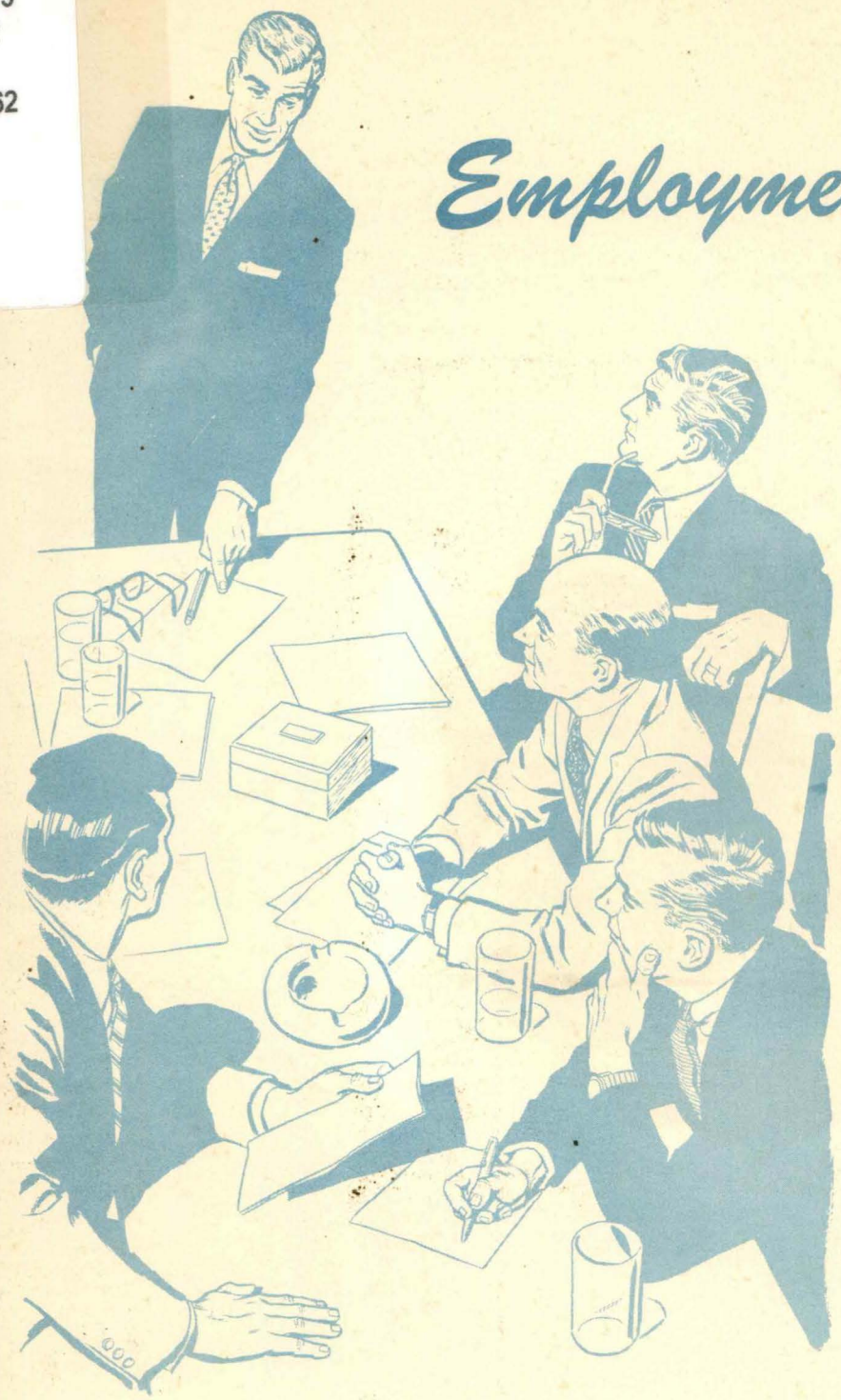
Employment Security



LEGAL AFFAIRS CONFERENCE

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REGION IV-V-VII

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JUNE 20-21-22

Hotel Fort Des Moines • Des Moines, Iowa

EMPLOYMENT SECURITY LEGAL AFFAIRS CONFERENCE

REGIONS IV, V, and VII

REPORT OF CONFERENCE

HOTEL FORT DES MOINES

DES MOINES, IOWA

JUNE 20, 21, and 22, 1962

NOTE: Only the prepared papers delivered at the Legal Affairs Conference are included in this report.

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AGENDA

EMPLOYMENT SECURITY LEGAL AFFAIRS CONFERENCE

REGIONS IV, V, AND VII - DES MOINES, IOWA - June 20-22, 1962

Neal C. Quiett, Iowa, Conference Chairman

WEDNESDAY, JUNE 20

9:00 REGISTRATION

9:30 OPENING REMARKS

1. Jerome W. Corbett, Chairman, Iowa Employment Security Commission.

2. Alfred G. Albert, Chief, Manpower & Employment Services.

3. Abraham Abramowitz, Bureau of Employment Security.

10:00 LEGAL PROBLEMS ARISING FROM THE LABOR DISPUTE DISQUALIFICATION PROVISION OF STATE LAWS.

1. When does a labor dispute exist;

" is " " " in active progress;

" does " " " terminate?

J. Eugene Foster, General Counsel, Alabama

2. What is the meaning of the phrase, "at the factory, establishment or other premises"?

John E. Sidner, General Counsel, Nebraska

12:30 LUNCH

2:00 LABOR DISPUTES, CONTINUED:

3. What is a "stoppage of work;"

When is it due to a labor dispute?

George Schwartz, Counsel, Missouri

4. Exceptions from disqualification:

What is participation, etc;

What is grade or class?

A. M. Frazier, Commission Counsel, New Mexico

AGENDA (CONTINUED)

5. What constitutes a termination of the labor dispute disqualification?

W. L. Moore, Chief Counsel, Tennessee

THURSDAY, JUNE 21

9:00 Discussion by Arnold Spencer of proposed legal reference service.

EFFECT OF COLLECTIVE BARGAINING AGREEMENTS ON BENEFIT ELIGIBILITY.

1. Is non-union work suitable for a union member;

Does a union member have good cause to refuse non-union work;

Is a union member available for work if he limits his availability to union work?

General discussion led by Abraham Abramowitz, Bureau of Employment Security.

2. Does a worker voluntarily quit a job if he refuses to take another job which the Collective Bargaining Agreement requires be offered to him?

N. C. Quiett, Assistant General Counsel, Iowa

3. What is the effect upon benefit eligibility of a contract provision for (1) vacation, and (2) retirement;

What is the effect of receipt or non-receipt of vacation pay?

H. L. Hutcherson, General Counsel, Mississippi

12:30 LUNCH

2:00 COLLECTIVE BARGAINING AGREEMENTS, CONTINUED

3:30 THE NEW MANPOWER PROGRAMS - Area Redevelopment and Manpower Development and Training

Alfred G. Albert, Chief, Manpower & Employment Services

FRIDAY, JUNE 22

9:00 FURTHER DISCUSSION OF AGENDA ITEMS NOT CONCLUDED THE FIRST TWO DAYS.

NEW COURT CASES AND CURRENT PROBLEMS.

1:00 ADJOURNMENT

CONFERENCE MEMBERS

Name	State
Abraham Abramowitz Deputy Assistant Director of the Unemployment Insurance Service	Washington, D. C.
Alfred G. Albert, Chief Manpower & Employment Services	Washington, D. C.
Harper Barnes, Regional Attorney U. S. Department of Labor	Kansas City, Mo.
Robert A. Friel, Attorney U. S. Department of Labor	Cleveland, Ohio
J. Eugene Foster, General Counsel	Alabama
William Mooneyham, Counsel	Alabama
Otis L. Hathcock, General Counsel	Georgia
Neal C. Quiett, Assistant General Counsel	Iowa
F. Duane Roberts, General Counsel	Kansas
Paul E. Tierney, General Counsel	Kentucky
George M. Bourgon, Assistant Attorney General	Michigan
H. L. Hutcherson, Acting General Counsel	Mississippi
John E. Sidner, General Counsel	Nebraska
A. M. Frazier, Commission Counsel	Nex Mexico
Lawrence E. Watson, Assistant Attorney General	North Dakota
O. O. Barr, Counsel	Ohio
R. Y. Funchess, Appeals Referee	South Carolina
W. L. Moore, Chief Counsel	Tennessee
Arnold J. Spencer, Chief Counsel	Wisconsin

J. Eugene Foster
Alabama

Gentlemen of the Conference:

The subjects assigned to me for discussion are:

1. When does a labor dispute exist?
2. When is a labor dispute in active progress?
3. When does a labor dispute terminate?

Naturally, these subjects are to be discussed in their relationship to the State Unemployment Compensation Laws.

The question as to when a labor dispute exists must, of necessity, be closely allied to, if indeed it is not a component part of the question, "What is a labor dispute?" A discussion of one cannot be made without a discussion of the other. The same can be said with respect to the questions, "When is a labor dispute in active progress?" and "When does it terminate?"

If it is determined in a particular case what is a labor dispute, it would seem that most of the times "whether a labor dispute exists" becomes a question of fact.

There are several variations in the unemployment compensation laws in the use of the words "labor dispute" in the disqualifying sections of those laws. Some provide a disqualification during a "trade dispute," such as California. Others use the words "bona fide labor dispute." New York uses the words "strike, lockout or other industrial controversy." Utah apparently restricts the disqualification to a "stoppage of work due to a strike." In addition to the usual "escape clauses" found in most of the laws, some provide additional escape or restrictive clauses. For instance, Kansas provides a disqualification for a failure to cross a picket line for any reason to accept available and customary work.

The Massachusetts law provides an escape clause in this language:

> "Nothing shall be construed so as to deny benefits to an individual who becomes unemployed during the course of the negotiations of a collective bargaining agreement, but not beyond the date of the commencement of a strike or lockout."

Minnesota provides an escape if

> "the stoppage of work is caused by an unjustifiable lockout, not occasioned by the individual."

Alabama is the only state, so far as I have been able to find, which incorporates into its law a definition of a labor dispute in the identical language of that found in the Norris-Laguardia Labor Dispute Anti-injunction Act (29 USCA 113) and the National Labor Relations Act, the so-called Wagner Act, (29 USCA 159 (9)).

There is such a multitude of court decisions on the labor dispute disqualification provisions found in the state laws, it would be well nigh impossible to study all of them in an attempt to rationalize or harmonize them. Then, too, as all of you know, there is not complete unanimity among the courts of the land as to the proper

interpretation and application of the labor dispute disqualification provisions.

In fact, I think the situation is not unlike that which was stated by one of the Court of Appeals Judges in one of the earlier cases in our courts involving labor disputes (Badgett vs. Department of Industrial Relations, 10 So. 2d 872, decided in 1942).

Our Court of Appeals is composed of three Judges. In the Badgett case each of the three Judges wrote a separate and different opinion, although two of them reached the same conclusion. One of the Judges was piqued to write in his decision: "My colleagues, while not agreeing with each other, refuse to agree with me."

To show further the differences of opinions among judges, when this case reached the Supreme Court, the decision was by a four to three majority.

An application for a rehearing was filed. Before the rehearing could be had, one of the Judges, who had sided with the majority of the Court, died. On rehearing his successor voted with what had previously been the minority, and one of the Justices who had previously voted with the majority, changed his mind and voted with what had previously been the minority.

Thus, on rehearing the previous four to three majority opinion of the Supreme Court became a two to five minority dissenting opinion.

Each of you, I am sure, has seen similar or somewhat similar situations in your states or the states within your Region.

I state this background so that if I fail to evolve any general rules or fail to reach any satisfactory solutions to the questions assigned to me, there will be ample precedent for the confusion I leave behind me.

None of the state statutes, with the exception of Alabama, I believe, attempt to define a labor dispute as it affects disqualifications for benefits.

At the inception of the Unemployment Compensation Program employers urged upon the courts that they adopt as a proper interpretation of a "labor dispute" in the disqualification sections, the definition found in the Norris-Laguardia Labor Dispute Anti-injunction Act (29 USCA 113) and the National Labor Relations Act, the so-called Wagner Act, (29 USCA (9)).

This definition, as you know, in those Acts is:

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

The courts were reluctant to ascribe those definitions to the words "labor dispute." This was possibly due to the feelings of the courts that to do so would create:

> "the unusual situation of a broad and comprehensive definition of a term used in a remedial statute (the Federal Acts), the design of which was to benefit the worker, wrenched from its original legislative setting and

> transposed to another remedial act (the Unemployment Compensation Act) as a penalty and for the evident purpose of disqualifying the worker under certain conditions named in the definition in the Unemployment Compensation Act." (Badgett vs. Department of Industrial Relations, 10 So. 2d 872).

Of course, in Alabama the question was settled by the Legislature in 1939. In that year, it adopted the language of the Norris-Laguardia Act and the Wagner Act as the definition of a labor dispute. This 1939 amendment was passed while cases involving the 1939 coal mine shutdown were pending before it, but when the decision was rendered in 1941, the Supreme Court was then reluctant to hold that in the absence of the statutory definition incorporated in the law, the proper definition should be that found in the Federal statutes.

The Court said:

> "Further criticism of the opinion of the Court of Appeals relates to the matter of reference to definitions of a labor dispute as found in the Anti-injunction and Labor Relations Act of Congress. But we do not construe the opinion as indicating any binding force or effect of those definitions so far as our own statute is concerned, but the citations are only by way of illustration and so to be considered." (Ex parte Pesnell, 199 So. 726)

The United States Supreme Court, in the famous Aragon case (Unemployment Compensation Commission of Alaska vs. Aragon, 329 US 143), which involved unemployed salmon fishermen, was reluctant to adopt, as the definition of a labor dispute for disqualifying purposes, the language of the Norris-Laguardia and Wagner Acts.

In that case the Supreme Court said:

> "We need not determine whether 'labor dispute' must in all cases be construed as broadly as it is defined in the Norris-Laguardia Act and the National Labor Relations Act . . . But there was full-scale controversy . . . dispute there certainly was; and the subject of that dispute consisted of matters usually contested in labor disputes as that term is normally understood. Since we find nothing to indicate that the territorial Legislature intended a contrary result, we conclude that the Commission might properly find a 'labor dispute' here present within the meaning of Section 5 (d) of the Alaska Act."

The Supreme Court of Pennsylvania refused to define a labor dispute in the case of Miller vs. Board of Review (31 A. 2d 740) contenting itself with saying:

> "It is enough to say that, in our opinion, the circumstances recited show that an industrial dispute was here involved."

The Supreme Court of Indiana, in the case of Knox Consolidated Coal Company vs. Board of Review (43 NE 2d 1019) refused to attribute to the words "labor dispute" the definition found in the Federal Acts, saying that the words should be given their common, ordinary and accepted meaning. The Court, however, did not say what was the common, ordinary and accepted meaning, so, naturally, this decision and the Pennsylvania decision in the Miller vs. Board of Review case, supra, are not very helpful in ascertaining a judicial definition of the words as applied to the dis-

qualification provisions of the law.

The Wisconsin courts refused to give to the words the definition found in the Federal Acts, but their refusal to do so was based on the fact there was a state statute which defined a labor dispute. (Spielman vs. Industrial Commission, 295 NW 1).

The Kentucky Supreme Court, in the case of Barnes vs. Hall (146 SW 2d 929) interpreted the words to have the same meaning as found in the Federal Acts mentioned. This interpretation was approved and followed in the very recent Kentucky case of Detroit Harvester Company vs. Kentucky Unemployment Compensation Commission (343 SW 2d 365, decided in 1961).

The majority of the courts now, either specifically or impliedly, interpret the words "labor dispute" to have the same meaning as is given to them in the Norris-Laguardia Act and the Wagner Act. (Alvarez vs. Administrator, 93 A. 2d 298, Connecticut; Dallas Fuel Company vs. Horne, 300 NW 303, Iowa; Miners in General Group vs. Hicks, 7 SE 710)

It seems quite proper for the courts to adopt these interpretations.

It has been suggested by some writers that a restricted interpretation of "labor dispute" should be given where it appears in the disqualification section and a broad and liberal interpretation given to it in those sections of the unemployment compensation laws which provide that a worker shall not be disqualified for benefits for refusing to accept a job vacant because of a labor dispute.

This seems rather an illogical and unsound approach to the problem. We have a complete law wherein the Legislature has used the identical words, "labor dispute", in two different sections. Surely it must be assumed that had the Legislature meant for identical words to have different meanings, it would have said so. To give different meanings to identical words appearing in the same Act in two different places, would be to stretch the interpretative powers and prerogatives of courts beyond reasonable bounds.

The Supreme Court of the United States voiced a similar opinion in the Aragon case, supra.

Thus, most of the courts, because of its fundamental soundness, and because it is what is generally understood by most people to be their meaning, now construe the words as "including any controversy concerning terms or conditions of employment, or concerning the association of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

As Mr. Shadur, writing in the University of Chicago Law Review, put it,

> "Although the decisions point out that they (the courts) are not bound by the definition of a labor dispute contained in the Federal Acts, the results reached almost invariably conform to the federal definitions." (Shadur, Unemployment Compensation and Labor Departments, 17 University of Chicago Law Review, p. 294)

This but seems logical, as a labor dispute is a dispute over labor. What kind of

dispute over labor can there be except a dispute over terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment?

If we assume that the correct definition of the words is that found in the pertinent Federal Acts, and if we assume that most of the courts now so hold, it would seem that the solution to the problem would be easy, as we would only have to decide whether there was a controversy concerning one of the matters specified in the definition. If there was such a controversy, then perforce there would be a labor dispute. However, because of varying factual situations, it is not always easy to definitely ascertain when there is or when there is not a disqualifying controversy.

It would seem uncontrovertible that where there is a lockout or a strike there exists a labor dispute. Some of the statutes specifically provide for no disqualifications for unemployment caused by one or both, under different circumstances. However, that does not keep the lockout or the strike from being a labor dispute.

"Lockouts" and "strikes" have very definite general meanings and I think no one will take issue with the definitions of those words found in the recent Detroit Harvester Company vs. Kentucky case, supra.

The Supreme Court of Kentucky, in that case, said:

> "A 'strike' within the meaning of the Unemployment Compensation Act that no worker may be paid unemployment compensation benefits where a strike, which has caused him to lose his employment, is in active progress, is a 'cessation of work by employees in an effort to obtain more desirable terms.'"

The Court further said that:

> "A 'lockout' under the provisions of that Act is a 'cessation of furnishing work by an employer in order to obtain more desirable terms."

It is stated in Restatement, Torts 797, that:

> "A strike is the concerted refusal by employees to do any work for their employer until the object of the strike is obtained, that is, until the employer grants the concession demanded."

Can a labor dispute exist when there is no present relationship of employer and employee at the time a controversy over working conditions arises?

This question was presented in the United States Supreme Court case of Unemployment Compensation Commission of Alaska vs. Aragon, supra. There, the claimants had been regularly employed by three companies in the seasonal work of catching and canning salmon in and near the Alaskan waters. It became necessary, on account of the termination of the previous working contract between the companies and the union representing the workers, that a new contract for the 1940 season be negotiated. The negotiations commenced on March 6, 1940, and quickly developed into an impasse. Because of this impasse, and the inability to agree on a new contract, no operations were carried on at two of the cities at which the companies operated.

The unemployed fishermen, who had formerly worked for the companies, filed claims for unemployment benefits. The employers contested the payment of such benefits, contending that the fishermen were unemployed due to a labor dispute.

The Supreme Court said:

> "We are met at the outset with the contention that the facts of this case do not present a 'labor dispute' within the meaning of Section 5 (d) of the Alaska Act. Respondents argue that the term must be narrowly construed to require a strike or leaving of employment, which, in turn, calls for a presently existing employment relation at the time the dispute arises. According to this view, the term would not cover a situation, such as presented here, where the controversy preceded the employment. Here, there was a full-scale controversy. Companies engaged in carrying on a seasonal business were ranged against a union representing seasonal workers who had been employed by the companies in previous years -- there is evidence that the Alaska Packers Association expected to hire about two-thirds of the number of workers in 1940 it had employed in 1939. But there is nothing in the record to establish that any of the claimants in this action would have been unemployed as the result of this contemplated curtailment in activity or if any of the claimants would have been affected, which of their number would have been unemployed. -- We think the Commission's finding that the unemployment was due to the labor dispute should stand."

Although, in order for a disqualifying labor dispute to exist, there need not be an employer-employee relationship existing at the time a controversy concerning terms or conditions of employment arises between a company and a union representing the workers, a certain criteria not pertinent to this discussion must exist, in order not to present a conformity question if the workers are disqualified. (See Findings of Fact and Conclusions of Law and Recommended Decision of a Special Advisory Panel to the United States Secretary of Labor, 1955-1956; Barber, et al, vs. California Employment Stabilization Commission, and Crouse, et al, vs. California Employment Stabilization Commission, 278 P. 2d 762).

