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Unemployment Benefits in Labor Controversies: The Anachronisms of the *Establishment* Doctrine

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COMMENTARY

UNEMPLOYMENT BENEFITS IN LABOR CONTROVERSIES: THE ANACHRONISMS OF THE *ESTABLISHMENT* DOCTRINE

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WHEN social consciousness and economic necessity reached the point where it was possible and necessary to enact legislation providing unemployment benefits for those out of work "through no fault of their own,"[1] the draftsmen of the legislation provided for a denial of such benefits in cases of unemployment due to a labor controversy. The rationale of this exception was that the state should take a neutral position in labor disputes to ensure that the controversy, usually manifested in the form of a strike, would not be financed by unemployment compensation benefits.[2] It would seem the intention of the drafters was that strikers, or those out of work as an incident of a strike, who stood to gain by the economic pressures being exerted, should not be given an unfair advantage over management in the give and take of collective bargaining. In short, the test of whether a claimant, out of work due to a labor controversy, was entitled to benefits should have depended upon the *voluntariness* of his unemployment; the voluntariness being measured either by his participation or interest in the outcome of the controversy. Voluntariness is, after all, the measure of a claimant's rights to benefits in any non-labor dispute situation.[3]

The draftsmen, despite what one might have thought their intent to be, drew a curiously broad statute which, on its face, has nothing to do with the voluntariness of the claimant's unemployment or the nature of his involvement in a labor controversy. Moreover, the statute, New York Labor Law Section 592, has been interpreted by the courts along lines wholly foreign to any concept of voluntariness. The statute provides:

> Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout or other industrial controversy was terminated.[4]

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1. The Unemployment Insurance Law is a remedial statute designed to protect the wage earner from the hazards of unemployment by providing money benefits to individuals "unemployed through no fault of their own." N.Y. Lab. Law § 501. It was first enacted by N.Y. Sess. Laws 1935, ch. 468.

2. Matter of Burger, 277 App. Div. 234, 98 N.Y.S.2d 932 (3d Dep't 1950).

3. Only employees who are unemployed through fault of their own—such as employees who voluntarily quit their jobs or who refuse employment without good cause or who are discharged for misconduct—are denied benefits under the statute. N.Y. Lab. Law §§ 593, 594.

4. N.Y. Lab. Law § 592(1).

While similar statutes[5] with widely divergent judicial interpretation[6] exist in other states, the best example of the bad statute literally construed exists in New York. Because of the wording of the statute itself and the interpretation given to the term "establishment" by the courts, the provision has failed to serve the function originally intended by the legislature. In some situations the statute has been used by the unions as a strike weapon, while in others it has been worked to withhold unemployment benefits to workers who are involuntarily unemployed and who have no interest in the outcome of the labor controversy. Under these circumstances it is difficult to see how the statute can be satisfactory to labor, management or the general public.

I. THE *Establishment* CONCEPT

Establishment has been interpreted in New York to mean nothing more than "geographic location." The first New York interpretation was rendered in 1951 in *Matter of Machcinski*[7] where a strike over local issues occurred at Michigan plants of the Ford automotive empire. The resulting interruption in the flow of materials in this highly integrated industrial complex caused workers at New York plants, who neither participated in the strike nor had an interest in its outcome, to be laid off. The company argued that establishment should be construed to mean the whole production complex including the New York plants, but the Appellate Division, noting that the legislature could have used the English statute as a model[8] had it intended to create something other than a geographic criterion, held that section 592(1) of the Unemployment Insurance Law meant exactly what it said—the place where the employee was last employed. In this particular case the claimants had nothing to do with the strike in Michigan and stood to gain nothing from it. Thus, they were truly out of work involuntarily. Accordingly, the court could, without inconsistency, note the legislative purpose underlying unemployment benefits, *i.e.*, that the public good and the well-being of the wage earners of the state required the enactment of this measure for the benefit of persons unemployed through no fault of their own,[9] and apply the geographic interpretation of the statutory term "establishment."

