UNEMPLOYMENT BENEFITS AND THE "LABOR DISPUTE" DISQUALIFICATION

Milton I. Sidor

Even the most simple of legal concepts, given moderate attention by a court over a few years, acquires a judicial gloss of altered meaning. When the single concept becomes a dozen, many of them unfamiliar and all of them undefined by the statutes—when the single court is replaced by those of fifty-one jurisdictions—the same few years thicken the gloss into an opaque shell beneath which the concepts themselves are increasingly obscured. Once this process has made the intended meaning of the statute purely academic, the subject is one appropriate for a law review article.

I. The Rule—Blanket Denial of Compensation

Early in 1937 Illinois and Missouri fell into line as the last states to enact unemployment compensation statutes. Under the pressure of meeting the deadline to qualify for credits under the federal Social Security Act, 2 most state legislatures had hurriedly3 taken advantage of the "Draft Bills" prepared by the Committee on Economic Security.4 The resulting uniformity was comparable to that effected by the Uniform Sales Act.

Each statute, whether modeled after the Draft Bills or not, enacted a specific disqualification provision barring from benefits workers unem-

1 Striking examples of the effect of court-created "gloss" on decision law are Terminiello v. Chicago, 337 U.S. 1 (1949), and Hotel and Restaurant Employees Internat'l Alliance v. WERB, 315 U.S. 437 (1942). In the former the state court's construction of an ordinance was held to infringe petitioner's right of free speech; in the latter the "gloss" saved an anti-picketing injunction from the same fate.

2 49 Stat. 620 (1935), 42 U.S.C.A. §§ 301 ff. (1943). In sustaining the constitutionality of the federal act, the Supreme Court rejected the argument that the states' decisions to enact statutes which would entitle them to the 90 per cent rebate were compelled by duress or coercion. Steward Machine Co. v. Davis, 301 U.S. 548, 589-90 (1937).

3 "The governors of state after state now convened their legislatures in special sessions 'to come under the wire,' and these sessions enacted unemployment compensation laws without giving any real consideration to their provisions." Witte, Development of Unemployment Compensation, 55 Yale L.J. 277, 33 (1946).

ployed during labor disputes. The Illinois provision typifies the majority Draft Bill enactment:

An individual shall be ineligible for benefits. . . .

For any week with respect to which it is found 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 that (1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work and (2) He does not belong to a grade or class of workers of which immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment, or other premises.5

With every phrase a potential breeder of litigation, careful study of the statutes and their history becomes increasingly important to proper decision of compensation claims.


THEORIES JUSTIFYING LABOR-DISPUTE DISQUALIFICATION

Among the several theoretical bases for the labor-dispute provisions, one has assumed unmerited prominence in judicial decisions. The states’ 1936 rush to enact the “Draft Bills” has already been mentioned. Unfortunately, part of the package adopted by the state legislatures was a ready-made “Declaration of Public Policy,” raising as a buffer against constitutional attack the spectre of “involuntary unemployment.” As a result many courts have devoted more time to explaining why claimants’ unemployment was “voluntary” so as to impose disqualification than to applying the actual terms of the labor-dispute provision itself. The term ‘involuntary unemployment’ has induced unrealistic controversy over the freedom of the will and tended to blur the outlines of specific disqualifications and eligibility conditions. Yet, despite the fact that it fails to explain much of the statutory language, the doctrine that the right to benefits should be gauged by the “involuntary” nature of unemployment must be recognized as the most influential theory in current case law.

Perhaps more plausible, though less often referred to by the courts,

6 See, for example, Ill. Rev. Stat. (1949) c. 48, § 217. This rationale was hardly original with the authors of the Draft Bills. Compare Douglas, Standards of Unemployment Insurance 59 (1933).

7 The Illinois Supreme Court has been one of the chief exponents of this approach. Its first three decisions involving labor-dispute disqualification laid particular stress on the statutory “public-policy” declaration. Caterpillar Tractor Co. v. Durkin, 380 Ill. 11, 42 N.E. 2d 541 (1942); Walgreen Co. v. Murphy, 386 Ill. 32, 53 N.E. 2d 390 (1944); Local Union No. 11 v. Gordon, 396 Ill. 293, 71 N.E. 2d 637 (1947). Since then the emphasis has diminished somewhat, perhaps because the court has been confronted with situations which cannot be explained on the basis of “voluntariness.” Compare Local No. 658 v. Brown Shoe Co., 403 Ill. 484, 87 N.E. 2d 625 (1949). In California the state supreme court has found the “voluntary-involuntary” dichotomy a source of dissension and controversy. Compare McKinley v. California Employment Stabilization Comm’n, 205 P. 2d 602 (Cal., 1949) with Bunny’s Waffle Shop, Inc. v. California Employment Security Comm’n, 24 Cal. 2d 735, 151 P. 2d 224 (1944).


is the notion of state "neutrality" in labor disputes. This view is notable at least for its age, having been a basis for the 1911 British Act. It usually appears today in the form of the often-repeated statement that disqualification must result whether the dispute is manifested by a "strike" or a "lockout," since "neither the unreasonableness of the demands nor the merits of the dispute have any place in the determination of the question whether the labor dispute actually exists."\(^{11}\)

But it should be obvious that such lack of interest in the merits is merely the statement of a dubious conclusion. "Formal neutrality"\(^ {12}\) was originally urged primarily because of the belief that fixing responsibility for the dispute would be too difficult. The unreality of this theory has since been demonstrated.\(^ {13}\) Moreover, the notion that governmental neutrality is to be desired as an end in itself has been objected to as ignoring the realities of already established government intervention in labor relations by means of minimum wage laws, workmen's compensation laws, and the Wagner Act.\(^ {14}\)

Finally, it has been questioned whether nonpayment of labor-dispute benefits qualifies even as a "formal neutrality." First, the "very existence of the law with the promise of benefits to those who do not in concert with other workers refrain from working amounts to considerable pressure to deter workers from combining their economic strength. This is

\(^{10}\) See Hughes, Principles Underlying Labor-Dispute Disqualification 1 (1946).


Cases reported in the Benefit Series, a Social Security Board publication containing selected unemployment compensation decisions from all jurisdictions, will hereinafter be cited as follows: 9 B.S. 9—10786 (Ga. R, 1946). The letter "A" indicates a decision by the initial administrative tribunal; "D," by an intermediate body; "R," by the highest administrative appellate tribunal of the state.


\(^ {12}\) Douglas, op. cit. supra note 6, at 61; cf. 5 B.S. 6—7330 (Ill. D, 1941): "This [denying benefits regardless of who may be the instigator of the dispute] does not result in favoring one party at the expense of the other, but on the other hand leaves both parties exactly where they were with regard to all of their rights, privileges and obligations outside of those contained in this one Section 7(d) of the Illinois Unemployment Compensation Act."

\(^ {13}\) In 1933 Professor (now Senator) Douglas relied for his examples on society's failure to fix guilt on the aggressor in warfare as well as in industrial conflict. Douglas, op. cit. supra note 6, at 61. The Nuremberg trials provide an answer to the first example; the Wagner and Taft-Hartley definitions of unfair labor practices, to the second.

\(^ {14}\) Lesser, op. cit. supra note 8, at 175—76; Schindler, Collective Bargaining and Unemployment Insurance Legislation, 38 Col. L. Rev. 858, 869 (1938).
particularly true if union membership or the payment of union dues is construed to amount to participation in, or financing of, the dispute."\(^5\)

Second, the Wagner Act has been pointed to as establishing a "recognized public policy of equalizing bargaining power between employers and employees. . . . 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."\(^6\)

Thus the rationale of state neutrality has been subjected to dual attack: on its theoretical legitimacy and on its proper application to the problem of unemployment benefits. But once again, the attacks cannot obscure the fact that the rationale is present and must be dealt with in evaluating the acts and decisions under them.

Allied to the neutrality argument is the contention that we cannot "attribute to the legislature an intent to finance strikes out of unemployment compensation funds."\(^7\) Insofar as this conclusion represents a feeling of unfairness in requiring an employer to finance workers against himself, it is refutable by a showing that the economic incidence of payroll taxes is shifted by the employer either to the consumer or back to his employees.\(^8\) And to the extent that it indicates a belief that granting benefits will actually "finance" strikes, several partial answers are available. One lies in the relative magnitudes of compensation and wages\(^9\) and another in the waiting period that all laws require before benefits may be paid. True enough, if a strike lasts long enough, the receipt of compensation will ease the drain on the union treasury, increasing staying power and hence the probability of the strike's success. But most strikes are of lesser duration than the usual benefit waiting period, and even with the additional incentive for holding out, the feared "financing" would not always materialize. In any event, the prospect of receiving a fraction of normal wages after the lapse of several weeks will seldom lead a labor organization to call a strike which it would have avoided had benefits not been payable.

\(^{15}\)Lesser, op. cit. supra note 8, at 175.

\(^{16}\)Fierst and Spector, op. cit. supra note 8, at 465. Whatever the theoretical validity of this argument, it would undoubtedly receive short shrift from the legislators who authored and adopted the Taft-Hartley Act and comparable state enactments.

\(^{17}\)Local Union No. 11 v. Gordon, 396 Ill. 293, 303, 71 N.E. 2d 637, 642 (1947); Muncie Foundry Division v. Review Board, 114 Ind. App. 475, 51 N.E. 2d 891 (1943); 8 B.S. 11—10025 (Mo. D, 1945); see Pribram, Compensation for Unemployment during Industrial Disputes, 51 Monthly Lab. Rev. 1375, 1376 (1949).

\(^{18}\)Burns, Toward Social Security 157-61 (1936); Yoder, Some Economic Implications of Employment Insurance, 45 Q.J. Econ. 622, 635 (1931); Brown, The Incidence of Compulsory Insurance of Workmen, 30 J. Pol. Econ. 67, 76 (1922).

\(^{19}\)Illinois' 1949 amendment to its Act, Ill. Rev. Stat. (1949) c. 48, § 220(b)(1), raised maximum benefits to $25 per week, an amount typical of the higher-benefit-paying states.
Even to the extent that actual financing may sometimes take place, the reply can be made that some strikes deserve to be financed as attempts, after failure of collective bargaining, to protect positive rights given employees by other legislation or by contract. In fact, the objection to financing strikes loses its impact whenever the shutdown has resulted from clearly unreasonable conduct on the part of the employer. This third argument, then, is not nearly so persuasive as it might initially appear.

Other theories are available as secondary explanations of the labor-dispute provisions. But the three already stated are sufficiently weighty

20 In 10 B.S. 10—11848 (Ill. R, 1946) miners left work because their employer had failed to conform to the statute defining and requiring adequate shower facilities for coal mines. In 2 B.S. 5—1430 (R.I. D, 1939) the employer had violated the wage provisions of a bargaining agreement by seeking to establish a piecework system, and the employees struck because the piecework rates would not allow them to earn the minimum wages prescribed by state law. Both decisions held that, since the conditions of employment in question were statutory and outside the proper area of negotiation, the work stoppages were not due to “labor disputes.” This administratively created exception has long been approved by the British Umpires. Brit. Ump. 6138/36 (1936); Brit. Ump. 368/1929, BU-145 (1939); Brit. Ump. 2353, BU-444 (1922); Ministry of Labour, Analytical Guide U.I. Code 7, Part III, §§ 11-13 (1939 ed.).

After the Illinois decision cited above, the state supreme court held that a labor dispute may exist even though the employer’s action leading to the controversy is in violation of his contractual obligations. Local Union No. 11 v. Gordon, 396 Ill. 293, 71 N.E. 2d 637 (1947). When another coal mine case arose in which unemployment was caused by protest against alleged violations of statutory safety requirements, the hearing officer relied on the Local No. 11 case to deny benefits. The logical basis asserted for this new result was that breach of a statutory duty cannot preclude existence of a labor dispute any more than does the breach of a contractual duty. 11 B.S. 12—12964 (Ill. A, 1948).

Apparently, however, the Illinois Supreme Court was more impressed with the earlier approach. In Fash v. Gordon, 398 Ill. 210, 75 N.E. 2d 294 (1947), the court considered the effect of a War Labor Board directive dealing with the issues in a labor dispute. The decision carefully pointed out that the WLB determination was not binding on the parties, so that the directive had not terminated the labor dispute. Compare similar decisions in 9 B.S. 9—10286 (Ga. R, 1946); 9 B.S. 10—10906 (N.Y. R, 1943). By implication, had the WLB directive been made conclusive, the court would have regarded the “labor dispute” as ended even though active controversy continued; see 5 B.S. 4—7169 (N.J. D, 1941). The area of conflict between the Local No. 11 and Fash cases is not yet defined and the Director of Labor is faced with a difficult choice.

21 See text at 304-07 infra for proposed statutory changes partially based on this premise.

22 One argument often advanced is that the difficulty of actuarial prediction of the incidence of labor disputes should prevent the allowance of benefits for unemployment caused by such disputes. Miners in General Group v. Hix, 123 W.Va. 637, 646, 17 S.E. 2d 810, 815 (1941); Hughes, op. cit. supra note 10, at 17; Pribram, op. cit. supra note 17, at 1376. Yet, as pointed out in Eligibility for Unemployment Benefits of Persons Involuntarily Unemployed because of Labor Disputes, 49 Col. L. Rev. 550, 551 (1949), “virtually every American jurisdiction today allows benefits during at least some of these ‘actuarially unpredictable’ labor disputes. . . .” Furthermore, a statistical objection is hardly one which helps answer the question of whether disqualification can be justified as a matter of principle. Accordingly, the argument will not be used as a basis for discussion in this article.

Justification for the “grade or class” provision of the statutes depends on still another theory, discussed in text at notes 174-75 infra.
in themselves, and exploration of the manifold aspects of the state statutes compels traveling light.

