

THE CONCEPT OF "LABOR DISPUTE" IN STATE UNEMPLOYMENT INSURANCE LAWS

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I. DEVELOPMENT OF A DEFINITION

Although labor law practitioners and labor economists generally associate the term "labor dispute" with federal and state labor relations acts and with the judicial codes and civil practice laws delimiting the use of provisional remedies in industrial conflict, the concept of "labor dispute" leads a separate life under the fifty-two unemployment insurance laws.¹ The jurisprudence that has evolved from these laws is most prominently identified with the labor dispute disqualification provisions found, in one form or another, in each of the laws providing for unemployment compensation.² Given the present federal-state employment security system, the growth of multi-unit, statewide, and multi-employer collective bargaining, the changing technology of the plant and the trend toward more sophisticated state amendments, it is likely that litigation of unemployment compensation claims arising out of labor dispute situations will continue to increase.

The statutory framework for the federal-state system has evolved from the Social Security Act of 1935.³ The state employment security laws were enacted as remedial measures in response to the federal act,⁴ and provide for the payment of benefits to totally or partially unemployed individuals who satisfy the eligibility requirements and have not been disqualified for other reasons. One universal ground for denying or suspending benefits claimed by an unemployed person is that the unemployment has been caused by a labor dispute. This reason for ineligibility emphasizes the *voluntary* character of unemployment resulting from a strike, in contrast to the design of the law to compensate only for *involuntary* unemployment. Two other factors are (1) that government must be neutral in labor disputes and not favor either party

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¹ See Hughes, *Principles Underlying Labor Dispute Disqualification* 8-21 (Federal Security Agency 1946).

² U.S. Bureau of Employment Security, Manpower Administration, Dep't of Labor, BES No. U-141, *Comparison of State Unemployment Insurance Laws* § 455, at E16-18 (1966). See *id.* at ET-13, -14 (Eligibility Table 5).

³ Ch. 531, 49 Stat. 620 (1935) (codified in scattered sections of 42 U.S.C.).

⁴ The one exception to this is Wisconsin, whose unemployment security law was enacted in 1931, before the federal act.

by "financing" strikers, and (2) that benefit payments disbursed out of funds accumulated through employer contributions would constitute, in effect, an employer "subsidization" of the strike. Lack of work due to labor disputes is not thought to be among the impersonal "cyclical, seasonal, technological, and casual unemployment" forces against which the legislatures have sought to ensure. Finally, it has been feared that compensation in labor disputes would undermine the actuarial soundness of the system.⁵

Despite the states' general agreement on the labor dispute disqualification, there is a great lack of uniformity among the various statutory provisions, limitations, and requirements.⁶ For example, an important distinction exists between the "stoppage-of-work" jurisdictions and jurisdictions where the wording of the disqualification provision turns solely upon the existence or the "active progress" of a labor dispute.⁷ More than thirty-one states follow a federally proposed formula and disqualify claimants if their unemployment has been caused by a "*stoppage of work, which in turn has been caused by a labor dispute.*"⁸ All state unemployment compensation laws, however, do have one common concern: the concept of "labor dispute." To deny benefits to a claimant under a labor dispute disqualification, it must be found that during the time for which the claimant seeks to recover benefits, there was either a labor dispute, or a labor dispute-caused stoppage of work, which brought about the unemployment. Examination of the fifty-two unemployment insurance laws discloses that, with the exception of Alabama and Minnesota, the terms "labor dispute" and "stoppage of work" appear with no express definition. It has been left to the courts to develop the applicable meanings. Clearly, the phrase "stoppage of work" has acquired a judicial interpretation which sets it apart from the ordinary meaning given these words in labor relations parlance.⁹ "Labor dispute," on the other hand, has been given its common meaning as codified into labor relations statutes. Moreover, the concept of "labor dispute" appears in every employment security statute. Although in some unemployment insurance legislation, the terms "strike," "trade dispute," or "other industrial controversy" replace "labor dispute," the last is the generic term, traceable to the Social Security Act of 1935.

As noted, most states have left the question of what constitutes a

⁵ Lesser, Labor Disputes and Unemployment Compensation, 55 Yale L.J. 167, 176-77 (1945).

⁶ See generally Lewis, Unemployment Compensation Law in Labor Disputes: Michigan Compared With Seven Selected States 1936-1964 (1964).

⁷ See U.S. Bureau of Employment Security, *supra* note 2.

⁸ See generally Lewis, Jobless Pay During Labor Disputes, 22 Management Record 5 (Jan. 1961).

⁹ *Ibid.*

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labor dispute under the unemployment compensation laws to their respective administrative tribunals and, upon judicial review, to their appellate courts. One state court has said:

We are of the opinion that the legislature deliberately failed to define that term [labor dispute], for the reason that it realized that any attempt to define that term might result in a definition which would not meet conditions arising in the future.¹⁰

When appeals have been taken, however, this issue has often been disposed of with a reference to either the federal/state anti-injunction statutes or the federal/state labor relations acts. The former take the pattern of the Norris-LaGuardia Act of 1932;¹¹ the latter follow the language of the National Labor Relations Act of 1935.¹² It is not surprising that when Alabama and Minnesota sought to formulate a definition of "labor dispute" in their employment security acts, they adopted language typical of these federal/state laws. Alabama, for example, added language identical to that which Congress had written into the original NLRA, and which was carried forward into the Labor-Management Reporting and Disclosure Act of 1959:¹³

[T]he 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.¹⁴

Prior to this amendment, the Alabama courts had held that the federal definition was merely illustrative, not binding.¹⁵ Minnesota's Employment Security Law declares that for the purposes of that statute "the term 'labor dispute' shall have the same definition as provided in the Minnesota Labor Relations Act."¹⁶

Such statutory definitions, however, are but the recognition, through the amending process, of the meanings accorded to the term "labor dispute" as it has evolved at the hands of the judiciary. In an

¹⁰ In the Matter of Polson Lumber & Shingle Mills, 19 Wash. 2d 467, 479, 143 P.2d 316, 322 (1943).

¹¹ 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1964).

¹² 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1964).

¹³ 73 Stat. 519 (1959) (codified in scattered sections of 29 U.S.C.).

¹⁴ Ala. Code tit. 26, § 214(A) (1958).

¹⁵ See, e.g., *Ex parte Pesnell*, 240 Ala. 457, 199 So. 726 (1940), cert. denied, 313 U.S. 590 (1941). Tennessee reached a similar conclusion in *Block Coal & Coke Co. v. District 19, UMW*, 177 Tenn. 247, 148 S.W.2d 364 (1941).

¹⁶ Minn. Stat. § 268.09(1)(6) (1961).

early opinion which commented on the problem of judicial construction in the absence of legislative directions, the West Virginia high court stated:

In the development of the law it has become increasingly necessary to use appropriate words to define what the law is on any subject. We say increasingly necessary, because of the wide use of statutory law to meet the changing needs of the times. It being necessary to so express thought, the rule has grown up, having universal application, that in all legislation it is supposed that the words used by the legislative bodies are to be given their common, ordinary and accepted meaning. Sometimes the meaning of the words used in the statute are defined. Unfortunately, the words on which this controversy hinges, "labor dispute," are not defined in the Unemployment Compensation Act, and we must, therefore, endeavor to determine what the legislature meant when those words were used.¹⁷

At this point, the court might have turned to the British predecessors of our unemployment insurance legislation for assistance in finding a suitable definition, as other courts had done with respect to the "stoppage of work" concept.¹⁸ Had such an historical approach been used, it would have disclosed the following definition:

"Trade dispute" means any dispute between employers and employees or between employees and employees which is connected with the employment or non-employment or the terms of employment of any persons, whether employees in the employment of the employer with whom the dispute arises or not.¹⁹

In order to arrive at a meaningful definition of the term, however, the courts looked instead to the Social Security Act of 1935²⁰ and its related Federal Unemployment Insurance Tax Act of 1939.²¹ Unlike the phrase "stoppage of work," which has no archetype in the federal social security legislation, the term "labor dispute" does occur in these acts. It appears, for example, in connection with provisions which must be written into each state or territorial employment security act in order for that act to qualify for tax offset approval from the Federal

¹⁷ *Miners in the General Group v. Hix*, 123 W. Va. 637, 644, 17 S.E.2d 810, 814 (1941).

