

UNEMPLOYMENT COMPENSATION IN LABOR DISPUTES

By HERBERT A. FIERST† and MARJORIE SPECTOR‡

OPPOSITION to the principles of unemployment insurance on constitutional and philosophical grounds seems to have subsided to wistful reminiscing.¹ Now that the various state systems have been paying benefits, many of them for two years,² the most important problem remaining is that of studying the operation of these systems with the purpose of correcting deficiencies which have lately become manifest. This Article will examine the administrative adjudication of contested claims for benefits where loss of employment was due to a labor dispute. Though denial of benefits for connection with a labor dispute is only one of several grounds for disqualifying claimants who have worked in covered employment,³ it is the most significant from the point of view of an immediate and direct effect upon the interests of organized labor.

Of the fifty-one states and territories with unemployment insurance laws, forty-one copied in most respects the labor dispute disqualification clause of the Social Security Board Draft Bill,⁴ while the others devised

† Member of New York Bar.

‡ Economist, Bureau of Research and Statistics, New York Division of Placement and Unemployment Insurance.

1. The decisive blows were dealt by the Supreme Court in *Carmichael v. Southern Coal Co.*, 301 U. S. 495 (1937) and *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937). The case for the opposition is summarized by the dissents of Sutherland, J., in the *Carmichael* case, and of McReynolds, Sutherland and Butler, JJ., in the *Davis* case.

2. Benefits first became payable in one state (Wisconsin) in July, 1936; in 22 states, in January, 1938; in 2 states, in April, 1938; in 3 states, in July, 1938; in one state, in September, 1938; in 2 states, in December, 1938; in 18 states, in January, 1939; and in the last 2 states, in July, 1939.

3. See note 11 *infra*.

4. "Sec. 5. An individual shall be disqualified for benefits—(d) For any week with respect to which the commissioner finds that his total or partial 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 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 purpose of this subsection, be deemed to be a separate factory, establishment, or other premises." / SOCIAL SECURITY BOARD, DRAFT BILLS FOR STATE UNEMPLOYMENT COMPENSATION OF POOLED FUND AND

their own formulae, either wholly or in part.⁵ The lack of uniformity in detail should not obscure the principle common to each of the systems: disqualification of otherwise eligible claimants whose loss of employment is due to a labor dispute. In elaborating and implementing this principle, the state laws embody three significant and overlapping variables: the duration of the disqualification, the character of the labor dispute, and the demarcation of the claimants involved in the dispute.

The disqualification period is generally for the entire duration of the stoppage of work; only six acts establish a maximum disqualification period, and the shortest is three weeks in addition to the normal waiting period.⁶ With regard to the character of the labor dispute, the great majority of states recognize no distinction between strikes and lockouts and make no provision for investigating the merits of the controversy. Reference is usually made, as in the Draft Bill, to "stoppage of work which exists because of a labor dispute." Yet, seven statutes seem to disqualify only for stoppage due to strikes;⁷ and one of these, along with two other states, allows compensation if the commission, upon investigation, finds that the labor dispute was the fault of the employer, either because he violated a collective agreement or a relevant state or federal law, or because he provoked the strike.⁸

EMPLOYER RESERVE ACCOUNT TYPES (Rev. ed. Jan. 1937). This provision was borrowed, with only slight alterations, from the one in the British Unemployment Insurance Act, 1935, 25 GEO. V, c. 8, § 26-(1). For a list of states following this bill, see APPENDIX, *infra* p. 491.

5. Alabama [§ 6B(a)], California [§ 56(a)], Delaware [§ 5(d)], District of Columbia [§ 10(a)(6)], Kentucky [§ 9(b)(4)], New York [§ 504.2(b)], Ohio [§ 6c], Pennsylvania [§ 401(e)], Utah [§ 5d], Wisconsin [§ 108.04(5)(a)].

6. Alaska [§ 5(d)] (8 weeks); Louisiana [§ 4(d)] (10 weeks); New York [§ 504.2(b)] (10 weeks); Pennsylvania [§ 401(e)] (3 weeks in addition to normal waiting period); Rhode Island [§ 7(4)] (8 weeks in addition to normal waiting period); Tennessee [§ 5(d)] (four weeks).

7. California [§ 56(a)] ("if he left his work because of a trade dispute"); Colorado [§ 5(d)] ("strike"); Kentucky [§ 9(b)(4)] ("strike or other bona fide labor dispute" . . . "provided that for the purposes of this subsection a lock-out shall not be deemed a strike or a bona fide labor dispute and no worker shall be denied benefits by reason of a lock-out"); Ohio [§ 6c] ("strike"); Pennsylvania [§ 401(e)] ("voluntary suspension of work resulting from an industrial dispute"); Utah [§ 5d] ("strike"); District of Columbia [§ 10(6)] ("strike or jurisdictional labor dispute"). However, California interprets its provision to include lock-out ("left his work" means "unemployed due to"; Unemployment Reserves Comm., May 3, 1938). And both Colorado and Pennsylvania intend to handle lockouts on the same basis as strikes. Communications from L. A. West, Chief of Benefit and Claims Section, Colorado Dep't Unempl. Comp. and Empl. Serv. (Dec. 5, 1939); and C. R. Davis, Special Deputy Att'y-Gen'l, Pa. Unempl. Comp. Bd. Rev. (Dec. 4, 1939).

8. Arizona [§ 5(4)] (failure or refusal of employer to conform "to the provisions of any agreement or contract between employer and employee and any law of the State of Arizona or of the United States pertaining to hours, wages, or other conditions of work"); Montana [§ 5(d)] (failure or refusal of employer to conform "to the provi-

Most important of these variables, in terms of numbers affected, is the delineation of those engaged in the proscribed activity. The forty-one statutes following the Draft Bill relieve a claimant from disqualification if neither he, nor any member of his grade or class of workers in the establishment, is participating in, financing or directly interested in the dispute.⁹ However, the remaining ten states disqualify *all* claimants who have lost their employment by reason of a labor dispute.¹⁰

Several reasons have recurrently been offered to justify disqualification for loss of employment due to a labor dispute. Most popular traditionally has been the argument that unemployment insurance schemes are intended to insure only against involuntary unemployment.¹¹ Loss of employment due to a labor dispute is "voluntary" and therefore beyond the pale. A second argument balks at the thought of permitting the state to take an "unneutral" position in industrial relations by "financing" a labor dispute through unemployment insurance benefits.¹² Coupled with this idea is a reluctance to lend any encouragement to strikes.¹³ And finally, some feel that it would be an ethical impropriety

sions of any law of the State of Montana [which has no labor relations act] or of the United States pertaining to collective bargaining, hours, wages or other conditions of work"); Utah [§ 5d] (failure or refusal of employer to conform "to the provisions of any law of the state of Utah or of the United States pertaining to hours, wages, or other conditions of work;" finding "that the employer, his agent, or representative, has conspired, planned, or agreed with any of his workers, their agents, or representatives to foment a strike").

9. See note 4 *supra*.

10. See note 5 *supra*. In these states, disqualification ensues even if the claimant, or any member of his grade or class, is not participating in, financing, or directly interested in the labor dispute.

11. See, for example, Declaration of State Public Policy in the Social Security Board Draft Bills (*supra* note 4), which has been followed by most of the states: ". . . the public good, and the general welfare of the citizens of this state require the enactment of this measure . . . for the compulsory setting aside of unemployment reserves to be used for the benefit of persons *unemployed through no fault of their own.*" (Italics supplied). The principle of compensation for involuntary unemployment only, is further expressed in all laws but Pennsylvania's by the disqualification of claimants discharged for wilful misconduct; and in all but the New York law, for voluntary quitting without good cause. Similarly, disqualification ensues under every statute if the claimant is not ready, willing and able to accept suitable employment.

12. "The provisions of Sec. 504.2 (b) of the Unemployment Insurance Law are in the nature of an assurance to the people of the state that the state will not participate, insofar as the provisions of this act may apply, in any industrial controversy during the first ten weeks thereof." New York, Appeal Board, 907-39 (Aug. 29, 1939). "The object of the [labor dispute] disqualifying provision is to prevent unemployment benefits from becoming an aid in financing a labor dispute . . ." Mich. Unempl. Comp. Comm., Decision on Chrysler Case, November 10, 1939. See also Maryland Unempl. Comp. Bd., Dec. No. 17 (1939); South Carolina, Unempl. Comp. Comm. Gen'l Counsel, Legal No. 85 (Oct. 21, 1938); SOCIAL SECURITY IN AMERICA (SOC. SEC. PUBL. No. 20, prepared by President's Committee on Economic Security, 1937) 125.

13. N. Y. Times, April 27, 1935, p. 16, col. 3.

to subsidize strikers with funds derived from contributions made by employers.¹⁴

If these are the arguments that have persuaded, "seductive clichés" have indeed prevailed over logic. A closer examination of the problem will reveal that the basis for this type of discrimination is by no means as convincing as it may at first blush appear. The "involuntary" argument is practically self-demolishing. Even if the assumption be made that compensation should be confined to those who have lost their employment "involuntarily," we are left with no explanation for the disqualification of workers who are locked out by their employer,¹⁵ or who are not directly involved in the strike which caused their loss of employment.¹⁶ More basically, it is unfortunate to apply willy-nilly to strikers an understandable objection to compensating malingerers. Though strikes are admittedly "voluntary" in so far as they involve a deliberate cessation of work by the employees, they are, unfortunately perhaps, necessary concomitants of an effective bargaining process which will achieve and maintain adequate wages, hours and working conditions. In fact, the experience of England demonstrates that even where industrial relations have become more stabilized, and peaceful collective bargaining the established practice, the strike remains an essential weapon of last resort to an active labor movement.¹⁷ To penalize strikers because they left their work "voluntarily" is to accept the anachronistic notion that strikes are essentially economic wastes engineered by irresponsible leaders to victimize the employer or to enable workers to enjoy a vacation from their jobs. Also, by ignoring the merits of the dispute, the state may often penalize employees for attempting to achieve the aims to which enlightened social legislation has pointed.¹⁸ Furthermore, the "involuntary" argument is particularly unrealistic in states where merit rating systems provide the employer with an incentive to instigate a dispute whenever it is necessary to lay off a substantial number of employees.¹⁹

14. See discussion in Schindler, *Collective Bargaining and Unemployment Insurance Legislation* (1938) 38 COL. L. REV. 858, 872. There are, moreover, employee contributions of 1% in Alabama, California, Kentucky and New Jersey; of 0.5% in Louisiana; and of 1.5% in Rhode Island.

15. See p. 479 *infra*.

16. See note 5 *supra*; p. 486 *infra*.

17. See REPORT OF COMMISSION ON INDUSTRIAL RELATIONS IN GREAT BRITAIN (submitted to Secretary of Labor, Aug. 25, 1938) ¶ 89 and Appendix E (strike statistics); REPORT OF COMMISSION ON INDUSTRIAL RELATIONS IN SWEDEN (submitted to Secretary of Labor, Sept. 19, 1938) ¶ 40.

18. *E.g.*, maximum hours, minimum wages, decent working conditions, collective bargaining.

19. Thirty-eight laws include provision for variation of the tax rate according to some measure of the employer's benefit experience. The usual measure is the relation between benefits drawn and contributions paid.