THE MEANING OF A "LABOR DISPUTE"

Nearly all of the fifty-one statutes employ the term "labor dispute" or its equivalent, but only a few attempt any definition or limitation of those words.\(^{23}\) However, one clue as to meaning has been inserted in every statute in order to satisfy the minimum requirements of the federal Social Security Act. The state statutes provide without exception that benefits shall not be denied to an otherwise eligible employee if he refuses to accept new work when the position offered is vacant due to a "strike, lockout, or other labor dispute,\(^{24}\) such a job not constituting "suitable work." This phrase indicates not only that "strikes" and "lockouts" are species within the genus "labor dispute" but also that a statutory "labor dispute" may exist in the absence of the strike or lockout manifestations.\(^{25}\)

Without further evidence of meaning within the statutes themselves, courts and administrators have been compelled to look elsewhere. Their most convenient sources for ready-made definitions are, of course, the Wagner\(^{26}\) and Taft-Hartley Acts,\(^{27}\) the Norris-LaGuardia Act,\(^{28}\) and

\(^{23}\) The Alabama statute defines "labor dispute" by repeating the Norris-LaGuardia Act terminology; the Arizona act refers to "labor dispute, strike, or lockout"; Arkansas excepts "lockouts" from the term "labor dispute"; Colorado disqualifies only for "strikes"; Connecticut provides that a lockout disqualifies only if it results from demands by employees as distinguished from an employer's attempt to deprive his workers of a present advantage; the District of Columbia act speaks of a labor dispute "such as a strike, lockout, or jurisdictional labor dispute"; Kentucky refers to "strike or other bona-fide labor dispute" but excepts lockouts; in Minnesota the disqualification clause applies to a "strike or other labor dispute," adopting the state Labor Relations Act definition of the latter term but excluding lockouts; Mississippi excludes the "unjustified lockout" from disqualification; New Hampshire excepts any work stoppage "due solely to a lockout"; the New York act specifies "strike, lockout or other industrial controversy"; Ohio refers to "labor dispute other than a lockout"; Rhode Island's provision includes "strike or other industrial controversy"; Utah disqualifies for a "strike involving his grade, class or group of worker"; Wisconsin includes "strike or other bona fide labor dispute." The statutory citations may be found at note 5 supra.

\(^{24}\) See, for example, Ill. Rev. Stat. (1949) c. 48, § 223(c)(2).

\(^{25}\) For a discussion of the most common nonstrike, nonlockout dispute, see text infra at notes 33–35.

\(^{26}\) "The term 'labor dispute' includes any controversy concerning terms, tenure 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 the disputants stand in the proximate relation of employer and employee." 49 Stat. 450 (1934), 29 U.S.C.A. § 152(2) (1947).


\(^{28}\) 47 Stat. 73 (1932), 29 U.S.C.A. § 173(c) (1947) (identical with the Wagner Act except that no reference is made to "tenure").
their state counterparts. Although the decisions regularly point out that they "are not bound by the definition of a labor dispute contained in the Federal statutes," the results reached invariably conform to the federal definitions. The net result has been a carry-over of the sweeping, all-inclusive interpretations of the anti-injunction and labor relations statutes into the unemployment compensation field.

This wholesale adoption of already-established broad definitions has been assailed by most writers on the premise that imparting different meanings to "labor dispute" in the different types of statutes involves less inconsistency than does a uniform interpretation:

The purpose of anti-injunction legislation, as has so often been pointed out, 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.30

---

30 One of the few opinions in which these definitions were flatly rejected by a court was that in the Department of Industrial Relations v. Drummond, 30 Ala. App. 78, 1 So. 2d 395 (1941), cert. den. 241 Ala. 142, 1 So. 2d 402 (1942) (prior to enactment of provision referred to in note 23 supra). Examples of the more usual result, in which the federal statutes become controlling in fact, though not in theory, are numerous: Dallas Fuel Co. v. Horne, 230 Iowa 1148, 300 N.W. 303 (1941); Huerta v. E. Regensburg & Sons, 7 B.S. 11—8891 (Fla. C. Ct., 1944); Snyder v. Consolidation Coal Co., 5 B.S. 7—7415 (Md. C. Ct., 1941); 9 B.S. 4/5—10000 (Va. R., 1945); 9 B.S. 3—10387 (Ohio A., 1945); 9 B.S. 2—10296 (Pa. A., 1945); 9 B.S. 2—10233 (Ark. D., 1945); 8 B.S. 11—10025 (Mo. D., 1945); 7 B.S. 5—8533 (Mich. A., 1943); 5 B.S. 9—7528 (N.J. D., 1941); 4 B.S. 7—6131 (Idaho A., 1940); 4 B.S. 3—5353 (Miss. R., 1940).

Occasionally the courts reach the more extreme conclusion that the federal statutory definitions are binding on them, usually as the result of fallacious reasoning. Barnes v. Hall, 285 Ky. 60, 148 S.W. 2d 929 (1940), cert. den. 314 U.S. 628 (1941); Sandoval v. Industrial Comm'n, 110 Colo. 108, 130 P. 2d 930 (1942).

But this self-styled "liberal" approach runs counter to basic notions of precedent, amounting to no more than an assertion that a term which had already acquired a commonly accepted, "ordinary" meaning through prior legislation should not have been employed in the compensation acts. The short answer is that the same term was used. Courts should not manufacture a distinction that the legislatures have not seen fit to create.

Even more important from a practical view, the device of narrow interpretation cannot make itself felt in any significant class of cases. Lockouts, like strikes, could not be excluded from the labor-dispute category unless a court indulged in distortion rather than definition. Just how small an area this leaves for interpretation may readily be seen by glancing at the nonstrike, nonlockout situation which has most often been presented to the courts: unemployment which results from the expiration of a collective bargaining agreement. Almost all the cases have dealt with the invocation of the "no contract, no work" formula in the coal industry. In accordance with common understanding—and incidentally with the Wagner and Norris-LaGuardia Act definitions—the decisions have refused to allow the absence of an employer-employee relationship to preclude the holding that a labor dispute existed. Dis-

---

32 "No doubt the meaning those words had in the mind of the General Assembly was the same as that expressed in defining them in the act concerning injunctions in labor disputes," Conte v. Egan, 135 Conn. 367, 371, 64 A. 2d 534, 535 (1949). Other decisions relying on "labor dispute" definitions in prior state statutes are Adkins v. Indiana Employment Security Division, 117 Ind. App. 132, 70 N.E. 2d 31 (1946); Spielmann v. Industrial Comm'n, 236 Wis. 240, 295 N.W. 1 (1940); Koski v. UCC, 7 B.S. 10—8851 (Ore. C. Ct., 1944); 5 B.S. 10—7614 (Minn. A, 1942); 4 B.S. 2—5232 (N.Y. A, 1940). In Local Union No. 11 v. Gordon, 396 Ill. 293, 71 N.E. 2d 637 (1947), the court pointed out that the state anti-injunction act was narrower in coverage than the federal statutes, but that it did not have to decide which was controlling.

33 Five distinct grounds were stated by the Washington Supreme Court for declaring that a lockout was a "labor dispute" in In re North River Logging Co., 15 Wash. 2d 204, 139 P. 2d 64 (1942); cf. The Midvale Co. v. UCB of Review, 67 A. 2d 380 (Pa. Super. Ct., 1949); Bucko v. J. F. Quest Foundry Co., 38 N.W. 2d 223 (Minn., 1949); Adkins v. Indiana Employment Security Division, 117 Ind. App. 132, 70 N.E. 2d 31 (1946). Perhaps most conclusive is that, even in those acts which refer to "labor disputes" without further elaboration in the disqualification section, the "suitable work" clause invariably speaks of "strike, lockout, or other labor dispute."

34 Johnson v. Iowa Employment Security Comm'n, 32 N.W. 2d 786 (Iowa, 1948); Walter Bledsoe Coal Co. v. Review Board, 221 Ind. 176, 46 N.E. 2d 477 (1943), followed in Peabody Coal Co. v. Lembermont, 112 Ind. App. 718, 46 N.E. 2d 706 (1943); Dallas Fuel Co. v. Horne, 220 Iowa 1148, 300 N.W. 303 (1941); Block Coal & Coke Co. v. UMW, 177 Tenn. 247, 148 S.W. 2d 364 (1941); Miners in General Group v. Hix, 123 W.Va. 637, 17 S.E. 2d 810 (1941); Department of Industrial Relations v. Pesnell, 29 Ala. App. 528, 199 So. 720 (1940), cert. den. 240 Ala. 457, 199 So. 726 (1940), cert. den. 312 U.S. 590 (1941); Barnes v. Hall, 285 Ky. 160, 146 S.W. 2d 929 (1940), cert. den. 314 U.S. 628 (1942); Peabody Coal Co. v. Gordon, 12 B.S. 7—13520 (Ill. Super. Ct., 1949); Metz v. Coal Operators, 10 B.S. 6—11549 (Md. C. Ct.,
qualification has therefore been nearly universally imposed. In fact, courts even in the few states which deny benefits only for "strikes" have been influenced by the "labor dispute" cases and have also refused to award compensation. It is obvious that the mere doctrine of narrow construction cannot prevail to transform a clear-cut labor dispute into some other type of animal. It is equally obvious that there are few situations indeed in which it is not clear whether a labor dispute exists.

The answer is the same if, instead of exploring anti-injunction statutes, the courts seek definitions in dictionaries, the "suitable work" provisions of the compensation acts, the Restatement of Torts, or the British Unemployment Insurance Act. "Labor dispute" is insufficiently flexible to exclude fact situations in which it may be concluded that benefits should be allowed as a matter of principle. Its scope is broad enough to cover nearly every controversy relating to conditions of work and involving more than a single employee. In short, encroachments on the

---

35 Baker v. Powhatan Mining Co., 146 Ohio St. 600, 67 N.E. 2d 714 (1946), rejecting the approach taken in United States Coal Co. v. UCB of Review, 66 Ohio App. 329, 32 N.E. 2d 763 (1946); Sandoval v. Industrial Comm'n, 110 Colo. 108, 130 P. 2d 930 (1942); cf. Employees of Lion Coal Corp. v. Industrial Comm'n, 100 Utah 207, 111 P. 2d 797 (1941). It is true that a "strike" contemplates a continuing employer-employee relationship, while expiration of the contract technically terminates that relationship. Nevertheless the parties in the latter case expect that the miners will return to work for the same employers once differences are settled. If, then, the employees' demands have been the motivating force in the work stoppage, it makes good sense to call the situation a "strike." However, the case is close enough so that the public policy favoring strict construction of disqualifications might throw the result the other way. Thus, benefits were allowed by the court in the United States Coal Co. case, supra.

36 Block Coal & Coke Co. v. UMW, 177 Tenn. 247, 148 S.W. 2d 364 (1941); Miners in General Group v. Hix, 123 W.Va. 637, 17 S.E. 2d 810 (1941); Ex parte Pesnell, 240 Ala. 457, 199 So. 726 (1940), denying cert. 29 Ala. App. 528, 199 So. 720 (1940), cert. den. 313 U.S. 790 (1941), United States Coal Co. v. UCB of Review, 66 Ohio App. 329, 32 N.E. 2d 763 (1940).


40 In addition to strikes, lockouts, and "no contract, no work" controversies, labor disputes have been found in the following situations: (1) slowdowns—Bankston Creek Collieries, Inc. v. Gordon, 399 Ill. 291, 77 N.E. 2d 670 (1948); 12 B.S. 3—13242 (Ohio R, 1948); (2) controversy over employer's contract violation—Local Union No. 11 v. Gordon, 396 Ill. 293,
labor-dispute disqualification provisions must take the form of legisla-

tive, not judicial, activity.

Four acts already include the sensible limitation that no ineligibility

ensues if the dispute is caused by the employer’s violation of “any state

or United States law on hours, wages, or other conditions of work.”

Two of these and one other have extended the same principle to allow

benefits if the work stoppage is due to the “employer’s failure to con-

form to the provisions of any contract.”

These provisos clearly pass muster on theoretical grounds. And in so

doing, they point the way to the general principle that should underlie

restrictions on the denial of benefits during disputes: Compensation

should be payable during any stoppage of work caused by unreasonable

conduct on the part of the employer.

Adoption of this view would create a distinction in the labor-dispute

section comparable to that found elsewhere in the unemployment com-

pensation acts. At the same time, it would conform admirably to all the

theories justifying disqualification. First, the need for “state neutrality”

was grounded on the assumption that it would be too difficult to assess

responsibility for disputes. Where the statute labels conduct as “un-

reasonable” for benefit purposes, the neutrality obstacle is therefore

71 N.E. 2d 637 (1947); Deshler Broom Factory v. Kinney, 140 Neb. 889, 2 N.W. 2d 332

(1942); (3) dispute over employer’s failure to comply with War Labor Board directive—cases

cited third paragraph of note 20 supra; (4) dispute between national and local union—Miller


Strangely enough, strikes to compel recognition of unions as bargaining agents have twice

been held not to impose disqualification. Duquesne Brewing Co. v. UCB of Review, 359 Pa.


These decisions are inconsistent with such Norris-LaGuardia Act interpretations as that in

United States v. Hutcheson, 312 U.S. 219 (1941), with such British decisions as Brit. Ump.

214/26, BU-474 (1926), and with common sense. In fact, the Pennsylvania Superior Court has

already undermined the Duquesne Brewing doctrine in Westinghouse Electric Corp. v. UCB


Arizona, Arkansas, Montana, and Utah statutes cited note 5 supra.

Montana, New Hampshire, and Utah statutes cited note 5 supra. The New Hampshire

provision was applied to prevent disqualification in 11 B.S. 5—12438 (N.H. R, 1947).

For example, disqualification for rejecting new employment extends only to refusal of

“suitable” work. “Suitability” clearly involves a rule of reason, especially since no statute

regards work as suitable “[i]f the position offered is vacant due directly to a strike, lockout, or

other labor dispute; if the wages, hours, or other conditions of the work offered are sub-

stantially less favorable to the individual than those prevailing for similar work in the

locality; if, as a condition of being employed, the individual would be required to join a

company union or to resign from or refrain from joining any bona fide labor organization.”

Ill. Rev. Stat. (1949) c. 48, § 223(c)(2). Similarly, not every individual who leaves his work

voluntarily is denied benefits. The concept of reasonableness is injected by excusing voluntary

leaving “with good cause.” Kempfer, Disqualifications for Voluntary Leaving and Miscon-
duct, 55 Yale L.J. 147 (1946).
automatically removed. Second, it was pointed out earlier that "the objection to financing strikes loses its impact whenever the shutdown has resulted from clearly unreasonable conduct on the part of the employer." The "strike benefits" argument, essentially equitable in its nature, cannot overcome the equitable answer of "unclean hands" when the employer himself has caused the stoppage. Finally, if the employees have by hypothesis been forced to contend with unreasonable opposition in a dispute, it would be a solecism to term "voluntary" any stoppage, whether strike or lockout, resulting from breakdown of negotiations.

Unfortunately, the criterion of unreasonableness has never been recognized as the ultimate objective of statutory modification. In addition, its translation into specific legislative provisions is not an easy task. Accordingly, aside from the "breach of contract" and "breach of law" enactments, few of the present statutory curtailments on "labor disputes" can be rationally defended.

Several acts seek to narrow the basic provision by excluding "lockouts" from the disputes that bar benefits or by replacing the term "labor dispute" with "strike." Without accompanying definitions the net result may in some cases amount simply to a trading of one ambiguity for another. And whether or not the terms are defined, a criterion based solely on how the dispute results in a stoppage (by strike or by lockout) is patently artificial, bearing no logical relevancy to benefit eligibility.