In 1961 the Court of Appeals put its stamp of approval on the geographic interpretation of establishment when, in *Matter of Ferrara*,[10] it decided that all employees of National Airlines could not be denied benefits for unemployment caused by a strike of one group. In that case certain clerks employed at what was then called Idlewild Airport failed to report for work because of stalled contract negotiations. This action was taken without union authorization. The absence of

5. *E.g.*, Minn. Stat. § 268.09(1)(6) (1959), as interpreted in Adelsman v. Northwest Airlines, Inc., 267 Minn. 116, 125 N.W.2d 444 (1963).
6. See Part IV, pp. 722-24 *infra*.
7. 277 App. Div. 634, 102 N.Y.S.2d 208 (3d Dep't 1951).
8. *Id.* at 638-39, 102 N.Y.S.2d at 212. See *infra* note 40.
9. *Id.* at 639-40, 102 N.Y.S.2d at 213.
10. 10 N.Y.2d 1, 176 N.E.2d 43, 217 N.Y.S.2d 11 (1961).

these clerks, along with work stoppage in National's offices located in other states, caused the suspension of the entire New York operation. As a result hangar employees at Idlewild, located in a different building than that of the striking clerks, and clerks in the Manhattan offices were laid off. The Appellate Division had determined, in line with *Machcinski,* that the Manhattan clerks and the Idlewild hangar employees were entitled to benefits since there was no industrial controversy in their establishments (locations), but that the Idlewild clerks would be barred since it was their controversy in their establishment.[11] In affirming, the Court of Appeals noted the remedial purpose of unemployment benefits legislation and the fact that in the area of labor relations law there was an historic policy of governmental neutrality. The Court reasoned that the suspension of benefits in this area must be narrowly construed in order to give effect to the remedial aspect of the legislation. Also, since the suspension provisions of section 592(1) demand no proof of individual participation or financial interest in the outcome of the controversy, the administrator (the Industrial Commissioner) is spared the need for making value judgments in assessing the rights of claimants to benefits; all he need do is follow the literal meaning of the word "establishment" in determining eligibility. Perhaps with an eye to another case on the docket[12] the Court noted that in certain situations suspension may have to be invoked even though the claimants are represented by separate unions for bargaining purposes. However, the Court did not state whether it would deny benefits to claimants who were unemployed due to a strike in their establishment instigated by employees with whom they shared no interest whatsoever.[13] In *Ferrara* the Manhattan clerks and the Idlewild clerks were members of the same union, but since the Idlewild clerks struck without union authorization, it does not appear that the Manhattan clerks could be said to be involved in the controversy or interested in its outcome. Thus there seems to be a tacit preservation of an involuntariness concept.

The extension of the establishment doctrine is further illustrated in certain companion cases decided with *Ferrara.* In *Matter of Curatalo*[14] the employer operated a steel fabrication plant and was also engaged in the construction of steel structures. The employees were divided into two classes: (1) steelworkers who worked at the plant, and (2) construction workers who were assigned to work at various construction projects. The construction workers' union called a strike and the inability of the employer to deliver steel across the picket lines at the construction sites ultimately led to lay-off of the steelworkers. Since the industrial controversy was not at the fabrication plant, there was no controversy in that establishment and the Court held that the steelworkers were entitled to benefits. It does not appear that the steelworkers who received the

11. 11 A.D.2d 171, 202 N.Y.S.2d 869 (3d Dep't 1960).
12. Matter of Gilmartin, 10 N.Y.2d 16, 176 N.E.2d 51, 217 N.Y.S.2d 22 (1961). See p. 721 *infra.*
13. See Part III, pp. 720-22 *infra.*
14. 10 N.Y.2d 10, 176 N.E.2d 48, 217 N.Y.S.2d 18 (1961).

benefits had anything to do with the controversy or had any interest in its outcome.

