Catholic University Law Review

Volume 27
Issue 2 *Winter 1978*

Article 8

1978

State Economic Aid to Strikers: Permissible or Preempted?

Joanna Moorhead

STATE ECONOMIC AID TO STRIKERS: PERMISSIBLE OR PREEMPTED?

Payment of unemployment compensation and welfare benefits to striking workers has sparked considerable controversy over the last four years. While the majority of states allow some type of welfare payments[1] to strikers, only five states extend unemployment compensation[2] to them.

Strikers are disqualified from receiving state economic aid for a variety of reasons.[3] Many state legislatures seek to preserve state neutrality in labor disputes reasoning that granting benefits to strikers is tantamount to taking sides in labor conflicts. Benefits to strikers are also perceived as threatening the fiscal integrity of the unemployment trust fund and undermining its purpose, which is to aid those involuntarily unemployed. Some conclude that by choosing to strike, a striker becomes voluntarily unemployed.[4]

---

1. The major source of welfare aid to strikers is the Aid to Families with Dependent Children—Unemployed Fathers program. This program received federal authorization under a 1961 amendment to Title IV of the Social Security Act, 42 U.S.C. § 607 (1970). Of the 29 jurisdictions participating in this program, only nine deny benefits: Arkansas, Indiana, Kansas, Maryland, Minnesota, Nebraska, Oregon, West Virginia, and Guam. Interview with Catherine Miller, U.S. Department of Health, Education, and Welfare, in Washington D.C. (Aug. 1, 1977).

2. New York and Rhode Island grant eligibility after an eight and a seven week period, respectively. N.Y. § 591 (Consol. Ann. 1977); R.I. GEN. LAWS § 28-44-1-6—(1971). Michigan allows payments if there has been bona fide interim employment. MICH. COMP. LAWS ANN. § 421.29(8) (Supp. 1977). New Mexico and Hawaii permit compensation only if there has not been a stoppage of work at the employer's business. N.M. STAT. ANN. § 59-9-5(d) (Supp. 1975); HAW. REV. STAT. § 383-30(4) (1968).

The stoppage of work disqualification had its origins in British law. *See* Hawaiian Tel. Co. v. Hawaii Dept. of Labor & Indus. Relations, 405 F. Supp. 275, 287 (D. Hawaii 1975). Under the British interpretation of the word "stoppage," the worker is disqualified as long as the job remains vacant. Workers cannot receive benefits unless they are permanently replaced or their jobs are eliminated. The U.S. courts, however, have broadened the British rule to provide payments even when employees have not been replaced. The crucial factor has become not whether a striker's job remains vacant, but whether the employer could maintain business in spite of the strike. *Id.* at 286-89.

3. For a comprehensive discussion of the underlying reasons for disqualifications of strikers, see Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294 (1949-50). An excellent analysis of the different programs that extend aid to strikers can be found in Carney, *The Forgotten Man on the Welfare Role: A Study of Public Subsidies for Strikers*, 1973 WASH. U.L.Q. 469 (1973).

4. While undoubtedly an individual worker in a large labor organization may not have

The Supreme Court in 1974 called attention to the effects of state economic aid to strikers in *Super Tire Engineering Co. v. McCorkle.*[5] The Court took judicial notice of the impact of welfare benefits to strikers and called for a clear determination as to whether state laws extending such benefits were preempted by federal labor policy. Just two years later, however, the Court in *Kimbell Inc. v. Employment Security Commission*[6] dismissed an appeal of a New Mexico case upholding unemployment compensation to strikers "for want of a substantial federal question."

Federal courts were divided as to the implications of *Kimbell.* The District Court for the Southern District of New York in *New York Telephone Co. v. New York State Department of Labor*,[7] and the District Court for the Eastern District of Michigan in *Dow Chemical Co. v. Taylor*[8] both distinguished the state unemployment compensation statutes under consideration from the New Mexico statute in *Kimbell.* The Third Circuit, however, in reconsidering *Super Tire Engineering Co. v. McCorkle*[9] read *Kimbell* much more broadly and concluded that it foreclosed further preemption adjudication of either unemployment compensation or welfare benefits.