More elaborate attempts have proved just as unsatisfactory. In Connecticut, any individual whose unemployment is due to a lockout shall not be disqualified, unless the lockout results from demands of the employees, as distinguished from an effort on the part of the employer to deprive employees of some advantage they already possess.

---

44 Arkansas, Kentucky, Minnesota, New Hampshire, Ohio, and Pennsylvania statutes cited note 5 supra. One writer has advocated coupling such an exclusion with a provision excepting lockout benefits from being charged against an employer's experience rating. 33 Minn. L. Rev. 758, 769 (1949). The idea, though novel, ignores the irrationality of any distinction based on the mere form by which a dispute is translated into a work stoppage.

45 Colorado and Utah statutes cited note 5 supra.

46 Courts in Ohio and Colorado adopted different definitions of "strike" from authoritative sources and arrived at diametrically opposite conclusions as to the nature of the "no contract, no work" miners' work stoppages. United States Coal Co. v. UCB of Review, 66 Ohio App. 329, 32 N.E. 2d 763 (1940) (no "strike"); Sandoval v. Industrial Comm'n, 110 Colo. 108, 130 P. 2d 930 (1942) ("strike").

The Mississippi labor-dispute section is inapplicable to any employee who satisfies one condition:

He is unemployed due to a stoppage of work occasioned by an unjustified lockout; provided, however, such lockout was not occasioned or brought about by such individual acting alone or with other workers in concert. . . .

Under the Utah act,

If . . . a strike has been fomented by a worker, none of the workers of the grade, class, or group of workers of the individual who is . . . a party to such plan, or agreement to foment a strike, shall be eligible for benefits. . . .

If . . . the employer . . . has conspired, planned or agreed with any of his workers . . . to foment a strike, such strike shall not render the workers ineligible for benefits.49

All three provisions adopt the unreal strike-lockout distinction. Surely if it makes good sense to differentiate among lockouts as "justified" and "unjustified," it must make equally good sense to draw the same line in other disputes. In the Connecticut act, this error is compounded by introduction of another fallacious test—that depending on which party seeks to disturb the status quo. To judge simply by the making of demands, without reference to then-existing economic conditions, would hinge benefit eligibility on a clear non sequitur. No such sanctity should be attached to nominally static working conditions.50

Only West Virginia has added a significant contribution based on notions of "unreasonableness":

No disqualification under this subsection shall be imposed if employees are required to accept wages, hours or conditions of employment substantially less favorable than those prevailing for similar work in the locality, or if employees are denied the right of collective bargaining under generally prevailing conditions, or if an employer shuts down his plant or operation or dismisses his employees in order to force wage reduction, changes in hours or working conditions.51

Although the third alternative in the statute is as erroneous as its Connecticut counterpart, the first two are sound in theory52 and operate well in practice.53 They furnish good examples of the type of provision that will carry out the rationale here suggested and at the same time will

50 Perhaps because of its relative simplicity of administration, the status-quo criterion was recommended by Lesser, op. cit. supra note 8, at 180.
52 See Lesser, op. cit. supra note 8, at 179; Schindler, op. cit. supra note 14, at 876.
solve the admittedly difficult problem of framing comprehensible, not overly-vague standards.\textsuperscript{54}

Beyond the draftsmanship barrier, valid objections may be leveled at the proposed exceptions on administrative grounds. For example, in many cases the compensation agency’s functions would overlap those of agencies responsible for administering other statutes. Perhaps most common would be cases in which a Commissioner or Director of Labor and the NLRB would both be asked to determine whether an employer’s activities constituted a statutory “unfair labor practice.” Inconsistent decisions would be both anomalous and embarrassing; consistent decisions could result in an employee’s being awarded unemployment benefits and back pay for the same period of time.\textsuperscript{55} Furthermore, there would often be the difficult task of deciding how much weight the benefits administrator should attribute to another agency’s prior decision.\textsuperscript{56}

Several possible solutions have been offered to these enforcement problems.\textsuperscript{57} If the difficulties can be minimized—and there seems no reason to believe that they cannot—the “breach of duty” exceptions and the desirable portions of the West Virginia act should be added to whatever else the legislature regards as employer unreasonableness. The combination would provide a sensible modification of the Draft Bill section.

\textbf{THE MEANING OF A “STOPPAGE OF WORK”}

Most unemployment compensation statutes, following the Draft Bill provisions, impose disqualification only if a “stoppage of work” exists

\textsuperscript{54} The writer’s use of “unreasonableness,” of course, is intended to indicate an idea rather than a statutory model. Some notion of the language difficulties inherent in the approach recommended herein may be derived from the use of the imprecise terms “unjustified” and “foment” in the quoted Mississippi and Utah provisions.

\textsuperscript{55} In Marshall Field & Co. v. NLRB, 318 U.S. 253 (1943), the Supreme Court held that unemployment “benefits received under the state compensation act were plainly not ‘earnings’” within the meaning of a Board order to the employer to reinstate employee victims of unfair labor practices with back pay, less “net earnings” after the discriminatory discharge. The earlier decision in Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940), had denied the Board’s power to order employers to reimburse relief agencies for amounts paid to employees discharged in violation of the NLRA. Since the NLRB is not disposed to allow employers to shift the economic effects of unfair labor practices to compensation funds, double recovery is not an uncommon occurrence.

\textsuperscript{56} In Members of Iron Workers’ Union v. Industrial Comm’n, 104 Utah 242, 139 P. 2d 208 (1943), an NLRB trial examiner had found the employer guilty of an unfair labor practice in refusing to bargain. The Utah court denied benefits, stating that it had not been shown that the alleged unfair labor practice was the cause of the work stoppage. This decision allowed the court to sidestep the problem of what effect to give the prior holding that the employer had failed to conform to provisions of a law of the United States.

\textsuperscript{57} Lesser, op. cit. supra note 8, at 179–81.
during the week for which benefits are claimed. Once again a deceptively simple phrase has proved a continuous source of litigation, both before the commissions and in the courts.

Like most other aspects of the Draft Bill, the stoppage of work requirement had its origin in the British Unemployment Insurance Acts. When this country’s fifty-one statutes were adopted, the phrase had long since acquired a settled construction from the British Umpires as referring “not to the cessation of the workman’s labour, but to a stoppage of the work carried on in the factory, workshop or other premises at which the workman is employed.” It is scarcely surprising that the overwhelming majority of appellate decisions in the United States have adopted the same interpretation.

Evaluation of this result can best be accomplished by means of an illustration. In Lawrence Baking Co. v. Michigan UCC, the employer had replaced his striking employees so quickly that only fifteen minutes’ production had been lost. Despite the fact that picketing continued and the strike was not abandoned, benefits were allowed because there was no “stoppage of work” at the employer’s factory.

At first glance it may seem that such a decision does violence to the “involuntary unemployment” theory. But the bakers’ unemployment, once the employer resumed production, was involuntary in a very real sense. Their strike action had been an effort to secure new terms by means of a temporary suspension of their employment relation. When they were replaced they lost all possibility of employment with the company even on their former terms. Their employment relation was not suspended but terminated. Insofar as employees are thus thrown on the free labor market when they anticipated no such result from their labor


93 Lawrence Baking Co. v. Michigan UCC, 308 Mich. 198, 13 N.W. 2d 260 (1944). The court’s task was made more simple by the fact that prior to 1941 the Michigan statute disqualified workers if their “unemployment is due to a labor dispute which is actively in progress. . . .” This provision plainly made benefits contingent on the individual’s cessation of work. When an amendment inserted the “stoppage of work” phrase, it was easy to infer a change in emphasis to the employer’s cessation of work.
activity, their unemployment is truly "involuntary." The uniformity of
decisions in this area indicates clearly that if the "involuntariness"
theory is at all valid, it must be so on this basis.

On "neutrality" and "strike-financing" grounds the result is equally
understandable. No reasonable man would concede the slightest chance
of success to a strike like that at the Lawrence Baking Company. As an
economic weapon it was impotent. The argument against financing labor
disputes extends logically only to cases in which the financing may re-
sult in the employer's being compelled to submit to the workers' de-
mands. But where production is unimpaired, the unemployed strikers
should be treated no differently than any other unemployed workers.
Nor does the neutrality theory preclude payment of benefits, since the
merits of the dispute can have no impact on the outcome once the strike
is effectively lost.

Despite the cogency of these arguments there has been insistence in
many jurisdictions on satisfying a supposed requirement that not only
the unemployment but the original leaving of work be "involuntary." Usually
this insistence is reflected in statutes which omit the "stoppage of
work" phrase, requiring only that "unemployment [be] due to the
existence of a labor dispute. . . ."61 Unfortunately, the same insistence
may also manifest itself in bad decisions under "stoppage of work"
statutes.

Illinois furnishes a fine example of the latter category. In Walgreen
Co. v. Murphy, the state supreme court emphasized the "involuntary
unemployment" theory by stating, "The manifest legislative intent is
that 'stoppage of work' was deemed synonymous with 'strike.' "62 No
confusion should have resulted, for despite this somewhat muddled dic-
tum, other portions of the opinion indicated a real understanding of the
meaning of "stoppage of work":

There was, without question, a stoppage of work at the warehouse resulting from a
labor dispute between the employer and claimant employees, the shutdown substan-
tially interfering with warehouse operations, curtailing them to approximately 20 per
cent of normal production. For all practical purposes, there was a cessation of the
operation of the establishment and a cessation of work. In short, there was both a
stoppage of work and a labor dispute at the warehouse.63

---

61 This is the language of the Connecticut act. Similar phraseology is found in the Alabama,
Alaska, California, District of Columbia, Florida, Kentucky, Louisiana, Minnesota, Nevada,
New York, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, and Wisconsin statutes
cited note 5 supra.

62 386 Ill. 32, 36, 53 N.E. 2d 390, 393 (1944).

63 Ibid., at 37, 393 (italics added); see Local No. 658 v. Brown Shoe Co., 403 Ill. 484, 87
N.E. 2d 625 (1949); Caterpillar Tractor Co. v. Durkin, 380 Ill. 11, 42 N.E. 2d 541 (1942);
Nevertheless the Illinois administrators have seized on "involuntary unemployment" and the single sentence first quoted above to adopt the position that the only stoppage required is that of the individual. As a result, Illinois is one member of a two or three state minority which adheres to this view.

Several problems are presented by the majority criterion of stoppage at the place of employment. First, the theoretical justifications for the requirement are plainly applicable even though a complete cessation of operations does not exist. There has consequently been unanimous acceptance, both under the British Acts and in this country, of the proposition that a substantial curtailment is sufficient to disqualify claimants. Less unanimity exists, of course, as to the meaning of "substantial." Although most decisions follow the general practice of examining decreased production, business revenue, service, number

Cuneo Press, Inc. v. Director of Labor, 7 B.S. 9-8785 (Ill. C. Ct., 1944). The Walgreen decision was cited in Sakrison v. Pierce, 66 Ariz. 162, 185 P. 2d 528 (1947), as having established the employer's stoppage of work as the test for disqualification, thus following the majority view.

As early as 1946 one member of the Illinois Division of Placement and Unemployment Compensation indicated his similar understanding of the Walgreen case. Hughes, op. cit. supra note 10, at 24-25; see 36 Ill. B.J. 364, 365 (1948), noting Fash v. Gordon, 398 Ill. 210, 75 N.E. 2d 299 (1947), and expressing the same view. But see 9 B.S. 1-10776 (Ill. R, 1945).

Similar mistaken reliance on the "declaration of policy" regarding "involuntary unemployment" led to the same conclusion in 10 B.S. 3-11288 (Colo. R, 1946); see 10 B.S. 11-11090 (Tex. A, 1947).


Statutory provisions in two states codify the judicial definition. Mo. Rev. Stat. Ann. (Supp. 1948) § 9423(q) requires a "substantial diminution of activities, production or service ...." The North Dakota statute cited note 5 supra refers to a "substantial stoppage of work" without further clarification.

Work stoppages have been found when operations were at the following percentages of normal production: 3 B.S. 8-4132 (Conn. R, 1940) (14%); 9 B.S. 4/5-10300 (Va. R, 1945) (15%); 4 B.S. 7-6129 (Del. R, 1941) (17%); Walgreen Co. v. Murphy, 386 Ill. 32, 53 N.E. 2d 390 (1944) (20%); 8 B.S. 11-10025 (Mo. D, 1945) (30-50%); 11 B.S. 2-12217 (N.H. R, 1947) (50%); 8 B.S. 10-9665 (Wyo. A, 1948) (50-80%); 6 C.C.H. Unempl. Ins. Rep. 39, 556 (Okla. App. Trib., 1949) (50-85%); 9 B.S. 6-10547 (Mo. D, 1945) (60%); 12 B.S. 5-13349 (Ill. A, 1948) (80%); 2 B.S. 8-1859 (N.J. D, 1939) (85%); the decision stating that the continued strike showed the employees' belief that the stoppage was substantial enough to make strike's success possible); 7 B.S. 4-8483 (Me. D, 1943) (94% of normal circulation of stuck newspaper held substantial cessation when 25% of the employees were on strike and advertising dropped 40%).

In 10 B.S. 4-11435 (Wash. R, 1946) the employer's counsel argued unsuccessfully that a 1% per cent drop in production was a "substantial" stoppage of work in a steel mill because of the then-existing large backlog of orders.

(See facing page for footnotes 68 and 69)
of employees, payroll, or man-hours, seemingly inconsistent results are bound to ensue from the great variety of fact situations presented. As long as the bases for decision are correct, however, an occasional aberration is small cause for alarm.

More troublesome has been the question of whether benefits are payable during disputes which cause a substantial production drop in one department, though not in the entire plant. Twenty-eight of the thirty-four "stoppage of work" statutes provide that if "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." The implication is that departments which are not "commonly conducted as separate businesses in separate premises" do not possess independent status for the purpose of determining disqualification. The test should thus be whether the stoppage was substantial in relation to the entire establishment.

69 Employees were disqualified in 11 B.S. 7-12598 (Mass. R, 1948) (one-third to one-half decrease in bar's business) and Magner v. Kinney, 141 Neb. 122, 2 N.W. 2d 689 (1942) (30% drop in total business) but not in 12 B.S. 1-13031 (Ariz. A, 1948) (one-fourth to one-third loss in revenue); 4 B.S. 4-5537 (Ill. D, 1946) (one-third decrease in goods billed); 3 B.S. 6-3613 (N.J. D, 1939) (when all current orders were being filled by eight employees out of original thirty, no work stoppage even though existence of strike caused failure to solicit new orders); 3 B.S. 3-2894 (Conn. R, 1939) (sales greatly reduced because of public sympathy with strikers, but held no stoppage where hired replacements could have handled ordinary volume of business).