¹⁸ *American Steel Foundries v. Gordon*, 404 Ill. 174, 88 N.E.2d 465 (1949); *Magner v. Kinney*, 141 Neb. 122, 2 N.W.2d 689 (1942).

¹⁹ Unemployment Insurance Act, 1935, Geo. 5, c. 8, § 113(1)(u).

²⁰ Ch. 531, 49 Stat. 620 (1935) (codified in scattered sections of 42 U.S.C.).

²¹ 53 Stat. 183 (1939), as amended, 26 U.S.C. § 3301-09 (1964).

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Social Security Board. As the section of the Unemployment Tax Act regarding suitability of new employment reads:

[C]ompensation shall not be denied . . . to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

- (A) If the position offered is vacant due directly to a strike, lockout, *or other labor dispute*. . . .²² (Emphasis added.)

A similar provision occurs in every unemployment compensation law, separate from the labor dispute disqualification provisions. It provides the nexus with the federal legislation to which the courts have turned in search of a more serviceable analysis of "labor dispute" than the dictionary could provide. The justification for seeking meanings in the federal statutes is to be found in the congressional policy behind enactment of the mandatory provisions of the Social Security Act. These provisions were to ensure that state laws would not defeat the national labor policy of the New Deal legislation which embodied labor dispute definitions peculiar to the purposes and goals of collective bargaining.²³

The earlier cases, then, initially defined the labor dispute concept by referring either to federal legislation in the labor relations and anti-injunction areas or to similar state enactments. In *Miners in the General Group v. Hix*,²⁴ the West Virginia Supreme Court decided that the "no contract, no work" policy of the United Mine Workers constituted a labor dispute which would bar unemployment compensation benefits. It reached this conclusion by applying the definitions of both the Norris-LaGuardia and National Labor Relations Acts:

We are not bound by the definition of a labor dispute contained in the Federal statutes, but these definitions are at least persuasive of what should be the definition of such a dispute, and are not out of line with the general and common acceptance of the meaning of the term. Until a better definition is found, or there is some substantial reason for finding that our legislature had in mind a different meaning to be attached

²² 68A Stat. 445 (1954), as amended, 26 U.S.C. § 3304(a)(5) (1964).

²³ But see *Johnson v. Unemployment Ins. Comm'n*, 367 S.W.2d 253, 255 (Ky. 1963), where the court stated:

The breadth of the definition in the Norris-LaGuardia and the Wagner Acts was complementary of their fundamental purpose to protect the right of collective bargaining. It was meant as an umbrella. On the other hand, it is argued, the disqualification provision of our unemployment compensation law . . . has a different purpose and calls for a restrictive rather than a broad definition of the term, in keeping with the spirit of unemployment compensation as distinguished from the objectives of the federal legislation relating to labor disputes.

²⁴ *Supra* note 17.

thereto, there would seem to be no impropriety in our accepting these existing definitions in the determination of what was then meant. So far as we know, the Federal statute, under which our own Unemployment Compensation Act to a certain extent operates, does not contain a definition of what a labor dispute is; but it does make provisions, which our statute closely follows, by which workers are protected against being deprived of compensation where strikes, lockouts, and other labor disputes are in existence. At least the sections governing this situation in both Federal and State statutes are, in effect, similar, and bring out into bold relief the proposition that in enacting them, Congress and the legislature had in mind that there could be a labor dispute aside from either a strike or lockout.

... The legislature using no words of explanation of its intent, we naturally resort to the generally accepted meaning of the term "labor dispute." Furthermore, our Unemployment Compensation Law, being enacted in consequence of, and to be administered in harmony with, pre-existing Federal legislation on the subject, we are warranted in resorting to general as well as special Federal enactments in interpreting the meaning of the terms as used in our statute, which, in our opinion, plainly cover the difference of opinion between the mine workers and the operators in the joint conference in New York.²⁵

This statement represents the attitude of a number of courts, despite an early argument which charged that it was "unwarrantable that such statutory definition, obviously given a comprehensive meaning in the Federal Law seeking to benefit the worker, should be torn from its original setting and, by judicial interpolation, be read into the Alabama Act so as to be destructive of the elemental purpose of that Act, i.e. the relief of unemployment."²⁶

Many courts, although reluctant to adopt outright federal definitions, have not hesitated to refer to their own state statutes, even though the latter may have been fostered by the former. In Connecticut,

²⁵ *Id.* at 646-47, 17 S.E.2d at 815-16. See *Spielmann v. Industrial Comm'n*, 236 Wis. 240, 295 N.W. 1 (1940), for a decision from a non-"stoppage-of-work" jurisdiction.

²⁶ *Department of Industrial Relations v. Drummond*, 30 Ala. App. 78, 82, 1 So. 2d 395, 399 (1941). See *Ex parte Pesnell*, *supra* note 15.

Other states have also considered this question. Washington, for example, has rejected the influence of the federal acts, *Ackerlund v. Employment Security Dep't*, 49 Wash. 2d 292, 300 P.2d 1019 (1956). Kentucky and Colorado have made the federal definitions binding, *Johnson v. Unemployment Ins. Comm'n*, *supra* note 23; *Sandoval v. Industrial Comm'n*, 110 Colo. 108, 130 P.2d 930 (1942). Iowa has applied the NLRA, *Dallas Fuel Co. v. Horne*, 230 Iowa 1148, 300 N.W. 303 (1941).

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Indiana, and Wisconsin, courts have assumed that their legislatures intended to adopt the definition and construction of "labor dispute" found in their respective anti-injunction acts.²⁷ Missouri has been guided by the definition in its public utility strike act;²⁸ and Hawaii has adhered to the description of "labor dispute" used in its stevedoring disputes law of 1955.²⁹

There was important early qualification to the appropriation of labor dispute definitions from other statutes: the other statute must pre-date the passage of the particular state unemployment compensation law. In *Spielmann v. Industrial Comm'n*,³⁰ the Supreme Court of Wisconsin refused to adopt the definition of labor dispute which was used in the Wisconsin Labor Relations Act because "the 1939 definition could not possibly have been in the mind of the 1931 Legislature."³¹ However, the court did adopt the definition used in the state anti-injunction law which had been in force at the time of the enactment of that state's Unemployment Reserves and Compensation Act.³² Consequently, in the *Spielmann* case, the Wisconsin court found that although there was no voluntary withdrawal from work, there was nonetheless a labor dispute under the broad definition of their anti-injunction statute. In that case, workers at the Racine plant of an automobile manufacturer were picketing to protest management's plan to close the Racine plant; there was technically no strike. As a result, unemployed workers at the Kenosha plant of the same company, where there was no picketing or striking, were denied unemployment compensation benefits.

An interesting development in labor disputes disqualification jurisprudence in Wisconsin followed the 1939 amendment to the definition of "labor dispute" in the anti-injunction act. The amendment introduced a narrower definition of that term, and a correlative broadening of the circumstances in which claimants were entitled to benefits.³³ In

²⁷ See *Alvarez v. Administrator*, 139 Conn. 327, 93 A.2d 298 (1952); *Conte v. Egan*, 135 Conn. 367, 64 A.2d 534 (1949); *Adkins v. Employment Security Div.*, 117 Ind. App. 132, 70 N.E.2d 31 (1946); *Spielmann v. Industrial Comm'n*, supra note 25.

²⁸ See, e.g., *Poggemoeller v. Industrial Comm'n*, 371 S.W.2d 488 (Mo. Ct. App. 1963).

²⁹ See, e.g., *Inter-Island Resorts, Ltd. v. Akahane*, 46 Hawaii 140, 377 P.2d 715 (1962).

³⁰ Supra note 25.

³¹ Id. at 250, 295 N.W. at 6. As pointed out supra note 4, both the Norris-LaGuardia and National Labor Relations Acts were enacted before all state unemployment insurance laws except that of Wisconsin.

³² Wis. Laws Spec. Sess. 1931, ch. 20, § 2, as amended, Wis. Stat. Ann. §§ 108.01-26 (1957).