In June of 1977, the Supreme Court issued two opinions shedding light on the implications of *Kimbell.* Although neither *Batterton v. Francis*[10] nor *Ohio Bureau of Employment Services v. Hodory*[11] dealt directly with the preemption of benefits to strikers, the Court's language suggested that the preemption issue was not foreclosed by *Kimbell.* This interpretation has recently been supported by the Second Circuit in its consideration of *New York Telephone* on appeal.[12]

---

voted for the strike and therefore has not "chosen" to strike in any meaningful sense of the word, such workers do have a certain amount of freedom regarding the strike. When the collective bargaining agreement or the union's constitution have not defined the circumstances under which a member can resign from the union, it is an unfair labor practice for the union to fine employees who had resigned their union membership in order to work during a strike. NLRB v. Local 1029, Textile Workers, 409 U.S. 213 (1972). Non-union members represented by a union who return to work during a strike cannot be fined at the union's urging if they have continued to pay required fees to the union. NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. 1975).

5. 416 U.S. 115 (1974).

6. 429 U.S. 804 (1976) (mem.).

7. 434 F. Supp. 810, 822-23 (S.D.N.Y. 1977).

8. 428 F. Supp. 86 (E.D. Mich. 1977).

9. 550 F.2d 903, 908 (3d Cir. 1977) (on remand from the Supreme Court), *petition for cert. filed*, 46 U.S.L.W. 3110 (U.S. Aug. 30, 1977) (No. 76-1684).

10. 432 U.S. 416 (1977).

11. 431 U.S. 471 (1977).

12. New York Tel. Co. v. New York State Dep't of Labor, 566 F.2d 388, 391 n.2 (2d. Cir. 1977).

I. FEDERAL LABOR POLICY AND THE PREEMPTION ISSUE

The National Labor Relations Act[13] (NLRA) attempted to rectify the imbalance of economic power between management and labor and thus encourage industrial stability.[14] The national labor policy, as set forth in the Act, was to encourage the practice of collective bargaining and worker self-organization.[15] The Act gave employees[16] the right to organize, made collective bargaining compulsory, and prohibited certain employer conduct as unfair labor practices.[17] The increased strength of unions and the industrial strife following World War II, however, led to the enactment of the Labor Management Relations Act[18] (the Taft-Hartley Act), designed to promote the public interest in industrial stability by protecting the rights of management as well as those of labor. The final major federal labor management relations act, the Labor Management Reporting and Disclosure Act of 1959[19] (the Landrum-Griffin Act), continued to define the boundaries of permissible conduct[20] but left the major provisions of the Taft-Hartley Act unchanged.

---

13. 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151-68 (1970)).

14. *See* Findings and Declarations of Policy, 29 U.S.C. § 151 (1970).

15. Section 1 of the Act—maintained in all subsequent amendments—establishes the federal labor policy:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

The Taft Hartley Act's additions to § 1 make it clear that labor as well as management can obstruct interstate commerce and that both parties are responsible for the effectuation of the Act's policies.

16. Employees covered by the Act are defined under § 2(3), 29 U.S.C. § 152 (1970). Under this definition, strikers do not lose their employee status when out of work due to labor disputes or unfair labor practices.

17. Section 7 of the Act gives employees the right to self-organization for collective bargaining purposes. 29 U.S.C. § 157 (1970). Section 8 defines unfair labor practices. 29 U.S.C. § 158 (1970). Such practices include interference with the employees' exercise of § 7 rights; domination or interference with labor organization; discrimination regarding employment which encourages or discourages union membership; and refusal to bargain collectively.

18. 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-67, 171-97 (1970)). This Act amended the NLRA in significant ways, most notably by prohibiting certain union activities as unfair labor practices. Secondary boycotts and jurisdictional strikes were outlawed. 29 U.S.C. §§ 158(b)(7) (1970). A union was also considered to have committed an unfair labor practice when it restrained or coerced employees from choosing not to participate in organization and concerted activities guaranteed by § 7. *Id* at § 158.

19. 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 401-531 (1970)).