Does the fact that a controversy over terms or conditions of employment arises in violation of a contract negate the existence of a labor dispute?

It seems to be the general rule that where there exists a controversy over hours, wages or conditions of employment, the fact that the controversy might be in violation of a collective bargaining agreement does not alter the character or the existence of a labor dispute.

The Supreme Court of Alabama, in the case of Miller vs. Johns, 75 So. 2d 680, decided in 1955) said:

> "This court is aware of the sanctity of contract and does not intend to disturb its utility to our society, but the unemployment compensation act is not designed to be used as an instrument with which to force compliance with other legal precepts."

The Court refused to decide whether there was a violation of the collective bargaining agreement by the union members, saying such was not involved in the question before it. It said there was in existence a controversy over working condi-

tions and thus the labor dispute disqualification was the proper disqualification to be imposed.

In the Pennsylvania case of Byerly vs. Unemployment Compensation Board of Review, 171 Pa. Super, 303, 90 A. 2d 322, the Court said:

> "In our judgment, even when viewed most favorably to claimants, the employer's action can be held to be no more than the violation of contract claimants contend it was. Whether the employer was justified is of no moment. The salient fact is that the workers walked off the job because of a labor dispute rooted in the alleged breach of contract."

In a later Pennsylvania court decision (Burleson vs. Unemployment Compensation Board of Review, 98 A. 2d 762) the Court most specifically pinpointed the proposition.

There, the question was raised whether or not a local steel workers' union was bound by a contract made by the National organization. In regard to this, the Court said:

> "However, that question is not before us and we express no opinion upon it. The Board's findings and the contentions relating to the effect of the November 17th contract are completely irrelevant in this context. Whether or not the basic agreement remained in force, the work stoppage nevertheless resulted from a labor dispute. If the basic agreement and the wages therein stipulated were binding upon the local, its strike was a violation of the agreement . . . As stated, there can be no doubt that the work stoppage resulted from a labor dispute."

These decisions would appear to reflect a proper interpretation of the law and the intent of the lawmakers. It was never intended for the unemployment compensation agencies to determine who was at fault for unemployment brought about by a labor dispute. Charges of violations of labor contracts are charges of unfair labor practices. Machinery is set up for the handling of such matters.

The Legislatures charged the unemployment compensation agencies with the duties to ascertain whether a controversy between an employer and his employees constituted a labor dispute, and, if it did, to apply the statutory labor dispute disqualification.

If we assume that a controversy is the fundamental prerequisite to a labor dispute, what is a "controversy," such as is contemplated? Do negotiations, looking toward a satisfactory working agreement, make for such a controversy? If so, at what stage of the negotiations do they assume the character of a controversy, if such they do?

In one of our earlier Alabama cases involving benefit rights of unemployed coal miners during the 1939 coal mine shutdown, when the phrase, "no contract no work" first made its appearance in unemployment compensation cases, our Court of Appeals said:

> "Negotiation may itself be a form of dispute. The union's position that its membership shall not work without a contract, and the employer's position of declining to enter into a contract that would obligate it to unknown and unforseeable provisions in another contract to be agreed upon,

> was in itself a dispute about terms and conditions of work -- a labor dispute." (Department of Industrial Relations vs. Pesnell, 199 So. 722)

When the Court said "negotiation may itself be a form of dispute," I do not think it meant to say that negotiation alone can constitute a labor dispute. It was saying that negotiating coupled with the positive positions taken by the parties and the unwillingness of both parties to agree to terms, constituted a labor dispute.

The Tennessee Supreme Court, in the case of Block Coal Company vs. United Mine Workers of America, said that:

> "Proposals, counter proposals and inability to reach an agreement are component parts of a labor dispute." (Block Coal Company vs. UMW of America, 149 SW 469)

The statement of the Tennessee Supreme Court seems to be as concise and as clear a one as can be expressed in words. Generally, irritation between the negotiating parties, threats (not necessarily of physical violence) and refusals to consider proposals accompany the inability of the parties to reach an agreement.

The Colorado Supreme Court held that where a coal mine operator ceased mining operations three days before the existing contract expired (at which time the parties had been unable to reach a satisfactory agreement for a new contract) and began sinking a deeper shaft, the ensuing unemployment of the miners was not due to a dispute. The Court said the cessation of work took place before any grounds for a labor dispute arose. (Bryant vs. Haden Coal Company, 137 P. 2d 417).

It seems to me that the Court assumed that under the facts existing in the coal mine industry generally at that time, there was no labor dispute in existence in the employer's place of business at the time he began sinking the new shaft.

In a 1943 decision, the Indiana Supreme Court had before it claims of miners unemployed due to the 1941 nation-wide coal mine shutdown.

The Court said that:

> "The employer's coal mine was shut down because of the inability of the employer and the union to reach an agreement, and that the fact that there was no contract was of no moment.
>
> "Here was a disagreement between the employer and the employees as a whole as to wages; a demand by the employees for new and different terms and a refusal of the employer to comply, and a refusal of the employees to work as a consequence. There was a controversy." (Bledsoe vs. Review Board, 46 NE 2d 477).

Benefits were denied. The Court said there was an existing controversy over wages and conditions of work and, therefore, there was an existing labor dispute.

In a more recent decision by the Supreme Court of Maine (Bilodeau vs. Maine Employment Security Commission, 136 A 2d 522, decided in 1957) the Court said:

"Previous to the termination date of the old contract, the parties attempted negotiations of a new contract but were unsuccessful in their efforts, so, on April 15, 1955, the contract terminated without replacement by a new one. There existed an inability on the part of the employer and the union to agree on conditions affecting both labor and management. In other words, there arose a dispute in which labor was vitally concerned, particularly as to fringe benefits and wages. Under these facts there existed a labor dispute."

Benefits were denied.

I have found no court decisions deciding at which point in negotiations a labor dispute comes into "actual progress." This is due, no doubt, to the fact that the courts are never called upon to decide this question. Generally, the only question before the court is whether at the time of the unemployment there was a labor dispute in "active progress."

There is an interesting article in Volume 49 of the Yale Law Review, page 461, by Mr. Herbert Fiest and Miss Marjorie Specter. I will quote some of the contents of that article:

"Bearing in mind the concept that there must be demands by one party and resistance to those demands by the other in order for negotiations to become a controversy within the meaning of the term 'labor dispute,' some losses of employment situations are excluded from the disqualification. For instance, where workers quit because of dissatisfaction with some phase of their work, in the absence of any negotiations or demands whatsoever, there is no labor dispute.

"When proposals or demands are made by both parties, it is sometimes difficult to determine when a disagreement has become sufficiently aggravated so as to become a dispute.

"Since there must be insistence by one side on the acceptance of terms or conditions, and resistance on the part of the other to their acceptance, in order to constitute a labor dispute, a distinction lies in the nature of the demand. So an exploratory offer, i.e., a mere inquiry by the employer as to whether the employees would accept a wage cut so as to make it worth his while to remain in business because of adverse economic conditions, followed by a negative reply, does not make for such a controversy, as is envisioned by the statute.

"On the other hand, it is not necessary that either side present its demands to the fullest extent of its resources, or that a strike be authorized or supported by the union, in order for there to be a labor dispute. (This follows somewhat the language of the Alabama Court of Appeals in the Pesnell case, supra.)

"Of course, there is no difficulty where employees take affirmative action to enforce demands concerning wages, hours, or work conditions. There is, likewise, no difficulty where the employer is insisting on wage cuts or to employ non-union labor in violation of an agreement. In these areas there is very little doubt as to there being a labor dispute."

Each case must depend on its own particular facts. Generally, during the first stage of negotiations, relationships are friendly and proposals are made by each side. At this stage no ultimatums or refusals enter into the picture. It is not until at a later stage in the negotiations, when parties become insistent as to terms to be incorporated into a new contract and demands and counter demands are made, that a labor dispute comes into active progress. However, as I said before, the courts have never been called upon to decide exactly when a labor dispute begins its active progress. They are only concerned with the question whether the dispute is in active progress at the time workers become unemployed.

The Supreme Court of Michigan, in the Peadon case, had before it the question of the benefit rights of the employees of the Calumet-Huckla Company (Peadon vs. Michigan Appeal Board, 96 NW 2d 281, decided in 1959).

There, the contract between the company and the union was about to expire and a controversy arose between the union and the company as to the terms of the new contract.

Apparently, there was no dispute between the parties that a labor dispute began on May 2, 1955. The main question was, how long was it in active progress?

On the 12th of August, 1955, the employees, having rejected through their union an offer made by the employer, the company issued a so-called liquidation notice stating in substance that it was closing its mine and plants and liquidating the properties involved in the existing strike. The negotiations, however, were continued by the company and the union after the 12th of August, and on the 21st of that month a new contract was agreed to and executed. Thereupon preparations were carried out for the resumption of operations, which reached normalcy in September of that year.

The question argued before the court was whether the labor dispute was terminated by the employer's notice of August 12th that it was liquidating its business and closing down its properties. The Court said that although the liquidation notice was given on August 12th, negotiations were carried on between the company and the union thereafter until an agreement was reached on August 21st; that this showed the labor dispute was still in active progress up to the time of the signing of the new agreement on August 21st.

Mr. Justice Black, while agreeing with the other members of the Court, wrote a separate opinion. He went into the problem at length and I think you will enjoy reading the interesting language he used.

One of the cases cited by the Michigan Court in the Peadon case, supra, in support of its position, was the Aragon case, supra.

You will remember this is the case which played such an important part in the conformity issue which was raised against California some years ago.

In the Aragon case (in addition to the points already mentioned in this paper) the contention was made by the claimants that the labor dispute ceased to be in active progress when the companies, on April 22d, formally announced abandonment of the Kaluk and Chignik operations.

The United States Supreme Court said there:

> "Respondents urge that, assuming their unemployment was due to a labor dispute, there was no labor dispute in 'active progress' within the meaning of the Act after the passage of the deadline dates. It is argued that when the expeditions were abandoned by the companies, the dispute must necessarily have terminated since there was no possible way in which negotiations could have brought about a settlement. It should be observed, however, that the record does not reveal that negotiations abruptly terminated with the passing of the last deadline date. Conferences continued in Seattle in which both the companies and the union participated. The respondents considered the negotiations sufficiently alive to make an offer as late as May 29th."

The Court thereupon affirmed the decision of the Alaska Agency denying benefits.

However, the Court reached a different conclusion with respect to the claimants who had been regularly employed in the Bristol Bay operations.

The evidence showed that, as regards the workers in that plant, several days before the deadline of March 3, 1940, (the deadline applicable to that plant) the company which employed those workers withdrew from the negotiations with the union and announced that it would be unable to send an expedition to Alaska in 1940. One of the officials of the company testified that even though the other companies had been able to negotiate contracts, it would have conducted no operations in 1940 after its withdrawal from the negotiations.

The Supreme Court said, as to these claimants, their unemployment was not due to a labor dispute "in active progress;" that after the company withdrew from active negotiations, and abandoned all efforts to operate during 1940, there was no longer a labor dispute in active progress, regardless of what happened in the plants at the two other cities mentioned.

In both the Peadon and the Aragon cases, supra (Kaluk and Chignik operations) there was no contention that the closing down or liquidation notices were not given in good faith, or that any of the interested employers did not fully intend to follow through on their decisions to cease operations for the 1940 season.

Thus, in so far as determining whether a labor dispute is still in active progress, it seems immaterial whether the employer's statement of permanently closing down his plant or business is made in good faith with the full intent to follow through, or whether it is made with no intent of following through, but only with the intent of coercing and putting pressure on the workers. If negotiations continue after such notice the labor dispute theretofore in active progress remains in active progress during such negotiations.

Corpus Juris Secundum, Vol. 81, page 289, analyzes the holding in the Aragon case in this language:

> "If negotiations between the employer and employees continue, a dispute may be found in active progress, even though a point is reached where all possibility of the settlement of the dispute has disappeared."

From these cases we can draw the conclusion that, if negotiations are carried on between the employer and his workers (or the union representing the workers) after a definite decision to discontinue operations because of the inability to reach an

agreement, has been made and communicated to the workers, the labor dispute continues in active progress until a later agreement has been reached, if one is reached.

On the other hand, if, during a labor dispute and pending negotiations the employer decides he is not going to operate anyway, whether an agreement is reached or not, withdraws from negotiations and ceases business operations, the labor dispute is ended and thereafter is not "in active progress."

The Tennessee Supreme Court had this "active progress" issue before it in the case of Davis vs. Aluminum Company of America, 316 SW 2d 24, decided in 1958.

The appeal to the Supreme Court was from a decision which denied the payment of unemployment benefits.

There was a labor dispute in the Alco plant, which culminated in a strike by the employees of the company. This necessitated the cessation of operations. An agreement on all matters in dispute was reached in about two weeks and operations in so far as possible, were immediately resumed.

However, the cessation of operations had unavoidably damaged some of the pots in which aluminum was melted. These could not be used until they were repaired. This was done as rapidly as possible. Some employees were necessarily unemployed pending the completion of said repairs. It was for the period during which these repairs were being made that the unemployed workers were claiming benefits, contending that a labor dispute was no longer "in active progress."

The Tennessee Agency approved the claims in the first instance. Its Board of Review reversed the Agency, saying:

> "We are of the opinion that 'active progress' would include all the time between the period wherein the claimant necessarily left his employment because of a labor dispute and continues through that period of time that is necessary to ready the plant for operations after an agreement has been reached."

The Tennessee Supreme Court affirmed the action of the Agency, reversing the Board of Review. In a well-reasoned opinion the Court concluded what should have been obvious from the very start. It said:

> "If the language in question were but given its generally accepted meaning, then it seems to this court that when the Tennessee Legislature provided for disqualification for unemployment compensation benefits, when such unemployment is due to a labor dispute which is in active progress, it meant that the stoppage of work and the labor dispute had to exist at the same time. That is what it said. To otherwise construe it is to judicially amend the act by striking therefrom the words 'which is in active progress.'"

The Florida Supreme Court, in the case of Meyer vs. Florida Industrial Commission (117 So. 2d 216) is a comparatively new one, being decided in January, 1960. It presents the case of a union calling a strike and later withdrawing a picket line established by it.

The claimant was an employee of the Florida Citrus Canners Cooperative, where she worked as a citrus grader. She was a member of the union.

Disagreement arose between the employer and the union concerning terms and conditions of employment. When the differences between them could not be resolved, the union called a strike on January 17, 1958.

The claimant did not report to work but joined the picket line. The employer continued operating the plant with non-union labor and the picket line remained active. The citrus season ended sometime after March 31, 1958. From January 17, 1958, the day the strike was called, until September 9, 1958, the day the union called off the strike and removed the pickets from the plant, the claimant served on the picket line.

In her argument before the Supreme Court the claimant contended, among other things, that a labor dispute was not "in active progress" in the plant of the employer for the whole period for which benefits were denied by the Agency; that, although a labor dispute came into being on March 17, 1958, (the day the strike was called) the active progress of the labor dispute terminated September 9, 1958, when the union called off the strike, removed the picket line from the employer's plant and released the claimant for re-employment.

The Court did not agree with this contention. It cited cases which defined a labor dispute as "including a controversy between the employer and employees concerning hours, working conditions or terms of employment." It cited, among other cases, the oft-cited Ablondi case (8 N. J. Super. 71, 73, A. 2d 262).

It then proceeded to dispose of the claimant's contention. It said:

> "In the present case, the 'active progress' of the labor dispute did not terminate on September 9, 1958, when the union called off the strike, removed the picket line and voted to release the claimant for re-employment, for this action merely amounted to abandonment of certain activities being employed by the union to force the employer to accede to the terms which were the basis of the claim out of which the labor dispute arose. It was not an abandonment of the labor dispute itself, because the decision was made by the union to call off the strike and release the claimant for re-employment. The claim out of which the labor dispute arose was still pending before the National Labor Relations Board."

Unless we keep in mind the concept that a "strike" is not synonymous with a "labor dispute," but is only one type of a labor dispute, we might be inclined, at first blush, to agree with the claimant's contention that when the union called off the strike, removed the picket line and released the claimant for re-employment, the labor dispute was no longer in active progress. But, if we keep this perspective clear, we can understand that when a strike (being but one activity employed by a union to force the employer to accede to the demands of the union) is called off and the picket line withdrawn, the labor dispute is not ipso facto terminated. The labor dispute is not necessarily no longer "in active progress."

The Florida Court in this case laid down as a general rule a reasonable test as to when a labor dispute remains in active progress. The Court said:

> "Once a labor dispute begins, it remains in 'active progress' until it is finally settled, terminated or completely abandoned."

This seems to make sense to me.

Before some of you take issue with the decision in this case, because the plant continued to operate with non-union personnel and there was no stoppage of work as far as the company was concerned, let me say that the Florida law does not contain the "stoppage of work" clause which so many of the state unemployment compensation laws have. It disqualifies for unemployment "due to a labor dispute in active progress, which exists at the factory, establishment or other premises at which he is or was last employed."

The Director of Industrial Relations of the State of Alabama (who is charged with approving the findings of fact of the examiner in labor dispute cases, Section 216, Title 26, Code of Alabama 1940) rendered a decision in 1959 pertaining to the "in active progress" feature of the law.

The decision related to claims of employees of the Tennessee Coal, Iron and Railroad Company. In 1959 there was a nation-wide steel strike, which caused the shutdown of the major steel companies in the country. The United States Government applied for and secured an injunction under the Taft-Hartley Act, and on November 7, 1959, the United States Supreme Court upheld the injunction previously granted.

The injunction, in effect, ordered the resumption of operations by the employer and ordered the union to call off the strike and return to work for a period of eighty days, beginning November 8, 1959.

While the company, in compliance with the injunction, made immediate preparations for the resumption of operations in an orderly manner, it was not possible for it to accomplish resumption in all works. A number of departments and divisions were able to resume operations immediately. Others were delayed for as much as two weeks before they could be started, this being necessary because other operations had to be first completed before these departments or divisions could resume their functions.

Since the Alabama law has the "in active progress" provision, the contention was made by the union that the men who were unemployed during the resumption of operations were not unemployed because of a labor dispute "in active progress."

The Director of the Department agreed with the contention of the union and held that during the eighty-day period, beginning November 8, 1959, the period during which the Court granted the injunction, the labor dispute was not in active progress. He ordered the payment of benefits to the workers who were unemployed during that period, which occurred during the orderly resumption of operations.

There was no court appeal from this decision, hence, we are not favored with a court precedent in Alabama.

The position of the company was that the words "labor dispute" and "strike" are not synonymous; that since negotiations continued during the period covered by the injunction, the labor dispute was still in active progress during that time.

There probably are supreme court decisions on this point, but I was able only to find a Kentucky county court decision on this same point. It is the case of Abraham Johnson vs. UIC, Franklin County, 1961.

The Court said there:

> "Where production was resumed following an injunction granted under the Taft-Hartley Act the claimants not immediately recalled to work were not entitled to benefits. The injunctive period constituted only a truce or armistice in the strike and the claimants' unemployment was a true result of the continuing (active) labor dispute."

In summary, let me say that a study of the many cases involving the points assigned to me for discussion convinces me that no set standard or rules can be adopted which would determine or control in every case. Each case must depend on its own particular facts. As Dean Farrah, of the University of Alabama Law School, used to tell us:

> "Out of the facts the law arises."

Thank you very much for your attention.

John Sidner
Nebraska

"ESTABLISHMENT" AS USED IN THE LABOR DISPUTE DISQUALIFICATION

What is the meaning of the words, "at the factory, establishment or other premises," which appear in the labor dispute disqualification in the laws of most states?

The labor dispute disqualification was found in the early draft bills furnished by the Bureau. It was adapted from the British provision:

> "An insured contributor who has lost employment by reason of a stoppage of work which was due to a trade dispute at the factory, workshop or other premises at which he was employed shall be disqualified for receiving benefit . . ." (25 Geo. V. Chap. 8, Sec. 26)

Most of the state laws still retain substantially the same language, limiting the disqualification to disputes at the place of employment. The Alaska Law specifically limits the location to "immediate factory, establishment or other premises." (Sec. 741). (Emphasis supplied). Connecticut on the other hand extends it to "(any) establishment . . . operated by his employer in the state of Connecticut." 1/ Idaho makes no reference to the place of the dispute. North Carolina, 2/ Oregon 3/ and Texas 4/ include disputes at another establishment owned by the same employer which furnishes essential services or supplies to the establishment at which the individual worked. Virginia extends the area to "another plant, which is either owned or operated by the employer or is a source of supply for the employer." 5/ Michigan, although stating the disqualification to be for unemployment, "due to a stoppage of work existing because of a labor dispute in the establishment in which he is or was last employed," exempts the individual who is not "directly involved." In determining who is directly involved, it contains this statement:

> "(4) That at any time, there being no labor dispute in the particular department or unit in which he was then employed, or there being no labor dispute among the grade or class of workers within the employing unit to which he belongs, he shall have become unemployed because of a stoppage of work in his particular department or unit, or among the grade or class of workers to which he belongs, which stoppage of work is due to a labor dispute which was or is in progress in some other department or unit or among a different grade or class of workers of the same employing unit by whom he was then employed." Sec. 421.29 (b) Mich.

