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UNEMPLOYMENT BENEFITS IN LABOR DISPUTES

By

RICHARD H. WAGNER*

If counsel for employers were writing upon this subject, he would probably entitle it, "What's This About Benefits for Strikers?" On the other hand, a union lawyer would surely phrase it, "Lockouts as Insurable Hazards in Our Economic System" or "Why Not Give Benefits to Locked-Out Employees?" "Why not, indeed?" agreed all three members of the Pennsylvania Board of Review in April, 1948, as they directed the payment of benefits to employes whose employer, because of a labor dispute, ordered them out of the plant and withheld work for approximately three weeks. In its decision the Board referred to this as a "lock-out" and few would dispute the use of that word in describing such a situation.¹

"Why not pay?" said the Board again in February 1949,² when it affirmed the Bureau's³ allowance of benefits to employes who, rather than accept a disputed wage cut (which even the employer conceded was "inequitable"), refused to work, but only after the employer had rejected their request to settle the dispute, without a stoppage, under the wage adjustment procedure of their contract and by arbitration. But this time there were only two; the chairman and one member (who heard the testimony) joined in the award, while the dissenting member said the latter case was a "strike" and, in his opinion, not compensable under the Act.

Since the labor dispute clause of the Pennsylvania Unemployment Compensation Law (Act of December 5, 1936, P. L. (1937) 2897, as amended, 43 P. S. 801-802) has never contained either the word "strike" or "lockout", a discussion of this subject had best begin with an examination of our statutory pro-

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¹ Claims of Norine Fetter, et al., B-15548 to B-15637. Copies of Board decisions may be obtained by writing to Melvin L. Jacobs, Secretary, U. C. Board of Review, Harrisburg, Pa.

² Claims of Michael Cybok, et al., B-17097 to B-17101.

³ Bureau of Employment and Unemployment Compensation of the Department of Labor and Industry.

visions.⁴ The Pennsylvania Act formerly imposed a fixed temporary disqualification only; originally it was three weeks, later it was extended to four to five weeks. In the language of the Act, the disqualification applied where the claimants' unemployment was "due to a voluntary suspension of work resulting from an industrial dispute, at the . . . establishment. . . at which he is or was last employed".⁵ Surprising as it may seem in the light of later developments, the compensation authorities first construed the term "voluntary suspension of work" to mean a voluntary cessation of operations by the employer as well as a suspension of work by the employes, as distinguished from suspensions due to some undesired condition such as lack of materials or the absence of key personnel, and only indirectly traceable to a labor dispute.⁶ This interpretation, however, was later abandoned and the term "voluntary suspension" was construed as referring to a stoppage of work by employes rather than to a withholding of work by the employer.⁷ The extent, however, to which the term "voluntary" applied to the conduct of each claimant affected by the suspension was another matter. The Bureau, the administrative agency which has to handle in the first instance the thousands of claims arising out of labor disputes, contended it was administratively impracticable to subject each and every claim in a labor dispute case to the test of "personal volition" and, for this reason, urged the Board to construe the term "voluntary suspension" on a plant basis so as to disqualify all of the employes in so-called

⁴ At the outset, it should be observed that every unemployment compensation statute imposes some sort of disqualification on employes in labor dispute cases. But, in the same breath, one must add that each state also provides for the payment of benefits in labor dispute cases under certain circumstances, or to certain individuals, or after a certain period of time. After a certain number of weeks: New York, Par. 4108; Rhode Island, Par. 4044. Where the dispute takes the form of a "lockout": Ark., Par. 4022; Conn., Par. 4028; Ky., Par. 4036; Minn., Par. 4051; Miss., Par. 4011; Ohio, Par. 4030; W. Va., Par. 4099. (The Connecticut Act defines a lockout as an effort on the part of the employer to deprive the employees of some advantage which they may possess. West Virginia achieves the same effect by allowing benefits if the employer shuts down operations to force wage reductions or changes in hours or working conditions.) Locked out employes are also eligible by implication in three other states: Calif., Par. 4064; Colo., Par. 4010; Utah, Par. 4015. Where the employer fails to conform to the provisions of some contract or law: Ariz., Par. 4034; Mont., Par. 4009; N. H., Par. 1980; Utah, Par. 4015. Even where employes voluntarily suspend work to obtain better terms of employment, most states relieve from disqualification such employes as did not participate or have any interest in the dispute. (Paragraph numbers refer to Commerce Clearing House, Unemployment Insurance Service.) As to the constitutionality of paying unemployment compensation in labor disputes, see *Boyertown Burial Casket Co., v. Board of Review*, 162 Pa. Super. Ct. 98.