³³ Wis. Laws 1939, ch. 25 eliminated the phrase "regardless of whether or not the disputants stand in the proximate relation of employer and employee." The statute now reads as follows:

The term "labor dispute" means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is

one case, there was a labor dispute between concrete suppliers and their drivers. As a result, a general contractor was unable to obtain concrete because he would not buy from non-union suppliers for fear of being picketed. When the general contractor had to lay off employees because of this supply shortage, these employees were allowed unemployment benefits, for the court required "more of a thread than is present here which connects the employer (in the case of a lockout) or the employee (in case of a strike) with the controversy."³⁴ In Illinois a similar result was suggested when the court said that "the term 'labor dispute,' as it appears in the Illinois Anti-Injunction Act . . . is narrower [than in the Norris-LaGuardia Act] in the sense that it has been held to apply only to those cases where employees have a dispute with their own employer or to a dispute between groups of employees and employers."³⁵

The United States Supreme Court, however, has rejected the restrictive construction of a disqualification clause urged by idled seasonal workers who argued that there must be an existing employment relationship at the time the controversy between the union and the employer arises. The *Unemployment Compensation Comm'n v. Aragan*³⁶ decision did not determine whether "labor dispute" must always be construed as broadly as it is defined in the Norris-LaGuardia and National Labor Relations Acts. It did hold, however, that a "dispute there certainly was; and the subject of that dispute consisted of matters usually contested in labor disputes as that term is normally understood."³⁷ In a footnote, the Court acknowledged the recognition accorded by the Kentucky, Alabama, and Colorado courts, and by the Alabama Legislature, to the federal labor law definitions.³⁸ Furthermore, the Court pointed to the mandatory federal language concerning conditions for refusal of new work when "the position offered is vacant due directly to a strike, lockout, or other labor dispute," as ground for favoring a broader meaning.³⁹ Relying upon the *Aragan* case, the New Jersey Supreme Court went so far as to declare that "the term 'labor dispute' broadly includes any controversy concerning terms or conditions of employment or arising out of the respective interests of employer and employee."⁴⁰

affiliated may be considered a party to the labor dispute.

Wis. Stat. Ann. § 103.62(3) (1957).

³⁴ *Kenneth F. Sullivan Co. v. Industrial Comm'n*, 25 Wis. 2d 84, 90, 130 N.W.2d 194, 197 (1964).

³⁵ *Local 11 v. Gordon*, 396 Ill. 293, 298, 71 N.E.2d 637, 640 (1947).

³⁶ 329 U.S. 143 (1946).

³⁷ *Id.* at 151.

³⁸ *Id.* at 149-50 n.8.

³⁹ *Id.* at 150, quoting from the Alaska Employment Security Act, Alaska Stat. § 23.20.385(a)(1) (1962).

⁴⁰ *Mortensen v. Board of Review*, 21 N.J. 242, 246, 121 A.2d 539, 541 (1956).

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II. LABOR DISPUTES IN THE ABSENCE OF MANIFEST CONFLICT

Strikes, picket lines, lockouts, and controversies over collective bargaining and contract negotiations have always been the indicia of labor disputes. Whenever it is alleged that a labor dispute exists in the absence of this kind of manifest conflict, there are troublesome questions regarding the interpretation of the underlying nature and purposes of such concerted action, as well as with the relationship of the parties involved. In addition, some jurisdictions have eliminated the lockout and certain other employer conduct from the list of disqualification factors. These circumstances require further refinement in the determination of when a labor dispute exists or ceases to exist.

A. "No Contract-No Work"

The problem of how to interpret this phrase in the context of the unemployment insurance laws first confronted the courts when the United Mine Workers implemented its "no contract-no work" slogan. When no new agreement was reached between the union and the mine operators, all coal mining facilities whose workers had been covered by the old agreement were closed down at midnight March 31, 1939, and again in 1941. During these periods, the industry made no effort to operate the mines.

In the several jurisdictions in which unemployment insurance claims were adjudicated, the mine workers resorted to a variety of arguments to avoid disqualification. In an Alabama case, for example, it was urged that a "labor dispute" exists only where a strike or lockout "or some similar show of force or intensity of feeling results." The state supreme court rejected this argument.⁴¹ Kentucky and Tennessee appellate courts both rejected the contention that there can be no labor dispute in the absence of an existing employer-employee relationship. The former court applied the federal definitions which declared that such a dispute existed "regardless of whether the disputants stand in the proximate relation of employer and employee."⁴² The latter interpreted the term as "broad enough to cover not only one presently in the relationship of employer and employee, but one who has last been in such relationship although that relationship may have expired."⁴³ In 1940, an intermediate appellate court in Ohio reached a contrary conclusion,⁴⁴ but this view was rejected by the state supreme court in 1946.⁴⁵ The expiration of the collective bargaining agreement between

⁴¹ *Ex parte Pesnell*, supra note 15.

⁴² *Barnes v. Hall*, 285 Ky. 160, 174, 146 S.W.2d 929, 935 (1940).

⁴³ *Block Coal & Coke Co. v. District 19, UMW*, supra note 15, at 259, 148 S.W.2d at 368.

⁴⁴ *United States Coal Co. v. Unemployment Compensation Bd. of Review*, 66 Ohio App. 329, 32 N.E.2d 763 (1940).

⁴⁵ *Baker v. Powhatan Mining Co.*, 146 Ohio St. 600, 67 N.E.2d 714 (1946).

the mine operators and the union was not a decisive factor to the Indiana Supreme Court, and a refusal to work except under new and different contract terms was held to be a controversy—a strike—in the ordinary meaning of those words.⁴⁶ In Utah, similar union action, even though notice thereof was given during a lay-off, was held to result in ineligibility since the “stoppage of work existed because of a *strike*.”⁴⁷ (Emphasis supplied.) More recently, a Pennsylvania superior court held that the Marine and Shipbuilding Workers’ refusal to work without a contract, after the expiration of the old collective bargaining agreement, constituted a strike, and consequently was a disqualifying labor dispute.⁴⁸ Some decisions were strongly supported by a history of legislative refusal to define the scope of the labor dispute concept through amendment. Thus, in West Virginia there had been a continued failure to enact a proposal which would have provided that the “loss of employment resulting from the expiration of an existing joint-wage agreement by reason of failure to agree upon a new joint-wage agreement, and until negotiations for a new joint-wage agreement are terminated by joint action of both parties or by either party thereto, shall not constitute a labor dispute.”⁴⁹

The leading Colorado case of *Sandoval v. Industrial Comm’n*⁵⁰ undertook a definitional analysis of “strike” as applied to the “no contract—no work” fact situation, and of “labor dispute” as defined by the NLRA. Citing a federal court decision,⁵¹ the Colorado Supreme Court listed the five indicia of a “strike”: (1) a suspended employer-employee relationship; (2) a demand for some concession, generally for modification of conditions of labor or rates of pay; (3) a refusal to return to work with intent to bring about compliance with the demand; (4) an intention to return to work when compliance is accomplished; and (5) an intention on the part of the operator to re-employ the same men or men of a similar class when the demands are acceded to or withdrawn or otherwise adjusted.⁵²

It is important to emphasize that a strike is characterized by a suspension, rather than a termination, of the employer-employee relationship, and, in addition, the employees who leave work must do so with the intention of returning. Both of these prerequisites were present in the mine workers’ dispute. Although the Colorado court rec-

⁴⁶ *Walter Bledsoe Coal Co. v. Review Bd.*, 221 Ind. 16, 46 N.E.2d 477 (1943).

⁴⁷ *Employees of Lion Coal Corp. v. Industrial Comm’n*, 100 Utah 207, 111 P.2d 797 (1941).

⁴⁸ *Hogan Unemployment Compensation Case*, 169 Pa. Super. 554, 83 A.2d 386 (1951).

⁴⁹ *Miners in the General Group v. Hix*, supra note 17, at 656, 17 S.E.2d at 820.

⁵⁰ Supra note 26.

⁵¹ *Iron Molders’ Union No. 125 v. Allis-Chalmers Co.*, 166 Fed. 45, 52 (7th Cir. 1908).

⁵² Supra note 26, at 120, 130 P.2d at 935-36.