68 Operation of busses at 80% of usual service did not bar compensation in 3 B.S. 3-2893 (Conn. R, 1939).

70 Substantial stoppages were inferred from the number of employees who left work in Deshler Broom Factory v. Kinney, 140 Neb. 889, 2 N.W. 2d 333 (1942) (90%); 10 B.S. 8-11730 (Okla. A, 1946) (75-80%); 10 B.S. 4-11382 (Md. D, 1946) (75%). The opposite decision was reached in 12 B.S. 1-13031 (Ariz. A, 1948) (one-third to one-half reduction); 4 B.S. 4-5538 (Ill. D, 1946) (5-10% drop); 3 B.S. 8-4140 (N.J. D, 1939) (17%); 2 B.S. 2-852 (Conn. R, 1938) (17%).

71 10 B.S. 3-11296 (Ill. R, 1946) (30% reduction in payroll indicates work stoppage).

72 4 B.S. 2-5211 (Conn. R, 1940) (two-thirds decrease in man-hours worked held appreciable stoppage). In 7 C.C.H. Unempl. Ins. Rep. 49,522 (Va. Comm'r No. 518, 1949), John L. Lewis' three-day work week was held to have caused a "definite decline in production" and hence a work stoppage.

73 In 9 Univ. Chi. L. Rev. 751 (1942), noting Magner v. Kinney, 141 Neb. 122, 2 N.W. 2d 689 (1942), the author reviewed the Illinois cases and concluded that 50 per cent of normal production was the approximate dividing line of "substantiality." Yet subsequent decisions have disqualified for 20 per cent [12 B.S. 5-13369 (Ill. A, 1948)] and 30 per cent [10 B.S. 3-11296 (Ill. R, 1946)] reductions.

74 All statutes cited in first paragraph of note 5 supra except Delaware, Idaho, Michigan, Pennsylvania, Utah, and Vermont. Only the West Virginia provision was enacted as a separate section rather than as part of the labor-dispute section. W.Va. Code Ann. (1943) § 2366(81).
ment's production, not merely to that of the department in which the dispute occurred. This approach would be harmonious with the view that benefits should depend in part upon the likelihood of success of the employees' strike. However, due perhaps to the pervasive influence of the "involuntary loss of work" theory, the decisions are in hopeless conflict.75

Several administrators have been faced with the difficult situation in which the normal production-crippling effect of a strike has been averted by a temporary work rearrangement by the employer. The principle of "probable strike success" indicates that decisions should turn on whether the work can continue permanently on the new basis or whether the employer will be compelled to rehire to replace the strikers.76 Once again the decisions are not fully consistent with this or any other theory,77 and it is fortunate that the problem arises only infrequently.

75 In 10 B.S. 3—11297 (Ill. R, 1946) claimants argued that cessation of work in the plant toolroom was not a stoppage of work "in the establishment." The Director of Labor once again misinterpreted the Walgreen case (see text at notes 62–64 supra) by stating that "the court held that the existence of a stoppage of work was not to be measured by the effect of a labor dispute upon the operations of an entire business. . . ." Disqualification was caused, therefore, by a "stoppage of work in the toolroom of the company's establishment." Compare Cuneo Press, Inc. v. Director of Labor, 7 B.S. 9—8758 (Ill. C. Ct., 1944) (50% stoppage in one department held "stoppage of work" without further discussion); 4 B.S. 4—5534 (Conn. R, 1940) (strike in repair department held work stoppage even though repair work represented only 14% of total revenue during strike and 8% during previous year); 3 B.S. 8—4145 (N.J. D, 1940); see Homer Laughlin China Co. v. Hix, 128 W.Va. 613, 37 S.E. 2d 649 (1946) (75% curtailment in one department held "stoppage" without discussing problem).

But in 3 B.S. 9—4333 (Mo. D, 1940) the employer met a complete shutdown in the fur-scraping department by shipping the furs to another locality for scraping and having them returned for completion. Since full production was maintained, no stoppage was held to exist. Compare 5 B.S. 7—7416 (Mass. R, 1941), in which half the shipping room employees and all but one truck driver had gone on strike. Claimants were held disqualified because of the over-all effect on the business of lack of delivery service, not merely because of the departmental stoppage.

76 Although the British Umpires' decisions include little theoretical discussion, the results are consistent with the view here suggested. Brit. Ump. 2575, BU-496 (1922); Swanish, Trade Disputes Disqualification Clause under the British Unemployment Insurance Acts 32–33 (1937); Ministry of Labour, Analytical Guide U.I. Code 7, Part III, § 48 (1939 ed.). One of the early American decisions, 2 B.S. 8—1854 (N.J. D, 1939), relied heavily on the British precedents in reaching a like result.

77 12 B.S. 5—13370 (Ind. A, 1948) involved a strike by 68 compositors of the Hammond Times's 168 employees. Twenty new employees were hired in the photoengraving and typetype departments. Average circulation decreased 2000 copies per issue, but there was no showing of the reason for the drop or that the newly constituted staff could not handle the former circulation. Yet benefits were denied because total employment was down (hardly relevant), circulation was down (not shown to be relevant), and the device adopted was "temporary." As to the last point, the "temporary" expedient served the entire Chicago news-
CAUSE AND EFFECT: LABOR DISPUTE AND STOPPAGE OF WORK

Benefit ineligibility is imposed on an employee "for any week [in] which...his...unemployment is due to a stoppage of work which exists because of a labor dispute. . . . " The italicized words inject a dual requirement of causality into the statute. Thus it is not sufficient for disqualification that the facts satisfy the definitions of "labor dispute" and "stoppage of work." Denial of compensation for any week depends on the additional finding that the stoppage exists because of the dispute during that week.78

This has not meant the importation of all the complexities of "proximate cause" doctrine into unemployment compensation. On the contrary, the decisions have escaped the difficulties of joint causation, concurrent causation, and intervening causation79 by adopting the relatively simple "but-for" rule: The work stoppage "exists because of a labor dispute" only if it would not have existed but for that dispute.

For example, the most common problem involves a stoppage due initially to a labor dispute. Later another factor appears which would alone be sufficient to cause a stoppage of work, and benefits are claimed for subsequent unemployment. Compensation has been uniformly allowed in such cases, whether the new causal element is the employer's paper-reading public for a twenty-two month period before settlement of the ITU strike. On appeal, despite its finding that "[p]ublication of the newspaper continued without interruption," the Review Board held that a work stoppage existed "in the composing room" (see note 75 supra) and affirmed the disqualification, 48-LDR-4. The decision is now before the Appellate Court in Brascher v. Review Board, No. 17943 (1949).

In B.S. 10—12848 (N.C. R, 1948) and 10 B.S. 11—1967 (N.D. A, 1947) administrative tribunals considered nearly identical telephone operators' strikes during which operations were maintained by recruiting and borrowing new operators, by using a dial system on local calls, and by regulating long distance service. The facts were held to show a work stoppage in North Dakota but not in North Carolina.

78 This plain meaning of the statutes, as stated in Conte v. Egan, 135 Conn. 367, 373, 64 A. 2d 534, 536 (1949), has been followed with near unanimity: "[E]ach week of unemployment is a severable unit." Only two decisions have been found to adopt a different approach: Johnson v. Iowa Employment Security Comm'n, 32 N.W. 2d 786 (Iowa, 1948); Employees of Utah Fuel Co. v. Industrial Comm'n, 90 Utah 88, 704 P. 2d 197 (1940). In Employees of Lion Coal Corp. v. Industrial Comm'n, 200 Utah 203, 711 P. 2d 797 (1941) the court, although seeking to distinguish the Utah Fuel case, reached a decision wholly inconsistent with it.

Since this article went to press, a third court has adopted the highly questionable reasoning of the Utah Fuel case. Frank Foundries Corp. v. Review Board, 88 N.E. 2d 160 (Ind. App., 1949).

79 See generally Prosser, Torts c. 8 (1941); cf. Abramowitz, "Stoppage of Work Due to a Labor Dispute" as Defined by the Unemployment Compensation Laws, 10 Geo. Wash. L. Rev. 604, 619 (1942).
decision to close down indefinitely\(^8\) or to liquidate his business\(^9\) the end of the normal season in a seasonal business,\(^10\) the making of repairs which would themselves have caused a shutdown,\(^11\) or the lack of supplies or orders necessary for operation.\(^12\)

Precisely the same "but-for" rationale has been applied where the stoppage was originally produced by nonlabor factors and a labor dispute has arisen during the stoppage. Benefits are consistently paid as long as the independent cause continues active,\(^13\) but disqualification occurs "for any week" in which the dispute becomes the sine qua non of the stoppage.\(^14\) These principles have carried so far as to allow com-

\(^8\) 1 B.S. 10—12847 (N.C. R, 1948); 9 B.S. 4/5—10481 (N.C. R, 1945); 9 B.S. 3—10370 (Mo. D, 1945); 6 B.S. 5—7950 (N.J. D, 1942); 5 B.S. 10—7612 (Mich. A, 1942); 4 B.S. 6—5948 (N.J. D, 1940); 4 B.S. 2—5339 (Wash. A, 1940); 4 B.S. 2—5337 (Va. D, 1940); 3 B.S. 1—2422 (Va. R, 1939); Brit. Ump. 4590/26, Bu-509 (1926).

\(^9\) 12 B.S. 6—13462 (Mass. A, 1948); 4 B.S. 12—6724 (Kan. D, 1941); 3 B.S. 6—3650 (Mo. D, 1940) (filing of voluntary bankruptcy petition); cf. 3 B.S. 9—4332 (Minn. A, 1940) (sale of business).

\(^10\) 10 B.S. 8—11730 (Okla. A, 1946) (benefits allowed earlier where drought caused small tomato crop, thus shortening normal canning season); 5 B.S. 9—7325 (Kan. R, 1941); 4 B.S. 12—6726 (Mich. A, 1941); 4 B.S. 10—6338 (Okla. A, 1941); 3 B.S. 5—3370 (Cal. A, 1939).

\(^11\) 3 B.S. 1—2423 (W.Va. A, 1939). But cf. 12 B.S. 6—13453 (Ky. R, 1948), in which disqualification was imposed during a strike even though the company would have had to shut down to comply with the state mine inspector's requirements. The decision may be partly attributed to claimants' failure to indicate the probable duration of such a shutdown.

\(^12\) 5 C.C.H. Unempl. Ins. Rep. 36,532 (N.C. Comm'n 1949); 4 B.S. 4—5540 (N.J. D, 1940); 3 B.S. 6—3615 (N.J. D, 1939); 3 B.S. 6—3605 (Ind. R, 1940). Contra: Johnson v. Iowa Employment Security Comm'n, 32 N.W. 2d 786 (Iowa, 1948); Employees of Utah Fuel Co. v. Industrial Comm'n, 99 Utah 88, 104 P. 2d 197 (1940). The latter two decisions are explainable by their failure to examine causation for each week of unemployment; see note 78 supra. The same flaw underlies Frank Foundries Corp. v. Review Board, 88 N.E. 2d 160 (Ind. App., 1949), decided since this article went to press.

\(^13\) Tucker v. American Smelting & Refining Co., 55 A. 2d 692 (Md., 1947) (stoppage caused by lack of materials due to strike at Utah plant of same employer; claimants not disqualified even during subsequent strike in Maryland plant); Muncie Foundry Divison v. Review Board, 114 Ind. App. 475, 51 N.E. 2d 891 (1943) (benefits payable despite labor dispute as long as original lack of work persists); Andrews v. Bates, 14 Wash. 2d 322, 128 P. 2d 300 (1942) (scheduled one-week shutdown coincident with dispute does not disqualify); Camera v. Egan, 2 C.C.H. Unempl. Ins. Rep. 10,606 (Conn. Super. Ct., 1949) (breakdown of negotiations and closing of department does not preclude benefits when employer had decided two weeks earlier to close department); 4 B.S. 6—5947 (N.J. D, 1940) (no disqualification for labor dispute when prior lack of available work caused stoppage); 3 B.S. 1—2422 (Va. R, 1939) (same); 2 B.S. 11—2138 (Ind. A, 1939) (same); see Danzer v. UCC, 4 B.S. 2—5235 (Ore. C. Ct., 1940).

\(^14\) Clapp v. Appeal Board, 38 N.W. 2d 325 (Mich., 1949); Abbott v. Appeal Board, 323 Mich. 32, 44 N.W. 2d 542 (1948) (labor dispute halted reconversion operation which originally caused stoppage; benefits denied from time reemployment would have occurred had dispute not affected reconversion); Andrews v. Bates, 14 Wash. 2d 322, 128 P. 2d 300 (1942) (dispute disqualifies after original cause of stoppage lapses); Employees of Lion Coal Corp. v. Indus-trial Comm'n, 100 Utah 207, 111 P. 2d 797 (1941); see Muncie Foundry Division v. Review Board, 114 Ind. App. 475, 51 N.E. 2d 891 (1943).
UNEMPLOYMENT BENEFITS AND "LABOR DISPUTES" 315

pensation even where the initial cessation of work resulted from the employer's anticipation of the dispute. In any event, the boundaries of causation are so well marked out in this area that further discussion is unnecessary.

CAUSE AND EFFECT: STOPPAGE OF WORK AND UNEMPLOYMENT

Despite the existence of a dispute-caused stoppage of work, any claimant may qualify for benefits if his unemployment was not caused by that stoppage. In jurisdictions without the work-stoppage requirement, escape from disqualification depends on a lack of causality between individual unemployment and the dispute itself. Both types of statute have received essentially the same judicial treatment as that discussed in the previous section, but certain recurring questions have called for special treatment.

Primary among these is the "purge"—the removal of disqualification by taking new employment. Under the British Acts, the labor-dispute provision is specifically inapplicable if the employee "has . . . become bona fide employed elsewhere in the occupation which he usually follows, or has become regularly engaged in some other occupation. . . ." The Draft Bills omitted this provision but inserted a reference to labor disputes at the premises "at which he is or was last employed." Most courts and administrators have pointed to the word "last" as evidencing legislative intent to approve the "purge" doctrine. The end result has been a judicial re-enactment of the British exception. Decisions have insisted that the new work be taken as bona fide permanent employment with no intent to return to the struck employer after the dispute ends, that the labor dispute be abandoned by the employee upon accepting new employment, and that there be no evidence of collusion

---

87 Bryant v. Hayden Coal Co., 111 Colo. 93, 137 P. 2d 417 (1943) (benefits allowed although coal mine closed to sink deeper shaft three days prior to contract expiration and expected stoppage); 5 B.S. 4—7173 (Wash. R, 1940) (mine repairs—same result); 3 B.S. 4—3116 (Ind. R, 1939) (no disqualification where employer had stepped up production in anticipation of coal mine labor stoppage so that no work was available at time of stoppage).