⁵ The administrative agencies and the Superior Court have used the terms "industrial dispute" and "labor dispute" interchangeably just as they are used in ordinary speech. *Susquehanna Collieries Co., v. Board of Review*, 137 Pa. Super. Ct. 110, 112, 115; *Barnas v. Board of Review*, 152 Pa. Super. Ct. 429, 432.

⁶ Claim of E. A. Lorah, B-786, (1939), in which the employer temporarily closed the plant to combat a union attempting to organize the employes.

⁷ Claims of H. F. Burns, B-1643; John A. Dixon, B-1743 (1941); Edward Jenkins, B-2041; Bert Walsh, B-2512. The Superior Court also adopted this construction of the Act in *Susquehanna Collieries Co., v. U. C. Board of Review*, 137 Pa. Super. Ct. 110, 115, (1939); *Phillips and Howley v. U. C. Board of Review*, 152 Pa. Super. Ct. 75, 79 (1943).

strike cases.⁸ On the other hand, employes and labor unions, led by the Pennsylvania Federation of Labor, argued that the clause should be construed in the light of Section 3 of the Act so as to compensate employes unemployed through no fault of their own because of a strike by other workers.⁹ The Board originally decided in favor of the personal test of fault¹⁰ but finally, and reluctantly, yielded to the Bureau's argument of administrative impracticability and held that where there was a voluntary suspension of work by *some* employes in an establishment, all other employes who thereby became unemployed were disqualified.¹¹ In this case the Bureau and the Board denied benefits to thousands of rank and file coal miners who lost their work when their supervisors struck for union recognition. This case was promptly appealed by the miners, but before it was argued the Bureau itself about-faced and announced that it was in favor of a personal test of volition and fault. Stripped of what it conceived to be the only sound support for its decision, the Board thereupon requested the Superior Court to remand the case for further study and, upon reconsideration, overruled its previous decision and held that the term "voluntary suspension" required the agency to examine the conduct of each claimant.¹² Benefits were still denied, however, on the ground that the miners in this situation had voluntarily suspended work because their union officers, acting as their agents, had sanctioned and supported the strike of the supervisors, and again the miners appealed. In affirming the disallowance, the Superior Court considered both interpretations of the Act and stated that while there was much to be said in favor of the Bureau's plant-wide construction of the term, the Board was on more reasonable ground when it based its decision on the conduct of the individual employe and the fact that the individual miners in this case had supported the strike through their union agents.¹³

Thus triumphed the principle that the basic test of eligibility in labor disputes, as in other cases, is whether or not the claimant is unemployed through his own fault.

In the meantime another problem was vexing the compensation authorities in labor dispute cases, viz., how to determine whether there was any "voluntary suspension" at all, or whether the stoppage was attributable to the action of the

⁸ It was also pointed out that to construe the term "suspension" as describing the act of the individual claimant would render meaningless the words "at the establishment where he was last employed", etc., since an employe could not, under any circumstances, suspend work in any establishment other than that in which he worked.

⁹ Section 3, the "Declaration of Public Policy" states that in the interest of the public good and general welfare payments should be paid for involuntary unemployment and to persons unemployed through no fault of their own. The court had held this to be a constituent part of the Act and that "subsequent provisions as to eligibility (Sec. 401), or ineligibility (Sec. 402) for compensation must all be read and construed as subject to this basic and fundamental declaration." See footnote 23, *infra*.