In view of the recognized public policy of equalizing bargaining power between employers and employees, it seems illogical to insist that "neutrality" requires nonpayment of benefits.²⁰ Since the employer is usually capable of greater endurance than his workers, a strictly neutral state would merely be adjusting the unequal balance if it made generous immediate payments. At any rate, whatever may be the merits of this theoretical argument, the state could not with justice be accused of "financing" a labor dispute if, after the average waiting period of three weeks,²¹ it paid striking workers approximately three to eighteen dollars²² weekly for an average maximum period of sixteen weeks.²³ And any danger that this would stimulate strikes is precluded by the preliminary waiting period and the small amount of benefits in comparison to the regular wages.

Finally, in answer to the argument that it would be unfair to subsidize strikes by employer-paid payroll taxes, the prevailing opinion among economists is that payroll taxes are either shifted forward to the consumer in the form of higher prices, or back to the workers in the form of lowered wages or sacrifice of potential wage increases.²⁴

It is not to lament their practical historical impotence that these weighty counter arguments are emphasized. Rather is it to indicate that at very best the scales are but infinitesimally tipped in favor of disqualification for unemployment attributable to a labor dispute. Hence, if the experience of the past two years shows that administrative application has been cumbersome or inequitable, this type of disqualification is not worth retaining and ought to be removed.

Two major industrial controversies within the past year have dramatized the difficulties confronting administrators and the profound consequences of their decisions. The first was the bituminous coal negotiations; the second, the recent Chrysler controversy.

20. 49 STAT. 449 (1935), 29 U. S. C. § 151 (Supp. 1938). See Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining* (1937) 50 HARV. L. REV. 1071.

21. All 51 laws provide for a waiting period before benefits are payable for total unemployment. For a detailed analysis of its duration, see SOCIAL SECURITY BOARD, COMPARISON OF STATE UNEMPLOYMENT COMPENSATION LAWS (Aug. 1, 1938) 69-71.

22. All laws limit the maximum weekly benefit amount, usually to \$15.00. Five states do not, however, provide any minimum amount. See *id.* 59-60.

23. See *id.* at 61-63.

24. The present system of financing is "merely the taking of contributions from poor Paul for impoverished Peter." EPSTEIN, *INSECURITY: A CHALLENGE TO AMERICA* (1938) 723; BURNS, *TOWARD SOCIAL SECURITY* (1936) 157-161; STEWART, *SOCIAL SECURITY* (1937) 161; BROWN, *The Incidence of Compulsory Insurance of Workmen* (1922) 30 J. POL. ECON. 76; Yoder, *Some Economic Implications of Unemployment Insurance* (1931) 45 Q. J. ECON. 622. In addition, there is direct taxation on workers' earnings in six states. See note 14 *supra*.

Following the termination of the two-year joint agreement between the coal operators and the United Mine Workers of America on March 31, 1939, there was a stoppage of work at mines throughout the country.²⁵ Neither a strike nor a lockout was declared. The union had proposed on two occasions that the operation of the mines continue pending the conclusion of a new agreement, but its proposal had been rejected.²⁶ Except in a few areas, there were no disturbances, and no attempts were made to picket.²⁷ Provision was made for maintaining the property in a working condition and for supplying coal to hospitals, churches, schools and dairies.²⁸ During the protracted negotiations, most of the 401,000 miners, scattered through fifteen states, were idle from six to fifteen weeks.²⁹ When the state unemployment compensation agencies were faced with thousands of claims filed by the miners, and the problem of determining whether their claims should be disallowed on the ground of a labor dispute, the same set of facts produced a bewildering array of ratiocination. At the present writing, with appeals still pending in many states, the miners' claims have been allowed in six states and disallowed in nine.³⁰

Typical of the confusion has been the vacillation in Tennessee. In making the initial determination, the Tennessee Commissioner of Labor referred to the express legislative policy to compensate for "involuntary unemployment" and to provide benefits for persons "unemployed through no fault of their own," and concluded that the miners' unemployment was "due to the lack of suitable employment being available to them through no fault of their own and not because of a labor dispute." He emphasized that peaceful negotiations were being carried on in accord

25. (1939) 49 MONTHLY LAB. REV. 691.

26. N. Y. Times, April 1, 1939, p. 7, col. 1.

27. Most of the decisions mentioned this. See, e.g., Md. Unempl. Comp. Bd., Memorandum of Findings and Determination *re* Claims Filed by Unemployed Coal Miners of Md., May 2, 1939. There were both violence and picketing in Kentucky. Unempl. Comp. Comm. Dec. of Special Agent, May, 1939. In Ohio there were instances of violence at nonunion mines but none at union mines because no attempt was made to operate. Ruling of Administrator, Ohio Bureau Unempl. Comp., May 9, 1939.

28. N. Y. Times, April 3, 1939, p. 2, col. 2; (1939) 49 MONTHLY LAB. REV. 694.

29. *Id.* at 695 *et seq.*

30. Benefits were allowed in Iowa [Comm. Dec. No. 39c-61, July 26, 1939]; Kansas [Comm. Dec. No. 28, cited C. C. H. Unempl. Ins. Serv. (Kans.) ¶ 8058.10]; Pennsylvania [(1939) 49 MONTHLY LAB. REV. 696]; Tennessee [(1939) 50 UNITED MINE WORKERS J. No. 23, p. 18]; Maryland (*infra* note 32); Ohio [Bd. Rev. Doc. No. 727, Aug. 29, *aff'd*, Ct. Common Pleas, Dec. 26, 1939.] Disallowed: Alabama, Colorado, Michigan, Utah, Wyoming [all in (1939) 49 MONTHLY LAB. REV. 696]; Indiana [App. Trib., 39-LD-31, 39-LD-38, 39-LD-43 (1939)]; Kentucky [Unempl. Comp. Comm. Dec. of Spec. Agent, May, 1939]; Virginia [Unempl. Comp. Comm. June 19, 1939]; West Virginia [Dec. Tr. Examiner, Sept. 26, 1939].

with the express provisions of the National Labor Relations Act.³¹ A similar line of reasoning was followed by the Maryland Unemployment Compensation Board³² and by one member of the Alabama Appeal Board.³³

The Tennessee Commissioner of Labor was overruled by the Board of Review.³⁴ Brushing aside the Commissioner's contention that the negotiations had been conducted under the "law of the land," the Board emphasized the proposals, the rejections, the counterproposals and the inability to reach an agreement. Although it recognized that there was neither a strike nor a lockout, the Board declared that the *negotiations as such* were a labor dispute. The dissenting member of the Board denied that a labor dispute could exist when negotiations were continuing.³⁵ A court decision later reversed the Tennessee Board on yet another ground. The court found that for the purposes of the Unemployment Insurance Law, the employer-employee relationship had terminated with the contract on March 31, and that no labor dispute could exist in the absence of that relationship.³⁶

The recent Chrysler-UAW (CIO) controversy provided another instance of the uncertain operation of labor dispute disqualification clauses. On October 6, 1939, the Dodge plant was closed, and 11,000 workers were sent home.³⁷ Work at the ten other Chrysler plants soon came to a standstill, and for over fifty days, about 50,000 Chrysler workers were idle.³⁸ The Michigan law disqualifies individuals for the period during which their unemployment arises from a labor dispute actively in progress, unless they were not participating in, financing or directly interested in the dispute.³⁹ Two opposing contentions were advanced as to qualification for benefits under this clause. The employer alleged that the plants were closed because of a slowdown strike by

31. *In re* Claimants Unemployed Because of Expiration of Appalachian Agreement on March 31, 1939. (Undated mimeographed memorandum of Tenn. Commissioner of Labor).

32. Md. Unempl. Comp. Bd., Memorandum of Findings and Determination *re* Claims Filed by Unemployed Coal Miners of Maryland, May 2, 1939. "The stoppage of work was due to the refusal of the operators to agree to the resolution proposed by the representatives of the miners." *Id.* at 16.

33. Dissenting opinion of J. A. Lipscomb, Member of Board of Appeals, Alabama Unempl. Comp. Comm. Decision No. 1, May 20, 1939.

34. Block Coal & Coke Co. v. District 19, U. M. W. A., No. 39-BR-6, Tenn. Bd. Rev., May 19, 1939.

35. Dissenting memorandum of R. O. Ross, Block Coal & Coke Co. v. District 19, U. M. W. A., No. 39-BR-6, May 19, 1939.

36. 50 UNITED MINE WORKERS J., No. 23, December 1, 1939, at 18. (Judge Brown).

37. N. Y. Times, Oct. 9, 1939, p. 11, col. 4.

38. *Id.*, Nov. 30, 1939, p. 16, col. 1.

39. Section 29 (d).

104 key men in the Dodge plant.⁴⁰ The union denied a slowdown, countered with a charge that the assembly line had been speeded up to a rate which was humanly impossible to maintain, and accused the company of having locked out the men.⁴¹ As in the bituminous coal situation, contracts and negotiations complicated the problem. A few days before the old agreement was to expire, the union had refused the company's request that it be extended for thirty days, but the union was willing and did continue to work pending the conclusion of a new agreement.⁴² Six days later the slowdown incident occurred; the 104 men were discharged, and the operation of the remaining plants was made impossible. Three days later negotiations for a new contract commenced. In a brief decision devoted mainly to reciting the facts, the Michigan Unemployment Compensation Commission disqualified all the workers.⁴³ The decision on appeal must take account of two possible interpretations of the facts. The situation may be regarded as a labor dispute, with initiative taken either by the company through a lockout or by the union through sponsorship of a slowdown. Or, emphasis on the fact that the employees had continued working and that negotiations were in the offing would lead to the conclusion that there was no labor dispute and the action of the 104 men constituted misconduct. This would subject them to a disqualification period of from three to nine weeks before they would be entitled to benefits. But they would not be disqualified for an indefinite period, as under the labor dispute provision, and the remainder of the unemployed workers would be eligible for benefits after the normal waiting period.⁴⁴

These two publicized situations highlight the host of issues arising in a routine manner, but admitting of no routine treatment. What is a dispute? What criteria are available for determining whether a "labor dispute" exists? What constitutes "stoppage of work?" When is it "caused" by a labor dispute? And when does it terminate? When are claimants not participating in, financing or directly interested in a labor dispute? How determine "grade or class of workers?"

To understand the significance of this broad range of problems fraught with important practical consequences, it is helpful first to have some idea of the process of adjudicating specific cases.⁴⁵ A deputy of the administrative agency ordinarily decides in the first instance whether

40. N. Y. Times, Oct. 25, 1939, p. 1, col. 2.

41. N. Y. Times, Oct. 26, 1939, p. 16, col. 3.

42. *Id.*, Oct. 26, 1939, p. 16, col. 4.

43. Mich. Unempl. Comp. Comm. Resolution, Nov. 10, 1939.

44. MICHIGAN UNEMPL. COMP. LAW § 29(a).

45. SOCIAL SECURITY BOARD, COMPARISON OF STATE UNEMPLOYMENT COMPENSATION LAWS (Aug. 1, 1938) 88-90. See WHITE, ADMINISTERING UNEMPLOYMENT COMPENSATION (U. of Chi. Soc. Serv. Monographs, June, 1939) 266 *et seq.*; Cloc, *Disputed Claims Procedure Under the New York Unemployment Insurance Law* (1939) 39 COL. L. REV. 1151.

the claim for benefits should be allowed. But each state law is further required by the terms of the Social Security Act to provide an "opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied."⁴⁶ While the method of satisfying this condition varies from state to state, three successive appellate stages are generally available to the claimant or to an interested employer.⁴⁷ Appeal may first be taken to a referee or to a three-member tribunal consisting of a salaried examiner and one representative each of employers and employees. This may be followed by review, either by the administrative agency itself or by an entirely independent three-member board appointed by the governor. Wide latitude in getting at the facts with the greatest speed and informality is permitted. Appeal procedure need not "conform to common law or statutory rules of evidence and other technical rules of procedure."⁴⁸ Departures from customary legal practice are allowed in such matters as burden of proof, admissibility of testimony, use of hearsay as evidence, and character of records that may be admitted. And finally, unlike Great Britain where the court of last resort is an administrative tribunal,⁴⁹ the third stage is judicial review. The findings of fact by the review board are considered conclusive, and the court is, technically, limited to questions of law.

