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UNEMPLOYMENT COMPENSATION-EFFECT OF THE MERITS OF A LABOR DISPUTE ON THE RIGHT TO BENEFITS

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UNEMPLOYMENT COMPENSATION—EFFECT OF THE MERITS OF A LABOR DISPUTE ON THE RIGHT TO BENEFITS—Every state and territorial unemployment compensation act contains a provision disqualifying persons from receiving benefits whose unemployment is the result of a labor dispute or some form thereof. In most states these provisions have been applied to deny benefits to striking or locked-out workers regardless of the merits of the particular controversy. A few states have adopted provisions permitting at least a limited investigation into the question of fault. It is the purpose of this comment to discuss the extent to which the merits of labor disputes are and should be considered in determining workers' rights to benefits.

I. *Acts Containing a Blanket Disqualification*

The majority of the American acts were modeled after the Draft Bills published by the Social Security Board in 1936.¹ The Michigan act contains typical language:

¹ SOCIAL SECURITY BOARD, DRAFT BILLS FOR STATE UNEMPLOYMENT COMPENSATION

"An individual shall be disqualified for benefits: . . . For any week with respect to which his total or partial unemployment is due to a stoppage of work existing because of a labor dispute in the establishment in which he is or was last employed."²

These acts contain no reference to the merits of disputes and most courts and agencies have considered this silence a prohibition. This position has resulted in many cases of substantial injustice. Benefits have been denied where the employer refused to follow War Labor Board and National Labor Relations Board directives,³ where the employer has violated state or federal labor laws,⁴ and where the employer has violated the employment contract.⁵

There have been occasional departures from this approach, only, in general, to be repudiated by later decisions in the same jurisdictions. In *Bunny's Waffle Shop v. California Employment Security Commis-*

OF THE POOLED FUND AND EMPLOYER RESERVE ACCOUNT TYPES (1936); *ibid.* (rev. ed. 1937).

² 12 Mich. Stat. Ann. (Supp. 1949) §17.531. Other acts containing substantially the same phraseology are: 43 Del. Laws (1943) c. 207, §6; Ga. Code Ann. (Supp. 1947) §54-610(d); Hawaii Rev. Laws (1945) §4231(d); Idaho Code (1949) §72-1366(j); Ind. Stat. Ann. (Burns, Supp. 1947) §52-1539c; Iowa Code (1950) §96.5(4); Kan. Gen. Stat. (Corrick, Supp. 1947) §44-706(d); Me. L. (1949) c. 430, §15-IV, p. 548; Md. Ann. Code (Flack, Supp. 1947) art. 95A, §5(e); Mass. Ann. Laws (1942) c. 151A, §25(b); Mo. Rev. Stat. (Supp. 1948) §9431 II(a); Neb. Rev. Stat. (1943) §48-628(d); N.J. Rev. Stat. Cum. Supp. (1950) §43:21-5(d); N.M. Stat. Ann. (Supp. 1947) §57-805(d); N.C. Gen. Stat. (Michie, Supp. 1947) §96-14(d); N.D. Rev. Code (1943) §52-0602.4; Okla. Stat. Ann. (Supp. 1948) tit. 40, §215(d); S.D. Code (1939) §17.0830(4); Tex. Ann. Rev. Civ. Stat. (Vernon 1947) art. 5221b-3(d); Vt. L. (1949) H. 212, §5379V, p. 129; Va. Code Ann. (Michie 1942) §1887(97)(d); Wash. Rev. Stat. Ann. (Remington, Supp. 1943), §9998-105(f); Wyo. Comp. Stat. Ann. (1945) §54-105BII; Ala. Code Ann. (Supp. 1946) tit. 26, §214A; Alaska Comp. Laws Ann. (1949) §51-5-4(d); Cal. Gen. Laws (Deering 1944) Act 8780d, §56(a); D.C. Code (Supp. 1948) tit. 46, §310(f); Fla. Stat. Ann. (Supp. 1948) §443.06(4); La. Gen. Stat. Ann. (Dart, Supp. 1947) §4434.4(d); Nev. Comp. Laws (Supp. 1945) §2825.05(d); N.Y. Lab. Law (McKinney, 1948) §592.1; Ore. Comp. Laws Ann. (Supp. 1947) §126-705(d); R.I. Gen. Laws (1948) c. 284, §7(4); S.C. Code of Laws (1942) §7035-85(d); Tenn. Code Ann. (Supp. 1948) §6901.29E; Wis. Stat. Ann. (1947) §108.04(10).