This would infer that the disqualification is not necessarily limited to unemployment because of a labor dispute at the establishment but can include a dispute elsewhere involving the same employing unit.

"Establishment" as used in the labor dispute disqualification received a thorough examination in state courts as an aftermath of the 1949 strike in the River Rouge plant of the Ford Motor Company. Assembly plants located in Massachusetts, Minnesota, New York, New Jersey, Kentucky, Georgia, Ohio, Pennsylvania, Virginia and Texas were closed because of lack of parts. Each plant had its own local of the UAW. However, the locals had to obtain UAW permission before striking. In nine of the ten jurisdictions, benefits were allowed on the basis of separate establishment.

Georgia denied benefits on the ground that the Hopeville, Georgia plant was an inseparable and indispensable part of the same factory as the Rouge plant.

Thirteen years after the 1949 stoppage, the Ohio Court of Appeals, in Guna v. Ford Motor Co., CCH Ohio 8163 (reversing the Court of Common Pleas of Stark County) held that there was no functional integration of the two Ohio Ford plants and the Michigan plant. The Court distinguished between this case and the Adamski case (Adamski v. B U C 108 Ohio, App. 198, 1959) by pointing out the autonomous nature of the Ford management. The Court emphasized in its conclusion that "integration is not the sole factor to be considered." This case probably will be appealed to the Ohio Supreme Court.

In an early Michigan decision, its Supreme Court held that two Chrysler plants eleven miles apart, because of their "functional integration" were part of the same establishment. Chrysler Corp. vs. Smith, 297 Mich. 438, 298 NW 87 (1941). In 1958 the Michigan Court rejected the "functional integration" theory, and in effect reversed its stand in the Chrysler case, to allow benefits to Ford employees in three Detroit area plants idle because of a dispute in Canton, Ohio. (Park v. Appeal Board, 355 Mich. 103, 94 NW 2d 407 (1959), certiorari denied, 360 U. S. 251 (1959).

Since the Park decision, the Ohio Court of Appeals for Lucas County in Adamski v. Ohio B. U. C., 108 Ohio App. 198 (1959) distinguished and to a certain extent rejected the Michigan decision in Park v. Appeal Board.

The Court, in holding a ceramic plant in the Detroit area to be a part of the same establishment as a spark plug assembly plant in Toledo, noted that cases dealing with establishments "appear to fall within three broad categories based upon tests of (1) functional integrality; (2) geographical location or physical proximity; (3) a combination of said tests which should not be adopted as absolute in all cases, but comprise elements to be considered from the standpoint of the scheme of management, supervision, production of each plant, authority of those operating plant, hiring, paying and discharging employees, methods of making purchases and sales, and all other relevant and kindred matters."

The Court placed emphasis on the fact that the Ohio law did not provide an escape clause for those who are not participating or directly interested.

It also took notice of the fact that an attempt to include the escape clause had been rejected by the legislature.

In a concurring opinion, one judge stated:

> "It seems that as a matter of fact, close proximity is merely an element to be considered incident to applying the test of integrality. If a plant supplying component parts for the manufacture of a product at the main plant is near enough to permit functional integrality and unitary supervision, the former is a part of the main establishment."

Two recent Minnesota cases of interest deserve consideration. In Koll v. Egekvist Bakeries, Inc., 259 Minn. 287, 107 NW 2d 373 (1961), the court cites the Nordling v. Ford Motor Co. (231 Minn. 89, 42 NW 2d 588) case and emphasized "the solution of the problem lies in determining from all the facts available whether the unit under consideration is a separate establishment from the standpoint of employment and not

whether it is a single enterprise from the standpoint of management or for the more efficient production of goods."

In the case of Easthagen v. Naugle - Lick Inc., ___ Minn. ___, 109 NW 2d 556, (5/26/61), the Supreme Court of Minnesota held that a strike by plumbers employed by a subcontractor which caused a shut down of operations on the construction of a new building did not disqualify other craftsmen employed on the same building. The court stated that:

> "It would seem more in line with logic and legislative policy . . . to hold that the central office of each of the various plumbing contractors whose employees were on strike constituted the 'establishment' referred to (in the law)."

In a special concurring opinion, Justice Knutson found fault with the use of the central or executive offices of the employer in determining the "establishment" of the employer. He indicated preference for use of the employing unit involved, when dealing with workers who are only temporarily employed at fixed locations.

In a recent decision, the Supreme Court of Utah refused to consider whether or not the Utah Copper Division of the Kennecott Copper Corporation was a single "establishment" when different locals reached an agreement at different times after a mutual and simultaneous strike, which caused a complete stoppage, although the Court did state, "With ample justification the Appeals Referee found that the operations of the Utah Copper Division are so integrated as to make the continuous flow of production dependent on each other," and indicated its approval of integration of operations as a basis for the single establishment approach.

United Steel Workers of America v. Board of Review, 12 Utah 2d 136, 363 Pac. 2d 1116, August 14, 1961.

In connection with recent stoppages in the airline transportation industry, which due to its inherent nature is multi-state, the various higher administrative review bodies have held the entire airline to be a single establishment. We have found no decisions by appellate courts involving these disputes. A Kentucky Commissioner's decision (3452-1959), in holding that employees at Kentucky airports were employed in the same establishment as airline personnel operating out of Miami, states:

> "Although the geographical or fixed location test is an important one, also important are the functional integration and general unity (tests)."

Following is an analysis of other leading decisions by appellate courts of the various states:

Same Establishment

Alabama: U. S. Steel Corp. (In re: Wood), 40 Ala. 431, 114 S. 2d 533 (1959).

Mines and ore conditioning plant were part of the same establishment when there was functional and managerial integrality, same collective bargaining agency and physical proximity (700 feet) of mine and plant.

Alaska: Alaska U. C. C. v. Aragon, 329 U. S. 143. Negotiations carried on in Seattle and San Francisco were a part of the whole contract and Alaska employees were a part of the same establishment.

Arizona: Mountain States Tel. & Tel Co. vs. Sakrison, 71 Ariz. 217, 225 P. (2d) 707 (1950).

The deputy's decision that employer's four departments (traffic, plant, commercial and accounting) were separate establishments was reversed by the appellate court when it found that (a) all departments were generally housed in a single building of a community exchange; (b) that billings for local service were handled at the central office in Phoenix; (c) that each exchange was interdependent for its long-distance service on other exchanges both within and without the state; (d) that company operations are conducted on the basis of a state-wide organization and exchanges are subject to central (state) supervision and control and (e) that for rate making and taxing purposes the operations within the state are treated as a single unit.

California: Mattson Terminals, Inc. v. Calif. Emp. Com., 24 Cal. (2d) 695, 151 P. (2d) 202.

This decision extended the "establishment" to the places of business of all employers of longshoremen who were hiring through hiring halls established by longshoremen's unions.

Kentucky: Snook v. International Harvester Co., ___ Ky. ___, 276 SW (2d) 658, (1955) Kentucky court held that two or more units, even though functionally separate, operating in close proximity to each other, with common boundary, each easily accessible to the other, and where the company has the right to integrate services, shall constitute an "establishment" within the meaning of the act.

Nevada: DePaoli v. Ernst, 78 Nev. 79, 309 P. (2d) 363. Nevada long lines truck drivers held disqualified when unemployed because of a California dispute involving their union and employer. The court inferred the establishment the same.

North Carolina: State ex rel U. C. C. v. Marlin, 228 N. C. 227, 45 SE (2d) 385.

A separate step in production was held not a separate establishment.

Ohio: McGee v. Timken Roller Bearing Co., ___ Ohio App. ___, 161 NE 2d 905, Court of Appeals, Muskingum County (1956). Zanesville plant held same establishment as Canton plant ninety miles away where the integration between the plants was such that work in the Zanesville plant was "utterly dependent upon supplies being furnished from Canton."

Pennsylvania: Neidlinger v. Board of Review, 170 Pa. Super 166, 84 A (2d) 363.

Two collieries with same payroll superintendent and connected by underground passageway held same establishment.

Washington: Ackerlund v. Employment Security Division, 49 Wash. (2d) 292, 300 P. (2d) 1019, (1956).

Entire waterfront held one establishment.

Wisconsin: Spielman v. Industrial Commission, 236 Wisc. 240, 295 NW 1 (1940).

Two different plants in different cities with functional integrality and general unity held same establishment.

Not the Same Establishment

Alabama: U. S. Steel Corp. v. Grimes, 267 Ala. 699, 104 S 2d 330 (1958). Ore mines and railroads held separate establishments.

U. S. Steel Corp. v. Glasgow, 40 Ala. S 424, 114 S 2d 565 (1959).

Wire works and rail transportation department held separate. Tennessee Coal, Iron and Railroad Company v. Martin, 33 Ala. App. 502, 36 S. (2d) 535, (1948). Affirmed by Ex parte Tennessee Coal, Iron and Railroad Company, 251 Ala. 136, 36 S. 2d 547 (1948). Where the employer maintained four separate divisions, (1) manufacturing, (2) ore mines and quarries, (3) coal mines, and (4) transportation department (railroad), a strike by the steel workers and ore miners held not in the same establishment as coal mines and benefits were allowed coal miners. The court distinguished between the situations involved and those in the Chrysler case in Michigan and the Spielman case in Wisconsin.

Connecticut: General Motors vs. Mulquin, 134 Conn. 118, 55 A. (2d) 732 (1947).

The Connecticut court stated that the word "factory" was meant to refer to a single industrial plant and refused to extend disqualification to employees of General Motors who were idled because of a material shortage brought on by a dispute in another General Motors plant. The court went so far as to say, "If a provision in a union contract, providing that an authorized strike in one bargaining unit which results in an interruption of the flow of material or services to operations in any other bargaining unit will be considered an authorized strike in any such affected bargaining unit, was intended to prevent the award of unemployment compensation benefits, such provision is, to that extent at least, void and ineffective."

Illinois: Caterpillar Tractor Company vs. Durkin, 380 Ill. 11, 42 NE (2d) 541. (1942).

Pattern making shop of a tractor company held a separate es-

tablishment when operated as a separate department. Walgreen Co. v. Murphy, 386 Ill. 32, 53 NE (2d) 390. (1944).

A warehouse was not same establishment as retail stores.

Maryland: Tucker vs. American Smelting & Refining Company, 187 Md. 250, 55 A. (2d) 692. (1947)

A processing plant in Baltimore held a separate establishment from Utah plant supplying materials. There was no evidence of "functional integrality," "general unity" or "physical proximity."

Missouri: Kroger Co. vs. Ind. Comm., ___ Mo. App. ___, 314 SW (2d) 250. (1958)

Retail store of chain not same establishment as warehouse.

Pennsylvania: Lehigh Navigation Coal Co. vs. Bd. of Review 176 Pa. Super. 69 106 A 2d 919 (1954).

Deep mine operated in connection with a contracted strip mine held not part of same establishment even though the deep mine could not be operated profitably alone.

CONCLUSION

The term "establishment" as used in the disqualification provisions of most state laws has been given both a geographical and operational meaning by the courts. Functional integrality in many cases has been permitted to override the geographical aspect, especially when other considerations such as membership in the same union is involved. When the claimants in different plants or locations are members of other unions or of no union, the geographical or physical aspects receive more consideration.

Possibly the solution to the problem lies in more legislative definiteness of specifications. In the meantime a variety of reasons and decisions are available for the assistance of the attorney or administrator.

Footnotes:

1/ Conn. Gen. Stat. Chapter 567 Sec. 31 - 236 (3).
2/ No. Carolina 1961 amendment to Sec. 96-14.
3/ Ore. Rev. Stat. Sec. 657.200.
4/ Tex. Sec. 5 Tex. Unemp. Comp. Act as amended 1955.
5/ Va. Title 60 Vol. 9, 1958 Cumulative Sup. Sec. 60-47(d).

George Schwartz
Missouri

WHAT IS A STOPPAGE OF WORK AND WHEN IS IT DUE TO A LABOR DISPUTE?

The unemployment compensation laws of about 34 states have provisions disqualifying claimants whose unemployment is found to be due to a stoppage of work in existence because of a labor dispute. With few exceptions the remaining states (and they include at least 4 of those participating in this conference -- Ala., Fla., S. C., Tenn.) have laws disqualifying claimants found to be unemployed due to an existing labor dispute, or, as some of the statutes phrase it, labor disputes in "active progress."

It has been said that the labor dispute provision in unemployment compensation laws represents an attempt by the states to achieve a neutral position in respect to the payment or denial of benefits. Whether the attempt has been successful has been and likely will continue to be debatable. Nonetheless, it is reasonably clear that under the broad interpretation generally given the term "labor dispute," the provision reflects legislative impartiality in that it thus applies to situations created by lockouts as well as by strikes. Furthermore, by the requirement that there be a resulting stoppage of work before disqualification is in order, the states have avoided any appearance of predicating the payment or denial of benefits on an apparent judgment of the merits of the labor dispute, and have instead made the dispute's effect on the employer's operations the chief criterion.

The phrase "stoppage of work" is statutorily defined, so far as I know, only in Missouri's law. In the labor dispute provision itself appears the following:

> "'Stoppage of work' as used in this subsection means a substantial diminution of the activities, production or services of the establishment, plant, factory or premises of the employing unit." (Sec. 288.040.4 (2) R. S. Mo. 1959).

The phrase has been similarly interpreted by the majority of the courts which have considered the question. While these courts have not, of course, all used identical language, the gist of their holdings is that a stoppage of work occurs when there is a substantial or appreciable reduction in the normal activities of the employer's factory, plant or establishment.

There was one court, however, which held that "stoppage of work" referred to a cessation of work by the individual worker and not to the complete or substantially complete cessation of the work carried on at the employer's establishment. That was the Supreme Court of Oklahoma, which in Board of Review v. Mid-Continent Petroleum Corp., 141 P. (2d) 69, had before it the claim of a striking worker, who in the course of the strike, received a letter from the employer advising that he was discharged. The Board of Review held that the claimant was entitled to benefits on the ground that his unemployment following the employer's letter was due to the employer's decision to dismiss him. The Supreme Court upheld a subsequent decision of the District Court of Tulsa County holding that the claimant's unemployment was due to a labor dispute and that the employer's letter did not change the claimant's situation. The claimant had contended, on appeal from the District Court's decision, that the labor dispute did not cause a stoppage of work at the plant and that he was, therefore, not disqualified under the act. The Supreme Court disposed of this argument

by holding that the disqualifying provision referred to the individual's unemployment and to his own stoppage of work, not to a shutdown or stoppage of operations at the employer's factory or establishment. So far as I have been able to ascertain, the Oklahoma Court's interpretation has not been followed in any of the other states. In fact, it has been the subject of criticism in several states, e. g., Sakrison v. Pierce, 66 Ariz. 162, 185 P. (2d) 528, 173 A.L.R. 840; Lawrence Baking Company v. Michigan UCC, 308 Mich. 198, 13 N. W. (2d) 260, 154 A.L.R. 660; and Abbott Publishing Company v. Annunzio, 414 Ill. 559, 112 N. E. (2d) 101.

The by-now almost universally accepted interpretation of "stoppage of work" is discussed as follows in 17 University of Chicago Law Review, 308:

> "Like most 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 workmen'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." (Citing cases).

Obviously, the determination of whether a stoppage of work exists presents no problem when there is a complete shut-down. Difficulty is frequently met, however, in cases where there has been no complete cessation of operations. Then the question is presented as to whether there has been a substantial or appreciable curtailment of the work normally carried on or, as required in Missouri by statutory definition, whether there has been "a substantial diminution of the activities, production or services at the establishment, plant, factory or premises of the employing unit."

Obviously, there is no hard and fast rule on the basis of which, in a particular case, it may be said that a partial reduction of activity is or is not substantial or appreciable. These are relative terms and the courts have approved varying degrees or percentages of curtailment as being sufficient to constitute a stoppage of work, e.g.:

> "Mountain States Tel. and Tel. Co., v. Sakrison, 71 Ariz. 219, 225 P. (2d) 707 (Services were greatly curtailed; revenues dropped 66.7% and the number of employees who reported for work was 89% of the total number).
>
> Deshler Broom Factory v. Kenney, 140 Neb. 889, 2 N. W. (2d) 332 (where 90% of the employees left their jobs and the factory was unable to operate).
>
> Magner v. Kinney, 141 Neb. 122, 2 N. W. (2d) 689 (business transacted by employer reduced by more than 30%).
>
> Ablondi v. Bd. of Rev., 8 N. J. Super. 71, 73 A. (2d) 262, (where only 10% of the normal amount of furs handled by the employer was in process).

In re Stevenson (S. Ct., N. C.), 75 S.E. (2d) 520, (where production was 70% of normal and 85% of the plant personnel was at work).

An even wider variety of such examples is to be found in the administrative decisions. It accordingly seems that little practical benefit would be derived from any attempt here to analyze all the holdings on the subject.

About all that can be safely said by way of comment in this connection is the obvious, namely, that each case must be judged on its own set of facts, and further, that the courts should sustain findings as to the existence of a stoppage of work in situations where there is evidence of a real and substantial reduction of normal activities, as distinguished from one which is merely negligible, or insignificant.

Since a claimant is disqualified only so long as his unemployment is due to a stoppage of work which exists because of a labor dispute, it must be determined not only whether a stoppage of work exists but also (1) whether a labor dispute is the cause of the stoppage, and (2) when the stoppage, so caused, comes to an end. (For the purposes of this part of the discussion, I am using the term "labor dispute" in its broad, generally-accepted sense. Furthermore, I am assuming that it is not necessary, within the limitation of the topic assigned to me, to go into the question of what constitutes "the factory, establishment or other premises at which the employee is or was last employed."

It isn't difficult to identify a labor dispute as the cause of a stoppage of work where a strike or lockout occurs. These are the usual manifestations of an unresolved controversy over the terms or conditions of employment. And, of course, where a mass layoff is clearly due to lack of work, the resulting curtailment of the employer's activities is not a stoppage of work caused by a labor dispute.

But where an employer lays off a number of workers in advance of an impending strike, how do we determine whether the curtailment occurring at that point is due to the labor dispute or solely to the employer's lack of orders? And, where the employer, following settlement of the labor dispute, fails to take back all of the employees who have been on strike, how do we determine whether the continuing curtailment of activities "exists because of" the labor dispute, or is the result simply of a decision on the employer's part not to resume activities as they were carried on prior to the strike? At the risk of over-simplification, it can perhaps be said that the test to be applied is this: Would the claimant be working if it were not for the labor dispute?

The Court of Appeals of our host state has put it this way in a recent case:

> "To disqualify for benefits under Code Ann. § 54-610(d) the stoppage of work must exist because of a labor dispute; in other words, labor dispute must be the prime, efficient, proximate, motivating cause of the unemployment. The evidence must at least preponderate to the conclusion that had there not been a labor dispute the work stoppage would not have occurred, whether or not other things combined with the dispute to bring about the unemployment." (Emphasis the Court's)
>
> --Dalton Brick and Tile Company v. Commissioner, 102 Ga. App. 221, 115 S.E. (2d) 748 (1960).

In this case the evidence indicated that the employer, in shutting down two brick kilns, had given its laid-off employees one or more of three varying reasons for discontinuing the work in such kilns: (1) The fact that the company had no orders for brick at the time, (2) the uncertainty of the outcome of negotiations with the employees, and (3) the fact that the employer did not know what price to set on brick made for inventory because of the uncertainty of the new wage scale. The Court, noting that it was interpreting a remedial statute, held that the employer had failed to sustain the burden of showing the claimants were disqualified because their unemployment was due to a stoppage of work existing because of a labor dispute, and said:

> "Although uncertainty as to pricing inventory brick was given as one of the three reasons for the shut down, it is inferable that had the company desired to make brick for inventory during this slack season it would not have been necessary to price the brick until subsequent offers of orders came in, and that as between the labor dispute and the lack of business the company was unable to assign either reason as having been of greater importance in its decision to shut down. There was no evidence that the shut down would have resulted if, at the time, orders had been received."