¹⁰ Claim of Edward Jenkins, *supra*.

¹¹ Claims of Antonio Arduino, et al., B-5999 to B-6127 (1946).

¹² Claim of James Prentice, B-6094-A (1947).

¹³ 161 Pa. Super. Ct. 630, 636-37.

employer.¹⁴ In these cases neither side, of course, unconditionally withheld work; each was willing to continue operating or working on his own terms but refused to continue on the terms offered or demanded by the other side in the dispute. (An unconditional withholding of work such as in the Fetter case, *supra*, is a rarity.) The Board decided this question first on the basis of which side had interjected some change in the existing terms of employment as a condition of continuing work. If the employer made work available on the existing terms and the employes stopped in order to force a change in the status quo, the suspension was deemed voluntary. If, however, the employer confronted the employes with the alternative of accepting some detrimental change in the existing arrangement or going jobless, benefits were allowed.¹⁵ This test for determining the responsibility for a stoppage was also employed by the Superior Court in the Barnas U. C. case¹⁶ where the court, in denying benefits, stated at page 432:

"A new condition was injected into the terms of their employment, not by the employer, but by the employes of the slope mine. . . Work was available in the slope mine without change of working conditions throughout the period. The controversy as to the change of starting time in the shaft mine ultimately was decided in favor of the workmen by a permanent board of arbitration and the prior working hours of the night shift were reinstated on their decision. Claimant and his co-workers might have assumed that the controversy would be decided on its merits by the board created for the very purpose of deciding such disputes."

But the injection of a change by the employer alone did not necessarily mean the ensuing stoppage was not attributable to the employes. Even where the employer confronted his employes with an ultimatum or *fait accompli*, the workers had to exhaust all other legal measures, short of a stoppage, for settling the dispute in order to escape the blame for their unemployment.¹⁷ The Superior

¹⁴ Once it had been decided that the suspension was attributable to the employes as distinguished from a lay-off or other action by the employer, the Board and the court found no difficulty in determining the eligibility of all employes unemployed as a result of the stoppage. Thus, employes who failed to cross picket lines, legally maintained, because of sympathy with the strikers or union principles, or because of a groundless or unreasonable fear of violence, were held ineligible for benefits, while those prevented from working were eligible. Stillman U. C. Case, 161 Pa. Super. Ct. 569; Phillips U. C. Case, 163 Pa. Super. Ct. 374; McGann U. C. Case, 163 Pa. Super. Ct. 379; Myers U. C. Case, — Pa. Super. Ct. —.

¹⁵ Claim of John A. Dixon, *supra*, where a coal operator prevented the miners from going to work unless they signed a contract that they would work "without the protection of a check weighman." Claim of Edward Jenkins, *supra*. Claim of Archibald Baskin, B-2817 (1943), where the employer refused to pay vacation wages for which provision was made in a contract and which were customarily paid. Claims of Samuel Bratton, et al., B-3505-35 (1944), where the employer offered to continue only on the basis of a ninety-cent a day wage cut for each employe. Cf. "Labor Disputes and Unemployment" by Leonard Lesser, 55 Yale L. J. 173. Of course the change and detriment had to be substantial to be recognized in this regard. Claim of Bernard Bonner, B-3366 (1944), reversed in favor of the claimants but on different grounds at 156 Pa. Super. Ct. 367.

¹⁶ 152 Pa. Super. Ct. 429 (1943).

¹⁷ Claim of Bert Walsh, B-2512 (1942), where benefits were denied because claimants failed to submit their grievances to arbitration. Cf. Claim of Bernard Bonner, *supra* and Barnas U.C. Case *supra*.