We may now examine how this elaborate machinery has attempted to formulate meaningful definitions and to solve specific issues.

NATURE OF A DISPUTE

Before determining whether a labor dispute exists, and whether it caused the loss of employment, it is necessary to have a workable definition of the nature of a *dispute*. If the labor dispute disqualification clauses were to be interpreted as loosely as possible, benefits would be denied to all claimants whose loss of employment was traceable to a *disagreement* with their employers over terms and conditions of employment. But no state has gone this far. The word "dispute" or "controversy" is recognized as having a more restricted meaning. The best definition is the statement of the British Umpire that a dispute implies the insistence by one party on the acceptance or abrogation of some condition of employment, and resistance by the other party.⁵⁰ How helpful is this principle in concrete cases?

46. SOCIAL SECURITY ACT, § 303(a) (3).

47. Unions may not appeal in their own name. However, they may and often do provide claimants with the assistance of an attorney or other qualified person at hearings.

48. Section 6(f) of the Social Security Board Draft Bills, *supra* note 4, which is generally copied in state laws. *See, e.g.*, N. Y. UNEMPLOYMENT INSURANCE LAW § 533.2.

49. Unemployment Insurance Act, 1935, 25 GEO. V, c. 8, § 44 (6).

50. SELECTED DECISIONS GIVEN BY THE UMPIRE RESPECTING CLAIMS TO BENEFIT AND DONATION PRIOR TO APRIL 19, 1928 (London: His Majesty's Stationery Office, 1929)

Some loss of employment situations are obviously excluded by the definition. The clearest cases are those involving voluntary quitting by employees in the absence of negotiations or demands by either side. Employees may consider their working conditions so intolerable that they simply give up their jobs.⁵¹ Or there may be a concerted voluntary leaving because of dissatisfaction, but no occasion to present demands because of the absence of an authorized representative of the employer to receive them; hence no opposing force.⁵² Similarly, employees have not been disqualified where they quit of their own accord rather than cross a picket line before another establishment, without having made any demand on the employer not to deal with that customer.⁵³ And un-employment may be due to a decision, amicably arrived at by the employer and his employees, to suspend operations.⁵⁴

When demands are made by one or both of the parties, it becomes more difficult to determine when disagreement has become sufficiently aggravated to be considered a "dispute." Two California "hot cargo" cases, decided within one day of each other, illustrate how tenuous the distinction may be. In both cases, the employer closed the plant. In one, it was because his employees, the claimants, refused to pass a picket line to unload a "hot car" which had been loaded by employees in a strike-bound warehouse. This was held to be a dispute because it was said to involve "a positive and affirmative act on the part of the employer, *e.g.*, the closing down of the plant . . . where the other party to the dispute, *i.e.*, the employer, has refused to meet the employees' demands."⁵⁵ In the other case, the employer had shut his plant in accordance with the policy of his association because of the refusal of the union in the field to handle the "hot cargo." There was said to be no dispute because the employer had not made any demands that his employees handle the "hot cargo."⁵⁶

cases 2103 (p. 203), 6781 (p. 429), 1282/25 (p. 644). *See, e.g.*, Alabama App. Trib. Dec. No. 4 (Dec. 19, 1938); N. Y. App. Bd., 274-38 and 275-38 (Oct. 19, 1938).

51. Pa. Bd. Rev., B-44-8-A-1259, April 4, 1939; N. Y. Referee's Dec. 575-34-38R, July 6, 1938, and 531-100-38R, Sept. 13, 1938.

52. N. J. Bd. Rev., BR-40L (1939). *Cf.* Iowa App. Trib. Dec. No. 39A-536-C (Sept. 26, 1939) (not dispute, but voluntary leaving without good cause).

53. N. Y. App. Bd., 274-38 and 275-38, Oct. 19, 1938.

54. As in a New York case, where a unionized blouse shop turned to work on non-union dresses when the blouse season ended. After two weeks' trial, the employees found that their earnings at the non-union rate were too low and a temporary suspension of operations was mutually agreed upon. Referee's Dec. 525-78-38R (July 22, 1938); *see also* N. Y. Referee's Dec. 531-192-39R (Sept. 8, 1939); N. J. Bd. Rev., BR-104L, 1051, (Aug. 21, 1939); Rhea Mfg. Co. v. Industrial Comm. of Wisconsin, C. C. H. Unempl. Ins. Serv. (Wis.) ¶ 8121 (Wis. Sup. Ct., May 9, 1939).

55. Cal. Ref. Trib. R-71-157-38, Dec. 31, 1938. *See id.* R-47-76-38, R-46-83-38 (1938).

56. Cal. Ref. Trib. R-54-120-38, Dec. 30, 1938, *subsequently aff'd in*, Cal. Unempl. Res. Comm. No. 15, March 3, 1939. In Great Britain, where the statutory definition of trade dispute stipulates "any dispute between employers and employees . . . whether

Another distinction lies in the nature of the demand. According to the definition, there must be *insistence*. This would exclude a purely exploratory offer, *e.g.*, a mere inquiry by the employer as to whether the employees would accept a wage cut so as to make it worth his while to remain in business despite adverse economic conditions, followed by a negative reply.⁵⁷ On the other hand, it is not necessary that either side press its demands to the full extent of its resources, or that a strike be authorized or supported by the union.⁵⁸ Although there is generally concerted action, overt action by a single person may constitute a dispute.⁵⁹

The area of greatest uncertainty, however, centers about the question of peaceful negotiations. Although the British Umpire's principle implies the presence of negotiations during a dispute, negotiations *per se* do not constitute a dispute.⁶⁰ Conversely, the absence of negotiations is not conclusive evidence that there is no dispute; for it may simply indicate that conferences had broken down or that the respective positions were known and recognized to be irreconcilable.⁶¹ Yet it is particularly important to distinguish between the normal process of collective bargaining and an industrial dispute. The Labor Relations Acts were passed for the declared purposes of encouraging the "friendly adjustment of industrial disputes" and of eliminating "forms of industrial strife and unrest" which result from the refusal of employers to accept the procedure of collective bargaining.⁶² It is a contradiction of these

employees in the employment of the employer with whom the dispute arises or not" [Act of 1935, § 113(1) (u)], a sympathetic lockout was deemed to be a trade dispute. **SELECTED DECISIONS**, *op. cit. supra* note 50, cases 437 (p. 92) and 5117 (p. 364). And in view of the clause in the Norris Act definition (*infra* note 71) "regardless of whether or not the disputants stand in the proximate relation of employer and employee," the British ruling would seem to be applicable here.

57. Ore.: Dec. of Referee No. 38-RA-178 (July 11, 1938).

58. Conn.: Decision of Comm'r No. 177-C-38, Dec. 23, 1938; W. Va. Bd. Rev., Dec. of Examiner, No. AT-13, Aug. 9, 1938.

59. N. Y. App. Bd., 577-39 (April 3, 1939).

60. **SELECTED DECISIONS**, *op. cit. supra* note 50, cases 1557 and 1558, (p. 168). See also Alab. Bd. App. Dec. No. 2 (June 8, 1939) (expressed willingness of employer to negotiate with U. M. W. during nation wide stoppage regarded as evidence of no dispute in that mine; shutdown caused rather by need of making repairs). *Pesnell v. Dep't of Industrial Relations*, C. C. H. Unempl. Ins. Serv. (Ala.) § 8072 (Alabama C. C. Jeff. Cty., July 22, 1939); Wis.: Dec. of Indus. Comm., No. 37-C-64 (Oct. 1937) (demand by employees and refusal by employer found to be of bargaining character and, with no attendant overt action by either side, not a labor dispute). Peaceful negotiations were held not a dispute in the following cases: Calif. Ref. Dec. No. R-42-85-38 (Dec. 17, 1938); Florida: App. Tribunal Dec. No. 37 (June 15, 1939); N. Y. Referee's Dec. No. 510-146-38R (July 8, 1938).

61. *E.g.*, an employer's refusal to negotiate, or bargain collectively with the representatives of his employees, may in itself be the subject of a dispute. Kans.: Dec. of Comm'r, Nos. 70-115 (Nov. 24, 1939); N. J. Bd. Rev. BR-SL (1939).

62. 49 STAT. 449 (1935), 29 U. S. C. § 151 (Supp. 1938). "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely

purposes to fail to narrow the concept of a "dispute" so as to exclude peacefully conducted negotiations unaccompanied by picketing or boycotts. But the dividing line is in fact hard to draw. Assume, for instance, that the termination date of a collective agreement is approaching and negotiations for a new agreement are pending. It is not unusual for the employer, in order to avoid being left with unfinished work in the event of a discontinuance of negotiations, to refuse further orders and lay off his employees as the work on hand is completed. The negotiations pending at the time of the layoff due to the employer's election not to accept further orders do not constitute a labor dispute and the loss of employment resulting therefrom is compensable.⁶³ However, where negotiations are deadlocked and employees are laid off despite the fact that there is sufficient work on hand to maintain complete operations, an industrial controversy exists although the old agreement may still be in effect.⁶⁴ This distinction may be of special practical significance in unionized seasonal industries.⁶⁵ When the slack season approaches, the employer's bargaining power increases, and he sacrifices little by closing down during the course of negotiation. And in the merit rating states there is a strong temptation, when economic conditions dictate curtailment of operations, for employers to use inability to reach an agreement as a pretext for the charge of labor dispute.⁶⁶

Viewed against this background, the bituminous miners' situation appears to have led most of the commissions astray. The stoppage continued, it is true, because the opposing forces were unable to adjust their differences, and the differences related to terms and conditions of employment. But, as pointed out above,⁶⁷ the negotiations were generally unaccompanied by overt hostile acts, such as lockouts, strikes or boycotts. The parties merely *disagreed* as to terms but were continuing to bargain in accordance with the declared public policy. The proper disposition of this situation, therefore, should have been to compensate the claimants

to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." Hughes, C. J., in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937). To same effect, see *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. (2d) 134, 139 (C. C. A. 4th, 1937), *cert. denied*, 302 U. S. 731 (1937).

63. N. J. Unempl. Comp. Comm. Bd. Rev. BR-14L (Oct. 16, 1939); N. Y. App. Bd. 649-39 (April 20, 1939); Wis. Dec. of Ind. Comm. No. 37-C-64 (Oct., 1937).

64. N. J. Bd. Rev. BR-16 L (1939); N. Y. App. Bd., 822-39 (May 19, 1939).

65. Although there is special provision in twenty-five laws for the establishment of regulations excluding seasonal workers from benefits during the off-season, only nine had taken action toward enforcement as of September, 1939. These states have all confined seasonal determinations to such obviously short-season industries as canning; Oregon, however, has applied the provision to the ladies' garment industry.