In *Matter of Wentworth*,[15] road construction workers were laid off because of a teamsters' strike involving truck drivers employed by the company furnishing concrete and the contractor's drivers who carted materials from one part of the project to another. The Court noted that it was clear that the claimants' loss of employment was not due to the participation of the job-site drivers in the strike but, rather, to the cessation of cement deliveries by drivers employed by the cement company. It was summarily held, although hardly on as clear-cut a set of circumstances as existed in the other cases, that there was no controversy at claimants' establishment, apparently some outdoor situs comprising the construction area. At any rate, as in the other cases, claimants' unemployment was involuntary and their compensation can be said to fully comply with the underlying purpose of the law.

II. Use of the Establishment Concept as an Economic Weapon

Preparatory to a nationwide strike against General Motors called by the United Automobile Workers International Union (UAW) in September, 1964, the union leaders plotted what was called a "selective strike strategy," *i.e.*, one automobile manufacturer at a time would be struck. By allowing other manufacturers to continue production it was the union's hope that such ongoing competition would serve as additional pressure in bringing the struck company to terms. A few of the many plants in General Motors' integrated system, however, produced parts sold to General Motors' competitors, Chrysler and Ford. Recognizing that curtailment in that production would, in turn, slow down or stop production at Chrysler and Ford, thus defeating the whole purpose underlying the selective strike strategy, the UAW requested its workers at those General Motors plants to stay on the job. How long they could do so, of course, was problematical since continued operation of those plants was dependent upon the flow of material from other General Motors plants which would be struck. With respect to this, the following appeared in a UAW publication addressed to its members: "How long we can operate without layoffs in certain areas of the plant is highly speculative. We have been assured of your eligibility for N.Y. State unemployment compensation benefits by recent Court decisions."[16] Thus the union recognized openly that its selective strike strategy could be financed, in part at least, by unemployment benefits.

The *Machcinski* and *Ferrara* decisions, of course, gave a basis to this advice, but it was not until the Court of Appeals' decision in *Matter of George*[17] that it became apparent that employees of an integrated, multi-plant industry

15. 10 N.Y.2d 13, 176 N.E.2d 50, 217 N.Y.S.2d 20 (1961).
16. Brief for appellant, General Motors Corporation, p. 10, Matter of Weis, 26 A.D.2d 414, 274 N.Y.S.2d 794 (3d Dep't 1966).
17. 14 N.Y.2d 234, 199 N.E.2d 503, 250 N.Y.S.2d 421 (1964).

represented by a single union could be awarded unemployment benefits even if their unemployment resulted from a strike participated in initially by these employees. In October 1958, UAW employees left employment in every one of General Motors' plants throughout the country. The national issues were soon settled, but strikes continued at the local level until local unions, on a piecemeal basis, reached agreements. Claimants' local unions reached agreement at the plants around the Buffalo, New York, area fairly quickly. The strikes at those plants were settled, both nationally and locally, and the claimants were ready to return to work. They remained unemployed, however, because the continuing strikes at other General Motors plants had halted the flow of material necessary to keep all the plants in this functionally integrated industry in operation. The Appellate Division held that these employees, who had themselves participated in the nationwide strike called by their international union, were not entitled to benefits. Noting that claimants must have been fully aware of the probable delay in resumption of employment caused by such a strike against interdependent factories, the court stated: "Their [claimants'] unemployment during the period for which they have been granted benefits was the direct and inevitable consequence of the strike in which they joined. They are not innocent victims of a situation wholly beyond their control, and their unemployment may not be said to be involuntary."[18]

In reversing, the Court of Appeals stated:

> The Appellate Division . . . erred, in our view, in attributing a vicarious voluntariness to the post-settlement unemployment on the ground that, when they commenced the strike, the claimants ought to have foreseen the consequences of idleness in some plants of an integrated industrial enterprise. The statute in question expressly limits such considerations to single "establishments." There can be little doubt that, under our cases, delays caused by lack of parts and supplies from other idle plants are no part of the termination of an industrial controversy in an establishment that has settled its own controversy. . . . [E]mployees in an establishment in which no dispute presently exists, even though they were participants in the initial multi-plant controversy, are not denied benefits where their unemployment is traceable solely to a controversy in another establishment.[19]