20. The Act placed still more restrictions on unions. Union members were granted a

Federal labor policy today thus focuses on maintaining a balance of strengths between management and labor, with an emphasis on collective bargaining as the most effective method to maintain industrial stability. Implicit in the federal labor policy is the recognition that economic pressure is crucial in achieving a workable collective bargaining process. As the Supreme Court recognized, "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining."[21]

The extent to which federal labor law preempts state regulation of labor or management has been the subject of much litigation. The first definitive analysis of the issue occurred in *San Diego Building Trades Council v. Garmon*[22] when the Supreme Court announced that conduct arguably protected by the NLRA as an organizational right or prohibited as an unfair labor practice is outside the reach of state or federal court regulation. Both states and the federal judiciary must defer in such instances to the exclusive jurisdiction of the National Labor Relations Board.[23]

Certain activities, however, are clearly neither protected nor prohibited by federal labor law and therefore the *Garmon* test is inapplicable. An early Supreme Court decision indicated that such activity is regulable by the states,[24] but later decisions indicated that by choosing not to prohibit certain activities, Congress had deemed them permissible and therefore also outside the scope of state regulation.[25] This second line of cases indicated that a different preemption standard is used regarding economic pressures applied by management or labor. Thus certain conduct is unregulable not because it is directly protected or prohibited by federal law but because it is considered "permitted."[26]

A recent Supreme Court decision expressly affirmed that Congress did

---

"bill of rights" under which unions were more closely regulated. In addition, the Taft-Hartley Act was amended, resulting in the tightening up of secondary boycott prohibitions and the restriction of organizational and recognitional picketing. This Act undoubtedly went the farthest in restraining the power of unions.

For a recent analysis of current federal labor law, see F. BARTOSIC & R. HARTLEY, LABOR RELATIONS IN THE PRIVATE SECTOR (1977).

21. NLRB v. Insurance Agents' Union, 361 U.S. 477, 495 (1960). *See also* NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272, 288 (1972).

22. 359 U.S. 236 (1959).

23. *Id.* at 245.

24. Local 232, UAW v. Wisconsin Employment Relations Bd. (Briggs-Stratton), 336 U.S. 245 (1949).

25. *See, e.g.*, NLRB v. Nash-Finch Co., 404 U.S. 138 (1971); NLRB. v. Insurance Agents' Union, 361 U.S. 477 (1960); Garner v. Teamsters Local 776, 346 U.S. 485 (1953).

26. *See* BARTOSIC & HARTLEY, *supra* note 20, at 26-27.

indeed intend to leave some activities unregulated by "any governmental power"[27] and controlled by only the " free play of economic forces."[28] The Court in *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*[29] recognized that Congress, in order to achieve a proper balance of power between management and labor, had selected which forms of economic pressure should be prohibited; those left unrestricted are considered permissible.[30] Thus, a state attempting to prohibit the use of economic weapons left unrestricted by Congress is "not merely filling a gap when it outlaws what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available."[31] The Court stressed that neither states nor the NLRB is afforded flexibility[32] in determining which economic weapons are prohibited, for neither can rebalance or readjust the economic power left by Congress to either management or labor even though one may appear economically weaker in certain instances.[33]

Although under either a *Garmon* or a *Machinists* analysis, states are precluded from regulating a significant number of labor or management activities, both theories recognize that certain activities are still within a state's power to regulate. In *Garmon*, the Court noted that states are free to regulate activity which is "a merely peripheral concern" of federal labor law.[34] They also may regulate "conduct touch[ing] interests . . . deeply rooted in local feeling and responsibility."[35] The Court in *Machinists* expressly upheld those same exceptions for the "permitted activity" preemption situations.[36] *Machinists* suggests, however, that the state interest exception is limited to "policing of actual or threatened violence to persons or destruction of property,"[37] or to the traditional

27. Lodge 76, IAM v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 141 (1976).

28. *Id.* at 140, *quoting* NLRB v. Nash-Finch Co., 404 U.S. at 144.