66. See p. 464 *supra*.

67. See p. 466 *supra*.

on the ground that there was no *dispute* as that word is used in the disqualification clause.

On the other hand, the Chrysler situation does not so clearly fit into this category. An argument that there was no dispute when the loss of employment occurred would emphasize that, according to the company's position, there was no lockout, and that no strike was declared by the union until over a month later.⁶⁸ There was not as yet the opposition of forces characteristic of a dispute, for the union continued to work after the expiration of the old agreement, and negotiations had been provided for, but had not yet commenced. The slowdown, if such it was, constituted an act of misconduct.⁶⁹ However, the position that a dispute existed probably accords more with the background of the situation. By refusing to extend the old agreement, the union had rejected a proposal. The company was already aware of the union's demands for a union shop, wage increases, a voice in the setting of the rate of production, improved grievance machinery, etc. The company already knew that these were unwelcome demands, and so did the union. Therefore, the slowdown, if authorized by the union, or the lockout—either would constitute a labor dispute—was simply a form of economic coercion to enable the side using it to come to the conference room with increased bargaining power. Although it preceded negotiations, it was a dispute just as surely as a strike following a break off in the negotiations would have been a dispute.⁷⁰

NATURE OF A LABOR DISPUTE

Having determined that a *dispute* exists, the administrative machinery must next decide whether it is a *labor* dispute. This term has a familiar ring. It is readily associated with the Norris-LaGuardia Act and its state counterparts. Because "labor dispute" is defined at length in anti-injunction legislation, and not in unemployment insurance legislation,⁷¹ there

68. N. Y. Times, Nov. 26, 1939, p. 6, col. 1.

69. In Rhode Island [Deputy's Dec. No. 4-D (1939)], claimants who "sat down" in protest against an increased work load and were fired, in a period when a new system of work assignment was under negotiation, were disqualified under the misconduct provision and not because of a labor dispute.

70. See statement by Herman Weckler, vice-president of Chrysler Corporation: "It is a demonstration of power to compel concessions in the contract negotiations soon to be entered into by the union and the corporation." N. Y. Times, Oct. 9, 1939, p. 11, col. 4. In another Michigan case, a claimant who did not report to work upon instructions from his union, during a period in which negotiations for a new contract were being carried on, was disqualified. Ref. Dec. Doc. No. 1549 (Mich. 1939); to the same effect, see Ind. App. Trib. 39-LD-21 (1939).

71. "(c) . . . 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in nego-

was some tendency to adopt that definition⁷² even before the United States Employment Service issued a ruling which will probably turn out to be definitive.⁷³

Public employment services are forbidden to refer applicants to jobs vacant because of a "labor dispute."⁷⁴ Similarly, the Social Security Act requires, as a condition for obtaining the benefits of the federal tax-offset provisions, that claimants will not be disqualified from receipt of benefits if they refuse jobs vacant due to a "labor dispute,"⁷⁵ and all state laws have such provisions.⁷⁶ The United States Employment Service ruled, on June 9, 1939, that for the purpose of the provision barring referrals to establishments where there is a labor dispute, "the term labor dispute shall include 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."⁷⁷ This definition is identical with that contained in the Norris-

tiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 47 STAT. 73 (1932), 29 U. S. C. § 113 (1934). State legislation is similar. *See, e.g.*, N. Y. CIV. PRAC. ACT § 876-a, subd. 10 (c) (adds "or any other controversy arising out of the respective interests of employer and employee"). The National Labor Relations Act copies the Norris Act definition almost verbatim. 49 STAT. 450 (1935), 29 U. S. C. § 152(9) (Supp. 1938).

Only Alabama defines labor dispute in its Unemployment Insurance Law. § 6B(a) incorporates the Norris-LaGuardia Act definition.

72. *See* Ind. App. Trib., 39-LD-49 (Sept. 19, 1939); N. Y. App. Bd., 21-38 (May 18, 1938); Wis. App. Trib. No. 37-A-19 (1937). The Minnesota Appeal Tribunal, in a memorandum attached to Case No. 117 (Dec. 6, 1938) stated, however: "We do not believe that this definition, broad in nature and which might include therein a lock-out, can be considered for the purposes of the Unemployment Compensation Law. The purpose of the Injunction Law is remedial in nature. Its purpose is to put labor on a parity with business organizations under certain conditions . . ." References have also been made to the similar definitions in the National and relevant State Labor Relations Acts: Pa. Referee's Dec. 44-4-B-54 and 44-4-B-75 (Nov. 1, 1938); Tenn. Bd. Rev. 39-BR-6 (May 19, 1939). Maryland, like Minnesota, has also refused to accept such a definition: "The individual and personal character of [the Unemployment Compensation Law] . . . and the clear collective and group type of the other [Labor Relations Act] made the term 'labor dispute' not interchangeable in the two connections." Md. Unempl. Comp. Bd., Dec. *re* Coal Miners' Claims (May 2, 1939).

73. *See* note 77 *infra*.

74. *See* note 77 *infra*.

75. INT. REV. CODE § 1603(a) (5).

76. Most of the states have, in fact, copied the required provision word for word.

77. Ruling amending § 14 of the "Rules and Regulations relating to the cooperation of the United States Employment Service and States in establishing and maintaining a national system of public employment offices." U. S. Empl. Serv. L-576 (6472) (June 9, 1939).

LaGuardia Act,⁷⁸ and similar to those contained in state anti-injunction laws.⁷⁹ To use different definitions of labor dispute for the purposes of placement policy and the disqualification of claimants for insurance would probably be impracticable, particularly since the state employment services and unemployment compensation agencies are coordinated administratively in almost every instance.⁸⁰

Yet there has resulted what seems to be a curious anomaly. On the one hand, organized labor, which campaigned for enactment of anti-injunction legislation, struggles to broaden that definition of labor dispute, since the advantages of the legislation become operative only when a labor dispute exists.⁸¹ Contrariwise, the same groups have sought to narrow the scope of labor dispute in disqualification clauses.⁸² The inconsistency can easily be justified. The purpose of anti-injunction legislation, as has so often been pointed out,⁸³ is to lessen the abuses resulting from injunctions in industrial disputes. By expanding the term "labor dispute," the maximum protection is attained. However, since the purpose of unemployment insurance is to provide compensation for loss of employment, any disqualifications, such as for labor disputes, should be strictly construed. This calls for a narrow interpretation of labor dispute in the field of unemployment insurance. Thus, in allowing the claims of the bituminous miners, Maryland admitted that the situation was embraced within the federal and state anti-injunction statutes, but held that the definition of "labor dispute" was not interchangeable.⁸⁴

(1) *Ordinary Employee Demands*

There is no difficulty under any definition in identifying a labor dispute when employees take some affirmative action to enforce demands

78. See note 71 *supra*.

79. See note 71 *supra*.

80. SOCIAL SECURITY BOARD, COMPARISON OF STATE UNEMPLOYMENT COMPENSATION LAWS (August 1, 1938) 91-92.

81. See Comment (1938) 47 YALE L. J. 1136.

82. Brief on Behalf of Claimants, Members of International Fur Workers Union, before N. J. Bd. Rev. (1939) 9: "It is submitted that under our Statute the dispute which disqualifies must be between *employer* and *employee*. A dispute between persons who did not stand toward each other in the relation of *employer* and *employee* at the time of the dispute, could hardly be the sort of dispute contemplated by the statute as a disqualification for benefits."

83. See generally FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930); Simpson, *Fifty Years of American Equity* (1936) 50 HARV. L. REV. 171, 193 *et seq.* It should be noted that the definition of labor dispute in the Norris-LaGuardia Act is specifically said to be "When used in this Act, and for the purposes of this Act . . ."
NORRIS-LA GUARDIA ACT § 13.

84. See note 72 *supra*.

concerning wages, hours, working conditions,⁸⁵ seniority rights,⁸⁶ representation⁸⁷ or a closed shop.⁸⁸ And, once identified as a labor dispute, its merits are generally disregarded. The employer may be depressing the wage level with substandard wages and hours. He may be attempting to enforce wage cuts or to employ scab labor in violation of an agreement. He may have refused to abide by the ruling of an arbitrator. Or he may have failed or refused to bargain collectively with the representatives of the majority of the workers as provided in Section 8(5) of the National Labor Relations Act. All such considerations are irrelevant,⁸⁹ except in the handful of states which inquire into the merits of the dispute.⁹⁰ One state has, however, without any specific provision, followed the British precedent of refusing to disqualify for strikes against violation of minimum wage laws.⁹¹ The issue has not yet been presented

85. See, e.g., Alab. Dec. of Unempl. Comp. Comm. Appeal Cases Nos. 4 and 5 (Jan. 5, 1939); Ind. App. Trib., 39-LD-16, 39-LD-39 (1939); Mass. Bd. Rev. 39-A-127 (July 19, 1939); Mich. Referee's Dec., Appeal Docket Nos. AB 697 (Jan. 13, 1939) and AB 782 (Feb. 17, 1939); Minn. App. Trib. Nos. 81 and 82 (Aug. 31, 1938); N. J. Bd. of Rev. BR-50L and BR-84 L (1939).

86. Calif.: Referee's Trib., R-24-65-38 and R-23-69-38 (Oct. 24, 1938); Ind. App. Trib. 39-LD-13, 39-LD-15, and 39-LD-17 (1939).

87. Mich. Referee's Dec., App. Docket Nos. AB-888 (April 12, 1939) and AB-1148 (April 27, 1939); N. J., Bd. Rev. BR-22 L (1939).

88. Mass. Dep't App. No. 39-R-1 (Feb. 2, 1939).

89. The New Jersey Board of Review stated that individuals who voluntarily absent themselves from work in order to conduct a strike cannot be regarded as being involuntarily unemployed although they may be justified in their action and their purpose may be socially desirable. BR-65L (1939). Conn.: 4 MONTHLY BULL. OF PLACEMENT AND UNEMPL. COMP. DIV. No. 3, p. 10 (March, 1939); Dec. of Commissioner, No. 358-A-38 (June 21, 1938) and No. 38-A-39 (May 12, 1939). Florida: Ind. Comm. No. 37 (June 15, 1939). Ind.: App. Trib., 39-LD-8 (April 8, 1939). Ky.: Ref. App. No. 50 (June 5, 1939). Mass.: Dep't of App., 39-R-1 (Feb. 2, 1939). N. J.: Bd. Rev. BR-80L (1939). N. Y.: App. Bd., 237-38, 238-38, 239-38, 240-38, 241-38, 255-38 (Oct. 6, 1938). N. D. Op. of Att'y Gen'l, Oct. 21, 1939, C. C. H. Unempl. Ins. Serv. (N. D.) ¶ 8038, reconsidering Op. of July 24, 1939 (¶ 8031); Ohio Bd. Rev. Doc. No. 911 (1939). W. Va.: Bd. Rev. No. 12 (June 29, 1938). Wis. App. Trib., Dec. No. 38-A-336 (1938).

But see Md. Unempl. Comp. Bd., Dec. No. 17 (1939) 17: "We cannot but conclude that under the Maryland Act where the covered employee is presumptively entitled to receive benefits and the Board must find that the stoppage exists because of labor dispute to disqualify him that the Board's finding should not be based on the mere perception of the presence of the characteristic conditions that are usually present in a labor dispute . . . The Board considers that its duty under the Maryland Act is to ascertain the facts and to inquire and determine whether or not the stoppage that here exists is because of a labor dispute, which . . . will disqualify the claimant, or whether the stoppage is because of the conduct on the part of the Employer or others which does not make the consequent labor dispute the cause of the existing stoppage."