³ *Fash v. Gordon*, 398 Ill. 210, 75 N.E. (2d) 294 (1947); 10786 Ga. R., Ben. Ser. Vol. 9/9 (1946); 10906 N.Y.R., Ben. Ser. Vol. 9/10 (1946); 12088 Calif. R., Ben. Ser. Vol. 11/1 (1948). The last citations are from the Benefit Series, a compilation of precedent-setting compensation decisions published by the Social Security Board. Cases are cited by case number, state, symbol indicating the nature of the tribunal, volume, and issue number.

⁴ 13242 Ohio R., Ben. Ser. Vol. 12/3 (1949); 12964 Ill. A., Ben. Ser. Vol. 11/12 (1948).

⁵ 12217 N.H.R., Ben. Ser. Vol. 11/2 (1948); 12438 N.H.R., Ben. Ser. Vol. 11/5 (1948); 12964 Ill. Ben. Ser. Vol. 11/12 (1948); 10668 Pa R., Ben. Ser. Vol. 9/7 (1946); 10176 Ill. R., Ben. Ser. Vol. 9/1 (1946). Benefits have also been denied where the employer has refused to negotiate: *The Midvale Co. v. U.C. Bd. of Review*, 165 Pa. Super. 359, 67 A. (2d) 380 (1949); *In re Persons Employed at St. Paul and T. Lumber Co.*, 7 Wash. (2d) 580, 110 P. (2d) 877 (1941); where the employees were locked out until they agreed to remove a provision from a previously agreed upon contract: 12712 Va. R., Ben. Ser. Vol. 11/8 (1948); where employees struck to induce payment of overdue wages: *Deshler Broom Factory v. Kinney*, 140 Neb. 889, 2 N.W. (2d) 332 (1942).

sion,⁶ the Supreme Court of California held that employees who left work because of the action of the employer in reducing wages in order to compel the union to bargain with an employers' association, left because of an "economic weapon" designed to compel compliance with the employer's demands and not because of a trade dispute. Yet in *McKinley v. California Employment Stabilization Commission*,⁷ decided five years later, employees locked out by all members of an employers' association due to a strike at the plant of one of the members were held disqualified since they knew that a strike at one plant would be considered by the employers as a strike against all.⁸ In 1946 the Illinois Director of Labor held that a strike caused by the failure of the employer to observe state law could not amount to a labor dispute since the absolute requirement of the law put the subject of the controversy beyond the possibility of settlement by free agreement of the parties.⁹ Two years later, the director held that a violation of state law did not prevent disqualification, since the unemployment compensation acts were not designed as an additional means of enforcing compliance with other state statutes.¹⁰ In Pennsylvania, a line of court and board decisions permitting a limited examination of the merits of disputes¹¹ was finally overruled in 1949.¹²

The arguments used to support the exclusion of the merits as a determinant are those which are used to support the labor dispute disqualification in general. Undoubtedly the payment of benefits to striking workers would ease the drain on union strike funds and the workers' pockets. Although the small amount of the average payments and the waiting period required under most acts may tend to mitigate this effect, the payments would prolong the time for which the workers can insist on their demands before being forced to compromise or surrender through economic necessity. Two major objections have been made to such a result. It is argued that such payments would violate the precept

⁶ 24 Cal. (2d) 735, 151 P. (2d) 224 (1944). The case was relied on in 13137 Hawaii AG., Ben. Ser. Vol. 12/2 (1949).