29. 427 U.S. 132. The economic activity in question in *Machinists* was the union's concerted refusal to work overtime—an unprotected activity. The Wisconsin Employment Relations Commission had enjoined the union from continuing to refuse to work overtime pursuant to a union policy of pressuring the employer during negotiations for renewal of an expired collective bargaining agreement. 67 Wis. 2d 13, 14-16, 226 N.W.2d 203, 204 (1975).

30. 427 U.S. at 140 n.4, *quoting* Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469, 478 (1972).

31. *Id.* at 150, *quoting* Lesnick, *supra* note 30, at 478.

32. *Id.* at 149, *quoting* NLRB v. Insurance Agents' Union, 361 U.S. at 498.

33. *Id.* at 149. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

34. 359 U.S. at 243.

35. *Id.* at 244.

36. 427 U.S. at 136, 137.

37. *Id.* at 136.

regulation of the streets and highways.[38]

II. LEGISLATIVE HISTORY

Congressional legislative history does not clearly indicate if state economic aid to strikers is an impermissible action that readjusts economic weapons or is a permissible action within a state's power to regulate. The House version of the Taft-Hartley Bill provided that strikers accepting unemployment compensation would no longer be considered "employees" under the Act, for such benefits were a "perversion of the purposes of the social security laws."[39] This provision, however, was dropped in conference without explanation.[40] In 1969, President Nixon proposed[41] to Congress that amendments to the Federal Unemployment Tax Act[42] include a requirement that strikers be denied unemployment compensation. The House Committee on Ways and Means, however, deleted the provision when creating a substitute bill. Chairman Mills in explanation indicated that states should be allowed latitude in this area.[43] There apparently was no floor amendment or debate in the House related to the issue. The Senate, in considering amendments to the Act, apparently never considered the issue.[44]

Congress has nonetheless shown a willingness to act directly in other related areas. It has provided in the Railroad Unemployment Insurance Act[45] that only those strikers engaging in wildcat strikes would be disqualified from unemployment benefits.[46] In addition, strikers are also able to receive food stamps under the Food Stamp Act.[47] Thus, Congress was willing to include expressly strikers under relief programs when it intended such a result.

Congressional action or inaction on the issue must be explored in the

38. *Id.* at 137.

39. H.R. REP. NO. 245, 80th Cong., 1st Sess. 12-13 (1947).

40. CONF. REP. NO. 510, 80th Cong., 1st Sess. (1947), 1947 U.S. Cong. Service 1135, 1137-39.

41. HEARINGS ON H.R. 12625 BEFORE THE HOUSE COMM. ON WAYS AND MEANS, 91st Cong., 1st Sess. 12 (1969).

42. 26 U.S.C. §§ 3301-11 (1970).

43. 115 CONG. REC. 34106 (1969).

44. *See* Grinnell Corp. v. Hackett, 475 F.2d 449, 456 (1st Cir. 1973). The defeated legislative efforts to exclude strikers is not necessarily determinative that Congress originally intended to authorize such eligibility. While discussing certain unsuccessful amendments to the AFDC program that would have omitted unborn children from coverage, the Supreme Court stated that it might be "equally plausible to suppose" that the original Act had been misinterpreted and that Congress "wanted to make the original intent clear." Burns v. Alcala, 420 U.S. 575, 586 n.12 (1975).

45. 45 U.S.C. §§ 351-367 (1970).

46. 45 U.S.C. § 354(a-2)(iii) (1970).

47. 7 U.S.C. § 2014(c) (1976).

larger context of the underlying goals of the federal legislation. Federal labor laws explicitly require that strikers are still considered employees for the purposes of the Federal Acts,[48] suggesting that the otherwise ongoing employment relationship is only temporarily interrupted by the labor dispute.[49] Congress was necessarily aware of this relationship when it passed the Social Security Act a month after the NLRA.[50] The unemployment compensation provisions were considered by Congress as an aid to workers whose unemployment was severed by business recessions.[51] Clearly strikers, who have remained employees, are not unemployed because of economic recessions. Furthermore, Congress recognized the need to harmonize the unemployment compensation system with federal labor policy and therefore mandated a duty of neutrality in labor disputes in order for a state to receive tax credit.[52] Under section 3304(a)(5) of the Act,[53] states could not deny benefits to claimants who refused to accept work at a struck plant, thus preventing states from forcing workers to "scab" and therefore interfering with the newly approved system of collective bargaining.