But cf. Revere Sugar Refinery v. Marshall, 10 B.S. 10—1786r (Mass. Muni. Ct., 1947), in which the employer stopped operations to prevent spoilage from a threatened strike. Although the strike occurred a week later, the court sensibly denied benefits from the stoppage date by holding that the labor dispute was in existence at that time and caused the stoppage.

88 Unemployment Insurance Act, 25 Geo. V, c. 8, § 26(1) (1935) was in effect at the time the American statutes were adopted. It has since been replaced by National Insurance Act, 9 & 10 Geo. VI, c. 67 § 13(1) (1946).

89 Only Missouri has treated this question in detail by statute. Mo. Rev. Stat. Ann. (Supp. 1948) § 9437 II(a) provides that subsequent employment must be of a permanent nature and last at least two weeks to terminate labor-dispute disqualification; cf. Minn. Stat. Ann. (1945) § 268.09 subd. 1(6).
with the second employer to attempt to break the causal relation. If these requirements are met, it is considered of no consequence that the employee eventually does return to his original employer. The universal acceptance of these principles indicates that apparent inconsistencies are merely the product of variation in the persuasiveness of claimants.

Another basic problem concerns employees whose discharge or layoff preceded the disqualifying stoppage. If the discharge is unrelated to the labor dispute, benefits are always allowed, even if the worker subsequently fails to cross a picket line to return at the employer's request or actually joins the pickets. In fact, carried to its logical extreme, the doctrine has produced the anomalous spectacle of one employee receiving compensation after his discharge while all other employees are disqualified for having struck to protest that very discharge. All these decisions are explainable on a "but-for" basis, the underlying premise being that the original cause for discharge would continue to cause unemployment even if the labor dispute were nonexistent.

By the same token, unemployment caused by the employer's or employee's anticipation of a work stoppage should be noncompensable as soon as the actual stoppage develops, there being no reason to assume

---


91 "Purge": 4 B.S. 9-6432 (Ind. R, 1941) (one day); 4 B.S. 3-5357 (Minn. A, 1940) (two days); 5 B.S. 10-7608 (Del. R, 1942) (two weeks); 4 B.S. 4-5543 (Mass. A, 1940) (same) 4 B.S. 9-6435 (Mich. A, 1941) (seven weeks).


93 4 C.C.H. Unempl. Ins. Rep. 24,566 (Mass. Board of Review X-83047, 1949); 12 B.S. 8-13589 (Ind. R, 1949); 11 B.S. 5-12418 (Conn. R, 1947); 9 B.S. 11-10999 (Utah A, 1946); 9 B.S. 9-10777 (Cal. A, 1945); 6 B.S. 5-7049 (Mass. R, 1942); 4 B.S. 7-6188 (Ohio R, 1941); 4 B.S. 7-6133 (Ind. A, 1941); 4 B.S. 7-6131 (Idaho A, 1940); 4 B.S. 5-5723 (N.J. D, 1940); 4 B.S. 4-5553 (N.Y. A, 1940); 4 B.S. 2-5209 (Ala. R, 1940); 3 B.S. 8-4133 (Mich. A, 1940); 3 B.S. 7-3858 (Ga. A, 1940).


95 12 B.S. 4-13344 (Tex. R, 1948); 5 B.S. 10-7617 (N.J. D, 1942); 3 B.S. 6-3608 (Mo. D, 1939); 3 B.S. 4-3131 (Okla. A, 1939); 3 B.S. 4-3114 (Idaho A, 1939); 3 B.S. 3-2897 (N.D. A, 1939); 2 B.S. 10-2036 (Ind. A, 1939); 2 B.S. 7-1700 (Cal. R, 1939).

96 11 B.S. 7-12565 (Conn. R, 1947); 5 B.S. 6-7334 (Mo. D, 1941); 4 B.S. 3-5359 (N.Y. A, 1940). In the Connecticut case, the employees whose firing precipitated the dispute continued to be paid benefits even though they participated in the strike after their discharge.
that such employees would not be working in the absence of the dispute.\textsuperscript{97} And no benefits should be paid where an employee is prevented from returning to work by the existence of a dispute, if his initial un-
employment was a temporary layoff rather than a discharge.\textsuperscript{98} Finally, if a new factor itself sufficient to cause unemployment appears during a dispute, the mere existence of the dispute does not bar compensation.\textsuperscript{99} Briefly, then, this second face of the causation coin has also given little difficulty.

**TERMINATION OF DISQUALIFICATION**

Only two states set a fixed statutory limitation on the duration of disqualification.\textsuperscript{100} Several other acts prescribe a limit by requiring that the dispute be "still in active progress" in order to deny benefits.\textsuperscript{101} But

\textsuperscript{97} 5 B.S. 6-7331 (Iowa R, 1941); 4 B.S. 2-524 (N.J. D, 1940); cf. 2 C.C.H. Unempl. Ins. Rep. 8,662 (Cal. Appeal Board 5250-10684, 1948) (employee disqualified for quitting because of desire to be dissociated from impending strike); 5 B.S. 9-7532 (N.J. D, 1942) (same); 2 B.S. 10-2039 (N.Y. R, 1939) (employee laid off during dispute in anticipation of shutdown denied benefits; statute requires only "employment lost because of . . . industrial controversy. . ."); Brit. Ump. 2736, BU-525 (1922).

Contrary decisions have been reached, but in each case the opinion failed to determine the right to benefits "for each week," assuming erroneously that unemployment not due in its inception to a dispute-caused stoppage cannot subsequently change its nature. 3 B.S. 8-4135 (Mo. A, 1940); 3 B.S. 1-2411 (Fla. A, 1939); cf. Ringuette v. UCB, 2 B.S. 12-2249 (R.I. Super. Ct., 1939).


\textsuperscript{99} UCC of Alaska v. Aragon, 329 U.S. 143 (1946); 10 B.S. 12-12062 (Ohio R, 1947); 4 B.S. 8-6287 (Neb. D, 1941); 4 B.S. 4-5552 (N.J. D, 1940); 4 B.S. 2-5228 (N.J. D, 1940). But cf. Echevarria v. Corsi, 273 App. Div. 1046, 78 N.Y.S. 2d 739 (1948), illustrating the un-wisdom of New York's omission of the "for any week" provision. The employee, who had been notified on April 4 that she would be laid off on April 11, was held disqualified for seven weeks because a strike was called on April 7.

On occasion the reasoning of the text has been erroneously employed where the new factor is not independent but is a direct product of the dispute itself. Thus used, the doctrine becomes a poor concealment of a predisposition to grant benefits because of vague feelings of "fairness." Bunny's Waffle Shop, Inc. v. California Employment Security Comm'n, 24 Cal. 2d 735, 151 P. 2d 224 (1944); Department of Industrial Relations v. Drummond, 30 Ala. App. 78, 1 So. 2d 395 (1941), cert. den. 241 Ala. 142, 1 So. 2d 422 (1941); 9 B.S. 3-10387 (Ohio A, 1945).

\textsuperscript{100} New York and Rhode Island statutes cited note 5 supra. The repeal of similar limitations in Alaska, Louisiana, Pennsylvania, and Tennessee shows a clear trend away from such provisions. However, the Report of the Advisory Council on Social Security (Edward R. Stettinius, Jr., Chairman) to the Senate Finance Committee, S. Doc. 206, 80th Cong. 2d Sess., at 35 (1948), recommended that a "Federal standard on disqualifications should be adopted prohibiting states from . . . postponing benefits for more than six weeks as the result of a disqualification except for fraud or misrepresentation."

\textsuperscript{101} Alabama, Alaska, California, District of Columbia, Florida, Kentucky, Louisiana, Minnesota, Nevada, Ohio, Oregon, South Carolina, Tennessee, and Wisconsin statutes cited note 5 supra. Compare the Connecticut and New York acts, using different language to reach the same result.
in the two-thirds-majority "stoppage of work" statutes, the end of the disqualification period may be a perplexing problem.

Of course, the breakdown of either of the causal relationships discussed in the two preceding sections cuts short the disqualification period. In addition, since the statutes disqualify only for a "stoppage of work which exists," there has been no question but that termination of the stoppage accomplishes the same result. Inconsistencies appear, however, in determining when a work stoppage ends.\footnote{Where the striking employees are quickly replaced without affecting production, the decisions are necessarily uniform in recognizing the end of the stoppage. Sakrison v. Pierce, 66 Ariz. 162, 185 P. 2d 528 (1947); Lawrence Baking Co. v. Michigan UCC, 308 Mich. 198, 13 N.W. 2d 260 (1944); 12 B.S. 8—13598 (Mass. R, 1949); 10 B.S. 12—12044 (Neb. R, 1947); 4 B.S. 7—6128 (Colo. D, 1941); 4 B.S. 2—5285 (Ind. A, 1940); 4 B.S. 2—5215 (Mo. D, 1940); cf. 17 B.S. 9—12734 (Ga. R, 1948). The sole exception is found in the few states equating "stoppage of work" to the individual's unemployment; see notes 64-65 supra.}

For some reason the decisions have failed to define the stoppage which reinstates in the same way as the stoppage which disqualifies. The Georgia Court of Appeals' syllabus in \textit{M. A. Ferst, Ltd. v. Huiet} is typical: "A stoppage of work ... commences at the place of employment when a \textit{definite curtailment} in operations occurs by reason of a labor dispute and ends when such operations are resumed on a \textit{normal basis}."\footnote{Where the striking employees are quickly replaced without affecting production, the decisions are necessarily uniform in recognizing the end of the stoppage. Sakrison v. Pierce, 66 Ariz. 162, 185 P. 2d 528 (1947); Lawrence Baking Co. v. Michigan UCC, 308 Mich. 198, 13 N.W. 2d 260 (1944); 12 B.S. 8—13598 (Mass. R, 1949); 10 B.S. 12—12044 (Neb. R, 1947); 4 B.S. 7—6128 (Colo. D, 1941); 4 B.S. 2—5285 (Ind. A, 1940); 4 B.S. 2—5215 (Mo. D, 1940); cf. 17 B.S. 9—12734 (Ga. R, 1948). The sole exception is found in the few states equating "stoppage of work" to the individual's unemployment; see notes 64-65 supra.} As a result, a hiatus between substantial and total revival of production may postpone benefits unreasonably.\footnote{Where the striking employees are quickly replaced without affecting production, the decisions are necessarily uniform in recognizing the end of the stoppage. Sakrison v. Pierce, 66 Ariz. 162, 185 P. 2d 528 (1947); Lawrence Baking Co. v. Michigan UCC, 308 Mich. 198, 13 N.W. 2d 260 (1944); 12 B.S. 8—13598 (Mass. R, 1949); 10 B.S. 12—12044 (Neb. R, 1947); 4 B.S. 7—6128 (Colo. D, 1941); 4 B.S. 2—5285 (Ind. A, 1940); 4 B.S. 2—5215 (Mo. D, 1940); cf. 17 B.S. 9—12734 (Ga. R, 1948). The sole exception is found in the few states equating "stoppage of work" to the individual's unemployment; see notes 64-65 supra.}

Far more significant is the recurring problem of the stoppage of work that outlives its cause.\footnote{Where the striking employees are quickly replaced without affecting production, the decisions are necessarily uniform in recognizing the end of the stoppage. Sakrison v. Pierce, 66 Ariz. 162, 185 P. 2d 528 (1947); Lawrence Baking Co. v. Michigan UCC, 308 Mich. 198, 13 N.W. 2d 260 (1944); 12 B.S. 8—13598 (Mass. R, 1949); 10 B.S. 12—12044 (Neb. R, 1947); 4 B.S. 7—6128 (Colo. D, 1941); 4 B.S. 2—5285 (Ind. A, 1940); 4 B.S. 2—5215 (Mo. D, 1940); cf. 17 B.S. 9—12734 (Ga. R, 1948). The sole exception is found in the few states equating "stoppage of work" to the individual's unemployment; see notes 64-65 supra.} After the settlement of a steel strike, for example, production must await the reheating of the furnaces. Former strikers apply for compensation on the theory that the labor dispute has ended. Management argues that no benefits are payable so long as the causal relation between the dead dispute and the continuing stoppage remains.

\footnote{Where the striking employees are quickly replaced without affecting production, the decisions are necessarily uniform in recognizing the end of the stoppage. Sakrison v. Pierce, 66 Ariz. 162, 185 P. 2d 528 (1947); Lawrence Baking Co. v. Michigan UCC, 308 Mich. 198, 13 N.W. 2d 260 (1944); 12 B.S. 8—13598 (Mass. R, 1949); 10 B.S. 12—12044 (Neb. R, 1947); 4 B.S. 7—6128 (Colo. D, 1941); 4 B.S. 2—5285 (Ind. A, 1940); 4 B.S. 2—5215 (Mo. D, 1940); cf. 17 B.S. 9—12734 (Ga. R, 1948). The sole exception is found in the few states equating "stoppage of work" to the individual's unemployment; see notes 64-65 supra.}
To date management’s victories have been impressive. But they have been founded on basic errors. Denial of benefits beyond the end of the dispute is said to rest on two factors: (1) the long line of decisions under the British predecessors to the “stoppage of work” statutes, all holding claimants ineligible, and (2) the failure of the legislatures to adopt provisions limiting disqualification to disputes “in active progress.” Yet, on closer scrutiny, each of these factors is seen to be wholly irrelevant.

For the most part, it is true that the British acts served as models for the Draft Bill provisions. In this instance, however, one extremely significant difference appears: The British statutes specifically barred compensation “so long as the stoppage of work continues,” while the Draft Bill expressly omitted that phrase. The reason is simple. The framers of the Draft Bill had a choice between the British provision and the early state “active progress” statute and found both unsatisfactory. The former allowed disqualification to last beyond the end of the dispute; the latter, lacking the “stoppage of work” requirement, allowed disqualification even though the employer was unaffected by the dispute.

One answer would have been to insert the “stoppage” language into the “active progress” mold. The other answer—and the one actually adopted—was to delete the “so long as . . .” clause from the British statutory language. It is clear that the authors of the Draft Bill believed that they were attaining the desired result by the mere deletion. In the initial 1936 publication of the Draft Bill text, the labor-dispute provision was summarized by its framers as denying benefits for “[p]artici-
pation or interest in, or financing of, labor disputes still in progress.”109 A plainer statement could hardly be desired.