The Pennsylvania case of Bako v. Board of Review, 171 Pa. Super. 222, 90 A. (2d) 309, (1952), was one where Bethlehem Steel Company, although having sufficient orders on hand to provide work, decided to taper off its operations in anticipation of an impending strike. The accompanying layoff of the claimants, covering a three-day period prior to the strike and another period of eight days after the strike's conclusion, was held to be due, in the first instance, to a necessary retraction in production in preparation for the strike, and, in the latter period, to unavoidable delays in the resumption of production after a lengthy shutdown. The Pa. Court said:

> "The disqualification enacted by §402(d) is not limited to the time appellants were on strike but includes also the period preceding the strike during which the employer, in anticipation of the strike, curtailed operations and employment in order to protect his property. This point was decided in Lavely Unemployment Compensation Case, 166 Pa. Superior Ct. 481, 485, 72 A. 2d 300, where this Court said: 'When a strike is imminent, when an employer has been officially notified that a strike will occur, and has reasonable grounds for a belief that the strike will actually take place, he may, prior to and in anticipation thereof, take reasonably necessary measures to protect his property during the pendency of the strike. The nature and extent of such measures depend upon the kind of work and the circumstances in which it is conducted, and ordinarily the board will not overrule the honest judgment of an employer.'
>
> "The rationale * * * is applicable also during the time reasonably required to put the plant in normal operation after the strike ends. What is a reasonable period will always 'depend upon the kind of work and the circumstances in which it is conducted.' In a department store, for instance, resumption of employment might follow the strike's termination in the course of a few hours. Perhaps a textile mill would require a longer time. In an industry, such as Bethlehem Steel, operating several departments which are dependent for power upon a central plant, with equipment to be repaired, machinery cleaned, and other preparatory steps to be taken, a longer time must necessarily be allowed. Possibly, the duration of the strike becomes a relevant factor. At all events, the Board will consider

> all the circumstances and override the management only when it finds that it failed to exercise honest judgment. It follows that, however willing employes may be to return to work immediately after the termination of the strike, the continuing stoppage of work must be held to be due to the original labor dispute. * * *"

Another case which follows the same principles in determining a stoppage of work to be due to a labor dispute both prior to and subsequent to a strike is Ablondi v. Board of Review, 8 N. J. Super., 71, 73 A. (2d) 262 (1950). In that case a fur processor, when it appeared that an agreement over a contract with the union would not readily be reached, "stopped taking skins until we knew where we stood" to avoid the risk of spoilage in the event of a sudden cessation of work. The Court held the resultant unemployment to be due to a stoppage of work in existence because of a labor dispute for all periods prior to the resumption of "substantial production" some fifteen days after settlement of the dispute. The evidence had indicated that the employer was not able to recall substantial numbers of its employees until that late date, even though it had made an apparently diligent effort to return its operations to a normal level without undue delay.

Among the cases which involve the extension of the disqualification only to a period subsequent to the strike or lockout, are the following: Carnegie-Illinois Steel Corp. v. Rev. Bd., 117 Ind. App. 379, 72 N. E. (2d) 662 (1947); American Steel Foundries v. Gordon, 404 Ill. 174, 88 N. E. (2d) 465 (1949); In re Stevenson, (N. C.) 75 S. E. (2d) 520 (1953).

A very interesting case, decided by the appellate division of the Superior Court of New Jersey in 1955, is Mortensen v. Bd. of Rev., 21 N. J. 242, 121 A. (2d) 539, in which it was held there was a stoppage of work in existence due to a labor dispute even though no strike actually occurred. The evidence indicated, however, that there was a definite threat of a strike throughout a period of almost two months, with the employer (the ship-building division of Bethlehem Steel Company) being forced to lay off employees because of the loss of work resulting from (a) its refusal to accept ship repair work on which it was required to guarantee a delivery date, incurring a penalty if it failed to meet that date, and (b) the withholding of orders by customers aware of the strike threat and fearing that work which they placed with the company might be delayed. It was shown by the evidence in the case that the work which was reasonably to be anticipated in the period for which the claimants were disqualified was enough to have provided adequate employment for all of the claimants had it not been for the existing labor controversy.

A like situation was dealt with in the case of Adomaitis, et al., v. Director, decided in 1956 by the Massachusetts Supreme Judicial Court, 136 N. E. (2d) 259. There, too, no strike actually took place. However, there was a definite threat of a strike, as a result of which customers of the wool-processing employer withheld orders through fear of non-completion. The Court, in holding that the claimants were disqualified under the labor dispute provision, said in part:

> " * * The notice (of the calling of a strike) operative until 8 P.M. on April 20 clearly said to wool-owning customers, 'We will not work on your wool if you ship it in,' and directly caused the wool to be withheld and the work to be unavailable. * * * "

A somewhat different view seems to have been taken by an Alabama Court in Gulf-Atlantic Warehouse Company v. Bennett, 51 S. (2d) 544 (1957), but that case arose

under a statute which provided for disqualification where the unemployment was "directly due to a labor dispute," and, perhaps for that reason, it is distinguishable from the Mortensen and Adomaitis cases.

It should be noted in passing that in the Mortensen and Adomaitis cases, unlike the situation in the Georgia case of Dalton Brick and Tile Co. v. Commissioner, discussed previously, the employer's lack of orders was quite clearly shown to be the consequence of the labor dispute.

One could go on almost indefinitely with further illustrations of the way in which the labor dispute provision is applied where the stoppage of work is not coextensive with a strike or lockout or with the labor controversy itself. However, there seems to be little point in doing so. In nearly all of those cases, as well as those we have here previously considered, it will be found that the crux of the problem lies in the determination of whether, but for the labor dispute, there would have been a curtailment or shutdown of the employer's operations.

Apart from the question of whether a stoppage of work is due to a labor dispute, there is the problem of determining when operations of the employer are restored to the point where a stoppage of work can no longer be said to exist. It has been generally considered necessary that activities be restored to their normal level. In a 1958 decision, however, the Arkansas Supreme Court held (in Monsanto Chemical Company v. Commissioner of Labor, (314 S. W. (2d) 493) that the stoppage ends when the employer's production is restored to a point at which it may be said to be substantially normal.

The Court expressed its view that it is illogical to say that a stoppage of work does not occur in the first place until production has fallen off by at least twenty or thirty per cent and yet hold that the stoppage continues until the plant again reaches one hundred per cent of its productive capacity. It would seem that there can be little quarrel over the soundness of this viewpoint.

Some of us have undoubtedly been perplexed at times over the question as to what standard or unit of measurement is appropriate in determining whether there has been a return to normalcy or substantial normalcy. Various factors have been used in the past, such as production, man-hours worked, numbers of workers, total sales, units of service, etc. Sometimes these factors have been used in combination, and at other time singly. Very likely the choice has most often been governed by the type of data available.

In this connection, let me tell you my little tale of woe. In Missouri, with our statutory definition of stoppage of work as a "substantial diminution of the activities, production or services * * *," it appeared that we were given considerable latitude in the use of relevant data. Yet, in the case of Producers Produce Company v. Industrial Commission, et al., 291 S. W. (2d) 166, our Supreme Court held that we were restricted to the factor of production in determining whether a stoppage of work had ended in a plant engaged chiefly in the processing of poultry and eggs and, to a lesser extent, in the processing of hides, wool and mohair. No production figures had been adduced, but there was evidence that the employer had begun rehiring replacements shortly after the strike began and had ultimately reached a point in its opera-

tions where it was possible for it to lay off help in substantial numbers. This evidence, despite testimony that the employer did not feel that the egg candling department was operating normally because of the inexperience of the replacements, appeared sufficient, in the Referee's view, to warrant a finding that the employer's activities, production or services had been restored to a normal or substantially normal level. In court, we argued that the layoff of 37 in one week and 60 more in the next week was the best possible evidence that the employer had all the workers it needed to take care of its current volume of business and that it was no longer obliged to curtail its "activities" by reason of the strike.

Although this theory was upheld in the Springfield Court of Appeals (281 S. W. (2d) 619), the Missouri Supreme Court, getting the matter on transfer because of "the general interest and importance of the questions involved," held that "production" was the only permissible criterion, saying, in part:

> "Respondent was primarily engaged in the production of powdered and frozen eggs approximately two-thirds of its business was egg business and 80 per cent of its egg business was powdered and frozen eggs. One-third of respondent's business was the production of dressed poultry. Clearly, respondent was engaged primarily in production and not in such activities as the buying and selling and handling of hides, wool and mohair. Respondent was not engaged in the furnishing of services. * * * " -- 291 S. W. (2d) 166, l. c. 173, 174.

Having thus eliminated "activities" and "services" as alternative factors, the Court went on to hold that in the absence of evidence that the employer's production was restored to substantial normalcy, it could not be found that the stoppage of work had ended.

I have never been able to understand why the processing of poultry and eggs could not be considered an activity of the employer, even though such activity seemed to include some types of production. "Activities," in its ordinarily understood sense, is certainly a broader, more comprehensive, term than "production." The legislature, in defining stoppage of work, obviously intended that our agency have "activities" available as a criterion, as an alternative to the other specified criteria of "production or services."

You gentlemen may or may not share this view. Nevertheless, I cite the case as but another illustration of the abundant uncertainties involved in the application of the labor dispute provision. On this rather doleful note, I conclude my paper. I hope I haven't taken up too much of your time.

W. L. Moore
Tennessee

WHAT CONSTITUTES A TERMINATION OF THE LABOR DISPUTE DISQUALIFICATION

After examining the Agenda, and at the time of preparing this paper, I made the determination that my subject would have to be treated in a very restrictive manner in order that I might not encroach on the previous subjects discussed by Mr. Foster, Mr. Sidner, Mr. Schwartz and Mr. Frazier, since to determine what constitutes a termination of the labor dispute disqualification, in most instances one must, of necessity, make some determination with regard to the subjects discussed by these Gentlemen who precede me on the Agenda, and particularly one of the subjects discussed by Mr. Foster which is: "When does a labor dispute terminate?" In many instances I believe you will find that a finding as to the termination of the labor dispute is necessary before arriving at what terminates the disqualification. This, of course, is not necessarily so but the two subjects go hand in hand in most instances.

This paper will not discuss the situations involving Intervening Employment, Resignations from Job with Struck Employer and Discharge except as they incidentally relate to the discussions of the cases hereinafter mentioned since those situations as relate to this subject were very adequately covered in the excellent paper presented by Mr. Harry Silverstone, Assistant Attorney General of the State of Connecticut, at the Legal Affairs Conference held for Regions I, II and V, in May, 1960, at the Hotel Governor Clinton in New York.

All of our state laws have some provision setting out some type of disqualification in connection with unemployment due to a labor dispute. The original draft bill furnished the States by the Social Security Board is as follows:

> "Sec. 5. An individual shall be disqualified for benefits - (d) For any week with respect to which the commissioner finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed: Provided, That this subsection shall not apply if it is shown to the satisfaction of the commissioner that -
>
> (1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work, and -
>
> (2) He does not belong to a grade or class of workers of which, immediately before commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute:
>
> Provided, That if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment or other premises."

Because the original draft bill used the phrase "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" I find from examination of the state laws as set out in the Commerce Clearing House Service that thirty one of our fifty one jurisdictions do adhere to a similar form of statute.

The second largest category of state laws dealing with the labor dispute disqualification consists of sixteen states and the District of Columbia which have a statute similar to that in Tennessee and which uses the phraseology "for any week with respect to which the commissioner finds that his total or partial unemployment is due to a labor dispute which is in active progress at the factory, establishment or other premises at which he is or was last employed."

New York and Rhode Island have a flat disqualification -- seven weeks in New York and six weeks in Rhode Island (in addition to the waiting period), and finally, Texas appears to have a statute which is different from all others in that it refers to the claimants' stoppage of work because of a labor dispute at the place he was last employed. More will be said about this theory later.

I find from the Commerce Clearing House Service that apparently the thirty one states which adhere more or less to the original Social Security Draft Bill are: Alaska, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

The jurisdictions which have adopted the active progress provision are: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Kentucky, Louisiana, Minnesota, Nevada, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Wisconsin and the District of Columbia.

Since by far the greater number of states have adopted a statute which in some form uses the phrase "stoppage of work," and since probably for the same reason there has been much more litigation over when the labor dispute disqualification terminates under such a statute, I will discuss representative cases falling under this type of statute first. In this connection, let me state here that the writer will, in this discussion, only refer directly to representative cases in each category, since the cases discussed contain many citations to decisions in other jurisdictions and to discuss each jurisdiction separately would make this handling of the subject overlong.

One of the clearest expressions of what, to me, is by far the better rule on this subject in "stoppage of work" states is found in the case of Sakrinson v. Pierce 66 Ariz. 162, 185 P2d 528, 173 ALR 480 (1947) wherein Justice Udall stated what he found to be the better rule as follows:

> "At the outset it should be made clear that this court is not concerned with any questions relative to the merits of the labor controversy itself. Our decision is not and cannot be determined by such factors. Instead it is determined by the choice that the elected legislative representatives of the people of this state have made for us. And whether or not the Act should compensate employees in this position is properly a choice for the legislature. As a matter of fact, the legislatures of the various states

> are divided on this question--some choosing one course, some the other--while Michigan and California, at least, have chosen first one (each a different one) and then the other route. The function of this court, then, is to simply to point out which route our legislature has chosen to travel. Though a matter of first impression in Arizona, deciding which route has been taken by a statute worded as ours is neither a new question nor is it one that requires abstruse reasoning or philosophical adventures. Our legislature has picked for its section on "disqualification" one of two usual types of wording, each of which is in wide use throughout the United States, and each, with but negligible exception, has been given a uniform interpretation. One would allow compensation in the case at bar; the other would not." (Emphasis supplied).

Further on in the opinion we find:

> ".....In other words, the technical meaning of the term, 'stoppage of work' as used in our disqualification clause, is a substantial curtailment of work in an establishment, not the cessation of work by the claimant or claimants.....
>
> The opposite view was taken only by the Oklahoma Court, Board of Review v. Mid-Continent Petroleum Corporation, 193 Okl 36, 141 P2d 69, 71, which held that "stoppage of work" as used in the act refers to the work of the employee rather than the operation of the plant. This decision not only stands alone on this point so far as we are able to determine, but was written by a divided court, unaware of the two previous decisions of courts of last resort on this matter."

Another case which severly criticizes the Oklahoma ruling and also enunciates what appears to be undoubtedly the prevailing rule in connection with these statutes is the case of Abbott Pub. Co. v. Ammunzio 414 Ill. 559, 112 NE 2d 101 (1953). In this case the Court states:

> "The question at issue which now confronts us has never been passed upon in this Court. The majority rule appears to have been followed by courts of review in Georgia, Maryland, Michigan, Indiana, Arizona, Nebraska and North Carolina, and by administrative decisions in Connecticut, Indiana, Maryland, Montana, Missouri, Nebraska, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon and Utah, and also by an administrative decision of the United States Veterans Administrator. The minority rule appears to be embodied in the decision of the Oklahoma Supreme Court in the case of Board of Review v. Mid-Continent Petroleum Corp., 193 Okla. 36, 141 P2d 69. The minority rule was followed in one administrative decision in Colorado. Briefly stated the majority rule holds that where the employer has permanently replaced all of the employees whose employment was terminated in the course of a labor dispute, has fully resumed its normal plan of operation and resumed previous production, then the unemployment of its former employees is no longer due to a stoppage of work because of a labor dispute at the employer's plant. The result of this rule, if followed by this Court, is to hold that unemployed claimants are no longer ineligible for benefits under the Illinois Unemployment Compensation Act upon cessation of the work stoppage."

> ".....A divided Court in the Lawrence Baking Company Case, involving the disqualification provisions of the Michigan act, which are substantially the same as our Act, fully discussed both the majority and minority rule. The dissenting opinion in the Lawrence Baking Company Case in following the minority rule based its reason for so holding upon the Mid-Continent Petroleum Case decided in Oklahoma in 1943. It is worthy of note that in the Mid-Continent Petroleum Case the claimants were not represented by counsel and there were two judges dissenting therefrom. Furthermore, the Oklahoma statute has been changed since rendition of the said opinion. Petition for writ of certiorari was denied by the Supreme Court of the United States on October 9, 1944 in the Lawrence Baking Company Case 323 U.S. 738, 65 S.Ct. 43, 89 L. Ed. 591. The Mid-Continent Petroleum Case was criticized in the case of M. A. Ferst Ltd. v. Huiet 78 Ga. App. 855, 52 SE2d 336. The majority rule was followed in the cases of In Re: Steelman 219 N.C. 306, 13 SE2d 544; Saunders v. Maryland Unemployment Compensation Board 188 Md. 677, 53 A 2d 579; Carnegie-Illinois Steel Corp. v. Review Board 117 Ind. App. 379, 72 NE2d 662; Deshler Broom Factory v. Kinney 140 Neb. 889, 2 NW2d 332."

The Georgia Court in the case of M. A. Ferst Ltd. v. Huiet 78 Ga. App. 855, 52 SE2d 336 (1949) said:

> "Clearly this term refers to stoppage at the place of work rather than stoppage on the part of the worker."

The same rule had previously been stated by the Nebraska Court in the case of Megner v. Kinney 141 Neb. 122 2 NW2d 689 in these words:

> "Obviously, if those leaving work are immediately replaced, or if the dispute does not otherwise interfere with production or operation and these are not diminished, there is no stoppage of work and hence no disqualification."

As previously stated, the Texas Statute is also a stoppage of work statute but uses the phraseology "due to claimants' stoppage of work because of a labor dispute." (Emphasis supplied). At first blush one would conclude that once unemployed because of a labor dispute, benefits could never be paid under such a separation. Not so, however, says the Texas Court in the case of Texas Employment Comm. v. Hodson 346 SW2d 665 (1961) where the Court said:

> "When appellee crossed his own picket line during the strike and was refused employment because there was no work available due to his job having been filled by another, his unemployment was no longer 'because of a labor dispute at the factory'; it was because there was no job for him. Resort to the escape clauses, Subsection (d)(1) and (2) is not required, since the basic disqualification did not then exist. A new cause of involuntary unemployment had then displaced the original disqualifying cause."

This rule as to abandonment of the dispute by either an individual separately or by the whole group is much more analogous to the holdings in the active progress states, as for instance, our recent Tennessee Case of Special Products Company v. Jennings 353 SW2d 561 which became final when a rehearing was denied February 8, 1962, and wherein the Court held:

> "We, therefore, are of the opinion that the labor dispute disqualification ceased to apply when the claimants notified the employer that the strike had been abandoned; and that they had decided to return to their jobs."

This same view is also taken in the recent Wisconsin Case of Rice Lake Creamery Company v. Industrial Commission 15 Wis. 2d 117, 112 NW2d 202 (1962). Although there was some reliance in this case on what the Court considered a discharge of the claimants, intimating thereby that an employer-employee relationship is necessary for the existence of the labor dispute. Incidentally, in this connection, the Tennessee Supreme Court has held that such a relationship is not necessary for the existence of a labor dispute. Block Coal and Coke Company v. United Mine Workers, 177 Tenn. 247 (1940).

A Tennessee Case, which like Sakrinson v. Pierce, supra, clearly illustrates the difference as concerns this subject between the stoppage of work statutes and the active progress type, is Davis v. Aluminum Co., 204 Tenn. 135, 316 SW2d 24 (1958). In this case the facts were that as a result of a labor dispute employees of the Alcoa Plant of the Aluminum Company of America went out on strike which necessitated cessation of operation at the plant. After about two weeks an agreement on all matters in dispute was reached and operations, insofar as possible, were immediately resumed. However, the cessation of operations had unavoidably damaged eleven lines of "electrolytic cells" called pots in which aluminum is melted. These lines could not be put back in operation until these so-called pots were repaired. It was conceded that this was done as readily as could be expected, however, some 498 employees who filed claims for benefits were unemployed pending the completion of such repairs. It was for this period for which claims for compensation were made. It was conceded by all parties that the labor dispute had been fully settled but the employer, who was sustained by the Board of Review, contended that the unemployment here was still due to a labor dispute. Concededly, there was a stoppage of work but the question arose under Tennessee Law and our Supreme Court, rightly, in my opinion, held that there was no labor dispute in active progress. The Court stated that the proper rule to apply in this case was that:

> "If the language in question here be given its generally accepted meaning, then it seems to this Court that when the Tennessee Legislature provided for disqualification for unemployment benefits when such unemployment is due to a labor dispute which is in active progress it meant that the stoppage of work and labor dispute had to exist the same time. That is what it said. To otherwise construe it is to judiciously amend the Act by striking therefrom the words 'which is in active progress'."

