X	X	X	X	

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<p>Pennsylvania Title 43, Sec. 802 Purdon's Penna. Statutes Annotated</p>	<p>X</p>	<p>X</p>	<p>X</p>	<p>Disqualification if claimant a member of "organization," "participating" or "directly interested" in labor dispute.</p>
<p>Rhode Island R.I. Gen. Laws 1956 Title 28, Chap. 44, Sec. 16</p>	<p>X</p>	<p>X</p>	<p>X</p>	<p>Disqualification if stoppage due to "strike or other industrial controversy." Must be shown that claimant is "not a member of group or organization responsible for the stoppage of work." Disqualification removed if unemployment lasts more than 6 weeks beyond waiting period.</p>
<p>South Carolina S.C. Code 1952, Sec. 68-114</p>	<p>X</p>	<p>X</p>	<p>X</p>	
<p>South Dakota S.D. Code 1939, Sec. 17.0830</p>	<p>X</p>	<p>X</p>	<p>X</p>	
<p>Tennessee Tenn. Code Anno., Sec. 50-1324</p>	<p>X</p>		<p>X</p>	
<p>Texas Texas Unemployment Comp. Act, Art. 5221 b-3 Vernon's Civil Statutes of Texas</p>	<p>X</p>	<p>X</p>	<p>X</p>	<p>Failure or refusal to cross picket line constitutes "participation" and "interest." Claimant shall not be held to be in "grade or class" if he is not a member of any labor organization involved in the dispute, and has made an unconditional offer to return to work.</p>

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**LABOR-DISPUTE DISQUALIFICATION PROVISIONS
OF STATE UNEMPLOYMENT COMPENSATION LAWS**

State	"Partici- pating"	"Financ- ing"	"Directly Interested"	"Same Grade or Class"	Other Provisions
Utah Utah Code Anno. 1953, Sec. 35-4-5					Claimant disqualified if unemploy- ment is due to a strike "involving his grade, class or group of workers," and if strike "fomented" by worker of his "grade, class or group." No disquali- fication if strike due to employer's failure or refusal to comply with any state law or with federal wage-hour law.
Vermont Vt. R.S. 1947, Tit. 23, Ch. 250, Sec. 5379.	X	X	X		
Virginia Va. Code 1950, Sec. 60-47	X	X	X	X	
Washington Wash. Rev. Code, Sec. 50-20-090	X	X	X	X	
West Virginia W. Va. Code 1955, Sec. 2366 (78)	X	X	X	X	Disqualification removed if unemploy- ment due to lockouts carried out for certain purposes.
Wisconsin Wis. Stat. 1953, Sec. 108.04 (10)					Disqualification when unemployment due to "strike or other bona fide labor dispute." No exceptions.
Wyoming Wyo. Comp. Stat. 1945, Sec. 54-105	X	X	X	X	