⁷ (Calif. 1949) 209 P. (2d) 602, noted 63 HARV. L. REV. 716 (1950).

⁸ The case overruled 12646 Calif. R., Ben. Ser. Vol. 11/8 (1948), which considered *Bunny's Waffle Shop* controlling.

⁹ 11848 Ill. R., Ben. Ser. Vol. 10/10 (1947). This exception is recognized in the British decisions. HUGHES, PRINCIPLES UNDERLYING LABOR-DISPUTE DISQUALIFICATIONS 13 (1946). The treatise by Hughes is a publication of the Social Security Board. See also 1430 R.I.D., Ben. Ser. Vol. 2/5 (1939).

¹⁰ 12964 Ill. A., Ben. Ser. Vol. 11/12 (1948).

¹¹ Wagner, "Unemployment Benefits in Labor Disputes," 53 DICK. L. REV. 187 (1949), discusses the development of the Pennsylvania law prior to 1949.

¹² *The Midvale Co. v. U.C. Bd. of Review*, 165 Pa. Super. 359, 67 A. (2d) 380 (1949).

that the state should be neutral in labor disputes.¹³ Secondly, it has been pointed out that since compensation funds are derived largely from taxes on the employer, such payments would unfairly require the employer to support his economic opponent.¹⁴

Another argument in support of the broad application of the disqualification is based on the declarations of policy found in those acts following the Draft Bills. These declarations state the purpose of the acts to be to relieve "involuntary" unemployment, and this has been construed to mean that in general only those who are victims of cyclical fluctuations, temporary layoffs, or other conditions over which they have no control are entitled to benefits. Those who voluntarily leave work to coerce their demands, however justified, are precluded.¹⁵ A further argument occasionally made is that the disqualification is necessary to prevent the depletion of compensation funds through the payment of benefits upon the happening of events which are not actuarially predictable.¹⁶

These arguments obviously have force where the employer is not at fault in the dispute, but recent writers have questioned their applicability to cases where the action of the employees is justified. Attack has been made upon the doctrine of "state neutrality" on two grounds. First, the denial of benefits to striking workers, while paying benefits to non-strikers, has been said to amount to no neutrality at all, since it acts to discourage strikes,¹⁷ thus supporting the employer. Secondly, it is doubted that the state should be neutral where the employer is at fault. Any such disqualification has been criticized as inconsistent with legislation aimed at equalizing the bargaining position of employee and employer.¹⁸

¹³ HUGHES, *PRINCIPLES UNDERLYING LABOR-DISPUTE DISQUALIFICATIONS* 1 (1946); 10786 Ga. R., Ben. Ser. Vol. 9/9 (1946); DOUGLAS, *STANDARDS OF UNEMPLOYMENT INSURANCE* 61 (1933).

¹⁴ Pribram, "Compensation for Unemployment During Industrial Disputes," 51 *MONTREY LAB. REV.* 1375 at 1376 (1940); 2243 Mich. A., Ben. Ser. Vol. 2/12 (1939).

¹⁵ "In brief, disqualification under the act depends on the fact of voluntary action and not the motives which brought it about." *Deshler Broom Factory v. Kinney*, 140 Neb. 889 at 893, 2 N.W. (2d) 332 (1942). DOUGLAS, *STANDARDS OF UNEMPLOYMENT INSURANCE*, 59 (1933); *Miller v. Unemployment Comp. Bd. of Review*, 152 Pa. Super. 315, 31 A. (2d) 740 (1943); *Fash v. Gordon*, 398 Ill. 210, 75 N.E. (2d) 294 (1947); *Barnes v. Hall*, 285 Ky. 160, 146 S.W. (2d) 929 (1940).

¹⁶ *Miners in General Group v. Hix*, 123 W.Va. 637 at 646, 17 S.E. (2d) 810 (1941); HUGHES, *PRINCIPLES UNDERLYING LABOR-DISPUTE DISQUALIFICATIONS* 1 (1946).