90. See note 8 *supra*. Without specific statutory authorization: Ind. Bd. Rev. No. 39-LDR-6 (Nov. 1, 1939) (employer breached written contract).

91. SELECTED DECISIONS, *op. cit. supra* note 50, case No. 2358, (p. 211); R. I. Deputy's Dec. No. 6 (Jan. 20, 1939).

elsewhere, but, if similar rulings follow, it will be interesting to observe the justifications offered for distinguishing infractions of minimum wage laws from violations of collective bargaining laws.

(2) *Secondary Boycotts*

Only two states, Indiana⁹² and Michigan,⁹³ specifically include sympathetic strikes in their disqualification clause. But the general problem of whether a labor dispute exists in "secondary boycotts" is not nearly so complicated as when that issue arises in the courts. There it is usually a primary or intermediate employer who applies for an injunction against strikes, picketing, unfair lists and circulars directed against its services or products.⁹⁴ But for the purposes of determining eligibility for unemployment insurance benefits, it is important to determine whether a labor dispute exists only when there has been loss of employment. This can occur in three types of cases. Loss of employment may be due to boycott activities directed by *others* against the employer. Clearly no labor dispute as between employer and claimant is involved, but loss of employment may be due to a labor dispute if court precedents treating such a secondary boycott as a labor dispute are followed.⁹⁵ Relief for claimants must then be sought in the "establishment" and "directly interested" clauses, discussed later.⁹⁶ Secondly, employees may walk out in a sympathy strike or refuse to work on "unfair" materials. And thirdly, they may refuse to pass a picket line placed around their employer's establishment by other workers desiring their support. In either of these two latter situations, a labor dispute is said to exist between employer and claimants.⁹⁷ This is also the clear import of the anti-injunction definition.⁹⁸

(3) *Rival Unions*

The so-called "rival union" situation may arise in an establishment either when two or more unions are actively competing for recognition, exclusive or partial, or when a union with few or no members there demands of the employer that the employed persons be compelled to

92. Section 6 (f) (3) (iii).

93. Section 29(d) (3).

94. See Hellerstein, *Secondary Boycotts in Labor Disputes* (1938) 47 YALE L. J. 341.

95. *E.g.*, *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284 (C. C. A. 2d, 1934), *cert. denied*, 293 U. S. 594 (1934). See Hellerstein, *op. cit. supra* note 94.

96. See p. 486 *infra*.

97. Sympathetic strike: Wis. App. Trib., Dec. No. 38-A-336 (June, 1938). Refusal to work on "unfair" materials: Calif. Referee's Trib., R-71-157-38 (Dec. 31, 1938); N. J. Bd. Rev., BR-56 L and BR-80 L (1939). Refusal to cross a picket line: N. J. Bd. Rev., BR-13 L (1939).

98. Hellerstein, *op. cit. supra* note 94, at 359.

join the union or that they be replaced by union members.⁹⁹ The applicability of the anti-injunction definition of "labor dispute" to this type of situation turns mainly on the effect given to the clause "regardless of whether or not the disputants stand in the proximate relation of employer and employee."¹⁰⁰ The Supreme Court has conclusively decided that the activities of the proselytizing union against a non-union establishment constitute a labor dispute.¹⁰¹ With respect to genuine inter-union rivalry, however, no explicit decision has as yet been made, though the Supreme Court's recent affirmance of the *Fur Workers* case seems definitely to indicate that it is to be deemed a labor dispute.¹⁰²

Since only one jurisdiction specifically includes "jurisdictional" disputes in the labor dispute disqualification clause,¹⁰³ it is necessary to consider whether these precedents should be applied to unemployment insurance cases. If so, some harsh results may follow.

Many rival union situations have already been submitted for adjudication under the disqualifying provisions of the unemployment compensation laws, and almost without exception a labor dispute has been found. Persons unemployed because of picketing by a union attempting to organize an establishment, in which it has no members, have been disqualified;¹⁰⁴ picketing of a factory by a minority union, where a rival union had been certified as exclusive bargaining agent by the National Labor Relations Board, was deemed to be a labor dispute;¹⁰⁵ company union men unemployed because of picketing by an independent union have not been allowed benefits;¹⁰⁶ and unemployment due to the employer's

99. On rival unions generally, see Jaffe, *Inter-Union Disputes in Search of a Forum* (1940) 49 YALE L. J. 424.

100. See note 71 *supra*.

101. *Senn v. Tile Layers Protective Union*, 301 U. S. 468 (1937); *Lauf v. Shinner & Co.*, 303 U. S. 323 (1938).

102. *Fur Workers Union No. 21238 et al. v. Fur Workers Union, Local No. 72 et al.*, U. S. Sup. Ct., 7 U. S. L. WEEK 701 (Dec. 11, 1939), *aff'g*, 28 F. Supp. (C. C. D. C. 1939); *Grace Co. v. Williams*, 96 F. (2d) 478 (C. C. A. 8th, 1938); *Houston & North Texas Motor Freight Lines, Inc. v. Local Union No. 886, etc.*, 24 F. Supp. 619 (W. D. Okla. 1938). *Contra*: *United Elec. Coal Co. v. Rice*, 80 F. (2d) 1 (C. C. A. 7th, 1935), *cert. denied*, 297 U. S. 714 (1936), (1936) 45 YALE L. J. 1320.

103. DISTRICT OF COLUMBIA UNEMPL. INS. LAW § 10 (a) (6).

104. N. Y. Referee's Dec., 533-76-39R (Aug. 16, 1939).

105. N. Y. Referee's Dec. 531-80-38R (Aug. 2, 1938); N. Y. App. Bd. 198-38 (Aug. 25, 1938). *But see* Ind. App. Trib. 39-LD-51 (Nov. 21, 1939) (plant forced to close down by picketing of minority union, but employer prevented from dealing with that union because had just signed closed shop contract with union representing majority of his employees; held, not a dispute in active progress). Analogous problems under anti-injunction legislation are discussed in (1939) 48 YALE L. J. 1053.

106. Mich. Referee's Dec. No. AB-888 (April 12, 1939). In one case, however, picketing by an independent union of a mine dominated by a company union did not serve to disqualify the company union members because they were deemed to be nonparticipants in a dispute existing only between the independent union and the employer. W. Va. Bd. Rev. No. 82 (Dec. 6, 1938).

action in closing down an establishment, to avoid trouble brewing between two unions, was held to be non-compensable.¹⁰⁷ Similarly, when a change of affiliation of woodworkers from the AFL to the CIO resulted in the shutdown of plants in Oregon for lack of raw materials because of a nationwide boycott instituted by the AFL, the woodworkers were disqualified.¹⁰⁸ In other cases, a change of affiliation of employees from one national labor organization to the other has sometimes led the former to charter a new local. The new paper organization gains a closed shop, and the employees are locked out. In most cases disqualification has been imposed,¹⁰⁹ in one it has been avoided through the device of holding the terms of the closed shop contract tantamount to a discharge of all members of a rival union.¹¹⁰

(4) Lockouts

Only nine state statutes refer in the disqualifying provisions, directly or inferentially, to a lockout; seven, for the purpose of exclusion,¹¹¹ and two for the purpose of inclusion.¹¹² Where the issue has arisen in the remainder of the states, a lockout has been deemed a labor dispute in every instance except one.¹¹³ Maryland has quixotically declared that unemployment due to a lockout is involuntary and therefore, pursuant to the purposes expressed in unemployment insurance legislation, compensable.¹¹⁴

107. Wis. App. Trib., No. 39-A-161 (May, 1939); N. J. Bd. Rev. BR-85 L and BR-86 L (1939).

108. Ore. Referee's Dec. No. 38-RA-108 (March 25, 1938).

109. Ore. Referee's Dec. Nos. 38-RA-114 (April 8, 1938) and 38-RA-128 (April 23, 1938) (union picketed against lockout); Dec. Unempl. Comp. Comm. No. 39-C-5 (April 19, 1939); Texas: Dec. of Unempl. Comp. Comm., No. 2 (Oct. 1, 1938) (dispute between two unions as to which should have right to collective bargaining and preferential employment is labor dispute).

110. Ore.: Referee's Dec. No. 39-RA-27 (March 27, 1939) (no overt action taken by union).

111. See note 7 *supra*.

112. ARIZ. UNEMPL. COMP. LAW § 5 (4) ("labor dispute, strike or lockout"); N. Y. UNEMPL. INS. LAW § 504.2 (b) ("strike, lockout, or other industrial controversy").

113. CONN.: 4 MONTHLY BULL. OF PLACEMENT AND UNEMPL. COMP. DIV. No. 6, at 8 (1939), Dec. of Comm., No. 38-A-39 (May 12, 1939). Florida: App. Trib., Dec. No. 37 (June 15, 1939). Ind.: App. Trib., 39-LD-6, 7, 9, 10, 11 (1939). Minn. App. Trib., No. 56 (March 2, 1939). Miss. Bd. Rev. 1-BR-39 (March 28, 1939). N. J. Bd. Rev., BR-14L (1939). N. Y. App. Bd. 822-39 (May 19, 1939); Ref. Dec. 524-9-39R (Feb. 7, 1939). Ore. Ref. Dec. 38-RA-128 (April 28, 1938).

114. Md. Unempl. Comp. Bd., Dec. No. 17 (1939). See N. Y. J. Commerce, October 10, 1939, p. 1, col. 2, where it is feared that "if a lockout is generally held not to constitute a labor dispute, workers affected by lockouts will be eligible for unemployment compensation. This will not only reduce the effectiveness of the lockout as an instrument of labor relations policy, but will encourage unions to resort to slowdowns and similar tactics to force employers to precipitate a lockout."

For an agency already overburdened with the complexities of the American system of benefit payments and not equipped to handle ticklish questions in the field of industrial relations, the administrative difficulties of distinguishing in each case between a strike and a lockout would be enormous. The encroachment of the unemployment insurance agency on the territory of the National Labor Relations Board, which would often consider the identical lockout in the guise of an unfair labor practice,¹¹⁵ would involve not only a duplication of effort but possible contradictory findings. On the whole, the experience of the seven states with statutory exclusions of lockouts is unenlightening.¹¹⁶ Kentucky's, however, indicates how the legislative intent can be evaded. The statute in unmistakable language excludes from disqualification loss of employment due to lockouts.¹¹⁷ In the bituminous coal case, lockout was defined as "a cessation of the furnishing of work by one or more 'subject employers' to their 'covered employees' in order to get for the 'subject employer or employers' more desirable terms than then existed in the unit and establishment . . ." ¹¹⁸ Then the possibility of a lockout was excluded on the ground that since the coal operators merely wanted to continue under the same conditions, they were not attempting to get "more desirable" terms.¹¹⁹

Whatever may be said for the administrative convenience of not bothering to distinguish between a strike and a lockout, the result is to enhance the bargaining power of the employer. For when negotiations are not progressing to his advantage and it is evident that the union is not disposed to resort to a strike, he may threaten a lockout. This would not only deprive his employees of the means of earning a livelihood, but would render them ineligible for unemployment insurance benefits. For example, in the Chrysler situation, the union vigorously denied that it had called a strike or that it had engaged in a slowdown strike, but claimed that its members had been locked out.¹²⁰ Legally, this had no effect on the result, for the Unemployment Compensation Commission refused to distinguish between a strike and a lockout.¹²¹ But if the union's

115. See *In re American France Line et al.*, 3 NLRB 64, 77, 79, 80 (1937).

116. See note 7 *supra*. No cases involving a distinction between strikes and lockouts have arisen yet in Colorado, District of Columbia and Utah.