A variation on the 1958 General Motors strike situation arose out of the 1961 strike of the same employer. As in *George* there were national and local issues to be settled. Locals came to terms separately at the three New York plants which were involved, but the national agreement was not signed for some days. While workers were ready and willing to return to work at the time their local disputes were settled, all of them were not able to do so because of the necessity of having gradually to restart the furnaces in each of the establishments. General Motors argued that unlike the situation in *George* where the delay in work resumption was due to lack of material caused by the continuing strikes in other es-

18. 15 A.D.2d 308, 309, 223 N.Y.S.2d 326, 328 (3d Dep't 1962).
19. 14 N.Y.2d 234, 239-40, 199 N.E.2d 503-05, 250 N.Y.S.2d 421, 424-25 (1964).

tablishments, the delay in work resumption here was due to the delays indigenous to each establishment wherein there surely had been an industrial controversy. The causal relationship was more direct here than in *George*—the delay in resumption of work caused by the industrial controversy could be traced directly, in each establishment, to the participation of the employees in that controversy. The Appellate Division, however, affirmed the allowance of benefits since the industrial controversy had, in fact, ended at the establishments and there was no room for any concept of "vacarious voluntariness" with regard to the post-settlement unemployment under the Court of Appeals' edict in *George*.[20]

Thus, as noted at the outset of this section, in preparing for the 1964 automobile strike, the union was able to instruct those members who were requested to stay in employment so that parts would be produced for General Motors' competitors, that if they were laid off it was likely they could receive unemployment benefits under the above mentioned court decisions. There indeed was a strike in 1964, and workers who stayed on the job at specified plants as part of the union's overall strike strategy did apply for benefits when they were laid off. Their awards were granted and, as predicted by the union, were upheld[21] for the days of unemployment occurring both before and after the date of the national strike settlement and the signing of the contracts locally at their own plants. Since there had been no industrial controversy in their particular establishments, their unemployment was compensable even though the lack of a controversy at these establishments was a calculated maneuver by the union to give it a stronger hand in the negotiation process.

III. Deprivation of Benefits to Those Involuntarily Unemployed

That the test of voluntariness generally applicable in the New York Unemployment Insurance Law has found no place in industrial controversy cases is graphically pointed out in the General Motors strike cases related above. In those cases the adoption of the geographic test resulted in providing the unions with a new economic weapon. In several cases, however, the geographic test has worked to deny benefits to claimants because there was an industrial controversy in the establishment in which they worked. These benefits were denied despite the fact that their unemployment was involuntary in every conceivable way.

The first such case was *Matter of Lasher*.[22] The claimants were employees of Bethlehem Steel who went from site to site performing steel erection work. While the claimants were engaged in the construction of approaches to open hearth furnaces at Bethlehem's Lackawanna, New York, plant, the permanent employees at the Lackawanna plant struck, causing the claimants to be laid off. Bethlehem's employees and the claimants were represented by different unions

20. Matter of Acquisto, 25 A.D.2d 326, 269 N.Y.S.2d 567 (3d Dep't), *leave to appeal denied*, 18 N.Y.2d 577 (1966).
21. Matter of Weis, 26 A.D.2d 414, 274 N.Y.S.2d 794 (3d Dep't 1966).
22. 279 App. Div. 505, 111 N.Y.S.2d 356 (3d Dep't 1952).

and the claimants neither participated in the instigation of the strike nor stood to gain or lose from the contract terms hinging on the strike's outcome. The Appellate Division, noting that voluntariness was not a criterion under section 592(1), held simply that since the controversy occurred in the establishment at which the claimants were last employed they would not be eligible for benefits if their unemployment was due to the strike.[23]

In *Matter of Gilmartin*,[24] a companion case to *Ferrara*, claimant was employed by a manufacturer of concrete products. A Lathers' Union representative demanded that the employer hire a member of that union to operate a certain lathe. The employer refused and the Lathers' Union enlisted the aid of the Teamsters' Union which ordered its drivers to refuse to deliver concrete to the employer. Claimant and his fellow workers were members of other unions and had no interest in the labor controversy which forced their lay-off. There being a controversy at claimant's establishment, the Court of Appeals held claimant was not entitled to benefits even though this unemployment was involuntary in the truest sense of the word.