While the Aid to Families with Dependent Children—Unemployed Fathers (AFDC-UF)[54] program was obviously not considered by Congress when enacting the earlier federal labor laws, the legislative history of the program may be helpful. The Supreme Court recently noted that exclusion of strikers is consistent with the declared goal of AFDC-UF—"namely to aid the families of the involuntarily unemployed."[55] In passing later amendments affecting the program, Congress also clearly linked eligibility for AFDC-UF benefits with the work and training incentives[56] authorized in the amendments, noting that the program

48. 29 U.S.C. § 152 (1970).

49. Employers must rehire economic strikers who unconditionally apply for reinstatement once their replacements depart unless (1) they have acquired regular and substantially equivalent employment, or (2) that the employer can prove that the failure to offer full reinstatement was for legitimate and substantial business reasons. Laidlaw Corp. v. NLRB, 414 F.2d 99, 103 (7th Cir. 1969).

50. 42 U.S.C. §§ 301—1396 (1970).

51. *See* Steward Machine Co. v. Davis, 301 U.S. 586, 87 (1937); H.R. DOC. NO. 81, 74th Cong., 1st. Sess. 8 (1935); H.R. REP. NO. 418, 74th Cong., 1st Sess. 3 (1935); S. REP. NO. 628, 74th Cong., 1st Sess. 11 (1935). The program operates by imposing a federal excise tax on employers. Payments to a state employment fund are credited against the federal tax.

52. 26 U.S.C. § 3304(a)(5) (Supp. V 1975). Under the statute, states cannot deny benefits to individuals who refused to accept employment "[i]f the position offered is vacant due directly to a strike, lockout, or other labor dispute."

53. *Id.*

54. *See* note 1 *supra*.

55. Batterton v. Francis, 432 U.S. 416, 429 (1977).

56. 42 U.S.C. § 606(b)(2) (Supp. V 1975)

was explicitly designed to reduce dependency on public assistance by helping those receiving funds improve their employability.[57] Thus in order to establish and maintain eligibility, an applicant must be amenable to job training. Since strikers possess marketable skills and have, by virtue of the NLRA, maintained a continuing relationship with the employer, strikers appear clearly outside the class of workers contemplated by Congress.

Taken as a whole, the congressional intent regarding the preemptive effects of federal labor policy on either unemployment compensation or welfare is not clearly discernable. Courts must thus look to the inferences of congressional intent suggested by the broad underlying policies of the federal labor statutes to determine if an unarticulated congressional intent is that such action is preempted. Prior to 1974, the only federal appellate court to deal with the issue was the First Circuit. Although the court in 1970 expressed "substantial doubt"[58] that Massachusetts' granting of welfare benefits to strikers frustrated federal labor policy, in 1973 it remanded[59] to the district court the question of whether Rhode Island's policy of granting unemployment compensation to strikers was preempted. After a thorough review of the pertinent legislative history, the court concluded that unambiguous congressional intent was lacking,[60] and therefore the lower court must consider whether such aid "palpably infringe[s] upon federal labor policy."[61] In both cases, the First Circuit stressed the need for probative evidence that state economic aid to strikers interferes with federal collective bargaining policy.[62]

III. *SUPER TIRE* AND ITS IMPLICATIONS

The Supreme Court first considered the preemption issue with regard to state economic aid to strikers in *Super Tire Engineering Co. v. McCorkle.*[63] The Court reversed an earlier dismissal of a suit charging that New Jersey welfare assistance[64] to strikers interfered with federal

57. H.R. REP. NO. 544, 90th Cong., 1st Sess. 97, 107-108 (1967); S. REP. NO. 744, 90th Cong., 1st Sess. 4, 145-146, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2834, 2837.

58. ITT Lamp Division v. Minter, 435 F.2d 989, 994 (1st Cir. 1970).

59. Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir. 1973).

60. *Id.* at 457.