And the Court further stated:

> "But when Tennessee enacted its Employment Security Law it did not provide therein, as had the great majority of states, a disqualification by reason of unemployment due to a stoppage of work resulting from a labor dispute. Instead, it limited the disqualification to unemployment existing while the labor dispute 'is in active progress'. Should it not be concluded that Tennessee's Legislature used different language as to such disqualification because its intent was different; that is, that it did not intend for unemployment due to stoppage of work to be construed as a continuation of the labor dispute, if all matters in controversy had, in fact, been settled?"

It should be noted that in the last sentence of the above quotation the Court used the phrase "if all matters in controversy had, in fact, been settled." This last phrase points up one of the essential elements necessary to the termination of the disqualification under this type of statute.

A clear illustration of this latter rule, and also a clear distinction between the two types of statutes, is found in the case of Meyer v. Florida Industrial Commission, 117 S2d 216 (1960). In this case the claimant had gone out on strike as a member of the Union and the Union had later abandoned the strike, and as far as most of the group was concerned the labor dispute was over, but at the time the claimant made her claim she had pending before the National Labor Relations Board a claim against her employer for back wages which had not been finally settled. The Court, therefore, held that since there was still a matter of controversy pending between her and the employer in this regard that as, between her and the employer, the labor dispute was still in active progress since all matters in controversy had not been finally settled; consequently, benefits were denied.

A very recent case in which I participated, and which pointed out that all matters in controversy must be finally settled before the labor dispute can be deemed not to be in active progress, was one which arose in the Chancery Court of Shelby County, Tennessee. The style of this case is: Wilson and Company v. Tennessee Employment Security, Et Al, and is Rule No. 62903-2 of said Court. I believe the facts and the decision here will be of interest to the conferees in considering the active progress statute. The claimants in this case became unemployed on November 3, 1959 due to a labor dispute and strike which occurred at the plant of the petitioner, Wilson and Company, in Memphis, Tennessee. It was conceded by all parties that the original unemployment of all claimants was due to said labor dispute and it was further conceded that all of said claimants were disqualified for unemployment compensation from the period of the original separation through February 16, 1960. The sole question before the Court was whether or not said claimants were entitled to benefits from the period of February 16, 1960 to March 10, 1960, when an arbitration award was made. The reason being that on February 16 the bargaining agent and the company entered into an agreement whereby most of the matters in controversy were finally settled by the execution of an agreement and those that were not finally settled were to be submitted for arbitration in accordance with an agreement which provided that a final award by the arbitrators should be made by March 10. The Court held, and this case was unappealed from, that the claimants were disqualified until the final arbitration award was made since it was the theory of the Court that during said interim period the labor dispute was still in active progress.

In conclusion, I might say that not all of the courts by their opinions clearly set out the difference between the two types of statutes as do those in the representative cases discussed here, but I believe you will find that the conclusions reached follow the cases here considered in almost every instance.

N. C. Quiett
Iowa

The topic assigned me was as follows: "Does a worker voluntarily quit a job if he refuses to take another job which the Collective Bargaining Agreement requires be offered to him."

If this question were propounded to the Iowa agency, the answer would be a qualified, "No," since Iowa is one of the states which generally considers the question raised by such circumstances as being that of refusing employment rather than quitting. We would also not attach a great deal of significance to the fact that the offer of work was required by the collective bargaining agreement, since it has been held that such an agreement cannot alter the Iowa statutes. Perhaps the basic reason for the Iowa agency's policy is that we have never been able to satisfactorily answer the claimant's question, "How can you quit a job you don't have?"

The difference in approach to the problem by the various states is not merely academic, since the penalty for voluntary quitting usually differs from the penalty for refusing employment, also most of the state unemployment insurance laws specify certain factors to be taken into account in determining whether an offered job is suitable for purposes of determination under the work refusal disqualification, but do not require them to be applied to voluntary leaving cases. The usual criteria include the degree of risk to the claimant's health, safety, and morals; his physical fitness and prior training, experience and earnings; the length of his unemployment and his prospects for securing local work in his customary occupation; and the distance of the available work from his residence. In the majority of cases the claimant objects to the reduction in pay which would accompany the new assignment, but I recall one instance where I was obliged to consider a claimant's solemn contention that the work in the sliced bacon department would be unsuitable for her because she did not know any of the girls in the sliced bacon department.

A typical Iowa case in point is reported at C.C.H.U.I.R., Iowa, 8001.02. I found almost no cases in point decided by higher courts, and for that reason I am using C.C.H. citations. The claimant was laid off from his regular job in the employer's canning department, after which he was offered a job in the hog kill department at a wage of 28 cents per hour less than he previously earned. He refused the job primarily because of the wage reduction. The claim was allowed by the Appeal Referee, but the Iowa Commission on review held that the 28 cents per hour difference in this case was not sufficient to make the offered work unsuitable to the claimant.

The claimant had also contended that under the terms of the union contract he had a right to refuse work in another department and accept a layoff without any loss of seniority. The Commission held that this provision had nothing to do with the claimant's right to receive benefits, since the contract between the union and the employer could in no manner change the terms of the Iowa law.

Alabama, Pennsylvania, New York, Wisconsin and New Jersey are listed among the states which have treated the problem as involving voluntary quitting, while other states have treated the problem as involving a refusal of employment.

Some states, including Michigan, Tennessee and Ohio, apparently have at times considered the question as involving quitting and at other times have considered that it involves a refusal of employment. A very recent case reported at C.C.H.U.I.R., Ohio, 8109, held that three claimants who were laid off from skilled and semi-skilled

positions, and who, at the time of layoff received offers of work at reductions of $1.28, 62 cents, and 51 cents per hour, had not refused suitable employment without good cause.

A Michigan decision stated that, "An offer of a new territory in a city 100 miles from home, without expense or drawing account, and no guaranteed pay is no offer at all."

The New Jersey case of Goebelbecker vs. Curtis-Wright Corp., reported at C.C.H.U.I.R., N. J., 8334, illustrates the policy which considers the question to involve voluntary quitting. The claimant, due to a lack of work in his job classification, was offered a lower paying job in accordance with a union seniority agreement. He refused because he had never worked at the proposed job, and because he objected to taking a job which paid $2.32 per hour as compared with $2.77 per hour on his former job. The claimant argued that since there was no longer any work available in the job he was performing, the employer's offer of other work was an offer of a new job and that, therefore, his unemployment was not due to his voluntary leaving without good cause but was due to a refusal to accept an offer of work. He contended that the lesser penalties that attend the latter disqualification should apply. The Court held that this argument was without merit since the employer-employee relationship continued, also that the fact that the tendered position carried with it a slightly lower wage was not good cause for refusing to work at all, therefore, the claimant caused his own unemployment by leaving his employment voluntarily without good cause.

The states which consider the question to be "refusal of employment," might contend that the New Jersey Court's opinion was self-contradictory in first stating that there was a lack of work in the claimant's job classification and then stating that the employer-employee relationship continued. It might also have been argued that a cut of 45 cents per hour or $18 for a 40-hour week was not "slight."

My discussion has strayed considerably from the basic theme of the Conference, however, the majority of cases which I read did not appear to give a great deal of consideration to the question whether or not the offer of other work by an employer was required by a Collective Bargaining Agreement, although it was apparent that the questions raised by such offers involve problems of frequent occurrence and difficult solution.

H. L. Hutcherson
Mississippi

The subject under discussion is, "The Effect of Collective Bargaining Agreements on Benefit Eligibility," and my assigned topic is, "What is the Effect Upon Benefit Eligibility of a Contract Provision for (1) Vacation, and (2) Retirement; What is the Effect of Receipt or Nonreceipt of Vacation Pay."

The questions involved in my topic have to do with the application of the eligibility and disqualification provisions contained in the state unemployment insurance laws under conditions involving vacations or retirement provided for or affected by union-management contract provisions. Before we consider the matter of how these questions are dealt with in the state laws and by the administrative tribunals and the courts in applying them, let us take a very brief look at the basic purposes of the eligibility and the disqualification provisions and what they are apparently designed to accomplish as a part of the legal structure established to govern the operation of the unemployment insurance program. I am speaking primarily of the eligibility conditions of being "involuntarily unemployed" and "available for work" and of the disqualification provision relating to "leaving work voluntarily without good cause." Why are these qualifying conditions imposed? Obviously, they are intended to define and to limit the type of unemployment that is insured. More specifically, they deal with the cause of the unemployment and mainly the extent to which the worker himself contributed and why he contributed to the unemployment or to the conditions which brought it about. Apparently these requirements circumscribing the unemployment that is to be insured are intended to serve two purposes: (1) To confine the program to the accomplishment of the declared public policy as contained in the state laws, of insuring against the hazard of involuntary unemployment, and (2) to provide a reasonable and proper balance by calling on the taxpaying employers, or the consuming public in the final analysis, to finance funds to be used only for the benefit of persons unemployed through no fault of their own.

Dr. Paul H. Sanders, Professor of Law, Vanderbilt University, in his article entitled, "Disqualification for Unemployment Insurance," in the February, 1955, issue of the Vanderbilt Law Review, finds parallels in the eligibility and disqualification provisions of state unemployment insurance laws as compared to the elements of coverage in an insurance policy. He states:

> "It is assumed that an insurance enterprise cannot function as such if the carrier is to be held liable for losses designedly caused by the persons insured--that such a situation is in basic conflict with the aleatory nature of insurance. It is implied in every insurance contract that the insured event is a fortuitous one, i. e., one not designedly brought about by the insured. This sketch of certain structural aspects of the selection and the control of an insurance risk has its rather obvious parallel in the eligibility and disqualification provisions of a state unemployment insurance act. Not all risks in connection with unemployment are to be covered. The program does not contemplate a welfare-type grant to every unemployed person. Eligibility conditions represent the affirmative statement of the risks selected for coverage under the program. In terms of conditions precedent the risk which the program insures against, i. e., the insured event, is the unemployment beyond the waiting period of a claimant who has established himself as a part of the labor market and who has a continuing attachment to it."

In referring to the disqualification provisions, Dr. Sanders states that these can be considered negative conditions of compensation designed to exert pressure upon the insured to decrease the risk or keep it from increasing. In referring to the voluntary action of a worker indicating an intention to terminate employment, notwithstanding that the immediate cause of separation was discharge or replacement, Dr. Sanders states:

> "The difficulty of finding an intention on the part of an individual claimant has produced conflicting results in cases where the claimant's separation from work was occasioned by the provisions of a collective bargaining agreement. Some courts have looked to the character of the action which the claimant has taken in conformity with the terms of the agreement and have attempted to judge his willingness with respect to that end."

Some of the specific questions at issue as defined by the courts in dealing with these matters covered by my topic are as follows: To what extent should workers' rights to benefits come within the scope of negotiation and agreement between workers or their representatives and employers? What weight should be given, in determining a claimant's rights to unemployment benefits, to those actions of his union that would be clearly disqualifying had he personally taken them? At the bargaining table, is the union the agent of its members to their individual detriment as well as their collective benefit? Are work separations provided for in union-management agreements, by operation of the agency theory of collective bargaining, voluntary quits? A worker who asks his foreman for two weeks off, without pay, for a vacation is not involuntarily unemployed nor available for work and is not eligible for benefits during those two weeks. Is the same thing true when he is off work for two payless weeks when the employer shuts down to give the employees a vacation, as required by the union agreement, but does not pay this worker because he lacks seniority to qualify for a paid vacation? Similarly, a worker who has retirement rights and who after reaching retirement age has a voluntary choice and decided to retire rather than keep working would ordinarily not be considered eligible for unemployment benefits. But, suppose he wants to continue to work but is forced to retire because of a compulsory retirement provision in the union-management contract, or the contract makes forced retirement optional with the company and it elects to retire him.

In trying to analyze the ways in which the state laws, administrative tribunals, and courts throughout the country have dealt with these questions, one finds it difficult to find any uniform line of reasoning or even any clear-cut weight of authority on the respective issues. This is true because of the variation in the provisions of the state laws, divergent viewpoints on concepts and principles to be applied and, of course, variations in the facts in the particular cases. As an example of conflicts in application of established legal principles, the courts have held that doubtful issues under the Federal and State unemployment insurance laws should be construed liberally in favor of coverage or eligibility for benefits because of the remedial nature of the legislation, but on the other hand they have said in cases involving employer liability that the unemployment taxes or contributions are excise taxes and that under the well established rule of law should be construed liberally in favor of the taxpayer and strictly against the taxing power.

Let us consider first the effects of contract provisions for vacations on benefit eligibility. Some courts have resolved this question on the point of whether the claimant is employed or unemployed during the vacation period, others on whether or not he is <u>involuntarily</u> unemployed, and others on the question of availability.

In most state laws an individual's week of total unemployment is defined as "any week during which he performs no services and with respect to which no wages are payable to him." Therefore, unless specifically provided otherwise in the state law, workers are usually held to be not unemployed in vacation weeks for which they receive pay. They may be eligible for partial benefits if the vacation pay is less than the weekly benefit amount. The question which most frequently arises in these cases is in regard to the allocation of the vacation pay. The following are some of the questions which have arisen in connection with the allocation of vacation pay and ways in which these questions have been dealt with: Courts in West Virginia, Eastern Gas & Fuel Associates v. Hatcher, ___ W. Va. ___, 107 S.E. (2d) 618 (1959), and Wyoming, Fornengo v. ESC and Union Pacific Coal Co., Wyo. Dist. Ct., 7th Jud. Dist., Natrona Co. (1957), have held that vacation pay given at the time of a layoff is allocable to the vacation period as specified in the bargaining agreement, and not to the period following the layoff. In Michigan, Hubbard v. UCC, 328 Mich. 444, 44 N.W. (2d) 4 (1950), it has been held that a bonus paid at Christmastime was not allocable to the vacation period where the employer-union contract did not mention the word "vacation" nor provide for the assigning of such pay to any specific period. Courts in West Virginia, Anderson v. Bd. of Rev., W. Va. Cir. Ct., Charleston (1954), New Jersey, Battaglia v. Bd. of Rev., 14 N. J. Super. 24, 81 A. (2d) 186 (1951), Pennsylvania, Hoenstine v. Bd. of Rev., 176 Pa. Super. 306, 106 A. (2d) 639 (1954), and Ohio, Collopy v. Smith, Ohio Ct. of App., Athens Co. (1950), have held that a claimant was not unemployed where vacation pay was allocated to a specific week by the collective bargaining agreement, although such week subsequently occurred during a layoff period.

In Wisconsin, Oglebay Norton Co. v. Comm., Wis. Cir. Ct., Dane Co. (1961), and Connecticut, Spillane v. Commr., Conn. Super. Ct., Fairfield Co. (1961), it was held that where the contract gave the employer the right to change vacations if the employee was given prior notice, and there was no evidence that such notice had been given to claimants whose vacation had been changed to a period of layoff, the claimants were eligible. In Wisconsin, Cutler-Hammer, Inc. v. Comm., Wis., 109 N.W. (2d) 468 (1961), it was held that where the union-employer contract provisions were ambiguous, but it was shown that the employer had by past practices established the right to reallocate vacations to a period of shutdown, claimants were not unemployed during a shutdown period to which their vacations had been allocated.

An Iowa court, Firestone Tire & Rubber Co. v. ESC, Iowa Dist. Ct., Polk Co. (1961), held that all workers were not unemployed when an employer exercised his contractual authority and shut the plant down for vacation, including workers who had already had a vacation. In New York State, Dresher, In re, 286 App. Div. 591, 146 N.Y.S. (2d) 428 (1955), it was held that claimants hired on a day-to-day basis were unemployed during weeks for which they received vacation pay, holding that such pay was a bonus for prior years' service. In Massachusetts it was held that vacation pay received upon termination of employment is wages and is allocable to weeks after termination, but an Arkansas court held to the contrary. In New York State, Schiavone, In re, 282 App. Div. 974, 126 N.Y.S. (2d) 344 (1953), it was held that vacation pay was not allocable to a period of layoff where claimants had originally agreed not to take a vacation and the employer was later forced to close down, but on a similar question a Minnesota court, Hamlin v. Coolerator Co., 227 Minn. 437, 35 N.W. (2d) 616 (1949), held to the contrary.

So, the principle generally applied here seems to be that in a week of vacation for which the worker receives vacation pay he is not unemployed and is not eligible for benefits. If he is off due to lack of work or plant shutdown for reasons other than

vacation but if the collective bargaining agreement allocates vacation pay to such week or gives the employer the right to do so, and he does, the worker is deemed through his union to have agreed to such allocation and is not considered to be unemployed because wages were payable to him with respect to such week.

In the case of workers who lack sufficient seniority to qualify for vacation pay, but are out of work because of plant shutdown for vacation weeks designated or authorized by union-management agreement, courts have frequently applied the agency theory of collective bargaining. The union is cast in the role of the worker's agent. The union's act in negotiating the vacation plan is considered the act of the worker. The union's agreement that workers with service of less than a fixed period are not paid for the vacation period is construed as the voluntary agreement by those workers that they are to be unemployed for the vacation period without pay. Other courts have held to the contrary.

The Mississippi Supreme Court, Comm. v. Jackson, 237 Miss. 897, 116 So. (2d) 830 (1958), rendered a typical decision reflecting the application of the "agency theory." The claimants were employees of a clothing manufacturer. Their union's agreement with the employer provided that all employees who had been in the continuous employ of the employer three or more years prior to Christmas week should receive an additional week's vacation with pay to be taken during the Christmas week. By agreement with the union, the employer customarily closed during Christmas week as a vacation and inventory week. In 1957, the employer closed down for a period of three weeks, including Christmas week, to reduce inventory. Approximately one-half of the company's employees had sufficient service to qualify and were paid vacation pay for Christmas week. The other employees, including the claimants, did not have sufficient service to be entitled to vacation with pay during the Christmas week. These claimants were allowed benefits for the other two weeks of the shutdown but were not allowed benefits for Christmas week. The Board of Review in sustaining the disallowance of benefits for Christmas week was reversed by the Circuit Court but was sustained by the State Supreme Court.

In its decision the Board of Review cited the declaration of state public policy appearing in the law which declared involuntary unemployment a subject of general interest and concern and that the public good and the general welfare required the enactment of the law setting aside reserves to be used for the benefit of persons unemployed through no fault of their own. The Board of Review said:

> "The weight of authority seems to be throughout the country that where the vacations are in accordance with union contracts that the employee is voluntarily unemployed and therefore ineligible for benefits. The union represents the employee and he is bound by the contract that he is beneficiary of. Some employees in this case were not eligible for vacation, yet it is our opinion that they cannot claim the benefits of the union contract and not be bound by all of its provisions."

The Mississippi Supreme Court, in its decision sustaining the Board of Review, said:

> "The proof was sufficient to justify a finding by the Board of Review that it was impracticable to operate the plant during Christmas week in the absence of those employees entitled under the union contract to that week's vacation with pay, and that it was the general understanding that the plant would be closed during Christmas week."

The Court, in referring to a Massachusetts case, Moen v. Dir., 324 Mass. 246, 85 N.E. (2d) 779 (1949), said:

> "In that case the union contract was silent as to the status of those employees not entitled to vacation with pay while the plant was shut down for vacations of those employees entitled to paid vacations, and the union contract permitted the company to designate any period of temporary shutdown as the vacation period. The court held that those employees who were not entitled to vacation with pay were on vacation without pay. The basis of the decision denying benefits to those employees who were not entitled to vacations with pay was that such employees were voluntarily unemployed."

The Mississippi Supreme Court then went on to say:

> "The shutdown for Christmas week was in accordance with the union contract and the union represented all of the appellees. It cannot be said that appellees were unemployed within the meaning and purpose of the statute. They were not laid off; their employment had not been terminated, and the relationship of employer and employee continued during the week the plant was closed for the purposes stated. It is true that the proof showed appellees were willing to work during the vacation week if they could have obtained employment, but this does not mean that their absence from their regular employment during Christmas week was other than voluntary."

As an example of decisions to the contrary, the New Jersey Supreme Court in four decisions, Teichler v. Curtis Wright Corp., 133 A. (2d) 320, Roeblings Corp. v. Bodrog, 133 A. (2d) 331, O'Rourke v. Board of Review, 133 A. (2d) 333, and Watson v. U. S. Rubber Co., 133 A. (2d) 328, which it handed down on the same date in 1957, reversing its former decision in 1955, in the case of Glover v. Simmons Company, 111 A. (2d) 404 (1955), said:

> "Implicit throughout the opinion in Glover is the notion that a vacation without pay is not a sufficiently serious or reasonable hazard calling for protective economic devices such as those embodied in the unemployment compensation law. This notion would hardly find any acceptance among workers who may be dependent upon their weekly pay checks for their families' sustenance. In any event, these are matters of social policy which under our democratic form of government are left to the legislature rather than to the court. Nowhere in our unemployment compensation law is there to be found anything which suggests the exclusion of benefit payments to the payless worker who is ready, able, and willing to work but is unable to obtain it because his employer's plant is shut down for a vacation period."