Another General Motors case, having nothing to do with the nationwide strikes pertinent to the cases discussed above,[25] illustrates the counterpart to those situations. In *Matter of Carmack*[26] there were two General Motors plants under separate management divisions located in two buildings at one site. The Fisher Body Division was in one building and the Chevrolet Motor Division was in the other. The buildings were connected by a tunnel housing the main assembly line. Fisher automobile bodies moved out of the Fisher building, through the tunnel and into the Chevrolet building where they were joined to the Chevrolet chassis and components. From twelve to fifteen Fisher employees worked in the Chevrolet building inspecting Fisher bodies as they came through the tunnel into the Chevrolet plant. Although the production was integrated, the management was separate, as were the unions. The Fisher employees struck, causing the Chevrolet employees to be laid off. Because Fisher employees worked in the Chevrolet establishment, the Appellate Division held that there was a controversy in that establishment thereby rendering the Chevrolet employees, involuntarily unemployed, ineligible for benefits.[27]

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23. Since the Unemployment Insurance Appeal Board had not specifically found that the shortage of steel was due to the steelworker's strike, the case was remanded for a finding on that point. In order for workers to be disqualified under N.Y. Lab. Law § 592(1), it must be found, in addition to the fact that the controversy occurred in the pertinent establishment, that the unemployment was due to a "strike, lockout or other industrial controversy" and that determination had not been made by the fact finders.

24. 10 N.Y.2d 16, 176 N.E.2d 51, 217 N.Y.S.2d 22 (1961).

25. See Matter of George, 14 N.Y.2d 234, 199 N.E.2d 503, 250 N.Y.S.2d 451 (1964), discussed *supra* notes 18, 19 and accompanying text; Matter of Acquisto, 25 A.D.2d 326, 269 N.Y.S.2d 567 (3d Dep't 1966), discussed *supra* note 20 and accompanying text; Matter of Weis, 26 A.D.2d 414, 274 N.Y.S.2d 794 (3d Dep't 1966), discussed *supra* note 21 and accompanying text.

26. 19 A.D.2d 766, 241 N.Y.S.2d 993 (3d Dep't 1963), *aff'd mem.*, 15 N.Y.2d 768, 205 N.E.2d 532, 257 N.Y.S.2d 339 (1965).

27. Had it not been for this presence of Fisher employees in the Chevrolet plant a perplexing geographical question would have arisen with respect to establishment because of

In *Matter of Cohn*[28] claimant was laid off because of a strike against another employer in the same establishment in which he worked. Even though his own employer was a corporate subsidiary of the struck employer, and the operation at this establishment was an integrated process involving both parent and subsidiary, there was no proof of claimant's interest or participation in the strike, but then there did not have to be. Establishment being the sole criterion, claimant was denied benefits.

IV. The Law in Other Jurisdictions

The anomaly presented in New York where, because of the establishment provision, voluntary unemployment is often rewarded and involuntary unemployment is often penalized, is found elsewhere as well. In states saddled with the establishment provision, the concept of what constitutes an establishment varies. In opposition to the New York test based solely on geographic location, the test in Ohio was whether two or more plants, regardless of physical separation, were *functionally integrated, i.e.*, whether continued production at one plant depended on continued production at another of the employer's plants. This being the case the two (or more) plants constituted one establishment. Consequently, claimants involuntarily laid off at one plant with no interest in the outcome of a strike at the other plant were denied benefits.[29] More recently, however, Ohio has come over to something akin to New York's geographic test by holding that establishment relates to physical place of business.[30]

The Michigan courts became so entangled over the definition of establishment that the legislature finally revamped the disqualification statute.[31] At one point the functional integration test was the only one used,[32] but this test was relaxed some years later when the court undertook to account for such multiple factors as physical proximity of separate plants and local plant management, as well as funtional integration.[33] Very recently, however, while still applying the prior Michigan establishment provision, it was held that the terms of a national collective bargaining agreement extending a strike at one bargaining unit to all bargaining units at different establishments, extended the industrial controversy to the other establishments at least at the point when layoffs occurred. This, in

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the presence of two plants under separate management located at one site but connected by an assembly line.