¹⁷ Lesser, "Labor Disputes and Unemployment Compensation," 55 *YALE L.J.* 167 at 175 (1945).

¹⁸ *Ibid.*; Schindler, "Collective Bargaining and Unemployment Insurance Legislation," 38 *COL. L. REV.* 858 at 869 (1938).

In further opposition to the broad application of the disqualification it is argued that requiring the employer to support the employees who are contending against him is unjust only where the employer is not himself the cause of the unemployment. Any hardship imposed upon him by a merit approach is of his own creation. It has been emphasized that the incidence of the unemployment compensation tax falls not on the employer, but is passed on to the employee or the consumer.¹⁹

Objections have also been made to the test of voluntariness. It has been criticized as artificial and unnecessary since the desirability of compensating a particular worker does not rest upon whether he could or could not have remained on the job, but upon whether his action in leaving was reasonable.²⁰ It has been argued that to ignore the compulsive effect of economic and psychological factors in a justified strike is unrealistic.²¹ Doubts as to whether a strictly objective concept of voluntariness is actually contained in the acts are raised by the fact that workers whose unemployment is objectively involuntary are often subject to disqualification while workers who have voluntarily left work for good cause are compensated.²²

No direct answer has been made to the argument of actuarial unsoundness. Those writers who have considered the point have stated that such practical considerations should not influence a discussion of principle.²³ While this attitude is questionable, it is true that unemployment itself, whatever the cause, remains an unpredictable occurrence and to that extent the compensation acts themselves are not actuarially beyond question in any event. Whether the payment of benefits to those who strike justifiably would materially increase the hazard of excessive fund depletion appears doubtful. At any rate, most states allow the payment of benefits during some labor disputes, a fact which weakens the statistical argument.²⁴

¹⁹ Shadur, "Unemployment Benefits and the 'Labor Dispute' Disqualification," 17 *UNIV. CHI. L. REV.* 294 at 298 (1950); Lesser, "Labor Disputes and Unemployment Compensation," 55 *YALE L.J.* 167 at 176 (1945).

²⁰ Kempfer, "Disqualifications for Voluntary Leaving and Misconduct," 55 *YALE L.J.* 147 at 150 (1945).

²¹ Lesser, "Labor Disputes and Unemployment Compensation," 55 *YALE L.J.* 167 at 171 (1945).

²² Shadur, "Unemployment Benefits and the 'Labor Dispute' Disqualification," 17 *UNIV. CHI. L. REV.* 294 at 296 (1950).

²³ Lesser, "Labor Disputes and Unemployment Compensation," 55 *YALE L.J.* 167 at 176 (1945); 49 *COL. L. REV.* 550 at 551 (1949).

²⁴ 49 *COL. L. REV.* 550 at 551 (1949).

II. Acts Permitting the Payment of Benefits During Lockouts

Although exceptions to the labor dispute disqualifications exist in the majority of statutes allowing the payment of benefits to persons not participating or directly interested in the dispute,²⁵ the term "labor dispute" is rarely defined or qualified. The judicial and administrative tendency has been to seek guidance in the definitions of the term found in labor relations and anti-injunction statutes.²⁶ The result has been a construction which includes almost all forms of industrial strife. Persons unemployed because of the acts of the employer in shutting down his plant in an attempt to coerce compliance with his demands or resist those of the workers are as readily disqualified as persons who have struck.²⁷ Perhaps because of the inconsistency of such holdings with a theory of aid to those involuntarily unemployed there has been a tendency to remove "lockouts" as a cause of disqualification. In 1940 only two states made this an express exception.²⁸ Nine states today have such clauses.²⁹

Unless it can be said that lockouts are more likely to be the result of unjustified demands of the employer than of the employees, these acts would appear to have no logical relevance to the merits.³⁰ However,

²⁵ In general a claimant is disqualified from benefits unless it is shown that he is not (1) participating, (2) financing, or (3) directly interested in the labor dispute, and (4) is not a member of the grade or class of workers, any of whom are participating, financing, or directly interested in the dispute. Nine states make no such exceptions. 33 MINN. L. REV. 758 at 760 (1949).