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ognized that there may be a *labor dispute* regardless of whether there is any employer-employee relationship, lacking that relationship there could be no *strike*. The court stated:

[A]n actual employer-employee relationship did not exist [during the no contract—no work period]; but neither was their relationship the same as that of men seeking employment from and negotiating for terms with operators between which and them an actual employer-employee relationship had never existed. As near as the relationship that did exist can be described, it was a suspended employer-employee relationship and recognized by both parties as such.⁵³

More generally, "strike" has been defined as an employees' work stoppage, by common agreement, for the purpose of obtaining or resisting a change in conditions of employment.⁵⁴ "Picketing forms no part of this definition. It is common knowledge that a strike may or may not be accompanied by the establishment of a picket line. On the other hand, picketing may exist in the absence of a strike."⁵⁵ Applying these statements to the mine owners who, under closed shop arrangements, depend entirely upon union labor for their operations, there certainly may be a labor dispute without picketing. It is equally certain that there may be a labor dispute in the absence of an existing collective bargaining agreement when the union and the employer are unable to agree on the terms of the contract to be entered into between them.

B. *Anticipatory Shutdowns*

Another instance in which it is necessary to determine whether a labor dispute exists in the absence of picketing, overt strike action, or lockout is in the case where there is an anticipatory shutdown in the face of threatened employee action, or an anticipatory decrease in business operations. Such shutdowns, occurring in both stoppage-of-work and non-stoppage-of-work jurisdictions, have led to decisions which further reinforce the view that it is not necessary to show that a strike or a lockout exists in order to establish a disqualifying labor dispute.

Two leading cases on this subject come from New Jersey. In one case,⁵⁶ a fur processing company being threatened with a strike over the terms of a new collective bargaining contract stopped taking skins, which might have spoiled if there were a strike, until the situation was

⁵³ Id. at 119, 130 P.2d at 935.

⁵⁴ *Bilodeau v. Employment Security Comm'n*, 153 Me. 254, 136 A.2d 522 (1957).

⁵⁵ *Local 11 v. Gordon*, *supra* note 35, at 300, 71 N.E.2d at 641.

⁵⁶ *Ablondi v. Board of Review*, 8 N.J. Super. 71, 73 A.2d 262 (1950).

clarified. This, of course, resulted in a curtailment of production and a simultaneous layoff of employees. In the other case,⁵⁷ the Industrial Union of Marine and Shipbuilding Workers threatened a strike against the Bethlehem Steel Company unless a new agreement was reached. The company refused to accept ship repair work on which it was required to guarantee delivery dates or risk assessment of penalty payments. Again, employees were laid off for lack of work. In both instances, unemployment compensation benefits were denied, which was consistent with developing case law sustaining the broad construction of the term "labor dispute." As in *Aragan*,⁵⁸ there was a "dispute" even though there was no strike or lockout. Moreover, the New Jersey Legislature had refused to pass amendments substituting the term "strike" in place of "labor dispute." The state supreme court declared that "'strike' or 'lockout' . . . are merely two of the forms by which a 'labor dispute' may be manifested."⁵⁹

In Alabama, there have been cases where employers extinguished kiln fires before a strike deadline to prevent excessive losses to ceramic products, and shut down annealing ovens to protect against damage during the threat of strike.⁶⁰ Under Pennsylvania law, if an employer curtails production and in good faith reduces employment in order to protect his plant against an impending walk-out, that constitutes an industrial dispute and the resulting unemployment is not compensable.⁶¹

It has been ingeniously argued that the unemployment was due to the expiration of the collective bargaining agreement and not to the differences between the employer and the labor organization,⁶² or that all that transpired between the parties were "negotiations" as such.⁶³ The lack of the new contract, however, was itself due to the labor dispute, and the reason for the negotiations was the difference over terms of employment. As one court put it: "the labor dispute was the controversy and disagreement which took place [and it] . . . was in existence before the strike and the lockout took place The strike and the lockout . . . were the tools by which [the union] . . . and the employers sought to prevail in the dispute."⁶⁴

⁵⁷ *Mortensen v. Board of Review*, supra note 40.

⁵⁸ Supra note 36.

⁵⁹ *Mortensen v. Board of Review*, supra note 40, at 246, 121 A.2d at 541.

⁶⁰ *Department of Industrial Relations v. Walker*, 268 Ala. 507, 109 So. 2d 135 (1959); *Department of Industrial Relations v. Savage*, 38 Ala. App. 277, 82 So. 2d 435 (1955).

⁶¹ *Mosko v. Unemployment Compensation Bd. of Review*, 199 Pa. Super. 73, 184 A.2d 395 (1962).

⁶² *Block Coal & Coke Co. v. District 19, UMW*, 177 Tenn. 247, 257-58, 148 S.W.2d 364, 368.

⁶³ *Poggemoeller v. Industrial Comm'n*, supra note 28, at 503.

⁶⁴ *Id.* at 501.

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C. Other Rulings

The question of whether or not a labor dispute exists without a strike, picket line, or lockout has resulted in a number of interesting rulings allowing recovery of benefits. The mere filing of a grievance by a union when an employer undertook unilateral changes in rates of pay did not, of itself, constitute a labor dispute.⁶⁵ Nor was there a disqualifying dispute when garment workers were laid off for lack of work during a period when the company and the union were negotiating piece-work rate adjustments.⁶⁶ A New York court found that the negotiations with the garment workers was evidence of peaceful collective bargaining with only an incidental stoppage of work, and that "is not what the Legislature meant by 'strike, lockout or other industrial controversy' which, read together, must open to the construction that the 'other industrial controversy' intended was something in the nature of a strike or lockout."⁶⁷ The same principle of "peaceful bargaining" was applied in favor of claimants laid off during a negotiating period unmarked by "act or incident,"⁶⁸ as opposed to a situation where picketing, employer-employee hostility, and use of the National Labor Relations Board were involved.⁶⁹ When a Connecticut employer voluntarily shut down during labor negotiations in order to improve his bargaining position, it was held to be a "lockout" only in the generic sense of that concept, and not a disqualifying "labor dispute."⁷⁰ The consequent unemployment, therefore, was caused not by the underlying labor dispute, but rather by a lockout occurring in the course of that dispute. On the other hand, a layoff resulting from a union-management agreement to abandon staggered work shifts and to reduce the number of shifts was held attributable to a continuing labor dispute, despite the initial mutual resolution of the controversy.⁷¹ More particularly, the union had struck the employer, alleging that the operation of the coal tippie by three staggered work shifts was a violation of the collective bargaining contract. Thereafter, the company accepted the union demands, began to operate in two shifts instead of three, and discontinued the staggered work force. Because the company could not process as much coal under this arrangement, it was necessary to reduce the number of workers in the mine. The laid-off employees sought unemployment compensation benefits. The Kentucky Court of Appeals held that those who

⁶⁵ *Bartlett v. Administrator*, 142 Conn. 497, 115 A.2d 671 (1955).

⁶⁶ *In the Matter of Cohen*, 283 App. Div. 143, 126 N.Y.S.2d 648 (1953).

⁶⁷ *Id.* at 144-45, 126 N.Y.S.2d at 650.

⁶⁸ *In the Matter of Keane*, 2 App. Div. 2d 148, 151, 153 N.Y.S.2d 290, 293 (1956), *aff'd*, 6 N.Y.2d 910, 161 N.E.2d 17, 190 N.Y.S.2d 714 (1959).

⁶⁹ *In the Matter of Klein*, 15 App. Div. 2d 201, 222 N.Y.S.2d 672 (1961), *aff'd*, 12 N.Y.2d 678, 185 N.E.2d 909, 233 N.Y.S.2d 471 (1962).

⁷⁰ *Brechu v. Rapid Transit Co.*, 20 Conn. Supp. 209, 131 A.2d 211 (1957).