28. 24 A.D.2d 298, 265 N.Y.S.2d 765 (3d Dep't 1965).

29. Adamski v. Ohio, 108 Ohio App. 198, 161 N.E.2d 907 (1959). For further discussion of *Adamski* see Note, 58 Mich. L. Rev. 1239 (1960); *cf.* Baumgarte v. Board of Review, 21 Ohio Op. 2d 52, 186 N.E.2d 146 (1961).

30. Abnie v. Ford Motor Co., 175 Ohio St. 273, 194 N.E.2d 136 (1963). Even though the employer conducted an integrated business where all plants were interdependent, employees who became unemployed at an Ohio plant because of a strike in Michigan were entitled to benefits.

31. Mich. Stat. Ann. § 17.531(29)(1)(b) (Supp. 1963), Mich. Pub. Acts 1963, No. 226 § 29(1)(b).

32. Chrysler Corp. v. Smith, 297 Mich. 438, 298 N.W. 87 (1941).

33. Park v. Employment Sec. Comm'n, 355 Mich. 103, 94 N.W.2d 407 (1959).

effect, caused a waiver of benefits by operation of the collective bargaining contract. No regard was given to anything but the contract.[34]

Other jurisdictions employ similar tests to define establishment. In Minnesota and Kentucky the courts rely more on a comprehensive test,[35] while the functional integration test has been used in Connecticut.[36]

The California courts, with not quite so stringent an establishment provision as in New York,[37] have taken a more realistic approach. In *Gardner v. State Dir. of Emp.*[38] restaurant unions seeking a more favorable contract with the restaurant owners' association struck certain key restaurants. The association had previously announced its intention to consider a strike against one member a strike against all members and carried out this threat by laying off all employees. The California Supreme Court upheld the Appeals Board ruling that laid-off employees, locked out because of their union's strike called at other restaurants, were not entitled to benefits since they had voluntarily left their work because of a trade dispute. The court realistically assessed the situation and pointed out that the union employees, having used the economic weapon first, were responsible for the foreseeable reprisals and therefore were "voluntarily" out of employment.

The California rationale of fixing responsibility against the party who first invokes a weapon leading to a labor controversy can hardly be faulted and is shown to be far superior to the other criteria discussed for the purpose of deciding whether or not to invoke the disqualification provision.[39] A statute without an establishment provision, such as the English model,[40] is obviously preferable. Although Michigan, in an attempt to unsnarl the interpretation of its statute by new legislation, retained the establishment concept, it made disqualification de-

34. General Motors Corp. v. Employment Sec. Comm'n, 376 Mich. 135, 135 N.W.2d 921 (1965). *But see* Employment Sec. Comm'n v. Vulcan Forging Co., 375 Mich. 374, 134 N.W.2d 749 (1965). See Note, 12 Wayne L. Rev. 710 (1966).

35. Adelsman v. Northwest Airlines, Inc., 267 Minn. 116, 125 N.W.2d 444 (1963); Snook v. International Harvester Co., 276 S.W.2d 658 (Ky. 1955).

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

37. Cal. Unemp. Ins. Code § 1262 (1956) states: "An individual is not eligible for unemployment compensation benefits, and no such benefits shall be payable to him, if he left his work because of a trade dispute. Such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

38. 53 Cal. 2d 23, 346 P.2d 193 (1959).

39. For a fuller discussion of the *Gardner* case see Note, 59 Mich. L. Rev. 145 (1960). See also Coast Packing Co. v. California Unemp. Ins. Appeal Bd., 410 P.2d 358, 48 Cal. Rptr. 854 (1966).