²⁶ "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 proximate relation of employer and employee." The Norris La Guardia Act, 47 Stat. L. 70 at 73 (1932), 29 U.S.C. §113 (1946). A similar definition is found in the National Labor Relations Act, 49 Stat. L. 449 (1935), 29 U.S.C. (1946) §151.

²⁷ In re North River Logging Co., 15 Wash. (2d) 204, 130 P. (2d) 64 (1942); The Midvale Co. v. U.C. Bd. of Review, 165 Pa. Super. 359, 67 A. (2d) 380 (1949); Adkins v. Indiana Employment Security Div., 117 Ind. App. 132, 70 N.E. (2d) 31 (1946); Lesser, "Labor Disputes and Unemployment Compensation," 55 YALE L.J. 167 (1945).

²⁸ SOCIAL SECURITY BOARD, COMPARISON OF STATE UNEMPLOYMENT COMPENSATION LAWS AS OF OCTOBER 1, 1940, 102 (1940). Three states in 1940 limited the disqualification to unemployment caused by "strikes."

²⁹ Ark. Stat. Ann. (1947) §81-1106(d); Conn. Gen. Stat. (1949) §7508(3); Ky. Rev. Stat. Ann. (1948) §341.360(1); Minn. Stat. Ann. (Mason, 1945) §268.09 subd. 1(6); Miss. Code Ann. (Supp. 1948) §7379(e); N.H. Rev. Laws (1942) c. 218, §4D, amended N.H.L. (1949) c. 185; Ohio Code Ann. (Throckmorton, 1948) §1345-6d(1); Pa. Stat. Ann. (Purdon, Supp. 1948) tit. 43, §402(d), amended Pa. L. (1949) Act 530 at p. 1760; W.Va. Code Ann. (1943) §2366(78)(4). Two states limit the disqualification to "strikes." Colo. Stat. Ann. (Michie, Supp. 1949) c. 167A, §5(c); Utah Code Ann. (1943) §42-2a-5(d).

³⁰ Shadur, "Unemployment Benefits and the 'Labor Dispute' Disqualification," 17

they do have the virtue of ease of administration, since, if properly applied, it is only necessary to determine which side, the employer or the employee, took the final step which resulted in unemployment. Their tendency to discourage resort to self-help by either side is certainly more consistent with a policy of neutrality than the Draft Bill type act.

Some jurisdictions have adopted an approach which has nullified any advantage which the exclusion of lockouts may have. Where the employer shut down his plant because of the existence of a "slowdown," the Ohio Board of Review held that the employer's action did not constitute a lockout since it was not an offensive means against the employees to compel them to accept terms which had not previously been in force, but was a purely defensive measure to prevent additional losses through decreased production.³¹ In a dissenting opinion, a member of the board objected to this examination into the merits since in past cases "regardless of the ruthlessness of the employer in imposing conditions upon the workers, if the workers left their employment as a means of preventing such impositions, the disqualification was applied."³² Although the Ohio statute does not require such an inequitable application of the lockout exemption, some state acts do, confining the exemption to "unjustified" lockouts³³ or lockouts "resulting from an effort on the part of the employer to deprive employees of some advantage they already possess."³⁴

The one-sided approach may work equally to the disadvantage of the employer should a justified strike be termed a lockout³⁵ while a justified lockout is held not to result in disqualification. It is clear that unless both sides or neither side of the controversy be held open to examination, the lockout exception makes no improvement in the acts patterned after the draft bills.³⁶

UNIV. CHI. L. REV. 294 at 305 (1950); Schindler, "Collective Bargaining and Unemployment Insurance Legislation," 38 COL. L. REV. 858 at 880 (1938); DOUGLAS, STANDARDS OF UNEMPLOYMENT INSURANCE 59 (1933).

³¹ 13242 Ohio R., Ben. Ser. Vol. 12/3 (1949).