Court also espoused this test for determining eligibility in the Miller U. C. Case¹⁸ stating at page 321:

"We are likewise of the opinion that the employees' suspension of work was 'voluntary' within the meaning of the Act. There were open to the employees forms of action or conduct by which the legality of the increased deductions could be determined without any stoppage of work. The Unemployment Compensation Law was not intended to promote stoppages of work by employees because of disputes with employers or bargaining agencies, which could be legally determined without any cessation of work. The fundamental idea of the Act is to provide a reserve fund to be used for the benefit of persons *unemployed through no fault of their own*. To call a suspension of work and act in concert to prevent a continuance of operations, without resorting to the legal measures open to determine the rights of the parties, amounts to a voluntary suspension of work, with the necessary consequences provided in the Act."

Those cases in which employes stopped work in order to force a change in the status quo or without first resorting to arbitration were called "strikes", while stoppages resulting from an employer's withholding of work except on new terms which he imposed and refused to arbitrate, were referred to as "lockouts". Although the use of these terms probably did not contribute much to the elucidation of the Pennsylvania law, it would seem that it did no harm either, since it was in harmony with the prevailing definitions of these words.¹⁹ The idea that a lockout necessarily involves a padlock or an unconditional withholding of work by the employer, if ever popularly entertained, lost favor during the revolution of the 1930's.

Against this background, the Legislature in 1947 amended the labor dispute section (43 P. S. 802) to disqualify a claimant for any week "in which his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory", etc.²⁰ The first appeal under the amended provision was the Fetter case, *supra*, in which the employer pulled the power switches and ordered the employes out of the factory for a three-week stoppage. The Bureau at this time had not yet formulated an interpretation of the amendment and denied the claims perfunctorily with the view to securing an appellate ruling. The employer contended the employes were disqualified on the ground that the term "stoppage of work" refers to any suspension or stoppage of operations

¹⁸ 152 Pa. Super. Ct. 315.

¹⁹ *Iron Molders' Union v. Allis-Chalmers*, 166 Fed. 45, 52. 20 L.R.A. (N. S.) 315; *Hall v. Barnes*, 285 Ky. App., 160, 142 S.W. (2d) 929; When controversies arise, of course, employers find a constructive strike in almost every lockout just as employes generally find a constructive lockout in every strike, each side pointing out that the other is withholding work, but generally neglecting to mention on what terms.

²⁰ Excepting, however, employes who can satisfy all three of these requirements: (1) not participating or directly interested in the dispute, (2) not a member of an organization (union) doing same, and (3) not a member of a grade or class of workers any of whom is doing same. The disqualification lasts for the duration of the stoppage. In substance this is a copy of the labor dispute section of the original Social Security Board draft bill, with one notable exception: Pennsylvania's Act disqualifies a claimant *solely on the basis of union membership*.

or work because of a labor dispute regardless of which side is responsible for resorting to it. In support of this argument the employer pointed out that the British have so construed their unemployment insurance acts and that the same term has been similarly construed in a majority of the states in which it is used.²¹ The Board, however, was not impressed. Since the highest appellate authority in the British system is only an administrative official, (the Umpire), and since there are fundamental differences between the British and American acts, the Board did not feel constrained to follow the British interpretations. As to the American decisions in favor of a blanket disqualification, it was observed that the statements were often mere dicta because the employes therein had resorted to a strike to secure improved terms. Nor did the reasoning in many of the cases seem sound. In some, the courts paid lip service to the declaration of public policy and its basic test of fault and, in the next breath, ignored it. Other cases failed to distinguish between a labor dispute and the consequences where one of the parties acts to suspend work or operations. Further, some of the cases were weakened by the fact that the court erroneously thought it had to construe the term "stoppage of work" without reference to who was responsible in order to limit the disqualification of the duration of the stoppage at the plant and thus give benefits to striking employes whose employer had replaced them. Finally, most of these decisions seemed to show the effect of pressure by fearful administrative agencies (already grouping with the terms "direct interest", "grade" and "class") to avoid having to decide the question of responsibility for the stoppage, which they often mistakenly confused with the merits of the dispute. The minority view, that no disqualification applies where the claimants are not at fault, was considered more reasonable and in harmony with the spirit of the law and the popular meaning of the words "stoppage of work."²² Apart from all this, however, the Board reasoned that the term "stoppage of work" *had to be construed with reference to the question of fault*. One thing was certain; the most that could be said on the majority side was that the term did not plainly indicate an intent to ignore fault. Under a long line of decisions, therefore, the Board was bound to look to the declaration of public policy in construing the term.²³ Like a refrain, these cases reminded the authorities that the question of fault for causing unemployment