40. This statute is outlined at length in Matter of Machcinski, 277 App. Div. 634, 638-39, 102 N.Y.S.2d 208, 212 (3d Dep't 1951). The statute (British Unemployment Insurance Act 1911, 1 & 2 Geo. 5, c. 55) provides that where separate branches of work which are commonly carried on as separate businesses in separate premises are in any case carried on in separate departments on the same premises, each of those departments shall be deemed a separate factory or work shop, as the case may be. It also contains provisions to the effect that the suspension shall not apply if the claimant is not participating in or financially or directly interested in the dispute which caused the work stoppage and does not belong to a class of workers who participated in the dispute. It is pointed out by the court in *Machcinski, id.* at 639, 102 N.Y.S.2d at 212, that in 1936 the Federal Social Security Board prepared a "draft bill" modeled after the English statute and that many states adopted this model almost verbatim. See Stewart, Planning and Administration of Unemployment Compensation in the United States 28 (1938).

pend on the nature of a claimant's involvement in the controversy. This is, in effect, an adoption of a voluntariness test.[41] The Arizona statute, based on the English statute, probably comes as close to simplicity as possible while making voluntariness the main criterion.[42]

V. Conclusion

The Court of Appeals in the *Ferrara* case noted, in support of its limited interpretation of establishment, that "it is of some relevance that the Legislature has resisted a number of attempts, first initiated shortly after the *Machcinski* decision, to amend the statute so as to extend the scope and content of the term 'establishment' and the consequent suspension of benefits."[43] Examination of the unadopted amendments indeed shows that legislative attempts were made to extend the concept so that workers at one plant laid off because of a dispute at another of the employer's plants would be denied benefits.[44] These amendments would have served to curb the use of unemployment benefits as an economic weapon in a nation-wide strike situation where, under the existing statute, workers who participated initially and/or stood to gain from continuing strikes elsewhere can receive benefits.[45] But these proposed amendments would have ag-

41. Mich. Pub. Acts 1963, No. 226 sec. 29(1)(b), Mich. Stat. Ann. § 17.531(29)(1)(b) (Supp. 1963) goes on at great length in setting disqualification standards and criteria.

42. Ariz. Rev. Stat. Ann. § 23-777(A) (1956) reads:

> An individual shall be disqualified for benefits for any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute, strike or lockout which exists at the factory, establishment or other premises at which he is or was last employed. This provision shall not apply if it is shown to the satisfaction of the commission that the individual is not participating in, financing or directly interested in the labor dispute . . . or that he does not belong to a grade or class of workers of which, immediately before the commencement of the labor dispute . . . there were members employed at the premises at which the labor dispute . . . occurs, any of whom are participating in or financing or directly interested in the dispute, strike or lockout. . . .

For an interpretation see Various Claimants & Constr. Union v. Employment Sec. Comm'n, 92 Ariz. 183, 375 P.2d 380 (1962). See also Ill. Rev. Stat. ch. 48, § 223(d) (1950).

43. Matter of Ferrara, 10 N.Y.2d 1, 9, 176 N.E.2d 43, 48, 217 N.Y.S.2d 11, 16 (1961).

44. To the existing wording of § 592(1) in the first four amendment attempts would have been added: "When an employer operates two or more premises, wherever situated, in the conduct of his business, they shall be considered one establishment for the purpose of this section, if a labor dispute at one of the premises causes unemployment at the other." A.I. 1807, Print A1807, N.Y. Legis., 176th Sess.; A.I. 3854, Print A3996, N.Y. Legis., 180th Sess.; A.I. 3162, Print 3220, N.Y. Legis., 182d Sess. Another amendment would have read: "No benefits shall be payable to a claimant, and no waiting period credit shall be allowed, with respect to any week during any part of which the claimant's unemployment is due to a lack of work caused by a strike, lockout or other industrial controversy in any establishment, within or without this state, of the employer by whom the claimant is or was last employed." A.I. 2753, Print A2805, N.Y. Legis., 183d Sess. The last amendment attempt would have rewritten the entire section thus: "No benefits shall be payable to a claimant, and no waiting period credit shall be allowed, with respect to any week during any part of which the claimant is participating in a strike, lockout or other industrial controversy, or with respect to any week during any part of which the claimant's unemployment is due to a lack of work caused by a strike, lockout, or other industrial controversy in any establishment, in this or any other state of the United States, of the employer by whom the claimant is or was employed." S.I. 2043, Print S2043, N.Y. Legis., 184th Sess.