³² 13242 Ohio R., Ben. Ser. Vol. 12/3 (1949) at p. 117.

³³ Conn. Gen. Stat. (1949) §7508(3); Miss. Code Ann. (Supp. 1948) §7379(e).

³⁴ Conn. Gen. Stat. (1949) §7508(3); W.Va. Code Ann. (1943) §2366(78)(4).

³⁵ This in effect was what was done in *Bunny's Waffle Shop v. Calif. Employment Security Comm.*, 24 Cal. (2d) 735, 151 P. (2d) 224 (1944), 33 HARV. L. REV. 716 (1950). Cf. *The Midvale Co. v. U.C. Bd. of Review*, 165 Pa. Super. 359, 67 A. (2d) 380 (1949).

³⁶ *Bucko v. J. F. Quest Foundry Co.*, 229 Minn. 131, 38 N.W. (2d) 223 (1949), noted 34 MINN. L. REV. 271 (1950), illustrates what is probably the best application of the lockout exception in confining the investigation of the court to the ultimate act causing the unemployment, rather than any preliminary act which might furnish a motive. In order to prevent penalizing the employer for a justified lockout one writer suggests that the employ-

III. Statutes Requiring an Investigation into the Merits

The most difficult problem arising from the acceptance of a merit approach as a test of eligibility for benefits is obviously that of determining what the merits of a dispute are. In view of the heated claims and counterclaims as well as the social and economic questions which must necessarily arise, it is not surprising that many legislatures, courts, and agencies have been content to follow the broad disqualification provisions of the Draft Bills. Going farther than a purely factual determination of the existence of a labor dispute would amount, it has been said, to compulsory arbitration, an institution which has not yet found favor in this country.³⁷ It is certain that deciding each case on the equities involved would provide no standard and leave much to the predilections of the particular examining body. Even where a merit approach is adopted, it would appear desirable to continue to confine the functions of agencies and courts to basically factual determinations while leaving it to the legislatures to specify what areas of employer activity constitute fault and what demands of striking workers shall be considered justified.

No American unemployment compensation act has given the agency entrusted with its enforcement complete powers to decide the merits of the controversy. A few, however, have declared that benefits shall be paid, despite the existence of a labor dispute, if the employer has been guilty of specified acts, the most common of which are violation of a state or federal labor law or violations of the provisions of a contract.³⁸ Only West Virginia has gone farther, allowing the payment of benefits if the employer seeks to impose wages or working conditions "substantially less favorable than those prevailing for similar work in the locality, or if employees are denied the right of collective bargaining under generally prevailing conditions."³⁹ In general, these acts comply with the suggested limit of factual determination. The unfair labor practices provisions of labor relations laws and the requirements of industrial safety statutes have clearly defined the scope of employer

er's experience rating should not be affected by the payment of benefits. 33 MINN. L. REV. 758 at 769 (1949).

³⁷ Lesser, "Labor Disputes and Unemployment Compensation," 55 YALE L.J. 167 at 178 (1945).

³⁸ Contract or labor law: Ariz. Code Ann. (Supp. 1947) §56-1004(d); Ark. Stat. Ann. (1947) §81-1106(d). Labor law only: Mont. Rev. Code (Darlington, Supp. 1949) §3033.8(d); Utah Code Ann. (1943) §42-2a-5(d). Contract only: N.H. Rev. Laws (1942) c. 218, §4D, as amended N.H.L. (1949) c. 185.

³⁹ W.Va. Code Ann. (Michie, 1943) §2366(78)(4).

fault and the agencies entrusted with the enforcement of such laws have worked out procedures for the determination of violations. Such violations are illegal and it is difficult to argue against the payment of benefits to those who resist them. Breach of contractual obligation by the employer can also be determined by established procedures, and the disqualification of persons striking on this ground seems unjustified.