Even apart from this and other evidence of actual intent as to meaning, the mere omission of the specific termination provision should lead to the same conclusion. Where, as here, an enactment deliberately departs from its model, common sense dictates a different interpretation:

It is one of the most ancient, as indeed one of the safest, rules of statutory construction that where the legislative body adopts the law of another state or country, all changes in words and phrasing will be presumed to have been made deliberately and with a purpose to limit, qualify, or enlarge the adopted law as the changes in the words and phrases imply.110

Yet this persuasive combination of real and presumed legislative intent has not prevailed, simply because the courts have been totally unaware of it. Illustrative of the misinformation and lack of information which have led to the present “majority view” is the Maryland Supreme Court’s reference to the clearly different British act as “practically identical with our statute.”111

Such decisions are even more puzzling in light of the statutes’ usual justifications. “Neutrality” demands nonpayment of benefits during a dispute. After peaceful settlement of a dispute, the need for “neutrality” of that kind ends, and continued benefit denial would be decidedly unneutral. Similarly, the “strike financing” argument is totally irrelevant in determining compensation for a period after the strike has ended. Finally, the workers’ unemployment between the end of the strike and the end of the stoppage is scarcely “voluntary” in the same sense as unemployment during the strike. Since each week should be examined separately in determining eligibility, none of these theories requires disqualification after the termination of the dispute. In the absence of better-informed decisions, however, the unreasonable trend continues.

109 Social Security Board, op. cit. supra note 4, at iii (1936); cf. BU, at 21 (1938); Social Security Board, Social Security in America 125 (1937).

110 Whittlesey v. Seattle, 94 Wash. 645, 652, 163 Pac. 793, 795 (1917), quoted and followed in In re Eaton’s Estate, 170 Wash. 280, 16 P. 2d 433 (1932); Baker v. Fraser, 209 Ark. 932, 104 S.W. 2d 131 (1946); Walker v. Wedgwood, 64 Idaho 285, 130 P. 2d 856 (1942); Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 Atl. 452 (1934); Richmond v. Moore, 107 Ill. 429, 434 (1883); 2 Sutherland, Statutory Construction § 5209, at 554 (3d ed. Hornak, 1943).

111 Saunders v. Maryland UCB, 53 A. 2d 579 (Md., 1947). In American Steel Foundries v. Gordon, 88 N.E. 2d 465 (Ill., 1949), the Illinois Supreme Court followed this quotation with the comment, “The Maryland Act is, in turn, practically identical with the Illinois act.” The Illinois court’s decision is the first to reject all the arguments presented in this article.
THE MEANING OF "FACTORY, ESTABLISHMENT OR OTHER PREMISES"

Nearly every statute limits the denial of benefits to labor disputes at the "factory, establishment or other premises" at which the claimant was employed. 112 In this phrase too, the apparent simplicity of statutory language has often been obscured by application of divergent theories.

The predecessor British acts referred to a "factory, workshop or other premises," 113 clearly establishing a test of geographic proximity. "Two factories belonging to the same employer but in different towns would, of course, be separate premises." 114 Consequently the only borderline cases involved the problem of how small to draw the circle of physical proximity. 115

When the Draft Bill adopted and Americanized the phrase by substituting "establishment" for "workshop," the decisions reached should have been identical. But the first two cases to come before the courts involved statutes referring only to the "establishment" at which the dispute occurred. Both the Wisconsin and Michigan Supreme Courts rejected the sole criterion of physical proximity, arguing instead that a single "establishment" depended on "functional integrality" regardless of the distance between separate units. 116 Since that time a battle has been waged between the English interpretation and an incorporation of the broad construction of "establishment" into the "factory, establishment or other premises" terminology.

Several arguments display the untenable character of the latter choice. First, a logical application of the "functional integration" test would disqualify workers unemployed due to a dispute in a separate installation owned by a totally different employer. Yet no decision has been willing to distort "establishment" to that extent. 117 Second, the controlling term
for the application of *ejusdem generis* principles is "factory," not "establishment," as seen by comparison with the parent British act. "Establishment," like "workshop," was intended to mean only a place of business which could not qualify as a "factory." As stated by the Illinois Supreme Court, "The words 'establishment' and 'premises' employed in Section 7 (d) are so commonly understood as units of place that further definition is superfluous." Finally, to adopt the "integration" test would effectively delete the entire limiting phrase from the statute, thus amounting to an unwarranted judicial amendment. Certainly claimants would not be in the position of applying for unemployment benefits if a close degree of functional integrality did not exist between their plant and the struck plant.

Nevertheless the struggle continues, with the argument even made (unsuccessfully) that employees may be disqualified although thousands of miles from any dispute. The criterion of "integration" alone should be flatly rejected as a solution. If the intended geographic test is attacked as unsatisfactory, such complaints are for the legislature.

---

118 General Motors Corp. v. Mulquin, 134 Conn. 118, 55 A. 2d 732 (1947).

Other cases holding that no dispute existed at the geographic establishment are General Motors Corp. v. Mulquin, 134 Conn. 118, 55 A. 2d 732 (1947) (18 miles from struck plant), followed in 12 B.S. 3-13204 (Conn. R, 1948); 4 B.S. 4-5560 (Wash. A, 1940) (50 miles); 2 B.S. 9-1972 (N.J. D, 1939) (Rhode Island strike caused New Jersey stoppage). Single "functional establishments" were the bases for disqualification in 6 C.C.H. Unempl. Ins. Rep. 35,532 (Ohio Board of Review 1127-TR-48, 1948); 12 B.S. 5-13404 (N.Y. R, 1948) (three miles apart); 11 B.S. 1-12123 (Mo. A, 1947) (1-15 blocks); 6 B.S. 6-8007 (Ohio R, 1942) (different cities); 4 B.S. 3-5361 (Wash. A, 1940) (3½ blocks).
APPLICATION OF THE "SEPARATE BRANCH OF WORK" PROVISION

Often confused with the phrase just discussed, but serving a wholly different function, is the "separate branch of work" clause contained in nearly three-fourths of the statutes. Instead of basing exemption on geographic separation, this provision applies to (1) separate branches of work (2) carried on in separate departments (3) at the same premises. If the branch of work is of a type ordinarily carried on as a separate business in separate premises, the employee is regarded as working at a "separate factory, establishment, or other premises."123

Explanation of this proviso is refreshingly simple. It regards as primarily accidental the fact that the claimants who conform to its requirements may happen to work on the premises of a struck plant. Accordingly, it excepts them from disqualification.124 Similarly, if a dispute

---

123 The reference in this proviso to separate departments at the same "premises" rather than at the same "factory, establishment, or other premises" tends to substantiate the argument that an "establishment" depends on geographic proximity. The term "premises" admittedly sets up a geographic limitation. If "establishments" were defined to reflect functional integrality, the "separate branch" provision would operate in an irregular and inconsistent fashion, relieving ineligibility in some "establishments" (those on the same "premises") but not in others (those physically separate but functionally integrated). Compare 5 C.C.H. Unempl. Ins. Rep. 33,610 (N.J. Board of Review BRL-815-1, 1949).

124 Hughes, op. cit. supra note 10, at 96-104 discusses at length the question whether the proviso serves as an automatic exemption from the labor-dispute section or whether it simply modifies the "grade or class" provision discussed infra at p. 332. Since the former interpretation was firmly established as proper under the British statute, and since the British wording was adopted verbatim by the Draft Bill, there seems little reason to deviate from the established construction because of any paragraphing or punctuation differences in the American acts.

In any event, most statutes specify that the "separate branch" provisos apply "for the purposes of this section," implying that they are not intended solely to modify the "grade or class" provision. The mere fact that the clause is sometimes inserted in an ambiguous position in the statute (see Illinois act quoted in text at note 5 supra, North Dakota, Tennessee, and Wyoming acts) should not lead to any other conclusion. Several other statutes (Florida, Maryland, Massachusetts, Nevada, New Hampshire, New Mexico, Texas, and Hawaii) increase the uncertainty by their format, but only two acts (New Jersey and Washington) specifically restrict the provision to its narrower scope. In such jurisdictions the claimant who has proved himself within the "separate branch" clause must also show that he is not participating, financing, or directly interested; cf. Wicklund v. Comm'r, 18 Wash. 2d 206, 138 P. 2d 876 (1943).
causes a substantial stoppage of work in a department of the "separate
branch" type though not in the entire plant, consistent application of the
proviso requires denial of benefits to the employees in that depart-
ment.125

Very little difficulty has been occasioned in applying this exception
once its area of operation has been understood. Most decisions have
hinged on whether the work is "commonly" conducted as a separate
business in separate premises,126 and there have been few hard cases
to make the proverbial bad law. In short, further discussion would be
unprofitable.

II. THE EXCEPTION—ESCAPE FROM INELIGIBILITY

At this point every element necessary for disqualification has been
encountered. But a statute that stopped here would violate every theory
advanced to justify denial of benefits during disputes. Blanket disquali-
fication would affect many whose unemployment was unquestionably
involuntary; it would abandon the state's neutral position and assume
a punitive aspect as to employees not involved in the dispute; it would
preclude payment of compensation that could in no way be termed
"strike benefits."

Most jurisdictions have essayed solution of this problem by granting
relief to any claimant who can show (1) that he is not "participating in,

125 Caterpillar Tractor Co. v. Durkin, 380 Ill. 11, 42 N.E. 2d 541 (1942); see Walgreen Co.
v. Murphy, 386 Ill. 32, 53 N.E. 2d 390 (1944). The Indiana Employment Security Division
Review Board recently applied the proviso to reach a like result, denying benefits to com-
posing room employees numbering 5 per cent of a printing plant's total complement. There
was a substantial stoppage in the composing room, though not in total plant production.
The Review Board stated without discussion or explanation that the composing room came
within the "separate branch" clause. The decision, 48-LDR-3, has been appealed to the Ap-
pellate Court. Blakely v. Review Board, No. 17944 (1949). A major ground of dispute between
the parties is whether the "branch of work" involved is that of the "composing shop" (many
of which are separate establishments) or the "composition shop furnishing type to a daily news-
paper" (none of which are separate establishments).

126 The proviso has been employed in these cases: Wicklund v. Comm'r, 18 Wash, 2d 206,
138 P. 2d 876 (1943) (railroad as part of logging operations); Caterpillar Tractor Co. v. Durkin,
380 Ill. 11, 42 N.E. 2d 541 (1942) (pattern shop in tractor factory); 17 B.S. 9—12780 (Ohio R,
1947) (railroad operations wholly on premises of tube manufacturing company); 10 B.S. 1—
11444 (Mass. R, 1946) (foundry in machine works); 8 B.S. 10—9961 (W.Va. A, 1943) (same);
Counsel, 1939) (company store near textile mill); 2 B.S. 5—1428 (Ore. A, 1938) (upholstering
department in furniture factory).

It has been held inapplicable in 12 B.S. 6—13470 (N.Y. A, 1948) (seamen's operations in
vessel stopped by cooks' and stewards' strike); 12 B.S. 1—13030 (Ariz. A, 1948) (meat markets
in food stores); 4 B.S. 4—5538 (Ill. D, 1940) (metal bedspring department in bed factory);
4 B.S. 3—5361 (Wash. A, 1949) (cab shop in truck manufacturing plant); 3 B.S. 4—3179
(Mass. A, 1939) (single department in production line operation); 2 B.S. 12—2255 (W.Va. A,
1939) (dry-cleaning plant in building adjacent to laundry).
financing, or directly interested in” the labor dispute and (2) that he is not a member of a “grade or class” of employees, any of whom are engaging in any of those activities. Thus four more undelineated concepts have been added further to complicate the benefit question.

“PARTICIPATING” IN A LABOR DISPUTE

In the ordinary case an individual’s status as a “participant” in the labor dispute offers no difficulty. If he leaves work in concert with the other employees at the inception of a strike, if he takes part in a concerted slowdown, if he pickets the struck plant, or if he refuses to continue his work during a dispute that would not otherwise affect him, his conduct clearly amounts to participation. Other and varied activities such as acting as a union observer, refusing to handle “hot goods,” and securing a union permit to work during a strike have also been termed “participation” in the dispute.

By all odds the most troublesome situation, and hence that most often before the courts, involves the failure of nonstrikers to cross a picket line. Since such employees are by hypothesis nondisputants, no violence would be done the theory of state neutrality by paying them benefits. For the same reason their receipt of compensation could not be called “strike financing.” It is not surprising, then, that decisions have ordinarily based the right to payment on the “voluntary” or “involuntary” nature of their failure to cross:

They were unemployed solely because, in accordance with their union principles, they did not choose to work in a plant where certain of their fellow employees were on

127 Only the Alabama, California, Delaware, Kentucky, Minnesota, New York, Ohio, and Wisconsin statutes cited note 5 supra fail to grant a similar exception.


129 In 9 B.S. 11—10973 (Mass. R, 1946) this was properly held participation although the claimant’s employment contract provided that he would not be compelled to handle struck work.

130 In re Persons Employed at St. Paul & Tacoma Lumber Co., 7 Wash. 2d 580, 110 P. 2d 877 (1941); 7 B.S. 2—8379 (Ohio A, 943).

131 Mere union membership has sometimes been the basis for a finding of “participation.” 9 B.S. 2—10233 (Ark. D, 1945); 4 B.S. 10—6540 (Ore. A, 1941); 3 B.S. 2—2710 (Wash. A, 1939); 2 B.S. 1—2413 (Ind. R, 1939). However, such a doctrine is subject to grave abuse. In the Indiana case the claimant was eleven months in arrears in union dues, refused to quit at the strike call and finished his shift, and disregarded the union’s order that he picket. Yet, because he had never notified the union that he was no longer a member, he was held a participant.

Union membership alone is very slight, if any, evidence of actual dispute participation. Since membership may be of considerable relevance in showing “direct interest” and since the claimant bears the burden of disproving both elements, the union card should be disregarded on this issue.
strike. Their own consciences and faith in their union principles dictated their action. This choice is one which members of organized labor are frequently called upon to make, and in the eyes of the law this kind of choice has never been deemed involuntary.\textsuperscript{13} 

No complaint is ordinarily made as to the voluntary-involuntary dichotomy as such.\textsuperscript{13} Thus where crossing is prevented "because of the militant attitude of the picket line, because of incidents of violence, and because of threats of physical violence,"\textsuperscript{13} claimants' action is clearly involuntary. Where an alleged fear of violence is demonstrably justifiable, decisions again properly hold that there has been no "participation."\textsuperscript{13} Where the police prevent any crossing\textsuperscript{13} or the employer locks the plant gates to avert possible violence,\textsuperscript{13} no finding of participation is made. 