²¹ *Magner v. Kinney*, 141 Nebr. 122, 2 N. W. (2d) 689; *Lawrence Baking Company v. Mich. U.C.C.*, 308 Mich. 198, 13 N. W. (2d) 260; *In re Steelman*, 219 N. Car. 306, 13 S. E. (2d) 544; *Adkins v. Ind. Emp. Sec. Div.* (Ind. App. Ct., 1946), 70 N. E. (2d) 31; *Bankston Creek Collieries v. Gordon*, (Ill. Sup. Ct., 1948), 77 N. E. (2d) 670; *In re North River Logging Co.* (Wash. Sup. Ct., 1942) 130 P. (2d) 68.

²² *Board of Review v. Mid-Continent Petroleum Corp.*, 193 Okla., 36, 141 P. (2d) 69; *Walgreen v. Murphy*, 386 Ill. 82, 53 N. E. (2d) 390; *Decision of the Colorado U. C. Comm.*, U. C. Inter. Service, Benefit Series, Vol. 10, No. 3, p. 32.

²³ *Berdan U. C. Case*, 153 Pa. Super. Ct. 49; *Teicher U. C. Case*, 154 Pa. Super. Ct. 250; *McFarland U. C. Case*, 158 Pa. Super. Ct. 418; *Sturdevant U. C. Case*, 158 Pa. Super. Ct. 548; *Baigis U. C. Case*, 160 Pa. Super. Ct. 379; *Duquesne Brewing Company, etc., v. U. C. Board of Review*, 162 Pa. Super. Ct. 216, *aff'd* at 359 Pa. 535; *Michalsky U. C. Case*, 164 Pa. Super. Ct. 436; *Barclay White Co., v. U. C. Board of Review*, 356 Pa. 43; *Dawkins U. C. Case*, 358 Pa. 224.

must control all testing of eligibility.²⁴ The employer did not appeal the Board's decision in the Fetter case.

When the Cybok case, *supra*,²⁵ arose, in which the employer imposed an hourly wage cut of ten cents and rejected the employes' request for arbitration, the Bureau allowed the claims. On the employer's appeal, the Board of Review affirmed the allowance, basing its order on the Board and Court cases decided under the old "voluntary suspension" provision, which were still applicable in the light of the Board's interpretation of the term "stoppage of work" in the Fetter case. Although the case will probably be appealed to the Superior Court, it is difficult to see why the administrative rulings should be disturbed. The Legislature was aware of the effect given to Section 3 and its application to labor dispute situations when it amended the act in 1947, and had it intended to obliterate this basic principle in the determination of eligibility it presumably would have used more appropriate language to do so.

It seems reasonable that where the employes have neither taken the initiative in creating a labor dispute nor in resorting to a stoppage, their eligibility for benefits should be predicated upon considerations other than a strict test of volition, *i. e.*, whether or not they had *any* choice in continuing at work. (As a matter of fact, the voluntary character of unemployment may be questioned where the choice laid before the employes involves a surrender to onerous terms with no opportunity for a peaceful, impartial settlement of the dispute.) In such cases the question should be whether or not the employes have done everything reasonable to avert their unemployment, *i. e.*, whether or not they were "at fault" in the occurrence of the stoppage. It is pertinent to observe at this point that the basic principle declared in Section 3, which the courts have held lies at the root of the Act, provides that benefits are payable to persons *unemployed through no fault of their own*, rather than merely to those who had no choice whatsoever in the matter of their separation. There are many situations where the Act, in the public interest, provides benefits for claimants who could not pass a hard and fast test of volition. This is only sensible, since there is no reason for imposing a higher standard of conduct on compensation claimants than one could expect, under the same circumstances, from the average, reasonable person who is not a claimant.