⁷¹ *Ward v. Barnes*, 266 S.W.2d 338 (Ky. 1954).

lost their jobs as a result of this change in operations were not entitled to benefits, because their unemployment was, in the language of the statute, caused by "a strike or other [good faith] labor dispute . . . in active progress. . . ." The workers were returned to their jobs when the union settled the dispute by withdrawing its opposition to the company's former practice. The court, however, viewed the period between layoff and reinstatement as "a mere truce or armistice in the labor dispute."⁷²

In Florida, another state with a labor-dispute-in-active-progress provision, there was an unusual case in which a claimant's disqualification was ruled to continue beyond the termination of the strike and throughout the period during which an unfair labor practice proceeding was pending before the NLRB.⁷³ The Indiana Appellate Court, when faced with a similar situation, reached a different result.⁷⁴ After a wild-cat strike by its employees, the company involved decided not to resume operations. When the employer refused to yield to union demands to reopen the plant, the union filed an unfair labor practice charge, but did not resort to a strike. In spite of the lockout by the employer, the court, in holding that there was no disqualifying labor dispute, said: "the existence of differences between labor and management does not ipso facto constitute a labor dispute causing a stoppage of work."⁷⁵

In one very difficult case,⁷⁶ employees returned from a vacation to learn that their working conditions and the standards by which they were to be paid had been substantially changed. Evidence indicated that the work could not be performed under the rigorous new conditions. It was found that this did not constitute a "dispute," because the employees were ready and willing to work. Since they were unable to comply with the new conditions, however, they were involuntarily unemployed.

Comparing some of the New York decisions⁷⁷ with others,⁷⁸ one can see the distinction between unemployment incidental to the normal period of collective bargaining and unemployment caused by economic warfare following an impasse. This distinction has achieved the status of doctrine in some jurisdictions. In New York, for example, the Unemployment Insurance Appeals Board has deliberately taken this ap-

⁷² *Id.* at 339. See *Johnson v. Unemployment Ins. Comm'n*, 367 S.W.2d 253, 256 (Ky. 1963), where the court stated that "if a dispute is considered to be still in active progress during a voluntary truce, surely it must be so during an involuntary one."

⁷³ *Meyer v. Industrial Comm'n*, 117 So. 2d 216 (Fla. Dist. Ct. App. 1959).

⁷⁴ *Ross v. Board of Review*, 172 N.E.2d 442 (Ind. Ct. App. 1961).

⁷⁵ *Id.* at 448.

⁷⁶ *Department of Industrial Relations v. Stone*, 53 So. 2d 859 (Ala. Ct. App. 1951).

⁷⁷ *E.g.*, In the Matter of Cohen, *supra* note 66; In the Matter of Keane, *supra* note 68.

⁷⁸ *E.g.*, In the Matter of Klein, *supra* note 69.

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proach to avoid enlargement of the "industrial controversy" concept. The Board thereby seeks to effectuate that state's policy of "encouraging collective bargaining and peaceful negotiations of written agreements."⁷⁹ The distinction has also been recognized in collective labor agreements themselves.⁸⁰ In order to attempt to insulate employees from the labor dispute disqualification, it has sometimes been provided in these agreements that employees can discontinue working while the employer and the union are adjusting piece rates. Both Massachusetts and Minnesota have amended their respective labor dispute disqualification provisions to avoid a judicial extension of those provisions to periods of unemployment during labor-management bargaining. The Massachusetts amendment states that

nothing in this subsection shall be construed so as to deny benefits to an otherwise eligible individual (1) who becomes involuntarily unemployed during the period of the negotiation of a collective bargaining contract, in which case the individual shall receive benefits for the period of his unemployment but in no event beyond the date of the commencement of a strike or lockout. . . .⁸¹

Minnesota provides that if an employee is otherwise eligible, benefits shall not be denied "because of a lockout or . . . dismissal during the period of negotiation in any labor dispute and prior to the commencement of a strike."⁸²

III. STRIKE ACTION AND PICKETING—THE PURPOSE TEST

Just as there may be a labor dispute in the absence of a strike, lockout, or picket line, the presence of such circumstances does not, of itself, guarantee the finding of a labor dispute. Although it has been stated that, "under any definition, a labor dispute includes a strike,"⁸³ such concerted action may be put to the "purpose test," for, "every 'labor objective' is not a technical 'labor dispute.'"⁸⁴ The trend, however, has been toward a broad construction. Clearly, for instance, picketing by a union in furtherance of its demand for recognition as a bargaining agent constitutes a disqualifying controversy.⁸⁵ Picketing to obtain reinstatement of a fellow employee who had been the subject

⁷⁹ Colin, *The Law of Unemployment Insurance in New York* 229 (1950).

⁸⁰ *Id.* at 230.

⁸¹ Mass. Laws 1959, ch. 554, § 25(b), Mass. Gen. Laws Ann. ch. 151A, § 25(b) (Supp. 1965).

⁸² Minn. Stat. § 268.09(1)(6) (1961).

⁸³ *Local 11 v. Gordon*, 396 Ill. 293, 299, 71 N.E.2d 637, 640 (1947).

⁸⁴ *Badgett v. Department of Industrial Relations*, 243 Ala. 538, 542, 10 So. 2d 880, 883 (1942).

⁸⁵ See *Nobes v. Unemployment Compensation Comm'n*, 313 Mich. 472, 21 N.W.2d 820 (1946).

of a disciplinary layoff was held to constitute a labor dispute despite the "no suspension of work" clause in the union's contract;⁸⁶ the court stated that "concerted activities in walking off the job and in picketing the plant in protest over the suspension of a fellow union member and in thus supporting him in connection with the treatment accorded him seems to be generally recognized as a labor dispute."⁸⁷ In one case, a strike was found to be a labor dispute even though there was no controversy between the employer and the employees, *qua* employees.⁸⁸ In another case, workmen picketed an Air Force base because the Government had implemented an economy order by replacing several steamfitters with civil service employees. The Appeal Board held that this was not an "industrial controversy" because it amounted to a dispute between the union and the Air Force. This was reversed. The New York court read the language of the dispute disqualification clause broadly enough to encompass this situation, which was viewed as a dispute between the union and two heating contract employers.⁸⁹ Even when the union involved is engaged in a secondary boycott and does not represent any of the employees, New York has suspended benefits.⁹⁰ Another dispute which comes within the disqualification clause occurs when a union protests the use of non-union supervisory personnel, contrary to the collective agreement, on maintenance jobs.⁹¹

Claimants have argued that walkouts designed to obtain recovery of past-due pay claims rather than future wages were not within the term "labor dispute." These arguments have not been recognized. In one case, involving a strike over a demand for approximately \$6,000 in back wages, the appellate court ruled that

conceding for the sake of argument that the claimants in this case stopped work because they had not been paid their past-due wages, that fact does not necessarily preclude a finding that a labor dispute existed. . . . The fact that the purpose of the walkout may have been the collection of the past-due wages makes it no less a labor dispute. . . . The means employed were identical with those ordinarily used to obtain a closed shop, better wages, shorter hours or better working conditions.⁹²

⁸⁶ *Milne Chair Co. v. Hake*, 190 Tenn. 395, 230 S.W.2d 393 (1950).

⁸⁷ *Id.* at 400, 230 S.W.2d at 395, citing *Carter Carburetor Corp. v. NLRB*, 140 F.2d 714, 718 (8th Cir. 1944).

⁸⁸ *In the Matter of Polson Lumber & Shingle Mills*, 19 Wash. 2d 467, 143 P.2d 316 (1943).

⁸⁹ *In the Matter of Sprague*, 4 App. Div. 2d 911, 167 N.Y.S.2d 127 (1957).

⁹⁰ *In the Matter of Gilmartin*, 10 N.Y.2d 16, 176 N.E.2d 51, 217 N.Y.S.2d 22 (1961).

⁹¹ See *Amory Worsted Mills, Inc. v. Riley*, 96 N.H. 162, 71 A.2d 788 (1950).

⁹² *Deshler Broom Factory v. Kinney*, 140 Neb. 889, 892-93, 2 N.W.2d 332, 334 (1942).