The West Virginia statute has apparently borrowed its provisions with respect to substandard wages and working conditions from the provision in all compensation acts that unemployed individuals shall not be disqualified for refusing to accept "suitable work" where they are offered work under such substandard conditions.⁴⁰ While the West Virginia provision is in advance of existing labor relations laws, it imposes upon the unemployment compensation agencies no unique problems, and it should be as feasible to determine such facts where many workers are involved as it is where the approach is on an individual basis.

Whether it is advisable to go farther than the West Virginia statute in borrowing from other provisions of the compensation acts is doubtful. Other specific conditions of employment commonly labeled as unsuitable work are covered by labor relations acts and cause no problem. However, under the compensation acts, individuals voluntarily leaving work for "good cause" are not disqualified from benefits.⁴¹ To the extent that "good cause" coincides with unsuitable employment there should be no objection to including it in the exceptions to the labor dispute disqualification. However, "good cause" has been given a broader construction than the violation by the employer of labor laws or contracts or the imposition of substandard conditions, and the agencies and courts have been willing to give weight to equitable factors for which there is no express legislative support.⁴² Such an approach to the "good cause" provisions is not improper since those provisions deal with the relations of the employer with an individual employee. Where the relationship involved is that of the employer with all or a large number of his employees, however, the economic and social significance of the decision is immeasurably greater. It seems advisable in such case to restrict the exceptions from disqualification to those which have express legislative sanction.

⁴⁰ See Menard, "Refusal of Suitable Work," 55 *YALE L.J.* 134 (1945).

⁴¹ See Kempfer, "Disqualifications for Voluntary Leaving and Misconduct," 55 *YALE L.J.* 147 (1945).

⁴² *Id.* at 156.

An administrative problem arises under those acts allowing the payment of benefits when the employer has violated state or federal laws because of the existence of other agencies entrusted with the enforcement of those laws. Since both an unemployment compensation commission and a state labor relations board or other agency may be called upon to determine from the same facts whether the employer's actions constituted such a violation, inconsistent decisions are inevitable. Various solutions have been suggested. A provision that the decision of the unemployment compensation commission is to be governed by the ruling of the other agency is workable if the labor relations act is amended to require an immediate determination as to the existence of violations upon the request of the unemployment compensation commission. Otherwise, the payments would come too late to be of assistance to the unemployed. As yet, no such subservience of one agency to another is provided for in the acts, and each is free to make a completely independent decision.⁴³

While inconsistent decisions by different agencies may be merely embarrassing, consistent decisions finding a violation by the employer may have a more serious effect, since the result would be the payment of benefits under the compensation act and the award of back pay under the labor relations act. A solution to this lies in the suggestion that unemployment benefits be deducted from the back pay awards and be returned to the compensation fund.⁴⁴

IV. Conclusion

The fact that the majority of the state unemployment compensation acts still follow the model provided by the Draft Bills is evidence that the arguments against a merit approach remain dominant in this field of legislation.⁴⁵ On the other hand, legislators and writers have shown an increasing appreciation of the inequities which these acts produce, and it may be expected that more states will depart from the Draft Bills

⁴³ The Utah court was of the opinion that the unemployment compensation commission was not bound by an NLRB decision that unfair labor practices existed, since the Utah act directed that an investigation be made by the commission as to the existence of such practices. *Members of Iron Workers' Union v. Industrial Comm.*, 104 Utah 242, 139 P. (2d) 208 (1943).

⁴⁴ Lesser, "Labor Disputes and Unemployment Compensation," 55 *YALE L.J.* 167 at 180 (1945).

⁴⁵ The Draft Bills have been followed in the unemployment compensation provisions of the "G.I. Bill," 58 Stat. L. 284 §800(b) (1944), 38 U.S.C.A. (Supp. 1949) §696a.

pattern in the future. The exclusion of lockouts has been an attractive intermediate step. Whether any state will go farther than the present West Virginia statute probably depends on whether the concepts of employer fault found in other legislation are expanded. While it is doubtful that any state will empower agencies to make a full investigation into the merits, a complete disregard of the circumstances attendant upon a labor dispute seems an undesirable alternative.

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