Some applications of the rule, however, are startling in their naïveté. These are the cases which overlook the coercive aspects of picketing and regard it solely as an innocuous form of publicizing. Because employees have a "legal right" to cross a picket line,\textsuperscript{13} these decisions impose an excessive burden of proof on the claimant who alleges that his conduct was impelled by a fear of violence.\textsuperscript{13} Although it is easy for a court to proclaim that "courts must presume that strikers are law-abiding [so

\textsuperscript{122} Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal. 2d 321, 327-28, 109 P. 2d 935, 940 (1943), followed in Matson Terminals, Inc. v. California Employment Comm'n, 24 Cal. 2d 695, 151 P. 2d 202 (1944). Although the California statute contains no specific exceptions to disqualifications, judicial construction has effectively inserted several by adopting the test of "involuntary unemployment.

\textsuperscript{13} Of course work must be available to the employee if he does cross the picket line. If his attempt to cross would be futile, even an outright refusal could not lend any additional strength to the strikers and should not be held participation. 4 B.S. 12-6730 (N.J. D, 1941); 4 B.S. 3-5361 (Wash. A, 1940); 4 B.S. 2-5217 (Mo. D, 1940); 2 B.S. 3-1079 (Ore. A, 1948).


\textsuperscript{135} "A non-striker's fear of injury must be real and substantial and not nebulous." McGann v. UCB of Review, 163 Pa. Super. 379, 385, 62 A. 2d 87, 90 (1948); Steamship Trade Ass'n of Baltimore v. Davis, 57 A. 2d 818 (Md., 1948); 10 B.S. 7-17625 (Hawaii R, 1947); 9 B.S. 12-11012 (Cal. R, 1946); 5 B.S. 10-7622 (Pa. A, 1942); 5 B.S. 9-7531 (N.J. D, 1942); 4 B.S. 11-6939 (Minn. A, 1941).

\textsuperscript{137} 5 B.S. 6-736 (N.J. D, 1941).


\textsuperscript{139} In re Persons Employed at St. Paul & Tacoma Lumber Co., 7 Wash. 2d 580, 595, 110 P. 2d 872, 884 (1941).

that there] must be more than a mere theatrical threat of violence,\textsuperscript{140} most workers (and most judges) would hesitate to risk serious injury on a pure guess whether a threat was "theatrical" or not. No finding of participation ought to be made without truly objective grounds: the failure to use available police protection,\textsuperscript{141} the failure to cross where others have done so without mishap,\textsuperscript{142} a prior indication by the employee's union of its decision not to cross the picket line,\textsuperscript{143} or a total absence both of violence and threats of violence.\textsuperscript{144}

Several cases have required even more, holding that the employer has an affirmative duty to provide safe ingress and egress\textsuperscript{145} or that physical violence is the natural result of any attempt to go through a picket line.\textsuperscript{146} It is also easy to go too far in this direction, for refusal to cross necessarily involves the exertion of additional economic pressure on the employer, and enhances a strike's chances of success. With neither extreme satisfactory, the objective test proposed above offers the best solution to the picket-line "participation" question.

\textsuperscript{140} Steamship Trade Ass'n of Baltimore v. Davis, 57 A. 2d 818, 820 (Md., 1948).
\textsuperscript{141} 10 B.S. 4—11389 (Mo. A, 1946); 9 B.S. 12—11017 (Cal. R, 1946).
\textsuperscript{145} Kalamazoo Tank & Silo Co. v. Michigan UCC, 324 Mich. 101, 36 N.W. 2d 226 (1949). Even though seventeen employees had gone through the picket line, the court found a reasonable cause to fear bodily harm. It then excused failure to cross because the company's president had not carried out his promise to secure an injunction or police protection. Compare 10 B.S. 11—11998 (W.Va. A, 1947).
\textsuperscript{146}["The term 'peaceful picketing' is pretty much of a myth. About the only peaceful picket is an unconscious one..."] 10 B.S. 11—11998 (W.Va. A, 1947), rev'd Yahrling v. Board of Review, 11 B.S. 12—13019 (W.Va. C. Ct., 1948); 10 B.S. 7—17625 (Hawai R, 1947); 5 B.S. 4—7164 (Neb. D, 1941); 5 B.S. 1—6871 (Neb. D, 1941) (employee "under no obligation to risk possible personal injury or to jeopardize his friendly relations with other workers as a prerequisite to qualifying for unemployment compensation"); cf. 4 B.S. 4—5542 (Kan. R, 1949); 3 B.S. 1—2413 (Ind. R, 1939); 3 Miami L.Q. 320 (1949), noting Appeals of Employees of Pacific T. & T. Co., 198 P. 2d 675 (Wash., 1948).
Disqualification for "financing" a dispute has been virtually a dead letter in the United States. Eleven jurisdictions differ from the Draft Bill by omitting the word entirely from the "participating-financing-directly interested" combination, and three others have specific provisions that "financing" does not include payment of regular union dues. Only a single appellate court and a handful of administrative tribunals have been called upon to define "financing."

Under the British acts "[e]very member of a trade union who ordinarily subscribes to, and thereby has a proprietary interest in, its funds is himself financing the dispute if the trade union is doing so." This construction applied to the American statutes would contradict every theoretical basis for labor-dispute disqualification. It would deny benefits to workers who are involuntarily unemployed and who have no interest in the outcome of the dispute, so that compensation payment would not be unneutral. Furthermore, the level of maximum benefit payments insures that benefits will be used to support the unemployed and their families and not diverted to financing the strike.

Accordingly, judicial desertion of the British precedents seems quite justifiable. Courts may readily employ the time-honored ground that adopted statutes bring with them their settled interpretations only when the latter are consistent with the public policy of the importing jurisdiction. However, the mere presence of the provision is potentially dangerous, and it has on occasion imposed disqualification. The variation from the Draft Bill already referred to should meet more widespread legislative approval so as to clarify the situation completely.

147 Alaska, Arkansas, District of Columbia, Hawaii, Louisiana, Mississippi, New Mexico, North Dakota, Oklahoma, Pennsylvania, and Tennessee statutes cited note 5 supra. The Idaho and South Carolina acts except "financing" from their "grade or class" provisos.

148 Florida, Massachusetts, and Michigan statutes cited note 5 supra.


150 Most decisions denying a claim of "financing" make their task easier by simply ignoring the British construction. Outboard, Marine & Mfg. Co. v. Gordon, 403 Ill. 523, 87 N.E. 2d 610 (1949) ($45 inter-union payment every three months); 4 B.S. 12—11663 (Mo. D, 1946) (no "financing" although strike benefits paid out of union funds); 2 B.S. 1—5236 (Va. D, 1940).

151 These decisions are hard to reconcile with the optimistic view expressed in Eligibility for Unemployment Benefits of Persons Involuntarily Unemployed because of Labor Disputes, 49 Col. L. Rev. 559, 561 (1949): "Although the original English provision still appears in a majority of American statutes, there can be little doubt that it will not be held applicable to the mere payment of union dues."
"DIRECTLY INTERESTED" IN A LABOR DISPUTE

Nonparticipants in a labor dispute (considering "financing" as a type of participation) may nevertheless have disqualification imposed on them in nearly all jurisdictions on the basis of their "direct interest" in the dispute. Denial of compensation because of the claimant's "interest" is apparently based on dual grounds: (1) Limiting disqualification to participants would allow evasion of the statutory provisions by a careful choice of key "participants," thus exerting the same economic pressure on the employer while most of the real parties in interest collected benefits. (2) Payment to "interested" employees might disturb the state's hypothetical "neutrality."

These theories in combination are adequate to explain disqualification of employees who will receive benefits from a successful resolution of the dispute. Naturally, most of the cases have involved this type of situation, with the subject matter of the controversy affecting claimants' wages, hours, seniority, grievance procedure, bargaining rights, or vacation rights. Since "direct interest" is tested solely by the possible effect of the dispute and is independent of the "financing" and "participating" provisions, it is of no importance that the claimant is a nonunion member or that his unemployment is unquestionably involuntary.

---

152 Tenn. Code Ann. (Supp. 1948) § 6901.29E requires for relief from disqualification only that the claimant and members of his grade or class be nonparticipants. This statute and judicially-created amendments to the standard statutory provision (see text at notes 170-72 infra) are the only exceptions to the "direct interest" rule. In fact, La. Gen. Stat. Ann. (Supp. 1947) § 4434.4(d) disqualifies if an employee is merely "interested."


156 Cases cited note 155 supra.


158 4 B.S. 7—6134 (Mass. A, 1941); 4 B.S. 4—5533 (Conn. R, 1940).

But where the success of the labor dispute would not bring over-all benefits to a claimant, the twofold justification for the provision obviously no longer "justifies." By hypothesis the employee's receipt of benefits would in no way evade either the "participation" clause or any concept of "neutrality." Nevertheless the American decisions have followed the best British tradition and disqualified even where the employees' demands involve damage to the individual claimants' rights, let alone where the effect on the claimant is dubious. Seldom has a court indicated that it recognizes the inherent inconsistency of denying benefits to a nonunion worker whose unemployment is caused by a strike for a closed shop. However, this is cause to scourge the legislatures rather than the courts, for as long as the statutes remain solely in terms of "direct interest," the judiciary cannot justifiably attempt to decide cases in terms of "beneficial interest."

One fault which is properly attributable to the courts is their failure to give content to the word "direct." Unlike the British decisions, which draw a sensible and understandable line between "direct" and "indirect" interest, most American opinions employ any discoverable interest, even though he stands to lose, and not to gain, if the employees engaged in the dispute bring it to a successful issue."

"If the issue of the dispute which causes the stoppage would directly affect the claimant's hours of work or wages, he is 'directly interested' in the dispute ... even though he may not have been a party to the dispute and may not even profit by the result of the dispute."

But where the success of the labor dispute would not bring over-all benefits to a claimant, the twofold justification for the provision obviously no longer "justifies." By hypothesis the employee's receipt of benefits would in no way evade either the "participation" clause or any concept of "neutrality." Nevertheless the American decisions have followed the best British tradition and disqualified even where the employees' demands involve damage to the individual claimants' rights, let alone where the effect on the claimant is dubious. Seldom has a court indicated that it recognizes the inherent inconsistency of denying benefits to a nonunion worker whose unemployment is caused by a strike for a closed shop. However, this is cause to scourge the legislatures rather than the courts, for as long as the statutes remain solely in terms of "direct interest," the judiciary cannot justifiably attempt to decide cases in terms of "beneficial interest."

One fault which is properly attributable to the courts is their failure to give content to the word "direct." Unlike the British decisions, which draw a sensible and understandable line between "direct" and "indirect" interest, most American opinions employ any discoverable interest,

160 "If the issue of the dispute which causes the stoppage would directly affect the claimant's hours of work or wages, he is 'directly interested' in the dispute... even though he stands to lose, and not to gain, if the employees engaged in the dispute bring it to a successful issue."


162 Huie v. Boyd, 64 Ga. App. 564, 13 S.E. 2d 863 (1941) (nonunion claimant disqualified in stoppage due to closed-shop strike); 9 B.S. 11-1988 (N.C.R., 1940) (same); 2 B.S. 6-1988 (Mich. A, 1939) (nonunion employee who tried to cross picket line held "directly interested" in strike to replace departmental seniority system with shop seniority, although net result was lowering of employee's seniority and earning power).

163 In re Deep River Timber Company's Employees, 8 Wash. 2d 179, 111 P. 2d 757 (1941); 7 B.S. 4-8482 (Ill. R, 1943); 2 B.S. 12-2243 (Mich. A, 1939); 2 B.S. 8-1956 ( ore. R, 1939).

164 Although so brief a statement is of necessity inaccurate, the distinction may be summarized as one between employees whose interests will automatically be ascertained by settlement of the dispute and employees whose interests may or will be reviewed and altered in the light of such settlement. Compare Ministry of Labour, Analytical Guide U.I. Code 7, Part III, §§ 102-5 (1939 ed.) and cases cited therein.

Two Connecticut decisions handed down the same day serve as admirable illustrations. Where the claimant's nonstriking union had decided to be bound by the negotiations of the striking union, the claimant was disqualified. 10 B.S. 12-19016 (Conn. R, 1946). In the other case the nonunion claimant's group, clerical workers, had neither participated in the strike nor in the negotiation. Claimant received a wage increase when the strike was settled, but the...
remote or immediate, future or present, potential or actual, to impose disqualification. Illinois ranks among the chief offenders in this regard. Its administrators have found “direct interest” in the possibility that nonstriking claimants may, at some future date, be affected by or interested in the interpretation and enforcement of a collective bargaining agreement or of the employer’s management prerogatives currently in dispute. Its Supreme Court has outdone even these decisions by its remarkable statement in Local No. 658 v. Brown Shoe Company: “When a labor dispute, which concerns a part or all employees, causes, as a direct result, a stoppage of work, it is one in which, under Section 7 (d), every employee thereby put out of employment is directly interested.” By a single sentence the court has thus effectively repealed the entire statutory exception to the labor-dispute provision.

Perhaps it is to avoid decisions like that in the Brown Shoe case that some jurisdictions have taken the equally indefensible step of equating “directly interested” to “participating.” Kieckhefer Container Co. v. UCC involved a union’s strike concerning hours, wages, vacations, reporting pay, and grievance procedure for all employees. Yet the New raise was caused by management’s desire to maintain appropriate wage differentials. No disqualification resulted. 10 B.S. 10—11842 (Conn. R, 1946); cf. 5 C.C.H. Unempl. Ins. Rep. 33,610 (N.J. Board of Review BRL-815-1, 1949).

In re Deep River Timber Company’s Employees, 8 Wash. 2d 179, 111 P. 2d 575 (1941) (CIO claimants unemployed in AFL strike to compel new employee to join AFL or be discharged held “interested” in employee’s continued working and CIO membership).


Cases cited note 166 supra.

403 Ill. 484, 491, 87 N.E. 2d 625, 630 (1949). Careful reading of this confusing opinion seems to disclose that the holding of “direct interest” was based on nothing more than the fact that claimants, whose conditions of employment had already been amicably settled, were members of the same union as the disputants, the NLRB having certified a single bargaining agent for all production and maintenance workers. This is in sharp contrast to the carefully reasoned decision first reached in this case. Docket No. 30634, 3 C.C.H. Unempl. Ins. Rep. 16,556 (1948). It is also totally inconsistent with the approach taken in Outboard, Marine & Mfg. Co. v. Gordon, 403 Ill. 523, 87 N.E. 2d 610 (1949), decided at the same term. In 4 B.S. 6—5041 (Mo. D, 1949) the facts were identical to those of the Brown Shoe case, even involving a shoe factory. Since the dispute affected only the participants, they alone were held disqualified under the “direct interest” test; cf. 5 B.S. 10—7611 (Mich. A, 1942).