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A similar result was reached when organized employees failed to report for work in an attempt to recover back vacation pay allegedly owed them. The court pointed out, however, that

it is undoubtedly true that where, because of the employer's refusal or inability to pay past-due wages, an employee or all employees quit with the intention of seeking other employment, there is no strike or labor dispute within the meaning of the act.⁹³

Similarly, strikes designed to force employers to comply with their contractual obligations to pay into health and welfare funds have been found to be within the labor dispute disqualification.⁹⁴

On the other hand, in deciding if a labor dispute exists, it is immaterial whether the concerted conduct of the employees was in violation of their own contract with the employer. The purpose of the walk-out (or lockout) is examined in terms of the general objectives sought after in labor disputes—not in terms of its justification or lack of justification. "[T]he unemployment compensation act is not designed to be used as an instrument with which to force compliance with other legal precepts."⁹⁵ The concept of state neutrality in unemployment compensation proceedings assures that industrial controversies are not prevented from being considered labor disputes simply because one of the parties may be breaching a collective bargaining agreement,⁹⁶ unless the statute provides otherwise.⁹⁷ A union walkout to protest an employer's refusal to sign a temporary renewal contract pursuant to the order of the War Labor Board was nonetheless a disqualifying labor dispute,⁹⁸ as was a suspension of work to force the employer to comply with the retroactive wage directive of that same Board.⁹⁹

IV. INTRA-UNION DISPUTES, RIVAL UNION DISPUTES, AND JURISDICTIONAL STRIKES

Intra-union and interunion differences which have led to employee collective action against the employer, and to subsequent unemployment, have presented difficult problems to both the administrative

⁹³ *Local 11 v. Gordon*, *supra* note 83, at 301, 71 N.E.2d at 641.

⁹⁴ *E.g.*, *Glen Alden Corp. v. Unemployment Compensation Bd. of Review*, 189 Pa. Super. 286, 150 A.2d 591 (1959).

⁹⁵ *T. R. Miller Mill Co. v. Johns*, 261 Ala. 615, 619, 75 So. 2d 675, 678 (1954). *Accord*, *In the Matter of Heitzenrater*, 22 App. Div. 2d 542, 256 N.Y.S.2d 1000 (1965).

⁹⁶ See *Burleson Unemployment Compensation Case*, 173 Pa. Super. 527, 98 A.2d 762 (1953).

⁹⁷ Arizona, Arkansas, and New Hampshire prevent disqualification when an employer breaches the collective bargaining agreement in a labor dispute.

⁹⁸ *Fash v. Gordon*, 398 Ill. 210, 75 N.E.2d 294 (1947).

⁹⁹ *Cassell Unemployment Compensation Case*, 167 Pa. Super. 440, 74 A.2d 809 (1950).

agencies and the courts. As a general rule, "labor dispute" has been construed to include situations in which the employer appears to be an innocent or neutral party. For example, when a steelworkers' local struck an employer as part of a dispute with the international union and its master collective agreement which froze all wage scales, a Pennsylvania court ruled the resulting unemployment noncompensable.¹⁰⁰ The union's constitution provided that exclusive representation of the company's employees rested in both the local and the international. If the master agreement was binding on the local, the local was striking in violation of that agreement; if the master agreement was not validly extended, or had been terminated by action of the local, the work stoppage was nonetheless a strike. Conversely, after another local union had negotiated a piece-work rate settlement with its employer, a walkout ordered by the international union was also declared to be a labor dispute.¹⁰¹ The claimants had urged that the dispute was not between the company and its employees, but rather between the local and the parent union. The court disagreed and emphasized that to have a labor dispute, the controversy need only arise "out of the respective interests of employer and employee, regardless of whether or not the disputants [the International and the employer] stand in the proximate relation of employer and employee."¹⁰²

In a similar fact situation, a labor dispute was held to exist when employee-members of a local union at one oil company plant refused to cross a picket line at their plant which was manned by "stranger pickets," employees from another of the company's plants who were members of a different local, but of the same international.¹⁰³ At the time, there was an industry-wide dispute in progress between the oil companies and the international union, of which the local negotiations were a part.

In an unusual case, a mineworkers' local union struck in protest against a company's checkoff of union dues and assessments at a rate that had been accepted by the district and international unions. The miners, covered by a closed shop contract with an automatic dues deduction clause, were, in effect, striking against the increased contributions that had been adopted by their own union. Commenting that the company derived no personal gain from the dispute, the Pennsylvania Supreme Court, in *Miller v. Unemployment Compensation Bd. of Review*,¹⁰⁴ found that there was an "industrial dispute" and said that

the Unemployment Compensation Law . . . does not define

¹⁰⁰ *Burleson Unemployment Compensation Case*, supra note 96.

¹⁰¹ *Alvarez v. Administrator*, 139 Conn. 327, 93 A.2d 298 (1952).

¹⁰² *Id.* at 334, 93 A.2d at 302.

¹⁰³ *Local 222, Oil Workers Int'l Union v. Gordon*, 406 Ill. 145, 92 N.E.2d 739 (1950).

¹⁰⁴ 152 Pa. Super. 315, 31 A.2d 740 (1943).

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an "industrial dispute"; nor are we called upon here to give the term an exact definition. . . . It may be between the employees and their Union or bargaining agency, provided it *involves the employer and affects the terms or conditions of employment*.¹⁰⁵ (Emphasis added.)

This principle was applied in subsequent years with various results. In one instance, the membership of an independent union which was the certified bargaining agent for certain employees voted to affiliate with the Congress of Industrial Organizations. Some of the members, however, formed a union associated with the American Federation of Labor and struck to compel the employer to recognize the latter union. Idled workers were granted compensation benefits when the court found that no labor dispute existed because the employer was not involved.¹⁰⁶ Later, the *Miller* principle was declared not to be "an invariable or infallible test in all circumstances . . . in determining whether a work stoppage is from a labor dispute."¹⁰⁷ But a labor dispute was found to exist when there was a controversy between the CIO and an AFL affiliate. Each was seeking recognition as the exclusive bargaining agent for a group of employees. The court held that such a dispute involved the interests of both the employer and all employees. However, it was the employer's refusal to recognize one of the unions except upon NLRB certification that, "in itself, stamped the contest a labor dispute."¹⁰⁸

One of the earliest compensation cases growing out of a conflict between opposing unions concerned a work force whose members were split between AFL and CIO affiliates.¹⁰⁹ When the workers associated with the AFL struck the company because they refused to work alongside the members of the CIO, the latter group, idled by the strike, filed for unemployment compensation. The Washington Supreme Court rejected the contention that the dispute was not one between workers and an employer and concluded that "there can be no question but that a labor dispute existed."¹¹⁰ In another instance, the same court held that there was a disqualifying labor dispute in a jurisdictional controversy between two foremen's unions, despite the argument that foremen are a part of management within the meaning of the NLRA.¹¹¹ The longshoremen who refused to cross the picket line were therefore

¹⁰⁵ Id. at 320-21, 31 A.2d at 742.

¹⁰⁶ *Duquesne Brewing Co. v. Unemployment Compensation Bd. of Review*, 359 Pa. 535, 59 A.2d 913 (1948).

¹⁰⁷ *Westinghouse Elec. Corp. v. Unemployment Compensation Bd. of Review*, 165 Pa. Super. 385, 390 n.1, 68 A.2d 393, 395 n.1 (1949).

¹⁰⁸ Id. at 391, 68 A.2d at 396.

¹⁰⁹ *In the Matter of Deep River Timber Co.*, 8 Wash. 2d 179, 111 P.2d 575 (1941).

¹¹⁰ Id. at 184, 111 P.2d at 577.

¹¹¹ *Ackerlund v. Employment Security Dep't*, 49 Wash. 2d 292, 300 P.2d 1019 (1956).

denied benefits. A contrary result was reached in a West Virginia situation in which the claimants were not members of the picketing union,¹¹² as between the picketers and the employer, however, a subsequent case in that state implied that a labor dispute did exist.¹¹³

In a difficult Alabama case, a mining company employed members of two different unions together with men who belonged to no union.¹¹⁴ The company shut down all operations to avoid violence while engaged in a dispute with one of the unions. The majority opinion sustained a judgment awarding benefits to a claimant who was a member of the other union. In accordance with the wording of the Alabama statute, the court held that the unemployment was not *directly* due to a labor dispute. Because of this, the case did not dispose of the more basic question of whether there *was* a labor dispute. Indeed, the decision was held inapplicable in a later rival union case.¹¹⁵

V. WILDCAT STRIKES

Just as workers involved in jurisdictional contests and rival union disputes have argued that they were not involved in a labor dispute, employees out of work due to wildcat strikes or unauthorized work stoppages have similarly sought to avoid disqualification. This theory usually maintains that the strike or stoppage is directed at an employer who has an existing collective bargaining contract with the union, and that the union has neither authorized nor ratified the conduct which precipitated the unemployment for which benefits are being claimed. Thus, it is asserted, the labor organization is not a party to the controversy and such a controversy is not within the meaning of the term "labor dispute."