In the case under consideration, Watson case, the claimant had gone to work for the U. S. Rubber Company at which time he became a member of the union which had a collective bargaining agreement with the employer. The union agreement provided for paid vacation for employees with seniority of one year or more. At the time the claimant was hired he was informed of this agreement and he was told that the company would shut down for vacation in about a month following the date he went to work. In referring to the claimant's unemployment at the time of the vacation shutdown, the New Jersey Court said the claimant's unemployment during the shutdown

could hardly be said to have been voluntary because he had no meaningful choice. The Court said:

> "He could not have rejected the tendered employment without rendering himself ineligible or disqualified for having refused suitable work and when the shutdown did occur he was given no alternative but to accept the lay off or vacation without pay."

In another one of these four cases, Teichler case, the New Jersey Supreme Court said:

> "It seems to us that a worker who is ready, willing and able to work but is left without work and pay because his employer's plant has temporarily shut down comes fairly within the broad coverage of the unemployment compensation law. The shutdown may be for a relatively short period or it may be for a relatively long period. In either event, the worker does not receive the weekly pay check upon which he and his family are generally dependent for their food and shelter. In good times as well as in bad there are unemployed persons who seek work and finally obtain it at plants which they understand may temporarily shut down thereafter. These persons are truly without employment during the payless shutdowns even though they will resume when the plants reopen. Where they have fully satisfied the statutory eligibility requirements and are subject to none of the statutory disqualifications they are justly entitled to the measure of protection against economic insecurity which the unemployment compensation law soundly affords for the welfare of our society."

In some cases the courts in determining whether or not the claimants were voluntarily unemployed by operation of the agency theory of collective bargaining during payless vacation weeks have examined the terms of the bargaining agreements, and have rejected this agency theory of voluntary unemployment in cases where the terms of the agreement did not require the closing of the business, where the agreement contemplated that ineligible employees would be given work during the vacation period, or where the closing of the business was not primarily for the purpose of providing vacations. In a case of this type, the Michigan Circuit Court had held in the case of Dach Underwear Company v. Commission, 80 N.W. (2d) 193 (1956), that clothing workers who were not entitled to vacation pay for lack of sufficient service and whose employer had shut down for a vacation period were voluntarily unemployed during that period and bound by the union contract as though they had individually agreed to take a vacation without pay. But, later in the Doyle Vacuum Cleaner case, Mich. E. S. Comm. v. App. Bd. and Doyle Vacuum Cleaner Co., Cir. Ct. Kent Co. (1958), the Court pointed out one difference in this case and the Dach case. Under the Dach Underwear Company contract the time for the annual vacation was not left to the employer or to subsequent agreement by the parties. The contract specified that all vacations would be taken during a specified week. In the Doyle Vacuum Cleaner case the contract provided that, "The company may in its discretion have a vacation shutdown for the first two full weeks beginning on and after August 1." In its decision in the Doyle case, the Court said:

> "In reviewing matters appealed to this Court under the Michigan Employment Security Act, the Court is ever mindful that its purpose, as set forth in Section 2 thereof, is the payment of unemployment benefits to workers who are involuntarily unemployed through no fault of their own. Being a form of remedial legislation the act must be accorded a liberal rather than a narrow or technical interpretation in the furtherance of

> that purpose. Whenever therefore it appears as a matter of fact that a claimant is involuntarily unemployed through no fault of his own, this court will not be disposed to cast about for loopholes in avoidance of the payment of benefits, nor (in the absence of clear and controlling precedent) be inclined to deny benefits upon the basis of mere technicality."

The Michigan Court went on to say:

> "The ordinary worker of today is, in many respects, a captive worker who, in the course of trying to earn a livelihood and keep a roof over his head, more often than not finds on obtaining work that he is bound willy-nilly under union and company agreements contracted without his knowledge, participation, or consent. Though it may well be that he is legally bound by such agreements, it is somewhat less than realistic not to recognize that there is very little free will about it all, considering that he can refrain from such employment only on penalty of going hungry."

An interesting point in the Doyle Vacuum Cleaner case was the Court's reference to the provision in the state law against a waiver by workers of their benefit rights. It cited this provision in the Michigan law as an argument against denying benefits. Other courts have considered the anti-waiver provision to be irrelevant in this type of case.

The issues involved and the concepts followed in retirement cases as affected by collective bargaining contracts are about the same as those dealing with vacations. The same two lines of thinking are reflected in these cases. One being that the unions are the bargaining agents for their members and that like all other agents acting within the scope of their authority bind their principals when they act just as though each member individually had entered into the agreement with the employer; the other view designating the union as the worker's representative for the limited purpose of securing for him fair and just wages and good working conditions. The latter view holds that the union cannot, by its act, deprive the individual member of that right or any other personal right he may have.

Typical of the first view is a case decided by the Supreme Court of Minnesota, Bergseth & Coonse v. Zinsmaster Baking Co., 89 N.W. (2d) 172 (1958). The claimants were members of a union whose contract with the employer provided for compulsory retirement. The union membership had accepted the mandatory retirement provisions by a majority vote at a regular meeting. The claimants had not attended this meeting although they were aware of it. The claimants were above the retirement age and were required to retire in accordance with the union contract. The Minnesota Supreme Court in holding that the claimants were subject to disqualification for discontinuing their employment voluntarily and without good cause attributable to the employer said:

> "When, for one reason or another, an employer is required to dismiss his employee pursuant to the collective bargaining agreement, questions regarding the voluntary or involuntary nature of the separation arises. By and large, if the contract contains reasonable provisions encompassing appropriate provisions for collective bargaining and is properly negotiated by the authorized agent and properly ratified by the union membership, it will be deemed to be the voluntary act of each individual member of the union, including the dissenters. The ratification forecloses any subsequent claim by an employee that actions which are encumbent upon him under the terms of the contract are involuntary and against his will."

The Court went on to say that any other result than disqualification in such a case "would destroy the principles of collective bargaining and render union-management contracts meaningless." The Court also said:

> "Unemployment compensation is designed as a cushion against the vagaries of sporadic losses of work for employees who are genuinely attached to the labor market and who fully expect to return. Retirement benefits, on the other hand, look to a withdrawal from the labor market and more nearly approximate a reward for past service."

A similar view was taken by the Superior Court of Pennsylvania, Warner Co. v. Bd. of Rev., 140 A. (2d) ___, April 16, 1958, CCH-Penna., Par. 8684, whose law does not contain the term "attributable to the employer," but which disqualifies a claimant if his unemployment is due to voluntarily leaving work without good cause of a necessitious and compelling nature. In the Pennsylvania case, the union agreement provided that an employee who reached a certain age could remain in the company's employ only with the consent of the company. The Court said that the claimant's retirement was "voluntary in the legal sense since his services were terminated under the provisions of a contract negotiated by his bargaining agent." The claimant argued that the agreement did not compel retirement but simply stripped the employee of his contractual job security. The Court, however, reasoned that "the claimant agreed to retire at age 68 if the employer did not consent that he remain in service."

An example of the opposing view is a New Jersey case, Campbell Soup Co. v. Bd. of Rev., 100 A. (2d) 287 (1953), in which the Supreme Court of that State put its stress on the facts at the time of separation, rather than on the agency theory of collective bargaining. The Court said:

> "If the inquiry is isolated to the time of termination, plainly none of the claimants left voluntarily in the sense that on his own he willed and intended at the time to leave his job. On the contrary, each claimant resisted his termination and left against his will only upon his employer's insistence that the contractual obligation gave neither of them any alternative but to sever the relationship."

The Court went on to say:

> "The legislature plainly intended that the reach of the subsection was to be limited to separations where the decision whether to go or to stay lay at the time with the worker alone and, even then, to bar him only if he left his work without good cause. The claimants here did not choose of their own volition to leave the employment of the company when they were separated. They left because they had no alternative but to submit to the employer's retirement policy, however that policy as presently constituted was originated. Their leaving in compliance with the policy was therefore involuntary for the purposes of the statute."

It seems that the prevailing view in the earlier cases supported the theory that workers are bound by their union contracts and are subject to disqualification upon compulsory retirements thereunder. In a good many of the later cases, the contrary view has been taken, and in some states where this concept has been followed in earlier cases, it has been overruled and reversed by their courts in later decisions. Also, in recent years a number of the state legislatures have dealt with these matters by placing in their laws specific provisions covering these issues. Several of these

amendments to the state laws have counteracted the principle laid down by their courts that the worker is subject to disqualification because of the acts of his union. In other states the amendments have affirmed this theory.

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Manpower and Employment Service

THE AREA REDEVELOPMENT ACT OF 1961 AND THE MANPOWER DEVELOPMENT AND TRAINING ACT OF 1962

By virtue of the enactment of the two statutes which are the subject of our present discussion, the job of the employment security lawyer has taken on a new dimension. Although for many years the Employment Security Program has involved close coordination and cooperation with training and training programs, we are now directly involved in the selection and referral for training as well as the payment of training allowances. Strain as we might, however, we have been unable to construe either the Area Redevelopment Act or the Manpower Development and Training Act to authorize payment of any training allowance to the participants of this Conference.

The Area Redevelopment Act (75 Stat. 47 P.L. 87-27) became law on May 1, 1961. It created an Area Redevelopment Administration in the Department of Commerce to assist areas of substantial and persistent unemployment and underemployment to take effective steps in planning and financing their economic redevelopment, and in creating new employment opportunities by developing and expanding new and existing facilities. To accomplish this objective, the Act provides for loans to business as well as loans and grants to public facilities to aid in financing projects in redevelopment areas for the purchase or the development of land and facilities for commercial or industrial use. Insofar as we are immediately concerned, the Act provides for training and the payment of training allowances for those unemployed or underemployed individuals residing in a redevelopment area who can reasonably be expected to obtain employment as a result of the skill they will acquire in the training which is being made available. Both the training and the training allowances as well as the loans and the grants are made contingent upon the filing of an overall economic development plan which must relate to a redevelopment area so designated by the Department of Commerce. Redevelopment areas are designated on the basis of the findings of the Secretary of Labor that the rate of unemployment is substantial and persistent. This finding is made in accordance with criteria spelled out in the Act which relate basically to the percentage of unemployment and a comparison of the percentage of unemployment with the national average.

Redevelopment areas may also be designated on the basis of other factors such as the percentage and number of low income families in an area and other considerations which are largely discretionary with special emphasis on Indian reservations and rural areas.

Administration of the training and training allowances is pursuant to agreements with the States and the training is furnished through arrangements made by the Department of Health, Education, and Welfare with training institutions.

To obtain training under the Act, the individual must reside in a city or county declared a redevelopment area. He must register with the nearest local office of the State employment service. He must be willing to take tests or otherwise qualify to participate in a training program. Once selected, on a merit basis, the individual must attend classes regularly and perform satisfactorily. Training allowances may be paid to a trainee while he is undergoing training. An individual

may not receive training allowances while he is receiving unemployment compensation. His eligibility for such training allowance is maintained through a weekly certification by the training institution or facility that he is undergoing training and is making satisfactory progress. A total of 4 ½ million dollars per year was authorized for the determination of the training needs of communities and individuals and for selection and referral of individuals for school or on-the-job training, and a total of ten million dollars was authorized annually for the payment of training allowances. The maximum period for which training allowances can be paid is sixteen weeks, but training programs are not so limited.

In the little more than one year that this Act has been in effect, there have been 883 redevelopment areas designated and in addition, 50 Indian reservations. These areas are located in 47 States, Puerto Rico, the Virgin Islands, Guam and American Samoa. There have been a total of 556 overall economic development plans submitted in addition to plans for 23 Indian reservations. Of this number the plans for 447 areas and 13 Indian reservations have been provisionally approved, involving 172 projects in 34 States and American Samoa with an estimated impact on employment of 9,646 jobs. The training programs approved have involved such diverse occupational skills, as farm machinery operators, ship electricians, elevator operators, clerk typists, nurses aids, electronic mechanics, welders, draftsmen and psychiatric aids.

Both the Area Redevelopment Act and the Manpower Development and Training Act are good examples of what some text writers consider a dangerously growing trend in the legislative process, that is, the Congress lays down the broad policy principles in the statute and leaves the details to interpretation and the promulgation of regulations. As we all know, in many cases this puts the lawyer in the business of guessing the legislative intent rather than actually ascertaining it. For example, the Area Redevelopment Act includes American Samoa in the definition of a State. The Act, however, provides that the amount of training allowances to be paid an individual in a State shall be equal to the amount of the average weekly unemployment compensation payment payable for a week of total unemployment in the State making such payments. Since American Samoa has no unemployment compensation law, this language literally requires the conclusion that the amount of training allowance payable in American Samoa is zero. Since American Samoa was, however, included in the definition of a State, training can be furnished in American Samoa. This anomaly in the statute prompted some rather startling suggested interpretations. The lawyers in fact were urged to construe the statute to authorize the payment of training allowances in American Samoa in an amount equal to the amount payable in the State of Hawaii on the rationale that they were both located in the Pacific Ocean. The consequences of such a construction, aside from the obvious legal vulnerability would have been that individuals in American Samoa would have been drawing training allowances approximately three times the amount of the average wage payable in that jurisdiction. In this instance, the attorneys successfully defended the disappearing distinction between interpreting and legislating and refused to so rewrite the statute. It might be noted parenthetically that in the Manpower Development and Training Act, American Samoa, is not included at all.

Another example of interpretative legerdemain is the construction arrived at with respect to the terms "unemployed" and "underemployed". Conspicuously absent from both the Area Redevelopment Act and the Manpower Development and Training Act is any definition of these terms although their meaning is fundamental to the scope of both programs. The concept of "unemployed" is certainly not an alien one to the Employment Security lawyer but the term "underemployed", particularly when

placed in the framework of a concept of unemployment which includes partial employment, has placed the lawyer in the arena with a ghost. The definitions ultimately adopted under the Area Redevelopment Act were that the "unemployed individual" was one who is able to work and available for full time employment and has no job. An "underemployed individual" is one who is able to work full time and available for full time employment but who is working substantially less than full time or is working at a level of skill substantially below his demonstrated level or is engaged in subsistence farming. We will meet these terms again as applied to the Manpower Development and Training Act in which they, like a chameleon, have changed their appearance somewhat. I believe we must resign ourselves, however, to the addition of the "underemployed individual" to our standard jargon along with "exhaustees", "high quarter fractions", "the ABC test" and "benefit wage ratios".

Another feature of the Area Redevelopment Act which required considerable interpretative padding was the complete silence in the Act, as well as the legislative history, regarding the effect of any earnings upon the receipt of training allowances. Clearly with a concept of underemployment in the Act and the recognition that the underemployed were to receive benefits, some allowance for earnings had to be made. The formula ultimately adopted, based in large part on a sort of common denominator of State practice, is that up to 50 percent of the benefit amount can be earned without reduction of the benefits; everything over 50 percent is deducted from the benefit amount. The best legal defense that can be made for this construction is that although it may be an addition to the statute rather than an amplification of it, it is a necessary addition consistent with and required by other features of the law. On the assumption that in the past year you have all been exposed to the Area Redevelopment Act, I will not go into any greater detail but will concentrate rather on the Manpower Development and Training Act which as a new statute I believe presents the opportunity to be more informative.

After approximately one years' experience with the Area Redevelopment Act the Manpower Development and Training Act (76 Stat. 23, P.L. 87-415) came into being on March 15, 1962. Rather than solve many of the interpretative problems encountered under the Area Redevelopment Act the Manpower Development Act perpetuated them and created new ones, probably on the assumption that since these problems were solved under the former Act, they could likewise be solved under the latter. In one respect, however, the legal problems were considerably simplified; whereas the administration of the Area Redevelopment Act involved the participation of almost every Federal agency from the Bureau of Indian Affairs through the Small Business Administration, the Manpower Development and Training Act is fundamentally administered by the Department of Labor and the Department of Health, Education, and Welfare.

As a big brother to the training aspects of the Area Redevelopment Act, the Manpower Development and Training Act is in the words of President Kennedy". . . perhaps the most significant legislation in the area of employment since the historic Employment Act of 1946. The new training program will give real meaning to the Act by making possible the training of hundreds of thousands of workers who are denied employment because they do not possess the skills required by our constantly changing economy. Their training is important both to them as individuals and to the economic health of the entire Nation." Echoing this sentiment Secretary Goldberg also stated "I consider the Manpower Development and Training Act of 1962 to be a milestone among legislative measures in behalf of the working men and women in this country and a key element in maintaining the economic stability of our economy."

In very broad outlines this Act authorizes; first a comprehensive research program to identify current and future manpower requirements and resources by occupations and planning on the basis of such information; and second, a far reaching training program to prepare individuals for jobs which they can reasonably be expected to obtain with training and to provide them with certain income and necessary tranportation and subsistence allowances while they are taking training. The research as well as the training emphasis is placed upon the long-term "hard core unemployed", those displaced by technological developments (or automation), young people just entering the labor market, and those unemployed or underemployed because of insufficient skills.

Aside from the broad scope of the authority for research and study under the Act, the training and training allowances provided thereunder basically follow the tradtional pattern. The Act provides for administration of both the training and training allowances through agreements with the States whereby selection and referral of trainees will be made to training facilities, either on-the-job arranged by the Department of Labor, or educational institutions arranged for by the Department of Health, Education, and Welfare. The Federal Government will pay the total cost of vocational training of the unemployed through June 30, 1964, after which States which continue to participate in the program will bear half the cost. The cost of training other persons will be borne equally by the Federal and State governments throughout the program.

On-the-job training programs may be set up by States and by private and public agencies, employers, trade associations, labor organizations, and other industrial and community groups. Program sponsors will be required to meet standards established by the Secretary of Labor for facilities, curricula, etc., and necessary arrangements will be made for supplementary classroom instruction whenever it is needed.

Operation of training programs under the Act is to extend from July 1, 1962 through June 30, 1965.

Priority in selection of persons to be trained under the Act goes to those who are currently unemployed. Priority is also to be extended to persons to be trained for skills needed first in their area of residence and, second, in their State of residence. Workers in farm families with an annual net income of less than $1,200 are considered unemployed.

Among other persons selected for training will be workers who are under-employed and those who are employed full time but who have the capacity and desire to up-grade or up-date their skills. Special programs may be provided for occupational training and further schooling of youths 16 years of age through 21 years of age.

Training procedure is expected to be as follows:

Potential trainees will apply or will be called into their local public employment office. There, they will be interviewed, counseled, and, in some instances, tested to determine their interest in and suitability and aptitude for occupational training. The occupations for which training will be provided are those in which labor shortages have been found to exist. The persons selected will be referred to a specific vocational training course or to an appropriate on-the-job training program.

The exact length of the training period may vary greatly, depending on the skill being taught.

Training curricula will be developed by State vocational education authorities, who will also be responsible for providing space, equipment, and instructors. The progress of each person referred to training will be followed closely. If he does not maintain a satisfactory attendance record or does not make suitable progress in his course, he may be dropped from the program.

Trainees who complete a course of vocational study will return to their local employment office for further counseling and for placement service. Presumably most trainees enrolled in on-the-job courses will continue employment in the establishments where they were trained. The Act provides that there shall be reasonable expectation of employment in an occupation for which training is provided.

The Act provides for payment of weekly allowances to persons who are unemployed, have a minimum of 3 years' experience in gainful employment, are either heads of families or heads of households and who are selected for and enrolled in training courses established under the Act. A small amount of funds are available for training allowances which may be paid (at the rate of up to $20 a week) to unemployed youths who are over 19 but under 22 years of age and who do not qualify for a regular training allowance. The maximum number of weeks training allowances may be paid is 52.

Generally, the weekly training allowance will be an amount equal to the average weekly unemployment insurance payment in the State (including dependents' allowances in those States which provide them) for total unemployment during the most recent calendar quarter for which data are available. In no event will a trainee, eligible for unemployment insurance, be penalized financially for being enrolled in training. If, for example, his entitlement to unemployment insurance benefits is higher than the training allowance, he may receive an allowance equal to the higher unemployment benefit amount while training. Conversely, if the training allowance is higher than his unemployment insurance entitlement, a trainee would be eligible for the higher training allowance.

The training allowance for a person who is employed while taking training will be reduced by an amount which bears the same ratio to the training allowance as the number of compensated hours per week bears to 40.

A trainee may receive transportation and subsistence expenses for separate maintenance (not to exceed $35 a week, at the rate of $5 a day for subsistence, and 10 cents a mile for transportation) when training facilities are not located within commuting distance of his regular place of residence.

The Secretary of Labor is to determine the amount of the training allowance in Guam and the Virgin Islands.