61. *Id.*, *quoting* Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 766 (1945). The court also indicated that in preemption cases in which *Garmon* does not apply, courts should use a balancing process whereby "both the degree of conflict and the relative importance of the federal and state interests are assessed." *Id.* at 452. The relevance of this test has undoubtedly been undermined by *Machinists*.

62. This stress on probative evidence appeared to place such a heavy burden on the employer that it appeared unlikely a preemption argument could prevail. Carney, *supra* note 3, at 508-509.

63. 416 U.S. 115 (1974).

64. The General Public Assistance Law, N.J. STAT. ANN. §§ 44:8-107 to 8-145 (Supp.

labor policy.[65] The Court noted the adverse effects such benefits had on the collective bargaining system: "It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract."[66] Accepting as given the fact that state aid to strikers impacts on the bargaining process,[67] the only inquiry the Court left open is whether such benefits are outlawed by federal labor policy.

The major federal case to follow *Super Tire* continued, nevertheless, to stress the need for statistical data to substantiate a claim of preemption. After finding such data conclusive, the district court in *Hawaiian Telephone Co. v. Hawaii Department of Labor and Industrial Relations*[68] concluded that Hawaii's work stoppage provisions,[69] granting unemployment compensation to strikers when the employer has been able to maintain substantial operations in spite of the strike, were preempted by federal labor policy. Noting that a clear determination of congressional

---

1971-8) (state program); Assistance to Families of the Working Poor, N.J. STAT. ANN. §§ 44:13-1 to 13-13 (Supp. 1977-78) (state program); Assistance for Dependent Children Law (ADC), N.J. STAT. ANN. §§ 44:10-1 to 10-8 (Supp. 1977-78) (federal-state program created by § 402 of the Social Security Act). *See* note 1 *supra*.

65. The employers argued that such assistance violated the federal policy of free collective bargaining expressed in the LMRA and with other federal policy expressed in the Social Security Act. The district court had dismissed the suit for injunctive and declaratory relief, holding that Congress was the appropriate forum for the claim, and that the challenged New Jersey statutes did not violate the supremacy clause. The court of appeals, 469 F.2d 911 (3rd Cir. 1972), did not reach the merits of the case but, rather, remanded it with instructions to vacate and dismiss for mootness because the strike had been settled and the strikers had returned to work. The Supreme Court held the issue was not moot because the state policies continued to affect the litigant's interests.

66. 416 U.S. at 124.

67. Statistical data and recent analysis support the Court's conclusions. An attitudinal survey, examined by the district court in New York Tel. Co. v. New York State Dep't of Labor, indicated a "predominant feeling among both union and non-union workers that because of unemployment insurance in New York State unions can achieve better strike settlements since [such funds enable] strikers to hold out longer." 434 F. Supp. 810, 816 (S.D.N.Y. 1977). Statistics and expert testimony also supported the conclusion that such benefits significantly impacted on collective bargaining, the incidence and duration of strikes, and the costs of settlements. *Id.* at 816-19. *See also* Hawaiian Tel. Co. v. Hawaii Dep't of Labor & Indus. Relations, 405 F. Supp. 275, 277-82 (D. Hawaii 1976).

For a major empirical study of the relationship between state benefits to strikers and labor-management relations, see A. THIEBLIT & R. COWAN, WELFARE AND STRIKES: THE USE OF PUBLIC FUNDS TO SUPPORT STRIKERS. *See also* Carney, *supra* note 3, at 527-40.

68. 405 F. Supp. 275 (D. Hawaii 1976).