The treatment given this line of argument is exemplified by the Connecticut case of *Bartlett v. Administrator*.¹¹⁶ When buffers and polishers in one department of a plant walked off of their jobs to protest the introduction of new pay rates, workers in other departments were laid off due to the interruption in the sequence of plant operations. All employees involved were represented by the same local union. Since the walkout was neither authorized nor ratified by the union, and was in fact a violation of the no-strike clause contained in the labor agreement, the claimants pleaded that the controversy did not constitute a labor dispute to which they were a party. The Court of Errors answered this plea by declaring that

¹¹² Board of Review v. Hix, 126 W. Va. 538, 29 S.E.2d 618 (1944).

¹¹³ Davis v. Ruthbell Coal Co., 133 W. Va. 319, 56 S.E.2d 549 (1949).

¹¹⁴ Department of Industrial Relations v. Drummond, 30 Ala. App. 78, 1 So. 2d 395 (1941).

¹¹⁵ Badgett v. Department of Industrial Relations, 30 Ala. App. 457, 10 So. 2d 872 (1942).

¹¹⁶ 142 Conn. 497, 115 A.2d 671 (1955).

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there is no provision in our statutes to the effect that a labor dispute cannot exist unless the actions of employees are authorized, legal and in accordance with the collective bargaining agreement. Neither is there any requirement that the union be a party to the dispute. . . . The union was the exclusive bargaining agency. The employer could not negotiate independently with either the plaintiffs or the employees who participated in the work stoppages.¹¹⁷

Earlier, an Illinois Supreme Court decision had applied the broad definitional approach of "any controversy concerning wages, hours, working conditions or terms of employment" to a wildcat strike situation.¹¹⁸ The employer and the union representing all production workers had agreed upon a trial period plan respecting the repair or correction of imperfectly manufactured items. Employees in the Lasting Department refused to work under the new conditions and left their jobs in protest. This forced the employer to shut down operations, in spite of the union's efforts to keep the objecting workers at their jobs. When workers filed unemployment compensation claims as a result of the shutdown, the circuit court reversed the Director of Labor and allowed the claims. The state's highest court reinstated the opinion of the Director of Labor, noting that

the employer in the instant case could not negotiate directly with the eighteen lasters. Their agency for that purpose was the same agency which represented all other workers. The dispute was indivisible; it was one single controversy.¹¹⁹

Under similar circumstances, the South Carolina Supreme Court found a labor dispute when employees stayed away from work to protest implementation of a plan approved by a majority of the union.¹²⁰

VI. LOCKOUTS

There is convincing authority for the proposition that a lockout is a "labor dispute" for the purposes of unemployment compensation proceedings.¹²¹ Although the term "lockout" is absent from the large majority of labor dispute disqualification provisions, it is present in the federally required clause relating to conditions for "non-suitability"

¹¹⁷ *Id.* at 504, 115 A.2d at 675.

¹¹⁸ *Local 658, Boot & Shoe Workers v. Brown Shoe Co.*, 403 Ill. 484, 87 N.E.2d 625 (1949).

¹¹⁹ *Id.* at 489-90, 87 N.E.2d at 629.

¹²⁰ *Johnson v. Pratt*, 200 S.C. 315, 20 S.E.2d 865 (1942). See *Bankston Creek Collieries, Inc. v. Gordon*, 399 Ill. 291, 77 N.E.2d 670 (1948); *Milne Chair Co. v. Hake*, *supra* note 86.

¹²¹ *Schoenwiesner v. Board of Review*, 44 N.J. Super. 377, 130 A.2d 648 (1957), and cases cited therein.

of work.¹²² However, nowhere is the word defined in terms of unemployment insurance laws. Just as courts have taken judicial notice of the definition of "strike" which appears in federal decisional law,¹²³ so have they recognized such a definition of "lockout." One such definition states:

A strike is a cessation of work by employees in an effort to get for the employees more desirable terms. A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms.¹²⁴

In those jurisdictions where the legislatures have elected to adopt an "employer-fault" theory, a lockout is not a labor dispute for unemployment compensation purposes. Eleven states *expressly* relieve lockouts, wholly or partially, from having the effect of disqualification which they might otherwise have.¹²⁵ In two other states, the phrasing of the labor dispute disqualification clause has been interpreted so as to exclude lockouts from the labor dispute concept.¹²⁶

Among the remaining thirty-seven states, it appears that benefits will be denied if unemployment is due to a lockout or to a lockout-caused stoppage of work. Given the rather comprehensive construction of the term "labor dispute," and the maxim that the payment of benefits is not dependent upon the merits of the controversy,¹²⁷ it is not surprising that the courts have included "lockout" within the scope of that term.¹²⁸ Moreover, the obligatory federal standards clause in every state employment security law provides that no work shall be deemed "suitable" in which "the position offered is vacant, due directly to strike, lockout, or *other* labor dispute."¹²⁹ (Emphasis added.) The last, the generic term, subsumes under it the concept of lockout.

The landmark case of *In the Matter of North River Logging Co.*¹³⁰ developed a detailed rationale which has proven definitive. In that case, the Washington Supreme Court recognized the lockout as

¹²² Federal Unemployment Insurance Tax Act, 68A Stat. 445 (1954), as amended, 26 U.S.C. § 3304(a)(5) (1964).

¹²³ See, e.g., *Sandoval v. Industrial Comm'n*, 110 Colo. 108, 130 P.2d 930 (1942).

¹²⁴ *Iron Molders' Union No. 125 v. Allis-Chalmers Co.*, 166 Fed. 45, 52 (7th Cir. 1908), cited, e.g., in *In the Matter of North River Logging Co.*, 15 Wash. 2d 204, 208, 130 P.2d 64, 66 (1942).

¹²⁵ These states are Arkansas, Colorado, Connecticut, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, Ohio, Pennsylvania, and West Virginia.

¹²⁶ *Gardner v. Director of Employment*, 53 Cal. 2d 23, 346 P.2d 193 (1959); *Local Nos. 222 & 976, Teamsters Union v. Board of Review*, 10 Utah 2d 63, 348 P.2d 558 (1960).

¹²⁷ See *Lawrence Baking Co. v. Unemployment Compensation Comm'n*, 308 Mich. 198, 13 N.W.2d 260, cert. denied, 323 U.S. 738 (1944).

¹²⁸ *Schoenwiesner v. Board of Review*, *supra* note 121.

¹²⁹ Federal Unemployment Insurance Tax Act, 68A Stat. 445 (1954), as amended, 26 U.S.C. § 3304(a)(5) (1964).

¹³⁰ *Supra* note 124.

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"a counterpart to the weapon of strike held by the workers."¹³¹ The court turned to British decisions under earlier insurance laws, a tool of judicial construction previously used only to interpret the concept of "stoppage of work."¹³² The holdings in those early cases uniformly agreed that a lockout was a "trade dispute" within the contemplation of the English national insurance acts. Another factor which the Washington court considered was that in some of the state unemployment compensation laws there were phrases removing or qualifying a lockout as a basis for disqualification from benefits. Language which exempted lockouts from the disqualification provision amounted to a legislative acknowledgement that the lockout was a form of labor dispute.

In recent years, the development of so-called "whipsaw" tactics by labor organizations confronting multi-employer bargaining groups has given rise to a number of lockout cases. When all members of a restaurant association, reacting to such tactics, temporarily closed down their establishments in response to a strike called by a union against one member of the association, the Illinois Supreme Court found "no distinction in principle between a lockout and a strike."¹³³ The Supreme Court of Oregon construed "labor dispute" similarly when members of a multi-state employers' association ceased operations in accordance with their declared policy that "a strike against one is a strike against all."¹³⁴ More recently, the suspension of the *New York Herald Tribune* and *The Mirror*, *inter alia*, as a retaliatory measure under a mutual assistance pact, led a New Jersey court to declare that "it is now well established law in the State that lockouts as well as strikes are two of the forms by which a 'labor dispute' may be manifested, and that, in either event, the State occupies a completely neutral position. . . ."¹³⁵

Except in those jurisdictions which expressly or impliedly allow claimants to draw benefits when their unemployment is due to a lockout or a lockout-caused stoppage of work, it must be concluded that "it is immaterial whether . . . unemployment was caused by a 'strike' or a 'lockout' for the reason that in either event it is crystal clear that such unemployment was the direct and immediate result of the 'controversy concerning terms and conditions of employment'. . . ."¹³⁶ For example, where idleness was due in part to a lockout and in part to lack of work, but both could be traced to a strike, a disqualifying labor

¹³¹ *Id.* at 208, 130 P.2d at 66.