Nor is the objection sound that it is often difficult to decide the question of fault in labor dispute cases. The "fault" to be determined in these cases relates not to the merits of the dispute and the positions of the parties therein, but rather to the responsibility for resorting to a stoppage of operations or work

²⁴ Except, of course, where the legislature has *expressly* provided to the contrary in the special provisions in the Act. Bonomo U. C. Case, 161 Pa. Super. Ct. 622.

²⁵ See footnote No. 2.

because of the dispute.²⁶ Such a determination does not involve anything foreign to the everyday work of the compensation authorities; it is not much different from the determination of "good cause" for leaving and refusing work in individual claim cases. The bases for determining fault in labor dispute cases which the Pennsylvania authorities and the Superior Court have worked out, viz., which side introduced a change in the status quo as a condition of continuing work and whether the employes exhausted all other means for settling the dispute, are fair, objective, practicable tests which any agency should be able to apply. Moreover, it is hard to believe that the Superior Court would be greatly moved by any argument of administrative difficulty in this situation; the Court has rather bluntly indicated by its opinion that rules of thumb are not conducive to justice and that there is no satisfactory substitute for a careful weighing of all the facts of a case, whether the issue is claimant eligibility for benefits or an employer's liability for contributions.²⁷

In its broader implications, there is much to recommend the Board's decision. The tax provisions of the Act contain an "experience rating" provision under which an employer may reduce his contribution rate by reducing unemployment in his enterprise. The theory of this provision is two-fold: (1) to offer an incentive for stabilizing employment and (2) to assess liability for benefits where it belongs, to wit, on those who are responsible for causing the unemployment. Although the soundness of these theories is doubtful, since most unemployment arises from causes over which the individual employer has little or no control, in labor dispute cases an employer frequently has some choice in the matter. Where he does, but elects to close the plant as a bargaining measure in preference to a peaceful solution of the dispute, both objectives of "experience rating" are served by paying benefits and charging the employer for contribution purposes.

Finally, as the Court has observed in denying benefits, the Act should not be construed in such a way as to promote stoppages of work by employes because of disputes which could be legally determined without any cessation of work. By the same reasoning it is desirable to construe the Law so as to encourage *employers* to use legal measures short of a cessation of operations for the settlement of their disputes. In the history of unemployment compensation in Pennsylvania to date, few employers have resorted to the methods which were used in the cases mentioned herein in which no disqualification was imposed. Are there any reasons, based upon justice to the contestants or the good of the public, for encouraging the use of such methods in future cases?

²⁶ As to the meaning of the term "fault" in the Act, see *McFarland U. C. Case*, 158 Pa. Super. Ct. 418, 423.

²⁷ *Baigis U. C. Case*, 160 Pa. Super Ct. 379; *Lavelly U. C. Case*, 163 Pa. Super Ct. 66; *Michalsky U. C. Case* 163 Pa. Super Ct. 436.

Conclusion

Unless and until the Courts rule to the contrary, the administrators apparently intend to hold:

- (1) That the Act still distinguishes between a "strike" and a "lockout", and that no disqualification is applicable for a stoppage which occurs through no fault of the employees.
- (2) That, under the 1947 amendment, the disqualification applies to stoppages of work by the employees and lasts for the duration of the stoppage.
- (3) That where the disqualification is applicable the old "personal test" of volition and fault has been practically abolished by the express denial of benefits to all members of any union or grade or class of worker participating or directly interested in the dispute.