117. Section 9 (b) (4).

118. Decision of Special Agent, Ky. Unempl. Comp. Comm. (May, 1939). The definition quoted follows closely the famous one in *Iron Molders Union v. Allis Chalmers Co.*, 166 Fed. 45, 52 (C. C. A. 7th, 1908).

119. "In the instant case there are no facts which would tend to show that the employers are attempting to get more desirable terms than have previously existed, since they are willing to sign a 2-year contract under the same conditions as the previous contract." Decision of Special Agent, *supra* note 118.

120. See p. 468 *supra*.

121. See note 43 *supra*. For a parallel case, see N. C. Deputy's Dec. No. 44 (Aug. 9, 1939).

charge was accurate, the company was responsible for having turned a disagreement into a labor dispute, and yet the employees were penalized by being deprived of unemployment insurance benefits.

We arrive, then, at this unfortunate result. If no distinction is recognized between a strike and a lockout, employers may add another weapon to their arsenal. On the other hand, if an attempt is made to recognize a distinction, the administrative machinery will be severely burdened in applying its vague criteria. The results of the adjudicated cases have, it seems, amply justified the skeptical prophesies of an earlier commentator on this subject.¹²²

(5) *Union Membership*

Thus far attention has been focused upon cases involving largely the loss of employment by groups of workers. Other cases arise under the labor dispute clauses involving the employment or non-employment of individual persons. In this more amorphous area, decisions interpreting anti-injunction statutes are neither help nor hindrance, for they seldom deal with those situations. The administrative adjudications on this subject may be divided into two groups, those involving discharge because of refusal to give up membership in a union, and those involving discharge because of non-membership in a union.

Under the first type, it seems clear that discharge for union membership does not constitute a labor dispute.¹²³ This is in contrast to the ruling of the British Umpire who, while conceding rather begrudgingly that "perhaps he (the claimant) should not be forced to leave his trade union," found that the insistence of the employer and the resistance of the employee constituted a dispute "connected with conditions of employment."¹²⁴ Since there is usually no opportunity for such claimants to be rehired by their dismissing employer, as there ordinarily is in a labor dispute, it would be unusually harsh to treat such a case as a labor dispute. Furthermore, it would condone what is generally regarded as reprehensible conduct on the part of the employer. All states are agreed, however, that a strike over the firing of an individual constitutes a labor dispute.¹²⁵

In Great Britain, a non-union worker in an open shop was disqualified for quitting when threatened with violence by fellow workers if he did

122. See Schindler, *Collective Bargaining and Unemployment Insurance Legislation* (1938) 38 Col. L. Rev. 858, 881.

123. N. Y. App. Bd., 21-38 (May 18, 1938) and 414-38 (Jan. 17, 1939); Kan. Comm. Case No. C-15-27 (Feb. 18, 1939).

124. SELECTED DECISIONS, *op. cit. supra* note 50, case 1282/25, at 644.

125. N. C.: Unempl. Comp. Comm. Dec. No. 5 (July 26, 1938); N. J. Bd. of Rev., BR-25L and BR-57L (1939); N. Y.: App. Bd., 237-38, 238-38, 239-38, 240-38, 241-38 and 255-38 (Oct. 6, 1938).

not join their union, since a dispute between employees may be a labor dispute.¹²⁶ But only one state has thus far disqualified a claimant under similar circumstances.¹²⁷ In other jurisdictions a distinction has been drawn between an open shop and a closed shop situation, and refusal to join a union has led to disqualification only when the union has a closed shop contract.¹²⁸ Justification is found in the fact that the principle of collective bargaining is now a basic public policy, and the closed shop is an effective outgrowth of this process. Hence a rugged individualist's refusal to adapt himself to these conditions may be construed as either a labor dispute with his fellow employees, voluntary leaving or misconduct.¹²⁹

A more complicated situation arises when a claimant refuses, because he is a member of a rival union, to join a union which has obtained a closed shop contract. Here, too, there is the same reluctance to disqualify for refusal to join a union, and the prevailing approach is to treat this situation as tantamount to a discharge of all the employees who were members of the rival union at the time the closed shop contract was signed.¹³⁰

Wisconsin has held that even religious tenets are an insufficient excuse for refusal to join a union.¹³¹ But the general tendency in the states is toward a policy of hands-off; benefits are allowed to those whose discharge is due to refusal to give up membership in a union¹³² and equally to those who are discharged because of non-membership.¹³³

In sharp contrast to Wisconsin's cavalier treatment of the claimant with religious scruples, most of the states have refused even to disqualify claimants who at one time belonged to the union but who were suspended

126. SELECTED DECISIONS, *op. cit. supra* note 50, case 439/1911, at 8.

127. Wis. App. Trib., 38-A-52 (Jan., 1938) and 38-A-274 (May, 1938); Wis. Ind. Comm. Dec. No. 38-C-23 (1938).

128. Texas: Unempl. Comp. Comm., Appeal No. 13 (Feb. 18, 1939); Mo. App. Trib., AR-87 (1939).

129. *See* Mo. App. Trib., AR-87 (1939) ("The principle of collective bargaining has been well established and accepted as public policy by the Congress of the United States and the State of Missouri . . . 'All Union' or 'Closed Shop' agreements are a furtherance of collective bargaining and are consonant with such public policy"). Wis. Ind. Comm. No. 38-C-11 (Feb., 1938) ("Personal conceptions as to the propriety of collective bargaining agreements cannot be held to prevail over specific expressions of public policy. The employer's rule requiring membership in the union was reasonable . . ."); *see also* Pa. Bd. Rev. No. B-44-4-RM-96 (Aug. 11, 1939).

130. Cal. Unempl. Res. Comm., Rules and Regulations Section, Code B 1356a-04 (1939); N. Y. Referee's Dec. M12-12-38 R (May 9, 1938); Ore. Ref. Dec. No. 39-RA-27 (March 27, 1939). *See also* Pa. Ref. Dec. 44-6-RH-242 (Oct. 11, 1939) (despite dynamiting of his home, claimant refused to give up membership in United Mine Workers and join the Progressive Miners, as required by his employer).

131. Ind. Comm. No. 38-C-11 (Feb., 1938).

132. *See* note 123 *supra*.

133. *See* note 130 *supra*; note 134 *infra*.

for disciplinary purposes or for non-payment of dues. Discharge of the claimants may have been induced by a strike of the other employees who refused to work with the culprits, but in most of the states even this situation was found not to involve a labor dispute.¹³⁴ Only one state has inquired, as did the Umpire in Great Britain, whether the claimant's lapse in payment of dues was due to financial stringency or to a negligent attitude toward both his union and his job, since he would be aware that suspension from the union in a closed shop would be followed by discharge.¹³⁵

Complicated though these definitional problems may be, the task of the administrator has usually just begun when he has determined that a situation involves a "labor dispute." The typical statute, it will be recalled, refers to loss of employment due to a stoppage of work which exists because of a labor dispute.¹³⁶ Thus the administrator is confronted with the perplexing problem of deciding (1) whether there is a stoppage of work, and (2) whether there is a sufficiently direct causal relationship between the claimant's loss of employment and the labor dispute.

STOPPAGE OF WORK

The technical meaning of the term "stoppage of work," as used in disqualification clauses, is a substantial curtailment of work in an establishment, not the cessation of work by the claimant or claimants.¹³⁷ Thus,

134. Ind. App. Trib. 39-A-345 (1939) (nonpayment of dues); Iowa App. Trib. No. 39-A-564-CH (1939) (same); Mo. App. Trib. AR-45 (benefits allowed to claimant in arrears in payment of dues who was laid off because of a strike of the other employees) and AR-124 (1939) (benefits allowed to claimant discharged because of pressure on employer by union because of nonpayment of dues); N. J. Bd. Rev. BR-10 L (1939) (discharge of worker for protesting to employer against fine levied on him by his union; not due to labor dispute); N. Y. Referee's Dec. No. 532-10-39 R (Jan. 18, 1939); N. Y. App. Bd. 541-39 (Feb. 25, 1939) (disciplinary suspension from union not misconduct); Pa. Bd. Rev. B-44-8-D-217 (March 23, 1939); Pa. Ref. Dec. 44-4-RM-112 (June 30, 1939) (under voluntary leaving clause). *Contra*: W. Va. Bd. Rev. App. Case No. 20 (Sept., 1938) (discharge of claimant suspended from the union for calling an unauthorized strike held to be due to labor dispute). *Cf.* C. C. H. Unempl. Ins. Serv. (Ohio) ¶ 8066.26.

135. SELECTED DECISIONS, *op. cit. supra* note 50, case 636 (p. 109); Ind. App. Trib. 39-14-417 (June 13, 1939) (claimants' failure to pay dues constituted voluntary leaving of employment, because claimants were bound as members by by-laws which provided for expulsion for dues arrears and because union acted as their agents in negotiating closed shop contract which made continuance of membership in union a condition of employment).

136. *See* note 4 *supra*.

137. C. C. H. Unempl. Ins. Serv. (Conn. 1939) ¶ 8026.05; Ind. App. Trib. 39-LD-12 (1939); N. C. Deputy's Dec. No. 13 (Jan. 6, 1939); In the matter of Francis J. Murnane, Claimant, Claim No. 7975 v. State Unemployment Compensation Commission of Oregon, and M. and M. Wood Working Company, Plylock Corp., Cir. Ct., Multnomah Cty., Oct. 14, 1938.

if strikers are replaced immediately, there is no "stoppage of work."¹³⁸ The main stumbling block lies in ascertaining what degree of curtailment of operations constitutes a stoppage. Stoppages have been held to exist where seven out of fifty-five men were on strike;¹³⁹ where operations were resumed with three-fourths the normal crew;¹⁴⁰ where there was a 20% decrease in production;¹⁴¹ where the plant operated on one shift instead of the usual two;¹⁴² where the union prevented resumption of work after the slack season;¹⁴³ where normal production was maintained only by utilizing emergency resources.¹⁴⁴ On the other hand, it has been held that no stoppage existed where 40-50% of the workers continued to work¹⁴⁵ or where production decreased only 15%.¹⁴⁶ The termination of a stoppage occurs when there is a general resumption of work, although picketing may continue.¹⁴⁷

DUE TO LABOR DISPUTE

The decisions dealing with the causal relationship between the labor dispute and the loss of employment or stoppage of work bear all the earmarks of the metaphysical torts nemesis: when does an intervening force break the chain of proximate cause?

The stoppage of work must be due to the dispute. If operations would have ceased in any event, because of economic conditions or the advent of the slack season, no disqualification is applied despite the obvious existence of a labor dispute.¹⁴⁸ And when the stoppage is no longer due to the dispute but to economic conditions, loss of contracts, cancellation

138. Conn., Dec. of Comm'r No. 473-A-38 (Nov. 16, 1938).

139. N. J. Bd. Rev. BR-15 L (1939) (work of strikers found to have caused appreciable reduction in the total output).

140. Ore. Referee's Dec. No. 38-RA-149 (June 1, 1938).

141. N. J. Bd. Rev. BR-65 L (1939).

142. N. J. Bd. Rev. BR-12L (1939); Ore. Referee's Dec. No. 38-RA-126 (Apr. 19, 1938).

143. N. J. Bd. Rev. BR-52L (1939).

144. N. J. Bd. Rev. BR-44 L (1939) (work customarily performed in plant was diverted to another establishment); N. J. Bd. Rev. BR-33 L (1939) (officer of corporation and his three brothers manned the trucks); Ore., Referee's Dec. No. 38-RA-109 (March 25, 1938) (remaining employees were employed for longer hours).