¹³² See *Magner v. Kinney*, 141 Neb. 122, 128, 2 N.W.2d 689, 692 (1942).

¹³³ *Buchholz v. Cummins*, 6 Ill. 2d 382, 388, 128 N.E.2d 900, 903 (1955).

¹³⁴ *Henzel v. Cameron*, 228 Ore. 452, 365 P.2d 498 (1961).

¹³⁵ *Basso v. News Syndicate Co.*, 90 N.J. Super. 150, 169, 216 A.2d 597, 607 (1966).

¹³⁶ *Adkins v. Employment Security Div.*, 117 Ind. App. 132, 142, 70 N.E.2d 31, 35 (1946).

dispute existed.¹³⁷ However, it must be noted that "not every shut-down or plant closing by an employer is a lockout within the meaning of the statute, or in the sense of being one of the economic weapons in the arsenal of combatants in a labor dispute."¹³⁸ Where a statute provides that unemployment is not compensable if caused by a "strike or other bona fide labor dispute,"¹³⁹ "there may be situations in which a lockout would not qualify as a bona fide labor dispute, even though it did not constitute a breach of contract on the part of the employer."¹⁴⁰

It must be remembered, however, that in the overwhelming majority of jurisdictions a court cannot attempt to fix or weigh an employer's responsibility or fault (nor, indeed, employee responsibility or fault) in the determination of whether a labor dispute exists. One rare attempt to distinguish bona fide from mala fide disputes in order to achieve a particular result in a disqualification appeal¹⁴¹ was criticized as inappropriate by that state's highest court in a different case.¹⁴²

VII. DISQUALIFICATION BEYOND TERMINATION OF THE DISPUTE

Since *Carnegie-Illinois Steel Corp. v. Review Bd.*,¹⁴³ it has become well settled in stoppage-of-work jurisdictions that a labor dispute disqualification continues after termination of the dispute for whatever period of unemployment is necessary to resume normal plant operations. No such condition obtains in the other jurisdictions except for statutory provisions such as Ohio's ("... and for so long as his unemployment is due to such labor dispute").¹⁴⁴ In construing an earlier version of the same statute ("... and for so long as such dispute continues."), the Ohio Supreme Court ruled that employees were not entitled to unemployment compensation during the period beginning with the termination of the strike and ending when the employer had reactivated its steel plant by what was necessarily a gradual process.¹⁴⁵ A "labor dispute" is broader than a strike. It includes a *controversy* over wages, working conditions, or terms of employment. Although the strike in the Ohio case was terminated by a federal injunction issued under the national emergency provisions of the Labor Management

¹³⁷ *Depaoli v. Ernst*, 73 Nev. 79, 309 P.2d 363 (1957).

¹³⁸ *Buchholz v. Cummins*, supra note 133, at 388, 128 N.E.2d at 903.

¹³⁹ E.g., Wis. Stat. Ann. § 108.04(10) (1957).

¹⁴⁰ *A. J. Sweet, Inc. v. Industrial Comm'n*, 16 Wis. 2d 98, 110b, 114 N.W.2d 141, 854 (1962).

¹⁴¹ *Department of Industrial Relations v. Stone*, 36 Ala. App. 16, 53 So. 2d 859 (1951).

¹⁴² *T. R. Miller Mill Co. v. Johns*, 261 Ala. 615, 617, 75 So. 2d 675, 677 (1954).

¹⁴³ 117 Ind. App. 379, 72 N.E.2d 662 (1947).

¹⁴⁴ Ohio Rev. Code Ann. § 4141.29(D)(1)(a) (Baldwin 1964).

¹⁴⁵ *Leach v. Republic Steel Corp.*, 176 Ohio St. 221, 199 N.E.2d 3 (1964).

CONCEPT OF "LABOR DISPUTE"

Relations Act of 1947,¹⁴⁶ the controversy continued until mutual agreement was entered into some two months later. Similarly, in New York, a plant seizure by the Secretary of Commerce, pursuant to a Presidential Executive Order, did not terminate the "industrial controversy," even though it did avert the strike.¹⁴⁷ As a result of shutdown arrangements, the claimants could not return to work until the mill had resumed operations. The consequent unemployment was held to be directly caused by the underlying controversy which did not cease until a collective settlement was subsequently reached. More recently, another New York case rejected an argument that claimants were out of work because of a strike which had not "terminated" until full production was restored.¹⁴⁸ The court stated that "the lack of work occasioned by the necessity for gradual resumption of production is merely an incident of the particular industry which is outside the purview of the statute and over which neither side has any control."¹⁴⁹ Thus New York has refused to attribute a "vicarious voluntariness to the post-settlement unemployment."¹⁵⁰

VIII. CONCLUSIONS

"Labor dispute" as a threshold concept in unemployment compensation proceedings has come to include virtually any controversy affecting the terms and conditions of the employment situation, regardless of whether the disputants stand in an employer-employee relationship. The restrictive construction of "labor dispute" has not received judicial acceptance. General usage derived from dictionary meanings, definitional provisions in federal and state labor relations and anti-injunction acts, authors and commentators, British antecedent interpretations—all have generally revealed a propensity to broaden the scope of the concept. This trend, supported by the highest court in the land,¹⁵¹ has been followed in labor dispute disqualification clauses even when terms other than "labor dispute" appear. "Trade dispute," "industrial controversy," "industrial dispute," and "strike" have all received similar treatment. Not yet adequately tested are strikes or lockouts engaged in for purposes which conflict with public policy or which exceed the historic demands of labor or management. Such controversies might develop over the introduction of new technology,

¹⁴⁶ 61 Stat. 155 (1947), as amended, 29 U.S.C. § 178 (1964).

¹⁴⁷ In the Matter of Vingoe, 285 App. Div. 160, 136 N.Y.S.2d 893 (1954).

¹⁴⁸ Acquisto v. General Motors Corp., 269 N.Y.S.2d 567 (App. Div. 1966).

¹⁴⁹ Id. at 570.

¹⁵⁰ Claim of George, 14 N.Y.2d 234, 239, 199 N.E.2d 503, 505, 250 N.Y.S.2d 421, 424 (1964). A labor-dispute-in-active-progress state would have no hesitation about allowing benefits for the period after resolution of the dispute but before resumption of operations. See Davis v. Aluminum Co. of America, 204 Tenn. 135, 316 S.W.2d 24 (1958).

¹⁵¹ Unemployment Compensation Comm'n v. Aragan, 329 U.S. 143 (1946).

over so-called "management prerogative," or over racial job distribution and preferential hiring. As labor disputes arise out of new issues in the future, the absence of a static definition permits better application of the concept to the dynamics of industrial conflict.

The effect of the broad construction of "labor dispute" has been, of course, to provide a greater opportunity for employers to successfully oppose the granting of benefits. Conversely, the opportunity of the unemployed laborer to establish entitlement to compensation has been lessened. A more restrictive interpretation of "labor dispute," however, might produce undesirable results. For example, since an unemployed worker receiving compensation may endanger his payments by refusing a position unless the vacancy was due to a labor dispute,¹⁵² a narrow construction might force him to interfere in a labor controversy by taking a job vacated by other than a technical "labor dispute." In addition, restricting the interpretation of "labor dispute" under anti-injunction legislation correspondingly lessens the protection afforded to labor organizations from the imposition of such powerful employer remedies. It is therefore submitted that only a flexible construction of the phrase "labor dispute" will be adequate to encompass the innumerable and complex situations of modern labor law.

¹⁵² See, e.g., Federal Unemployment Tax Act, 68A Stat. 445 (1954), as amended, 26 U.S.C. § 3304(a)(5) (1964), which reads:

[C]ompensation shall not be denied . . . to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute. . . .