69. The Hawaii statute disqualified individuals for benefits "for any week . . . that his unemployment is due to a stoppage of work which exists because of a labor dispute at the . . . establishment . . . at which he is . . . employed." HAW. REV. STATS. § 383-30 (4) (1968). For a discussion of work stoppage provisions in general, *see* note 2 *supra*.

intent regarding such benefits could not be made,[70] the court relied on the principle that Congress intended economic pressure to be a major force in collective bargaining.[71] Anticipating *Machinists*, the court stated that Congress alone could balance the competing interests and by its interference, Hawaii had irreconcilably intruded into the "federal process of free collective bargaining."[72]

IV. *KIMBELL* AND ITS AFTERMATH—CONFLICTING DECISIONS

Super Tire and *Hawaiian Telephone* laid the foundation for other federal courts to address the preemption issue. The 1976 decision in *Kimbell, Inc. v. Employment Security Commission*,[73] however, raised the question of whether any preemption issue remained to be adjudicated. The striker-claimants in *Kimbell* received unemployment benefits under a New Mexico statute[74] which, like the Hawaii statute, provided benefits unless there was a work stoppage. Although the lower state court found a work stoppage had occurred, the court went further to find that payment of compensation would "interfere with the national policy of federal labor law of encouraging self-organization and collective bargaining without state interference in the use of economic weapons available to both labor and management."[75] The New Mexico Supreme Court summarily reversed the decision on the basis of an earlier decision[76] which, although discussing unemployment compensation provisions, had focused on criteria for eligibility rather than on the preemption issue. The United States Supreme Court dismissed the appeal for

70. 405 F. Supp. at 288-89.

71. *Id.* at 283-84.

72. *Id.* at 290. The court rejected the balancing approach suggested by the First Circuit. *See* note 61 *supra*. It noted that the only inquiry to be made is whether the state and federal statutes conflict. If they do conflict, even if not directly, the "national scheme preempts the state power to act." *Id.* at 284 (footnote omitted).

73. 429 U.S. 804 (1976).

74. N.M. Unemployment Compensation Law of 1936, N.M. STAT. ANN. § 59-9-5(d) (Supp. 1975).

75. Kimbell, Inc. v. Employment Security Comm'n, No. 6-73-08568, slip op. at 9 (N.M. Dist. Ct., 2d Dist., filed October 11, 1974).

76. Albuquerque-Phoenix Express, Inc. v. Employment Security Comm'n, 88 N.M. 596, 544 P.2d 1161 (N.M. 1975). The only mention of preemption in this case was in a footnote which criticized the decision in *Hawaiian Tel. Co.*, arguing that the decision "totally overlooks the fact that in order to qualify for unemployment compensation a striker must be available and actively seeking work." 88 N.M. at 600 n.1, 544 P.2d at 1165 n.1. This position ignores the business reality that other employers are not usually willing to hire strikers, recognizing that they will normally return to work when the strike is settled. Furthermore, in New York at least, little effort is made to enforce this requirement because the state prefers to keep an employer's labor force intact during a strike. New York Tel. Co. v. New York State Dep't of Labor, 434 F. Supp. 810, 819. (S.D.N.Y. 1977).

"want of a substantial federal question." Three justices would have noted probable jurisdiction and set the case for oral argument.[77]

Lower courts have been split in their interpretation of *Kimbell*. The district courts in *New York Telephone Co. v. New York State Department of Labor*[78] and in *Dow Chemical Co. v. Taylor*[79] took the position that *Kimbell* is only authority for upholding a statute with a work stoppage clause such as New Mexico's.[80] They stressed that the New York[81] and Michigan[82] statutes, unlike the New Mexico statute, grant benefits regardless of whether the employer's business has been halted. The Second Circuit, although reversing the New York district court in *New York Telephone* on its preemption findings, nonetheless agreed that *Kimbell* was not dispositive of the preemption issue.[83]

The district court in *Dow Chemical* found *Kimbell* not controlling and denied the State Employment Commission's motion for summary judgment, thus leaving the preemption issue to be resolved by the court. The New York district court, finding *Kimbell* inapplicable, struck down the state statute, noting that the state interests for maintaining compensation

77. 429 U.S. 804 (1976) (Justices Brennan, Blackmun, and Stevens).

78. 434 F. Supp. 810 (S.D.N.Y. 1977).

79. 428 F. Supp. 86 (E.D. Mich. 1977).

80. In their efforts to distinguish the New York and Michigan statutes from the New Mexico statute, both district courts ignore the obvious argument that in allowing benefits to strikers if the employer's business remains functioning, the states are still subsidizing a strike. The fact that the employer *is* able to continue production lowers the economic impact of the strike; granting benefits serves to neutralize that advantage gained and undermines the employer's economic strength. If the Supreme Court were indeed upholding a work stoppage condition, it may have been speaking only to a restrictive, virtually unused statute such as New Mexico's rather than speaking to a more broadly applied work stoppage clause such as Hawaii's.