125 N.J.L. 52, 13 A. 2d 646 (1940).
Jersey court rejected the "strained interpretation" which would have disqualified nonunion claimants as directly interested, ruling instead that only those creating or participating in the strike were barred from benefits.\(^7\) The New Jersey administrators have erected a unique edifice on the same illogical foundation.\(^1\)

Fortunately the choice is not one between New Jersey's nullification of the "directly interested" proviso and Illinois' more drastic judicial surgery. "Direct interest" can serve as a useful criterion to courts which will recognize that in some cases unemployed claimants may be only "indirectly interested" in the subject matter of the dispute. And the legislatures can transform that useful criterion into a theoretically justified criterion by amending the phrase to read "directly and beneficially interested."

**THE MEANING OF "GRADE OR CLASS"**

Anyone confronted with a "grade or class" problem under the unemployment compensation laws possesses one sure-fire first step in reaching a proper solution: Throw away all the American precedents and start from scratch. Whatever the cause, administrators and judges alike have defined the statutory terms with total disregard for the basic premise underlying the provision. The resulting body of doctrine formulates the most remarkable principles of vicarious guilt found in the law.

Nearly every statute which contains any exceptions to labor-dispute disqualification couples the "participating-financing-directly interested" proviso with a corresponding "grade or class" section.\(^1\) Since this means that a claimant may lose benefits although he himself is not a "participant," does not "finance," and has no "direct interest," the provision cannot be based on the corresponding theories of voluntary un-

\(^7\) The Kieckhefer decision was approved and adopted in Wicklund v. Comm'r, 18 Wash. 2d 206, 214, 138 P. 2d 876, 881 (1943): "The words 'directly interested in the labor dispute' are clearly limited in their application to those employees directly interested in furtherance of the dispute by participation and activity therein."

\(^1\) The most recent New Jersey decision, Wasyluk v. Mack Mfg. Co., 68 A. 2d 264 (N.J. Super. Ct., 1949), distinguished the Kieckhefer case in disqualifying the claimants involved. This case may foreshadow a more sensible approach in future New Jersey decisions.

\(^1\) Only Louisiana and Vermont have enacted no provision comparable to a "grade or class" clause. The Connecticut statute cited note 5 supra refers to "trade, class, or organization"; the Utah act speaks of "grade, class, or group"; Rhode Island disqualifies members of an "organization or group responsible for the stoppage of work." In Idaho and South Dakota the grade or class provision extends only to those "participating or directly interested," even though individual bases for disqualification are broader.
UNEMPLOYMENT BENEFITS AND "LABOR DISPUTES"

employment, payment of strike benefits, or loss of state neutrality. Instead, the danger of omitting the "grade or class" clause has been thus expressed:

It would permit a stoppage of work to be embarked on by the withdrawal of a small number of pivotal men in the establishment in the knowledge that a majority of workers will get benefits and thus augment the workers' fighting fund. On the other hand, it permits the unemployment compensation system to be used to induce defections from a union which calls a strike by the promise of benefits to workers who take no part in it.\textsuperscript{174}

Obviously these objections are largely dispelled by the "direct interest" provision, which extends to all employees affected by the dispute, whether participants or nonparticipants, union or nonunion. Only a small area thus remains for operation of the "grade or class" disqualification. This area involves situations in which the individual's proximity to the dispute is not great enough to disqualify him personally but is great enough so that paying benefits would permit evasion of the basic purposes of the acts.\textsuperscript{175}

Simple illustrations may clarify the distinction. If a union which is bargaining agent for all employees in a plant calls a general wage strike in which only union men participate, a nonunion machinist and a nonunion clerk are nevertheless both disqualified for "direct interest."\textsuperscript{176} But if the union represents only union machinists and strikes to increase only their pay, neither nonunion employee has an interest sufficient to disqualify him as an individual. The clerk may receive a raise if the strike is successful, but only because of the employer's wish to maintain given wage differentials. He should therefore not be disqualified for the degree of "indirect interest" which he possesses—the strikers are not members of his "grade or class."\textsuperscript{177} But the nonunion machinist is certain to receive a raise because the employer pays all men doing the same work at the same rate. Here the claimant's interest is "indirect," but allowing him benefits would permit the "key man" type of strike and

\textsuperscript{174} Lesser, op. cit. supra note 8, at 169; Douglas, op. cit. supra note 6 at 62; see In re St. Paul & Tacoma Lumber Co., 7 Wash. 2d 580, 595, 110 P. 2d 877, 884 (1941); Chrysler Corp. v. Smith, 297 Mich. 438, 439, 298 N.W. 87, 91 (1941); Spielman v. Industrial Comm'n, 234 Wis. 240, 248-49, 295 N.W. 1, 4 (1940). The basis of this explanation was criticized in Queener v. Magnet Mills, Inc., 170 Tenn. 416, 167 S.W. 2d 1 (1942) as inapplicable to labor conditions in the United States. The criticism may be apt, but it logically leads to the conclusion that the entire "grade or class" proviso is similarly inapplicable and should be repealed.

175 Eligibility for Unemployment Benefits of Persons Involuntarily Unemployed because of Labor Disputes, 49 Col. L. Rev. 550, 553 (1949).

176 See, for example, Kemiel v. Review Board, 117 Ind. App. 357, 72 N.E. 2d 238 (1947).

177 Cases cited in second paragraph of note 164 supra.
would discourage union membership. This conclusion is expressed by holding that members of his "grade or class" (i.e., machinists) are participating or directly interested in the dispute.\footnote{See Brit. Ump. 8344, BU-608 (1924); 10 B.S. 8—12700 (Ind. R, 1946). The British Umpire's decision cited above contains the most rational discussion of the grade or class proviso ever expressed on a practical level. Yet it has received virtually no attention in this country, even from the writers. One exception is Hughes, op. cit. supra note 10, at 83-84, quoting the opinion in full.}

All this is simple and plausible enough, requiring only application of a few basic principles. One is that "grade or class" should be determined in terms of the dispute itself,\footnote{Brit. Ump. 8910, BU-647 (1947); Brit. Ump. 8344, BU-608 (1924). Thus, where the employer causes a strike by seeking to reduce the wages of all employees over twenty-one it should be clear that the only "class" involved is that of age. Nonparticipants under twenty-one should not be disqualified even if they perform identical work. Brit. Ump. 3465/1929, BU-650 (1929); cf. Brit. Ump. 6488/1929, BU-665 (1929); see generally Ministry of Labour, Analytical Guide U.I. Code 7, Part III, §§ 106-16 (1939 ed.).} not in a vacuum of vague platitudes about what "ordinarily" constitutes a grade or class. Another is that "grade" and "class" were put in the alternative so as to narrow disqualification, not broaden it: "What the section means is that if the dispute relates only to men of a particular grade one must see whether the applicant belongs to that grade; if the dispute relates to a class of workers one must see whether the applicant belongs to that class."\footnote{It follows that "grade" or "class" may in a given case be dependent upon similarity in type of work, occupation, conditions of work, methods or rates of pay, union membership or eligibility therefor, or the employees’ age—but only when the dispute itself makes that factor significant.}

It follows that "grade" or "class" may in a given case be dependent upon similarity in type of work, occupation, conditions of work, methods or rates of pay, union membership or eligibility therefor, or the employees’ age—but only when the dispute itself makes that factor significant.

Such a sensible rationale is conspicuous by its absence from this country's decisions.\footnote{Ministry of Labour, Analytical Guide U.I. Code 7, Part III, § 107 (1939 ed.), quoting Brit. Ump. 8344, BU-608 (1924).} Here the typical approach is to look almost exclusively at the type of work performed, lumping the largest number of employees possible into a so-called "class." Most popular seems to be the "class" of "production workers,"\footnote{It is. Strikingly enough, the one American court which has adopted an approach nearly identical to that of the British Umpire believed that it was completely overthrowing British reasoning and precedent by its decision. Queener v. Magnet Mills, Inc., 179 Tenn. 416, 767 S.W. 2d 1 (1942).} a grouping adopted whether the

dispute relates only to red-headed engineers or whether it actually involves all production workers. Consequently thousands of individuals have been disqualified without having the remotest connection with a dispute. Equally erroneous results have been reached by indiscriminate use of union membership or the size of the bargaining unit certified by the NLRB. \(^1\) Worst of all, many decisions point to “functional integration” and “interdependence of operations” as grounds for disqualification, ignoring the fact that using these criteria is tantamount to denying benefits simply because the claimant is unemployed. \(^2\)

One of the most frequently encountered “grade or class” problems involves a strike by workers in one department of an assembly-line process. Work in prior departments quickly piles up a backlog and work in subsequent departments ceases for lack of materials, culminating in a total shutdown. In \(\text{Local No. 658 v. Brown Shoe Company}\), \(^3\) the employer’s suggested change in the procedure of repairing defective shoes had been accepted by all of the 450 production employees with the benefits as the result of a CIO strike for recognition as sole bargaining agent, the court stressing the “grade or class” provision.

Of course, where claimants are foremen unemployed due to a strike of production workers, the “production worker” classification leads to correct results. \(^4\) In \(\text{Outboard, Marine & Mfg. Co. v. Gordon}\), \(^5\) claimants were rank-and-file miners thrown out of work by a foremen’s strike. The court disqualified claimants on the amazing ground that they belonged to the same national union as the strikers: “[W]e are of the opinion that ‘grade or class’ is a term coextensive with the national jurisdiction of the organization to which the claimant belongs and to which the local union of which he is a member is subservient. . . .”

Occasionally union membership has been properly applied as the “grade or class” criterion, usually where two different unions are involved. \(^6\) It is ironic that legislation passed to strengthen labor organization, such as the NLRA, should be employed to impose sweeping and unjustified disqualification for unemployment benefits.

\(^1\) \(\text{Local No. 658 v. Brown Shoe Co.}, 403 \text{ Ill. 484}, 87 \text{ N.E. 2d 625} (1949); 7 \text{ B.S. 4--8482 (Ill. R, 1943).}\)
\(^2\) \(\text{In Copen v. Hix, 43 S.E. 2d 382, 385 (W.Va., 1947) claimants were rank-and-file miners thrown out of work by a foremen’s strike. The court disqualified claimants on the amazing ground that they belonged to the same national union as the strikers: “[W]e are of the opinion that ‘grade or class’ is a term coextensive with the national jurisdiction of the organization to which the claimant belongs and to which the local union of which he is a member is subservient. . . .”}\)
\(^3\) \(\text{Of course, where claimants are foremen unemployed due to a strike of production workers, the “production worker” classification leads to correct results.}\)
\(^4\) \(\text{Outboard, Marine & Mfg. Co. v. Gordon}, 403 \text{ Ill. 523}, 87 \text{ N.E. 2d 610} (1949); 4 \text{ B.S. 11--6636 (Ind. A, 1941); 2 \text{ B.S. 5--1428 (Ore. A, 1938); cf. 9 \text{ B.S. 10--19065 (N.J. R, 1946).}}\)
\(^5\) \(\text{Occasionally union membership has been properly applied as the “grade or class” criterion, usually where two different unions are involved. Outboard, Marine & Mfg. Co. v. Gordon, 403 \text{ Ill. 523}, 87 \text{ N.E. 2d 610} (1949); 4 \text{ B.S. 11--6636 (Ind. A, 1941); 2 \text{ B.S. 5--1428 (Ore. A, 1938); cf. 9 \text{ B.S. 10--19065 (N.J. R, 1946).}}\)
\(^6\) \(\text{It is ironic that legislation passed to strengthen labor organization, such as the NLRA, should be employed to impose sweeping and unjustified disqualification for unemployment benefits.}\)
ception of eighteen "lasters." Despite joint pressure from the union and the employer, the eighteen walked out. The loss of two-fifths of the employees in one of the nine departments in the continuous production chain caused a complete plant stoppage. Even though the dispute related only to the working conditions of the lasters, the court disqualified all 450 production workers, coupling its erroneous holding on the "direct interest" point\(^8\) with an equally bad "class" decision:

The fact that all of the employees of appellant seeking benefits have by their own act placed themselves in the class of "production and maintenance" workers by being members of the same union, and by jointly making said union their bargaining agent, excludes a division of classes smaller than that. They were also jointly engaged in a continuous and co-ordinated process for the production of one finished product.\(^8\)

Basing the decision on the "class" of production workers instead of on the "grade" of lasters produced an incorrect result, but it placed the Illinois court in excellent company.\(^9\) The Brown Shoe decision is symptomatic of the prevailing approach, which almost invariably frustrates the very purpose of unemployment compensation.\(^9\)

The bare handful of decisions employing the proper analysis of the "grade or class" issue\(^10\) holds out little hope for future enlightenment of the majority. Here, indeed, is a concept distorted beyond recognition by an encrustation which began as harmless "judicial gloss." Unfortunately, the courts' natural reluctance to abandon stare decisis, however

---

\(^{18}\) See text at note 169 supra.

\(^{18}\) 403 Ill. 484, 492, 87 N.E. 2d 625, 630 (1949). This unanimous decision on rehearing reached a conclusion wholly opposite in every respect from that originally announced in Docket No. 30634, 3 C.C.H. Unempl. Ins. Rep. 16,556 (1948).


\(^{19}\) See, for example, 10 B.S. 10—11867 (Neb. R, 1946) (nonunion claimants disqualified because union to which fellow production workers belonged gave $100 to striking union); 10 B.S. 11—11122 (Ill. R, 1946) (nonunion part-time employee denied benefits during union strike for salary increase only for regular employees); 9 B.S. 11—10975 (Mass. R, 1946) (nonunion production worker, prevented by threats of violation from crossing picket line in office employees' strike, disqualified because union production workers refused to cross as sympathy measure); 9 B.S. 6—10562 (N.C. R, 1946) (entire plant disqualified in union strike for union members' benefit, since union had members in every department).

bad their own precedents, virtually compels the application of external force—again by the legislature.

CONCLUSION

"Grade or class" serves as a particularly appropriate final topic in any discussion of labor-dispute disqualification. It presents in exaggerated form nearly every question encountered in dealing with any aspect of the subject. As in every case, the concept was introduced to solve a specific problem in the light of certain basic underlying theories. No definition was furnished to aid the courts, and consequently judicial growth has proceeded in the wrong direction. If the trend becomes plainly discernible and the legislative tenor has remained relatively static, the cycle may be completed by explanatory amendment. The better solution—the growth of an informed case law—is all too slow in coming. Meanwhile, the mistaken decisions continue.