Reconsideration and review of determinations with respect to entitlement to training allowances under the Act is provided through the regular administrative appellate procedure applicable to unemployment insurance claims but no recourse is provided to the State courts. Upon the request of a trainee or a State agency or upon the Secretary of Labor's own motion, a decision of the authority in the State that has the final administrative jurisdiction of unemployment insurance appeals may be appealed to the Secretary. The Secretary's decision is also made final and conclusive and precludes recourse to the courts.

As was mentioned earlier, the terms "unemployed" and "underemployed" are also used in this Act without being defined. The Act, however, unlike the Area Redevelopment Act permits payment of training allowances only to the unemployed. In view of the formula, expressly specified in the law, for the reduction of training allowances when an on-the-job trainee has compensated hours, and the clear statement in the Conference Committee Report accompanying the final bill that the same limits on training allowances would be applicable to other occupational training, it was quite apparent that the definition of "unemployed" must include some concept of partial employment. The formula for reduction of benefits, moreover, is in accordance with the ratio that compensated hours bears to 40 hours per week. For example, an individual compensated for 20 hours would receive 20/40ths or $\frac{1}{2}$ of the training allowance. It follows necessarily, therefore, that an individual compensated for 39 hours would receive one fortieth of the training allowance and accordingly the definition of "unemployed" must recognize partial employment up to as much as 39 hours per week. It is evident that such a concept of "unemployment" overlaps materially with the concept of "underemployment" which in the Area Redevelopment Act was defined as employment at substantially less than full time. The resolution of this question involved the adoption of a duel concept of unemployment; (1) in relation to the extension of priorities for selection and referral to training and (2) with respect to the payment of training allowances. The term "unemployed individual" has accordingly been defined for purpose of priority in selection for training as an individual who is able to work, available for full time employment and has no job or is a member of a farm family which has less than $1,200 annual net farm family income and for the purpose of paying training allowances as an individual who has worked less than 40 compensated hours in the week or worked less than a full work week scheduled for his industry or occupation. The term "underemployed individual", since under the Manpower Development and Training Act it has meaning only with reference to priority in selection for training, has been defined as an individual working below his skill capacity or one who is working less than full time in his industry or occupation or one who will be unemployed because his skill has become obsolete. These definitions have further significance in connection with the authority of the Department of Health, Education, and Welfare to pay either 100 percent of the training cost or only 50 percent of the training cost. The Act authorizes the payment of 100 percent of the training cost only for the unemployed. Others receiving training under the Act would have their training cost paid 50 percent by the Federal Government and 50 percent by the States. We have been advised that the Department of Health, Education and Welfare will adopt the definition of "unemployed" for this purpose which we have set forth as applicable to the payment of benefits.

Since the Act provides for an increased amount of training allowances whenever the trainee would be entitled to a higher amount under the State unemployment compensation law but for the training, the question was raised whether the higher amount was payable under the Act throughout the 52 weeks of training or only for as long as the higher unemployment insurance benefit would have been paid. The conclusion was reached that the higher amount would remain in effect only for as long as the unemployment insurance benefit would have been paid at the higher rate. But this in turn, like a chain reaction, prompted a more difficult question. Since the Act also provides for reimbursement to the States who pay unemployment compensation during the period an individual is taking training, the theory was advanced that the immediate reimbursement of amounts paid under State law immediately again made that amount available to the claimant under the State law. This in effect would have moved one week's entitlement to a higher unemployment benefit under the

State law throughout the 52 week period by virtue of the reimbursement. This problem has in the meantime become largely academic by virtue of the construction of the Federal Act which permits payment of the Federal allowance even though an individual may be entitled to benefits under the State law but does not seek them. The practical result appears to be that claimants when advised that they may draw a Federal benefit throughout the period of their training in an amount no less than their entitlement to State unemployment compensation would probably draw that Federal benefit and preserve their eligibility under the State law.

Three provisions of the Manpower Development and Training Act provide for determination of "good cause". Under Section 202(g) the training facility must determine whether a trainee is making satisfactory progress and has satisfactorily attended, absent good cause. Although the language in Section 202(g) does not seem to contemplate termination of the training where the conclusion was reached that the failure to have satisfactory attendance or to make satisfactory progress was with good cause, on the basis of sheer logic we have been constrained to construe this provision as warranting termination of the training but that under such circumstances the trainee would not be disqualified for further training for one year thereafter. This construction necessarily involves some mutual understanding with the Department of Health, Education, and Welfare since the training facility will be making these determinations in accordance with criteria prescribed by that Department. In Section 203(f) and 203(i) the term "good cause" also appears in connection with disqualification for training allowances for refusing to accept training under the Act "without good cause" and in connection with termination of an occupational training program under the Act or any other Federal Act for "other than good cause". In these two areas the definition adopted under the Act is basically in terms of justifiable reasons beyond the control of the individual and is left to the expertise of State agency personnel who have had wide experience in the administration of this same concept under unemployment insurance laws.

Another example of interpretative ingenuity which we were compeled to resort to in order to avoid a complete emasculation of the intent of the Act involved the definition of the terms "head of family" and "head of household". The Act requires, in order to be eligible for a training allowance that the individual be either the head of the household or the head of the family. The term "head of household" according to the Act must be construed as that term is defined in the Internal Revenue Code. The Internal Revenue Code's definition, however, states "that an individual shall be considered as maintaining a household only if over half of the cost of maintaining the household is furnished by such individual". Obviously this is a test which would be rather difficult for an indvidual to meet and simultaneously to be unemployed. It accordingly became necessary to adopt a definition of the term "head of family" (which the Act does not require to follow any Internal Revenue Code definition) which was more in keeping with the general purpose of the statute. That term has accordingly been defined as any individual who is responsible for supporting and maintaining a household or home for a dependent or dependents.

Time does not permit any further detailed exposition of the various terms and concepts adopted in the statute which were not spelled out and which the attorneys were required to amplify and justify. For example, "commuting area", "residence", "annual net farm family income", "three years' experience in gainful employment", and "further schooling" are all terms susceptible of various interpretations. Those adopted can perhaps best be defended on the grounds that they appear to be reasonable and by resting heavily on the maxim that remedial legislation is to be

broadly construed in favor of accomplishing its social purpose. Even such a simple term as "youth" presented a problem since in one place in the Act it was described as an individual 16 years of age or older. Although extremely flattering, this dream had to be shattered since it was clearly incompatible with several other features in the law.

Before terminating this account of perplexing problems and perhaps even more perplexing solutions, may I caution you all that the future holds promise of even more fertile fields for statutory construction. On June 12, the House Committee on Ways and Means reported favorably on H. R. 11970 "The Trade Expansion Act of 1962." Without attempting to go into any detail on this measure, in relation to our topic today, it would authorize in certain circumstances adjustment assistance to industries, firms, and workers who may be seriously injured or threatened with serious injury by increased imports resulting from trade agreements concessions.

Adversely affected workers would be eligible to receive adjustment assistance, in the form of weekly allowances (payable during periods of unemployment or retraining), and, in certain cases, relocation allowances. Allowances would be payable only to workers who have been employed substantially over the previous 3 years, who have been attached for at least 6 months in the last year to a firm or firms or subdivisions thereof found to be affected by imports, and who have become unemployed because of lack of work due to the effect of increased imports on such a firm after the enactment of the bill.

The trade adjustment allowance would be 65 percent of the worker's average weekly wage, subject to a limitation of 65 percent of the national average manufacturing wage. These allowances would be received for a duration of no more than 52 weeks, with two exceptions--one to assist in completing retraining and one for workers over 60. Allowances would not be paid to workers who refuse, without good cause, to take or complete retraining unless they accept or return to approved retraining.

The only comforting thought I can extend to the Employment Security lawyer, both State and Federal, who has already wandered through the interpretative jungle of UCV, UCFE, UCX, TUC, and TEUC is that by virtue of the ARA and MDTA, he will certainly never be "underemployed".

A. M. Frazier
New Mexico

LABOR DISPUTES

Exceptions from Disqualifications:

1. Participation;
2. Direct Interest;
3. Grade or Class.

This subject, as assigned to me originally for an earlier conference but deferred for one reason or another, involves the type of labor dispute disqualification provisions common to all of the states present except Alabama, Kentucky and Ohio. Otherwise, all of the statutes here of interest involve disqualification due to a stoppage of work caused by a labor dispute at the establishment where the claimants are or were employed. All such employees are disqualified unless and until it is established that they are not participating, (or financing), and not directly interested in the labor dispute; and do not belong to a grade or class of employees any of whom are so involved.

The New Mexico statute is typical of a numerous group of state laws operating similarly, and is as follows:

> "59-9-5. Disqualification for Benefits.--An individual shall be disqualified for benefits--
>
> .....
> "(d) For any week with respect to which the Commission finds that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; provided, that this subsection shall not apply if it is shown to the satisfaction of the Commission that--
>
> "(1) He is not participating in 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 directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises."

The discussion which follows is intended to deal with the exceptions from disqualification in such a way as may be helpful in resolving issues arising under five points, whether the opinion you may be called on to write, or the administrative decision you may be called on to defend, is on facts calling for the payment of benefits or for disqualification. Briefly, the five issues which may and very often will arise in labor dispute cases require examination of (1) the public policy behind your unemployment compensation law, (2) the burden of proof as between the employer and the

employees involved. Assuming that the general disqualification may apply, are the claimants eligible to be paid benefits as satisfying all three conditions for exception? These will be treated as the third, fourth and fifth points.

> 1. The public policy found at the beginning of most of our state laws, as a guide to interpretation and application of the act, declares that the public good and the general welfare of the citizens of the state require the compulsory setting aside of unemployment reserves to be used for the benefits of persons involuntarily unemployed through no fault of their own.

This public policy has become an issue in numerous labor dispute cases. Seemingly it could always be an issue in cases where benefits are claimed by non-striking employees during a strike because the immediate question always arises as to why they are unemployed, when they are not numbered among the striking union or unions. Cases where a declaration of public policy was examined as a determinative factor or issue include the following, among others:

Abshier et al v. Review Board of Indiana, 122 Ind.App. 425, 105 N.E.2d 902 (1952) involved appeals (numbering 1,253) of production and maintenance workers, who refused to cross picket lines of striking plant guards to effectuate the strike, in which appellants had nothing but a sympathetic interest. The court first noted its approval of the cases from other courts holding that refusal to cross picket lines is "participation" in the strike, but decided the case against the appellants on another ground, denying them benefits under the "grade or class" disqualification. The court then said, at page 904, referring to a similar declaration of public policy:

> "Furthermore, this court has held that voluntary unemployment is not compensable under the declared purpose of the Act to provide benefits for persons unemployed through no fault of their own." (Citing Bedwell vs. Review Board, 119 Ind.App. 607, 88 N.E.2d 916, 1949.)

Drylie v. Board of Review of Pennsylvania, 161 Pa.Super. 211, 56 A.2d 272 (1948) involved the appeal of a beer distributor's employee, who on advice of his union left his job in sympathy with strikers at the brewery supplying the beer. In denying benefits the Court said, among other things:

> "Unemployment Compensation under such circumstances is not contemplated by the act and is not within its purpose as declared by § 3 (citing statute). This section is a declaration of public policy but within definite limits. And the unemployment of a workman, who even on order of his union joins in a sympathy strike for an illegal purpose, is in violation of the declared purpose of the act and must be regarded as voluntary and without good cause."

In Local Union No. 11 v. Gordon, 396 Ill. 293, 71 N.E.2d 637 (1947) where the court, in upholding disqualification in a labor dispute case, called a similar declaration of policy "an invaluable guide to legislative intent," and found that the unemployment due to the dispute was not involuntary.

See also Walgreen Co. v. Murphy, 386 Ill. 32, 53 N.E.2d 390 (1944); Department of Labor and Industry v. Board of Review, (In re Stewart), 148 Pa.Super. 246, 24 A.2d 667 (1942). The latter case, where benefits were denied, is remarkable in its flat

holding that the Pennsylvania act's declaration of public policy (almost identical with New Mexico) is "not a mere preamble to the statute, but a constituent part of it," and that benefit eligibility provisions "must all be read and construed as subject to this basic and fundamental declaration."

Other cases are reported in Commerce Clearing House Unemployment Insurance Service from time to time.

2. It has usually been held that the burden of proof with respect to eligibility for benefits is upon the claimant, due to the public policy just mentioned, and due to the express language of the typical labor dispute disqualification.

The New Mexico labor dispute section has been set forth, providing that a claimant may escape disqualification only if it is shown to the satisfaction of the Commission that he is not participating or directly interested in the labor dispute, and does not belong to a grade or class, any of whom are so involved. The authorities on this point are quite numerous. Mention of some of them follows. These authorities have quite universally placed this burden upon the claimants. 28 A.L.R.2d 287, at page 331, and the cases cited there; Haggart, Unemployment Compensation During Labor Dispute, 37 Nebr. L. Rev. 668, at page 680 (1958). Among the cases cited by these authorities are the following: A. Borchmann Sons v. Carpenter, 166 Neb. 322, 35 S.C.J. 322, 89 N.W.2d 123 (1958); Lanyon v. Administrator, Unemployment C. Act, 139 Conn. 20, 89 A. 2d 558 (1952); Brown Shoe Co. v. Gordon, 405 Ill. 384, 91 N.E.2d 381 (1950); Auker v. Review Board, 117 Ind.App. 486, 71 N.E.2d 629 (1947); Lloyd E. Mitchell, Inc. v. Maryland Employment Sec. Bd., 209 Md. 237, 121 A.2d 198 (1956); Martineau v. Director of Div. of Employment Sec., 329 Mass. 44, 106 N.E.2d 420 (1952); Producers Produce Co. v. Industrial Commission, 365 Mo. 996, 291 S.W.2d 166 (1956); Schooley v. Bd. of Rev., 43 N.J.Super. 381, 128 A.2d 708 (1957); State ex rel. Employment Security Commission v. Jarrell, et al., 231 N.C. 381, 57 S.E.2d 403 (1950); Kontner v. Unemployment Comp. Bd. of Rev., 148 Ohio St. 614, 76 N.E.2d 611 (1947); Westinghouse Electric Corp. v. Unemployment Compensation Board of Review, 165 Pa.Super. 385, 68 A.2d 393 (1949); Re Appeals of Employees of Polson Lumber and Shingle Mills, 19 Wash.2d 467, 143 P.2d 316 (1943); Copen, et al. v. Hix, et al., 130 W.Va. 343, 43 S.E.2d 382 (1947).

3. To escape disqualification, the claimant must first show that he is not participating in the labor dispute.

"Participation" and "direct interest," (with "financing" often added), are coupled in a single sentence in the typical statute. In my experience it has always been found that "participation" and "direct interest" must be treated separately. This will be done in what follows.

It will be realized that not all of the numerous forms of participation can be discussed here. Starting with the assumption that some of the employees at an establishment have struck, and that others have simultaneously or soon after absented themselves from work and have claimed benefits, it will have to be determined with respect to each claimant whether he is participating in the strike. Forms of participation may be active and direct, such as joining in the picketing or patrolling the picket areas; publicly supporting and endorsing the strike; holding meetings where the strike is discussed, members polled and action decided on; participating in a system of permits as a condition to returning to work. But where such direct and open participation is not found, the claimants may explain their unemployment and failure to report for work

with various statements. On the one hand, if the claimant reports for work at his assigned place, with or without crossing the picket line and is ready to work but is told there is none, he has clearly indicated that he is not a participant, actively or otherwise, in the dispute.

But the problem is more difficult where the claimant, absent from work from the beginning of the strike, explains his unemployment in one of various other ways.

To make a determination, it must first be determined whether his failure to report for work and his absence from the premises is due to the presence of picket lines which he will not cross. There are numerous authorities for guidance in making this determination.

The settled law of the country seems to be that failure or refusal of non-strikers to cross the picket lines of another union makes them participants in the labor dispute. The cases so holding are gathered and discussed in the Annotation, 28 A.L.R.2d 333-337; Commerce Clearing House Unemployment Insurance Service, Paragraph 1980 on page 4507; Haggart, Unemployment Compensation During Labor Dispute, 37 Nebr. L. Rev., 668.

Claimants may show that they would have met violence and bodily harm at the picket lines on reporting for work. This may be a valid and effective reason for not crossing the picket lines, but not if the picketing is peaceful and orderly. Where this exception has occasionally been recognized, the cases have pointed out that the evidence must show real and not simulated fear. Shell Oil Co. v. Cummins, 7 Ill. 2d 329, 131 N.E.2d 64 (1956)--"a reasonable fear" of "violence or bodily harm"; Texas Co. v. Texas Employment Commission, 261 S.W.2d 178, (Tex. Civ. App., 1953)-- "a well founded fear of violence and bodily harm"; Steamship Trade Association of Baltimore, Inc. v. Davis, 190 Md. 215, 57 A.2d 818 (1948); see Brechu v. Rapid Transit Company, 20 Conn.Sup. 210, 131 A.2d 211, at 216 (1957), stating that "the question is whether the refusal was voluntary, so that the resulting unemployment was voluntary, and, so, of course not compensable, or whether the refusal was involuntary because of actual physical obstruction to passage or an honest and reasonable fear of probability of physical injury if an attempt to cross the picket line is made." (Emphasis supplied in each instance.) These cases show that there must be both an actual fear and a well-founded or reasonable basis in fact for that fear. For a recent case and a full discussion, see Achenbach v. Review Board, Ind.Sup.Ct., CCH, page 17, 716.

The courts will presume that picketing will be conducted lawfully. In Steamship Trade Association of Baltimore, Inc. v. Davis, 190 Md. 215, 57 A.2d 818 (1948), the Maryland Supreme Court said at page 820:

> "The courts must presume that strikers are law abiding. There must be more than a mere theatrical threat of violence. The fear of violence must be real and not nebulous. Just because claimants say that they are afraid of the pickets is not enough and the mere presence of the pickets is not enough to excuse claimants from crossing the picket lines." (Emphasis added.)

Other courts have agreed with the Maryland Court that the court must presume picketing will be conducted within the limits prescribed by law. See, for example, Lexes et al v. Industrial Commission, 243 P. 2d 964 (Utah, 1952); Meyer v. Industrial Commission of Missouri, 240 Mo.App. 1022, 223 S.W.2d 835 (1949); Bodinson Manufactur-

ing Co. v. California Employment Commission, 17 Cal.2d 321, 109 P.2d 935 (1941).

In a situation occurring frequently in my experience, there may be an additional fact to be weighed in determining whether fear of the picket line was real and not simulated. In New Mexico, small towns and communities surround or are surrounded by copper mining and potash mining operations, which are continuous, closely integrated and interconnected operations carried on usually by employees of the community grouped into from four to ten unions. Non-striking claimants may invoke fear of violence to excuse their failure to cross the picket lines of one or more striking unions, although all of the striking and non-striking employees are neighbors, friends, and daily associates, regardless of union affiliation, with no past record of violence on any picket line. Real fear probably does not exist here.

A second explanation may be offered by claimants for failure to cross picket lines, and may or may not be found valid. This is a case where their explanation is that the operation had shut down, and that their work was not available to them, or that they thought it was probably not available, due to cessation of the work of the strikers. Under some circumstances this will excuse non-striking claimants from crossing picket lines to their duty stations. There are lines of authorities which have been cited both ways under a variety of facts.

In one line of cases, non-striking claimants have been held eligible for benefits during a strike by other employees at the establishment. In a recent case in which the New Mexico Employment Security Commission denied benefits to non-strikers during a labor dispute which caused a stoppage at a copper mine and mill, this denial was appealed to the district court, and thence to our Supreme Court, where it is now pending. The authorities in the matter were brought together in a brief defending the Commission's decision, from which the following is taken, to the conclusion of the discussion on this point:

In their briefs and arguments in District Court, claimants' counsel cited, among other cases, Great A. & P. Tea Co. v. New Jersey Department of Labor and Industry, 29 N.J.Super, 26, 101 A.2d 573, as holding that the abandonment of operations two days after a strike qualified the strikers for benefits. But that is clearly distinguishable from the case at bar because permanent arrangements for discontinuing the claimants' operations were made by the employer in that case shortly after the strike commenced, and their jobs were gone for good. Also cited as authority by the IAM was Diaz v. Koppers Co., 133 N.E.2d 797, a New Jersey case, for the proposition that claimants who had no connection with the strike and were laid off by the employer due to lack of work, were entitled to draw benefits. In view of the layoff, severing the employment relation, the case is clearly not in point. In In Re: Bucklaew, 96 N.Y.S.2d 875, a New York case relied on by IAM and BRT, the claimant in question was an employee of an electrical contractor, whereas the strike was by employees of other contractors. The strikers erected no structures on which the claimant could install electrical apparatus, as he must have known. Obviously this clearly distinguishes the case. Another case brought forward by the IAM, Buckeye Coal Company v. U.C. Board of Review, 161 Pa.Super 594, 56 A.2d 393, is not in point for the reason that the work claimed to be available to the claimant was "new work," so far as the claimant was concerned, which brings it within the meaning of a different and unrelated subsection of disqualification provisions such as ours--Sec. 59-9-5(c)(2) in our act.