145. N. C. Dec. of Comm. No. 6 (Sept. 2, 1938).

146. N. J. Bd. Rev. BR-91 L (June 12, 1939).

147. Mich. Referee's Dec. AB-1585 (1939); N. D. App. Trib. App. No. 6 (Oct. 27, 1939).

148. *E.g.*, continued maintenance of a picket line: Conn. Dec. of Comm'r No. 2-A-38 (Feb. 18, 1938) and No. 425-A-38 (Aug. 11, 1938); Ind. App. Trib. 39-LD-25 and 39-LD-38 (1939); Ore.: Referee's Dec. No. 38-RA-298 (Dec. 31, 1938) and Dec. of Comm. No. 39-C-14 (May 22, 1939). Similarly, where an employer, in anticipation of a strike, stepped up production to such an extent that at the time fixed for the strike, further production was impossible; *held*, cessation of work not due to labor dispute. Ind. Bd. Rev. No. 39-LDR-5 (Nov. 18, 1939).

of orders or liquidation of the business by the employer, disqualification is lifted.¹⁴⁹

In addition, the loss of employment must be due to the labor dispute. Where they occur simultaneously, a presumption of a causal relationship is raised. But where it is established that the loss of employment was for reasons independent of the dispute, there is no disqualification despite their concurrence in point of time.¹⁵⁰ There is one exception to this principle; a layoff for reasons independent of a dispute may result in disqualification when that layoff is itself the subject of a dispute.¹⁵¹ Another situation arises where the claimant was temporarily laid off prior to the dispute and was unable to return to work because of the intervening strike. Although opinion is divided, the prevailing view is that a temporary layoff does not sever the employer-employee relationship and therefore inability to return to work because of a subsequent strike may be interpreted as loss of employment due to the dispute.¹⁵² When

149. Ind. App. Trib. No. 39-LD-13 (March 31, 1939); N. J. Bd. Rev. BR-9 L (1939); Ore.: Ref. Dec. No. 38-RA-116 (1938).

150. N. Y. Referee's Dec. No. 535-270-38R (Oct. 21, 1938) (claimant's work ceased because of slack season); N. Y. App. Bd. 577-39 (April 4, 1939) (decline in volume of business).

151. N. Y. App. Bd. 236-38 (Oct. 3, 1938). The employer sought to have the employees submit to a two-day lay off without pay because of insufficient work. The union refused his request on the ground that there was no lack of work. Thereupon fourteen men were laid off and the remainder of the employees walked out in protest. All the claimants were disqualified, the Board stating that the contention that their unemployment was due to lack of work was based upon, and assumed, the truth of a question which was the subject of a controversy.

152. "It is the claimant's contention that he was laid off on May 27 because of lack of work, and that this layoff and not the strike was the cause of his loss of employment within the meaning of Section 504.2 (b) of the Labor Law . . . We believe that loss of employment as used in the foregoing Section means more than a temporary layoff of a fixed duration. There must be some tangible evidence of a complete severance of the relationship of employer and employee . . . where a claimant is absent from his employment for a temporary period which is of a fixed duration, and a strike intervenes which prevents his return to his employment, he must be deemed to have lost his employment on the day on which he would have returned." N. Y. App. Bd. 222-38 (Oct. 11, 1938). A similar decision, 229-38 (1938) was affirmed on appeal, Matter of Sadowski, 257 App. Div. 529 (3d Dep't 1939). Conn. Dec. of Comm'r No. 17-C-38 (Mar. 1, 1938) and 391-A-38 (Aug. 26, 1938) and 462-A-38 (Apr. 15, 1939); Mich. App. Bd. AB-215-34 (Jan. 26, 1939); N. J. Bd. Rev. BR-52L (1939); Wis. App. Trib., No. 38-A-68 (Feb., 1938). *Contra*: Ind. App. Trib. 39-LD-6, 7, 9, 10, 11 (1939); Ore. Referee's Dec. No. 38-RA-111 (April 8, 1938).

An indefinite, as distinguished from a temporary, layoff has been held to sever the employer-employee relationship so that no disqualification results from a subsequent strike. Calif. Referee's Trib. R-44-163-38 (Dec. 8, 1938); Mass. Dep't App. 33-A-3 (Dec. 28, 1938); Ga. App. Trib., Nos. 274 and 275 (Sept. 20, 1939); Minn. App. Trib., No. 845 (Nov. 4, 1939); N. D. App. Trib., No. 10 (Sept. 27, 1939); Wis. App. Trib., Nos. 38-A-351, 352, 353, 359 (1938).

the dispute is settled, the unemployment of persons not immediately called back to work is no longer subject to disqualification.¹⁵³

DIRECTLY INVOLVED

Much of the adjudication of the administrative agencies has been devoted to interpreting and applying the provisions in the 40-odd statutes which attempt to confine disqualification to workers actually connected with the dispute. The bulk of these cases deal with whether the claimant is (1) participating in, (2) financing, or (3) directly interested in the labor dispute; whether he was a member of a grade or class of workers which took such a part; and whether the stoppage occurred at the establishment where he was employed.¹⁵⁴

Participation in the labor dispute may be inferred either from the claimant's status as a union member or from his own activity. Mere membership in the striking union has been held to be conclusive evidence of participation.¹⁵⁵ It is then immaterial whether the claimant voted against the strike or took no steps to support it.¹⁵⁶ It is also of no consequence that he does not pay dues or attend meetings, as long as he is still considered a member.¹⁵⁷ The rationale of this attitude is that by joining a union each member consents to be bound by its acts in dealing with the employer. In fact, this collective responsibility was extended in one case to membership in a union affiliated with a central labor council which supported a strike on the part of a second union.¹⁵⁸ Other states have established the principle that membership in the striking union is merely presumptive evidence of participation, but the practical results in specific applications are indistinguishable.¹⁵⁹

Though not a member of the striking union, a claimant may "participate" in the labor dispute by taking some affirmative action. Usually this involves voluntarily declining to pass a picket line around the establish-

153. Ind. App. Trib. 39-LD-5 (March 31, 1939). See Georgia Unempl. Comp. Law, § 5 (d) (2); So. Car.: Legal Rulings of Gen'l Counsel, Q-16, C. C. H. Unempl. Ins. Serv. (S. C.) ¶ 8029.16 (1938).

154. See note 4 *supra*.

155. Ind. App. Trib. 39-LD-27 (1939).

156. Ga. App. Trib., No. 336 (Nov. 22, 1939); Ind. App. Trib. 39-LD-5 (March 31, 1939); Pa. Bd. Rev., B-44-4-A-535 (May 12, 1939).

157. *Ibid.*

158. N. J. Bd. Rev. BR-36 L (1939).

159. "While mere membership in a disputant union is not conclusive evidence of participation . . . a union member is held to be participating in a dispute if he fails to show otherwise . . . If a union, through its representatives acting within the scope of their authority, decides to 'support' a strike, all members of the union are participating." N. J. Bd. Rev. BR-36 L (1939); Mich. App. Bd. 215-34, (1939) (presumably all members of union which calls and conducts the strike are affected by outcome and must be held to be directly interested and involved in the strike).

ment.¹⁶⁰ Or, he may himself join the picket line after having been laid off because of lack of work due to a strike by other employees.¹⁶¹ The motive for such behavior is of no consequence, as is illustrated by an amusing Michigan case where a non-union claimant opposed to the strike confessed that he was picketing solely because the striking union was distributing free sandwiches to pickets.¹⁶² Nor is it necessary for a "participating" claimant to be active in behalf of the striking union. He may be included in the same category if he assists a company-organized back-to-work movement, even though he was not a member of the back-to-work league and merely signed a certificate indicating it as his choice for bargaining agent.¹⁶³ This is on the theory that the effect of such an organization may be to furnish an excuse to the company to break off negotiations with the bona fide union and to prolong the dispute by stiffening the company's resistance to immediate settlement.

The likelihood is that most "non-participating" claimants will still be subject to disqualification because they are "directly interested" in the outcome of the labor dispute. For a claimant to be "directly interested," it is ordinarily necessary only that his wages, hours or conditions of work will be affected, favorably or adversely, by the outcome,¹⁶⁴ or that a dispute as to representation include his occupation.¹⁶⁵ It is usually immaterial that such interest be wholly involuntary; the principle applies even if a picket line forcibly prevents him from working.¹⁶⁶

"Financing" is really but a subdivision of "participating," and therefore of slight practical consequence. Two statutes specifically provide that mere payment of union dues shall not constitute "financing,"¹⁶⁷ but their effect is unimportant as long as union membership is regarded as so intimately connected with "participation." In the only case which has thus far arisen solely on the specific "financing" issue, members of a union not interested or participating in a dispute between a second union and the employer, but which had contributed \$25 to the strikers, were disqualified.¹⁶⁸

160. Cal. Referee's Dec. R-13-114-39 (Jan. 11, 1939); Ore. Referee's Dec. 38-RA-171 (June 30, 1938) and 38-RA-279 (Oct. 1, 1938); Wash. App. Trib., Docket No. A-64 (Nov. 30, 1939). Cf. Ind. App. Trib. 39-LD-53 (Nov. 8, 1939).

161. R. I. Deputy's Dec. No. 7 (Mar. 24, 1939).

162. Mich. Referee's Dec. AB-513 (1939).

163. Mich. Referee's Dec. AB-1148 (Apr. 27, 1939).

164. Conn. Dec. of Comm'r, 381-A-38 (Sept. 6, 1938); Dist. of Col.: Opinion of Corp. Counsel, No. 140 (May 23, 1939); Ind. App. Trib. 39-LD-39 (1939); Mich. Referee's Dec. AB-909 (1939).

165. Ore.: Dec. of Comm. 39-C-5 (Apr. 19, 1939).

166. N. J. Bd. Rev. BR-1 (1939). *But see* Ga. App. Nos. 288 and 291 (Oct. 4, 1939) (claimant could not safely cross picket line; claim allowed because he was nonunion and he stated that he was satisfied with conditions as they were before the strike, although other employees in the same department were members of the union and were on strike).