45. Matter of George, 14 N.Y.2d 234, 199 N.E.2d 503, 250 N.Y.S.2d 451 (1964); Matter of Acquisto, 25 A.D.2d 326, 269 N.Y.S.2d 567 (3d Dep't 1966); Matter of Weis, 26 A.D.2d 414, 274 N.Y.S.2d 794 (3d Dep't 1966).

gravated the inequity inherent in situations where workers are laid off due to a dispute, either in their own or different plants, in which they have no interest.[46] In short, these proposals would not have brought the criterion for denial of benefits for unemployment due to labor disputes into line with the voluntariness test used in other unemployment benefit situations.[47]

It is not impossible to maintain the state's neutral position in labor controversies and at the same time carry forth the underlying purpose of the Unemployment Insurance Law, which is to protect individuals unemployed through no fault of their own. It is difficult to understand, for example, how the award of unemployment benefits to the Chevrolet employees in the *Carmack*[48] case would have aided or hindered the labor dispute involving the Fisher employees who were in a totally separate bargaining situation. As noted, a realistic approach to involuntary unemployment due to labor disputes has been adopted in other jurisdictions.[49] While the California courts have wisely found room for a voluntariness test in interpreting their statute,[50] that statute is not totally free from the possibility of such restrictive interpretations as the New York geographic location test.[51] Consequently a California-type statute is not ideally suited to the furtherance of the cause of the voluntariness test. There appears to be no substitute for the English statute which is based wholly on the criterion of voluntariness,[52] unless it is the fairly simple and clear-cut version adopted by the Arizona Legislature.[53] The latter appears adequate and far superior to the rather intricate statute finally enacted in Michigan.[54]

The law in New York, of course, has fossilized to the point where there is no alternative to a legislative amendment eradicating the anomalous situation presented above. It is time New York parted company with those states out of step with the underlying concept of unemployment benefits and joined those jurisdictions which have adopted a realistic approach to the labor dispute question.

46. Matter of Lasher, 279 App. Div. 505, 111 N.Y.S.2d 356 (3d Dep't 1952); Matter of Gilmartin, 10 N.Y.2d 16, 176 N.E.2d 51, 217 N.Y.S.2d 22 (1961); Matter of Carmack, 19 A.D.2d 766, 241 N.Y.S.2d 993 (3d Dep't 1963); Matter of Cohn, 24 A.D.2d 298, 265 N.Y.S.2d 765 (3d Dep't 1965).

47. See N.Y. Lab. Law §§ 501, 593, 594.

48. Matter of Carmack, 19 A.D.2d 766, 241 N.Y.S.2d 993 (3d Dep't 1963).

49. Ariz. Rev. Stat. Ann. § 23-777(A) (1956); Cal. Unemp. Ins. Code § 1262 (1956); Mich. Stat. Ann. § 17.531(29)(1)(b) (Supp. 1963), Mich. Pub. Acts 1963, No. 226 § 29(1)(b).

50. Gardner v. State Dir. of Emp., 53 Cal. 2d 23, 346 P.2d 193 (1959).

51. See Cal. Unemp. Ins. Code § 1262 (1956).

52. Matter of Machinski, 277 App. Div. 634, 638-39, 102 N.Y.S.2d 208, 212 (3d Dep't 1951).

53. Ariz. Rev. Stat. Ann. § 23-777(A) (1956).

54. Mich. Stat. Ann. § 17.531(29)(1)(b) (Supp. 1963), Mich. Pub. Acts 1963, No. 226 § 29(1)(b).