Cases to which we were cited by other claimants' counsel, seeimingly as having some bearing on this point (the claim of lack of work at Kennecott), will be mentioned, as it is important to show that they clearly bear little or no relation to the claimants' case, on either the facts or the law. We will make this as brief as possible.

Barrett v. Wasson, 404 Ill. 11, 87 N.E.2d 769. There actually was no work for the claimants because the mine operator, dissatisfied with the price of coal, withdrew from the operators association, closed down operations, dismantled and removed machinery, told claimants "No more work until further notice." There was no strike, no picket lines. The men reported for work, but were turned away. We would agree with this decision allowing benefits.

Dept. of Indust. Rel. v. Drummond, 30 Ala.App. 76, 1 So.2d 396, cited by BRT. There actually was no work for claimant, because the mine operator, Tennessee Coal and Iron Company, with a strike in progress at another mine, closed both down. There was no strike, no dispute, no picket lines at the mine where claimant worked. The men there wanted to work, urged the employer to continue operations, but were refused. The court allowed benefits (noting that in Alabama the employees as well as employers contribute to the fund, thus had "bought and paid for" benefits). But even on such facts the court divided, the Presiding Judge dissenting in a strong opinion. This case is no authority in the case at bar.

Wicklund v. Com. of U.C. and Pl., 18 Wash.2d 206, 138 P.2d 876, cited by all claimants' counsel. Again, there was no work. The Loggers' union wanted logging-train handlers to join their union, and struck in the woods, refused to load cars, when trainmen refused to join up. Trainmen wanted to continue working, reported for work and performed all the work available. The case turned on the finding that trainmen were not "directly interested" in the strike, and the case did not involve participation, refusal to cross picket lines, or the presence or absence of work. Case turned on absence of direct interest, by court's definition.

Outboard, Marine etc. v. Gordon, 403 Ill. 523, 87 N.E.2d 610, cited by BRT. Again there was actually no work for claimants, office workers, when factory workers struck and the employer and the striking union agreed to shut down, lock the gates, and allow no one to enter except on permits. Office workers were not faced with a picket line, had a satisfactory contract, were ready to work, but were denied entry. Case turned on the employer's action barring entry or work, and on lack of any direct interest, by court's definition.

U.S. Steel Corp. v. Garris, 267 Ala. 698, 104 S.2d 327, cited by BRT. There was no work for members of the railroad Brotherhoods at Tennessee Coal and Iron Company during the United Steelworkers' strike, because the company followed the fixed practice of ten years, of closing completely down at the inception of a strike. (See Usher v. Dept. of Ind. Rel., Alabama Sup.Ct. 1954, 75 So.2d 165.) Witness the Drummond case, where that company shut down both mines over a dispute at one.

U.S. Steel v. Grimes, 267 Ala. 698, 104 S.2d 329, a BRT case. Court rules claimant work was at a "separate establishment," an entirely different issue not raised in case at bar.

In Re Wettlaufer, 96 N.Y.S.2d 877, 277 A.2d 805, cited by MTC. There was no work at other jobs for the claimant, an electrician, when he reported to his employer's office after refusing to cross another union's picket lines to the work assigned him at

a job site where his employer had the electrical contract. The court found he had not lost his employment "as a result of an industrial controversy"--the language of the New York law. Unless this different language of the New York statute or the claimant's reporting back to his employer accounts for the decision, the case is hard to reconcile with our view. We agree with the dissenting opinion in the case.

We have here treated with all of the cases by which the claimants have sought to show that lack of work excused them from crossing the picket lines and from disqualification. We believe we have analyzed them fairly, and have distinguished them from the case at bar. Witness: in at least six of the cases lack of work was due to positive employer action withdrawing it, in only two cases was it due solely to a labor dispute; in five cases picket lines were not involved; in five cases claimants willingly worked on until the work was exhausted, or reported ready to work; five of the cases turned on other issues not involving participation in the dispute, for example, an offer of "new" work, absence of "direct interest", labor dispute at "separate establishment". Only in the Wettlaufer case did the claimant refuse to cross picket lines to continue work apparently still available. This is against the heavily prevailing view--which is recognized, as noted above on page 7, by all counsel for claimants, which is that failure to cross picket lines is participation.

Representing perhaps the weight of better authority, the following cases have realistically probed the excuse of lack of work, where non-strikers failed to cross picket lines to report for work:

In Lloyd E. Mitchell, Inc. v. Maryland Employment Security Board, 209 Md. 237, 121 A. 2d 198 (1956), claimants who failed to cross the picket line argued that the reason for their unemployment was that work was not actually available to them. The employer testified that had the men reported work would have been available but that he took the precaution of securing his equipment because he felt sure the men would not report. The Maryland Court of Appeals emphasized that the burden to show non-participation was on the claimants and states that claimants' burden "to show they were not participating in the labor dispute is not met by a mere showing that the employer secured its equipment before an actual test....." The court stressed that as a practical matter the employer had to secure his equipment before the employees left the job and that he should not be penalized for doing "what reasonably prudence would suggest." Accord: Dept. of Industrial Relations v. Savage, 6 Ala.App. 913, 82 S.2d 435, 439 (1955).

The Maryland Court also indicated that in order to escape disqualification for participation claimants must show a final overt act by the employer making employment impossible.

In Matson Terminals, Inc. et al v. California Employment Commission, 24 Cal.2d 695, 151 P.2d 202 (1944), where longshoremen were disqualified for "leaving work because of a trade dispute" by honoring the picket line of the clerks, the California Supreme Court held it immaterial to the question of availability of work that some of the claimants were not instructed to return to work or to go to the hiring hall. "Their work was available to them as it had been in the past, but pursuant to union principles they voluntarily refused it." Accord: Andreas v. Bates, 14 Wash.2d 322, 128 P.2d 300 (1942).

In Barker v. Powhatan Mining Co., 146 Ohio St. 600, 67 N.E.2d 714 (1956), the court said that it was not necessary that there be "positive action" of the union such as a proclamation announcing the intent to strike, in order to support a finding that a concerted staying away was a strike rather than the result of an assumption that there was not work available.

Cottini v. Cummins, 8 Ill. 2d 150, 133 N.E.2d 263 (1956) involved another version of the specious nonavailability of work argument. There the claimants, members of a lithographer's union, argued that they did not work during a strike of the processors because of their belief that the employer did not actually want them to work. Claimants emphasized (1) the functional integration of their work and that of the striking processors, and (2) the employer's failure to notify claimants in advance that they were expected to work, although it knew the strike was coming at least a week before.

The Supreme Court ruled that claimants had not carried their burden to show "non-participation," emphasizing the following notice which the company had posted shortly before the employees left the plant on the eve of the strike: "The plant will remain open for any employee who desires to work." The court said that the record was consistent with the possibility that most of the lithographers saw this notice. The court also said that there were other circumstances which suggested "that the claimants' conduct was not attributable to their asserted belief that the company did not want them to work." Finally, claimants "could not rely on their unilateral determination as to the company's wishes in the face of an expression to the contrary." Page 266.

Brown v. Maryland Unemployment Compensation Board, 189 Md. 233, 55 A.2d 696 (1947) is directly in point on presence or absence of work as an excuse for honoring picket lines. There machine shop repairmen (an AF of L union) struck. Two other AF of L unions and one CIO union honored the strikers' picket lines. It was conceded that in the absence of the strikers, only a day or two of work would have been available for non-striking employees, even with all of them on hand. Lack of work was urged as the excuse for not crossing picket lines.

The court, denying benefits, held that the non-striking claimants participated in the strike by failing to cross the picket lines for the one or two days' work available and were thereby disqualified for the entire three weeks of the stoppage. Very fairly, the court said:

> "If they had crossed the picket line and worked when work was available they would have been entitled to their benefits until work was supplied."

> 4. To escape disqualification, the claimant must show that he has no direct interest in the strike or other labor dispute and the settlement or outcome.

Members of a striking union or belonging to the same bargaining unit and covered by the same contract are rather clearly interested directly and will be affected by the calling of the strike and any settlement or other outcome. The rule usually stated is that an employee is directly interested in a labor dispute if his wages, hours, or other working conditions will be affected in any way by the outcome of the dispute.

This rule has been approved and followed by a number of authorities--among others:

Martineau v. Director of Div. of Employment Sec., 329 Mass. 44, 106 N.E.2d 420 (1952); Lanyon v. Administrator, Unemployment C. Act, 139 Conn. 20, 89 A.2d 558 (1952); Auker v. Review Board, 117 Ind.App. 486, 71 N.E.2d 629 (1947); Huiet v. Boyd, 64 Ga.App. 564, 13 S.E.2d 863 (1941); A. Borchmann Sons v. Carpenter, 166 Neb. 322, 35 S.C.J. 322, 89 N.W.2d 123 (1958); Nobes v. Michigan Unemployment Compensation Commission, 313 Mich. 472, 21 N.W.2d 820 (1946); Boot & Shoe Workers Union v. Brown Shoe Co., 403 Ill. 484, 87 N.E.2d 625 (1949). See also Chrysler Corporation v. Smith, 297 Mich. 438, 298 N.W. 87 (1941); Kemiel v. Review Bd., 117 Ind.App. 357, 72 N.E.2d 238 (1947); Annotation, 28 A.L.R.2d 287, at 337; Haggart, Unemployment Compensation During Labor Dispute, 37 Nebr. L. Rev. 668, at 683.

Martineau v. Director, etc. (supra)

> "It is plain that the claimant's unemployment occurred in consequence of a labor dispute which brought about a stoppage of work. The claimant was not a member of the union which initiated the strike and he refrained from any activity in support of it.-----His position is, therefore, that he should not be deprived of benefits for a loss precipitated entirely by others. That there is force in this argument cannot be denied. The statute, however, does not confine disqualification to those employees who participate in or finance the labor dispute. In addition, it withholds benefits from employees who are 'directly interested' in the labor dispute.-----Most of the statutes in other jurisdictions contain provisions identical with or similar to Section 25. Although the authorities are not uniform, the prevailing view is that a person is 'directly interested' in a dispute when his wages, hours, or conditions of work will be affected favorably or adversely by the outcome. It is of no consequence that the person is not a member of the union conducting the strike or that he may not be in sympathy with its purposes." (Citing cases.)

Huiet v. Boyd (supra) pointed out that the words "directly interested" must necessarily, if given any meaning at all, be given a meaning different from that of "participating," and held:

> "It is immaterial that the claimants, whether as members of the union or not, may not have voted for or participated in the strike which caused the stoppage of work, and may not have been in sympathy with the strike and may have tried to go back to work but were prevented by the pickets. Since they are directly interested in the dispute which caused the stoppage of the work and their unemployment, they are not entitled to the benefits of the act."

Haggart (supra), page 690.

"Summary of Application of Labor-Dispute Provisions

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

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

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

* * *

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

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

Another rule, developed and followed by a smaller number of authorities quite often cited, is that an employee should not be considered as directly interested in the labor dispute unless he has directly interested himself in furtherance of the strike or the labor dispute by participation and activity therein. Outboard, Marine and Mfg. Co. v. Gordon, 403 Ill. 523, 87 N.E.2d 610; Wicklund v. Commissioner of Unemployment Compensation & Placement, 18 Wash.2d 206, 138 P.2d 876, 148 A.L.R. 1298 (1943); Kieckhefer Container Co. v. Unemployment Compensation Com., 125 N.J.L. 52, 13 A.2d 646 (1940). Writers and the majority of the courts have criticized this view as depriving "direct interest" of any meaning of its own, confusing it with "participation," even though the two are everywhere stated as conjunctive equals. Other considerations include the degree of separation between the plant or department where the claimants were employed and the plant or department where the dispute exists. 28 A.L.R.2d at 337; Haggart (supra), page 690.

A fairly common type of situation which presents some real difficulties as to the interest of claimants is the case where the operation or establishment in which the employees are engaged is a continuous, integrated mining, production or manufacturing process, where the work of all is in a connected flow to produce the final product. This type of situation exists importantly in New Mexico, in our large copper mining and potash mining operations. In these and other production, reducing or manufacturing processes you may have to deal with in your states, the employees will be grouped in any number of unions. I think of one such operation which takes nineteen different union locals. There will be a number of separate contracts. Let us suppose that all of these contracts come up for bargaining on the same dates, and there is separate or joint bargaining, and separate or joint meetings. One or several of the unions strike to enforce demands, others do not, but all employees absent themselves from work. Unless the unions have all grouped together for joint demands, negotiations and bargaining, the non-strikers may show that they have no direct interest in the outcome of the strike. The authorities cited supra pretty well exhaust this field.

But what if, as the direct result of a long history of simultaneous demands, negotiations and bargaining, the contracts have become substantially identical, with company-wide identical wage grades, hours, seniority rules, vacations, premium pay, retirement benefits, health and welfare benefits, and so on. The long history shows strikes by different unions at different times to obtain the identical benefits

granted to others, and shows a firmly established and understood company policy to grant and maintain uniform company-wide wages and benefits so as to produce industrial harmony and protect the company's interests. Historically all contracts of all groups, strikers or non-strikers, could come out of the bargaining with near simultaneous settlements and identical new benefits.

In the situation depicted above, I believe the courts are coming more and more to recognize a broad area of common direct interest, as among the various striking and non-striking employees. Haggart notes this without lengthy citation. Cases cited as recent cases at other points indicate it.

> 5. To escape disqualification, claimants have the burden, in addition to showing themselves not "participating" or "directly interested," to prove that they also did not belong to the same "grade or class" as any others who were.

First, if "grade or class" means no more than membership in the same local union or bargaining unit, then the clause should have been left off, because all such are themselves directly interested and usually participating. We have found no cases where this alone was held enough to circumscribe a "grade or class" for the purpose of allowing benefits to co-workers. Whether the claimants were or were not members of the same union or bargaining unit may be a consideration bearing on the question. But in the cases with which we are familiar, a variety of other circumstances have had important bearing on the question. The cases were gathered together and are discussed in the Annotation, 28 A.L.R.2d 287, beginning at page 340.

"Grade or class" is probably most often equated in the cases with the type of work (production workers, maintenance workers, office workers, etc.). Whether the workers perform similar tasks or possess similar skills are facts sometimes considered. It has been held that workers in different departments are not necessarily of different grades or classes, and that all persons engaged in the same process of manufacture are of the same grade or class. See Haggart, pages 685, 691, and cases cited. That authority also points out on page 691: "It has also been held that workers in a continuous, integrated production process, where the performance of one step in the process is dependent upon the completion of the preceding step, are of the same 'grade or class,' regardless of differences in the degree of skill required." Commenting on some cases which appear to have given "grade or class" no meaning separate from direct personal interest (ante, p. 18), Haggart has a criticism: "The definition of grade or class adopted by these courts is difficult to distinguish from the definition of 'direct interest' subscribed to in most jurisdictions. The two terms were probably intended to have different meanings by the legislatures." We believe most courts will subscribe to this moderate observation.

By any of the established rules, the following groups of the claimants in a case like that on page 19 will be found to belong to the same "grade or class":

> 1. Members of all union locals affiliated within a Metal Trades Council, Unity Council or the like, and bargaining as a unit, because of this affiliation.
>
> 2. All of the strikers and all of the claimants in the non-striking unions, if they have submitted identical proposals and participated in joint meetings or negotiations with respect to company-wide benefits such as pay scales,

seniority, retirement, or health and welfare plans and agreements.

3. All of the strikers and all of the claimants shown by their contracts as belonging to the same occupational or skills groups. In the contracts the occupational classifications are usually listed. In my experience, numerous identical classifications will be present in the contract of the striking union or unions and in the contracts of one or more of the non-striking claimants' unions.

4. All of the striking employees and non-striking claimants in corresponding job classifications and wage grades, as negctiated by and for them. All hourly jobs at Kennecott Copper and the potash companies are placed in horizontal job classifications, with corresponding company-wide wage grades. The companies and their employees have thus agreed that certain jobs throughout the various unions are in the same wage grades. This arrangement is in my opinion precisely the literal letter and the meaning of "grade or class" in the statute.

We again emphasize that all of these groupings are given more cogency by reason of the nature of the operations in one hypothetical but common mining operation--the simple process of uncovering and removing ore from the ground, separating the raw metal or mineral, keeping and selling it and discarding the rest. Without detracting from the sturdy capabilities of the men so engaged, it must be observed that this process is, in essence, identical to the simple functioning of an ant hill. Any attempt to classify the claimants into five or ten different grades or classes is no more realistic, no more possible, than it would be with the ants.

At this point, I strongly recommend that you turn to the recent case of Commissioner MacInnes v. DeBoard, Oregon Sup.Ct. (11-1-61), Ore. P. 8162, CCH, page 40,708. The lengthy decision first disposes in a few lines of claimants who refuse to cross picket lines, by upholding their disqualification. The court then took up in an exhaustive discussion the problem of grade or class as applied to other non-striking claimants. The decision by the majority held that the continuous, integrated character of the operations resulted, with other factors, in disqualification of the other claimants because of their belonging to the same grade or class as the strikers where, in addition to the integrated character of the work, the court found that all had an indirect interest, although not disqualified as having a direct interest. This was the point of friction on the court. Since there are three other separate opinions, either concurring or dissenting, by four members of the court, you will readily see that the subject of "grade or class," as existing in an integrated operation, was pretty well exhausted.

A D D E N D U M

In the same week as our conference at Des Moines, the Utah Supreme Court issued a decision in the case of Kennecott Copper Corporation Employees v. Department of Employment Security, Utah P. 8160, CCH, page 47,726. Although the various unions representing claimants in negotiations with the employer had reached agreement on new contracts, one union contracting with the employer did not and went on strike. The claimants' contentions that a few members of non-striking unions had attempted to return to work but none was available, and that the employer could not have continued operations very long, if at all, without the strikers does not place the

employer's evidence that he would have continued but for claimants' mass refusal to return in sufficient doubt to warrant reversal of the Board's conclusion. The Board's disqualification is upheld.

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RESOLUTIONS

BE IT RESOLVED BY THE ATTORNEYS PARTICIPATING IN THE EMPLOYMENT SECURITY LEGAL AFFAIRS CONFERENCE, REGIONS IV, V AND VII, HELD IN DES MOINES, IOWA, ON JUNE 20-22, 1962 INCLUSIVE:

That the papers published by the panel members evidence a painstaking and exhaustive study of the subject matters, and the contents together with the discussions by attending members have been interesting and enlightening to the individuals attending the Conference and of great aid to all states receiving a copy of a report of the Conference;

That much progress is being made toward inaugurating a Legal Reference Service for and by the various states which will be of great value to attorneys in advising administrative officials of the interpretations of laws with respect to common problems constantly arising in our rapidly and ever changing economic conditions, and will be of a great material aid to attorneys in the State Employment Security Agencies in preparing briefs of law involving the interpretation and application of Employment Security Laws;

That it is the consensus of all those in the Conference that this medium of exchange of information and experience will afford each state with current decisions of the courts, and provide a medium of exchange of opinions of the various agency attorneys as to the interpretation of words, phrases, sentences, and provisions of Employment Security Laws;

That it is a source of satisfaction as well as enlightenment for the attorneys specializing in a common objective to meet together to discuss the many problems arising by virtue of the Employment Security program and the

resulting conflicting opinions and decisions. A better understanding of the background of other state court decisions and reasoning will serve to aid in advising the administrative officials of their state with regard to any question or problem arising under the Law of that state;

That it is the opinion of the attending attorneys that meeting together and having personal, open and frank discussions of the legal problems arising under their particular laws permits a friendly and personal relationship between the attorneys which can only result in a unification toward a more effective legal interpretation and application of the principles and purposes of the Employment Security program, together with a more economical and better representation of the state policies and administrations.

BE IT FURTHER RESOLVED that it is the unanimous opinion of those in attendance that the Legal Affairs Committee Report is a forward step in providing for the exchange of legal information, and the sharing of mutual experience, which will enhance the value of the services of attorneys to their administrators; that a continuation of the Legal Affairs Conference be had regularly with an exchange of regions for a more diversified exchange of thinking and experience.

BE IT FURTHER RESOLVED that the genuine thanks of the Conference be extended to Mr. N. C. Quiett, of the Iowa Agency, for the able and efficient manner in which he performed the duties as Chairman of the Conference.

Respectfully submitted,

J. Eugene Foster
Alabama

The foregoing Resolutions were unanimously adopted upon motion of Mr. Arnold Spencer, of the Wisconsin Agency.