167. Florida, § 6D(1); Michigan, § 29(d)(2).

168. Conn. Dec. of Comm'r, 357-A-38 (Aug. 3, 1938).

A claimant who has satisfied the above conditions has not yet run the entire length of the gauntlet. He must still show that he does not belong to a "grade or class of workers" any member of which was participating in, financing, or directly interested in the dispute. For this determination, homogeneity of interest is the general test, but, like determining an appropriate bargaining unit under the NLRA, each case must be decided on its own peculiar facts. A maintenance man and millworkers may be considered to be of the same grade or class because of interdependence of terms and conditions of employment,¹⁶⁹ but not photo-engravers and editorial employees.¹⁷⁰ And the test of eligibility in the same union would group together fixture workers and those engaged in sash and door work,¹⁷¹ but not the clerical staff and production workers.¹⁷²

A similar problem is involved in determining whether the labor dispute is at the establishment where the claimant is or was last employed. Where independent businesses are involved, there is no question that separate establishments exist. For example, a shutdown of firm *A* because of inability to get materials from firm *B* does not disqualify the employees in firm *A*.¹⁷³ Similarly, employees of a subcontractor in the same premises as the contractor would not be disqualified because they refused to pass a picket line before the premises because of a strike involving the contractor.¹⁷⁴ Different establishments have been found even where corporations have interlocking officers and are functionally coordinated.¹⁷⁵

Less clear-cut are the cases involving different plants of the same employer. The tests of "functional integrality" and "physical proximity" are said to apply to different plants.¹⁷⁶ Thus a clerk in a company store would not be disqualified if the store were closed because of a strike in the company mill,¹⁷⁷ but the parts and services building might be considered functionally integrated with four other buildings about five hundred feet away.¹⁷⁸ Similarly, plants in different states, or even in different cities, would be regarded as separate establishments.¹⁷⁹

169. Ore. Dec. of Comm., 39-C-5 (Apr. 19, 1939).

170. Minn. App. Trib., No. 285 (Feb. 28, 1939).

171. Minn. App. Trib., No. 157 (Dec. 9, 1938).

172. N. C. Dec. of Comm., No. 5 (July 26, 1938). However, mere nonmembership in the striking union does not preclude the claimant from being considered in the same grade or class. Mass. Bd. Rev. 39-A-345 (Oct. 24, 1939) and 39-A-394 (Nov. 6, 1939).

173. Calif. Referee's Dec. R-29-119-38 (Oct. 21, 1938); N. J. Bd. Rev. BR-59L (1939); N. Y. Referee's Dec. M40-4-38R (Mar. 1, 1938).

174. N. Y. Referee's Dec. 511-116-38R (Oct. 4, 1938).

175. Wis. App. Trib. 38-A-484 (Oct., 1938).

176. Wis. App. Trib. 38-A-484 (Oct., 1938).

177. S. C. Opinion of Counsel, Legal No. 93 (Feb. 10, 1939).

178. Wis. App. Trib. 37-A-34 (1937).

179. Iowa, App. Trib., 38A-149-Z (Nov. 25, 1938); N. J. Bd. Rev. BR-20L, 45L (May 1, 1939).

Finally, disqualification is lifted if a claimant becomes bona fide employed elsewhere. The employment must not be makeshift, or taken for the purpose of circumventing the disqualifying provision.¹⁸⁰ A day or two of work provided by a relative as lawn cutter or handyman, when such is not the claimant's usual occupation,¹⁸¹ or a job at a wage much lower than that normally earned,¹⁸² provides no escape from disqualification because it does not negate the presumption that, if the dispute were over, the claimant would return to his former employment.

CONCLUSION

This Article has been intended neither as a complete compendium of all contested "labor dispute" claims nor as a critical barrage directed against particular decisions. Its chief purpose, rather, has been to indicate that the task of administering labor dispute disqualification clauses has proved to be infinitely more burdensome and complex than the legislators could possibly have envisaged. This alone is no condemnation. Though promptness is desirable, any effective administrative process must at times seem ponderous in laboriously applying flexible criteria to individual situations; and "hard" cases always lie strewn in its wake. But in administering unemployment compensation systems, speed is not only desirable but essential. Unless benefits are promptly paid, the system will be utterly ineffectual in relieving the distress of the unemployed and in attempting to maintain purchasing power. Protracted hearings, tardy decisions and time-consuming appeals prevent attainment of these purposes.¹⁸³ Concededly, the price would be worth paying if the reasons for disqualifying all claimants associated with a labor dispute were pre-eminently persuasive. But, we have seen, they are not.

What, then, is the solution? We urge a simple and direct one: the labor dispute disqualification clauses should be repealed.

180. Cal. Unempl. Res. Comm., Rules & Regulations Section, Code No. B 1356a-02 (1939); Oregon, Ref. Dec. 38-RA-155 (June 1, 1938); S. C.: Op. Unempl. Comp. Comm. General Counsel, Legal No. 85 (Oct. 21, 1938).

181. N. Y. Referee's Dec. 524-4-39R (Jan. 14, 1939) and 532-367-39R (Oct. 14, 1939).

182. Conn.: Op. Att'y Gen'l (Sept. 30, 1937).

183. Cf. Cloe, *supra* note 45, at 1153 *et seq.*

Inadequate data and inconstant factors make it impossible to compute the precise average time length of an appealed decision. Decisions usually omit relevant dates. Procedures are usually in a constant state of flux in an effort to achieve simplification. And sometimes, where inertia and budgetary obstacles can be surmounted, an attempt is made to lessen the backlog by correcting the understaffing. Nevertheless, it may be conservatively estimated that the time from the first appeal agency to the second usually runs into months. When courts become involved, the period may seem interminable—*c.g.*, eight months after the stoppage of work during the bituminous coal negotiations, appeals are still pending in some of the courts. Even if the claimant has been successful before the final administrative agency, an appeal to a court would further delay payment, *c.g.*, for four months in the *Ohio Miners'* case. See note 30, *supra*.

Lest this suggestion be considered merely a flippant gesture, some of the hazards confronting any attempt at piecemeal reform, whether by legislation or by administrative interpretation, may be indicated. Four plausible lines of reform are available: (1) the definition of "labor dispute" might be considerably narrowed, especially by excluding lock-outs, stoppages of work during peaceful negotiations and secondary boycotts; (2) the "participating" and "directly interested" clauses might be drawn so as to disqualify fewer workers; (3) more consideration might be given to the merits of the dispute, as in the Arizona, Montana and Utah statutes; and (4) a short maximum period of disqualification, in addition to the normal waiting period, might be set, as in Pennsylvania.

However, none of these suggestions, singly or in combination, would afford a satisfactory solution. Narrowing the definition of "labor dispute," though justifiable theoretically, might afford alluring precedents for judges interested in emasculating anti-injunction legislation. It would also involve practical difficulties, already mentioned,¹⁸⁴ for placement agencies. The suggestion that fewer workers be considered directly involved in the labor dispute is attractive in the sense that it increases the number eligible for benefits. But it is undesirable in that its effect would be to discourage or penalize those workers who take forthright action.¹⁸⁵ An inquiry into the merits would have the advantage of eliminating some of the present inequities, but only at the expense of further retarding the process of administration and projecting the administrators into fields reserved for others better qualified. Reduction of the period of disqualification would be closest, it is true, to outright repeal. But it would not lessen the administrative burden; it would be arbitrary; and it would, of course, ignore the arguments against any disqualification.

It would be a grievous misconception, however, to imagine that repeal of labor dispute disqualification clauses would encourage, or even countenance, on the part of labor any activity which is condemned by prevailing standards. Claimants who are unemployed because of a labor dispute would, of course, still be subject to the regular waiting periods

184. See p. 475 *supra*.

185. This is graphically illustrated by the Question and Answer Summary of Texas Unempl. Comp. Law, Revised, April 19, 1937. Release of Tex. Unempl. Comp. Comm.

Q. 13: "A previous article said that strikers cannot draw benefits under this Act. Suppose I leave my job as a result of a strike at my factory, although I personally had nothing to do with the strike. Will I be ineligible for benefits?"

A.: No. But you must be able to prove to authorities that you had no part in the labor dispute.

You must show that you were not taking part in, or helping to finance, or directly interested in the labor dispute which stopped the work.

If you belong to a labor union or group, and other members of that union are interested in the dispute, then you will be considered to have a direct interest in it." C. C. H. Unempl. Ins. Serv. (Tex.) ¶ 8004.13.

and would receive benefits far less than their wages. Anyone foolhardy enough to provoke a labor dispute in the hope of thriving on this meagre pittance would be subject to disqualification if he subsequently refused suitable employment. The penalties for misconduct would still be applicable; and, in appropriate circumstances, this might include illegal sit-down strikes or violence. In short, unemployment compensation without labor dispute disqualification clauses would relieve unemployment without being either an incentive or a deterrent to customary forms of labor activity.

APPENDIX

Statutes Modeled after Social Security Draft Bill

(Modifications noted in parentheses)

ALASKA [§ 5d] (8-wk. maximum disqualification; omits "financing"; "labor dispute in active progress" instead of "stoppage of work because of labor dispute"); ARIZONA [§ 5(4)] ("labor dispute, strike or lockout"; investigation into merits, *see note § supra*); ARKANSAS [§ 5(d)]; COLORADO [§ 5(d)] ("strike"); CONNECTICUT [§ 808d(b)(3)] ("trade, class or organization"; omits "separate branches" clause); FLORIDA [§ 6D] (adds "the payment of regular union dues shall not be construed as financing a labor dispute"); GEORGIA [§ 5(d)]; HAWAII [§ 5(d)]; IDAHO [§ 5(e)] ("a then existing labor dispute" instead of "stoppage of work because of labor dispute"); ILLINOIS [§ 7(d)]; INDIANA [§ 6 f(3)] (adds clause on sympathetic strikes); IOWA [§ 5(d)]; KANSAS [§ 44-706(d)]; LOUISIANA [§ 4(d)] (ten weeks maximum disqualification; omits "financing"); MAINE [§ 5(d)]; MARYLAND [§ 5(d)]; MASSACHUSETTS [§ 16(b)]; MICHIGAN [§ 29(d)] ("labor dispute which is actively in progress" instead of "stoppage of work . . . because of a labor dispute"; adds "the payment of regular union dues shall not be construed as financing a labor dispute . . ."; slightly different tests for "directly involved," including sympathy strike but omitting "separate branches" clause); MINNESOTA [§ 7 E.] (omits "directly interested"); MISSISSIPPI [§ 5(d)] (omits "financing"); MISSOURI [§ 10 II(a)] (adds: subsequent employment must last at least 3 weeks to terminate disqualification); MONTANA [§ 5(d)] (investigation into merits, *see note § supra*); NEBRASKA [§ 5(d)]; NEVADA [§ 5(d)]; NEW HAMPSHIRE [§ 4D]; NEW JERSEY [§ 43:21-5(d)]; NEW MEXICO [§ 5(d)]; NORTH CAROLINA [§ 5(d)]; NORTH DAKOTA [§ 7(d)]; OKLAHOMA [§ 5(d)] (omits "stoppage of work which exists because of"); OREGON [§ 5(e)] ("labor dispute which is in active progress" instead of "stoppage of work which exists because of a labor dispute"); RHODE ISLAND [§ 7(4)] (different phraseology; 8 weeks plus waiting period maximum; no "separate branches" clause; "strike or other industrial controversy" instead of "labor dispute"; "organization or group responsible for stoppage" instead of "grade or class" clause); SOUTH CAROLINA [§ 5(d)] ("directly due to labor dispute in active progress" instead of "stoppage of work which exists because of a labor dispute"); SOUTH DAKOTA [§ 17.0830(4)]; TENNESSEE [§ 5(d)] (4 weeks maximum; labor dispute "in active progress" instead of "stoppage of work which exists because of a labor dispute"); TEXAS [§ 5(d)] ("benefit period" instead of "week"); VERMONT [§ 5(d)] (omits "grade or class" and "separate branches" clauses); VIRGINIA [§ 5(d)]; WASHINGTON [§ 5(e)]; WEST VIRGINIA [§ 4(4)] (omits "separate branches" clause); WYOMING [§ 5(d)].