81. N.Y. LAW § 591 (Consol. Ann. 1977). Central to the conclusion reached by the district court in *New York Tel. Co.* was the court's finding that the New Mexico law, unlike New York's, did not allow expectations of payments upon which "employees could reasonably predicate labor dispute strategy," 434 F. Supp. at 823, for benefits were determined after the strike had terminated. Also persuasive to the court was the fact that the Security Commission had only allowed payments to strikers in three instances in its history. Furthermore, although the New York court took great pains to distinguish the two statutes, it also stressed that the New Mexico Supreme Court decision was only a summary reversal, citing a case which had dealt "entirely with state issues." *Id.*

82. MICH. COMP. LAWS ANN. § 421.29(8) (Supp. 1977). The Michigan court noted that the Supreme Court could have decided "the New Mexico statute presented no problems only because it contained a provision disqualifying strikers in the event of a successful strike." 428 F. Supp. at 90. New York grants benefits after an eight-week waiting period, while Michigan does so if the striker has obtained bona fide interim employment. "In 1974, the Michigan statute was amended to define 'bona fide interim employment' as being of at least two weeks duration at wages equaling the claiman [sic] potential unemployment benefits." *Id.* at 88 n.2.

83. New York Tel.Co. v. New York State Dep't of Labor, 566 F.2d 388, 391 n.2 (2d Cir. 1977).

were insubstantial[84] and that government neutrality is violated when the state extends financial aid to either side.[85] The Second Circuit, however, reversed the lower New York court without reaching the substantive arguments regarding state interests and government neutrality. The court indicated that congressional intent, far from being ambiguous, was instead "relatively onesided."[86] Disagreeing with the lower court, the Hawaii district court, and the First Circuit, the Second Circuit found that Congress has evinced an intention to leave the states free to regulate in the area of unemployment compensation.[87]

Only the Third Circuit, in considering *Super Tire* on remand, has found that the *Kimbell* decision foreclosed any further discussion of preemption.[88] After the Supreme Court remanded, the district court held that New Jersey's practice of paying welfare benefits to strikers was not inconsistent with either federal labor or welfare policy.[89] On appeal, the Third Circuit concluded that the employer's claims of preemption, regardless of "[w]hatever merit this argument might have had in the past" were foreclosed by the *Kimbell* decision.[90] After examining briefs and documents, the court stated that when the Supreme Court dismissed *Kimbell* the "necessary predicate . . . was a determination that federal labor policy did not preclude the payment of unemployment compensa-

84. The court argued that "administrative convenience" is not sufficient to allow the state to subvert the "avowed purpose" of the New York law—to aid those persons involuntarily unemployed. 434 F. Supp. at 818. The administrative convenience to which the court referred was established through the testimony of a member of the Legislative Advisory Committee which had aided in drafting the state law. He stated that the major reason for granting unemployment compensation to strikers was that future administrators were deemed too unsophisticated in labor disputes to determine whether a labor dispute was a strike or a lockout or whether the employee was a striker, a locked-out employee, a sympathy striker, or someone else affected by the dispute. *Id.*

85. The court stressed that free collective bargaining was premised on government noninterference and neutrality. Because the use of economic force was intended to be a factor in reaching agreement in collective bargaining, the government interferes wrongly when it extends aid to strikers. *Id.* at 820.

86. New York Tel. Co. v. New York State Dep't of Labor, 566 F.2d at 391.

87. *Id.* at 395. The court stressed that Congress' failure to forbid payments when it had been urged, its express granting and denying of benefits in other instances, and its undoubted awareness of New York's longstanding practice of extending benefits indicated that Congress decided to tolerate the "conflict between New York's statute and the broad federal policy of free collective bargaining." *Id.*

88. 550 F.2d 903 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3215 (Oct. 4, 1977) (No. 76-1684).

89. 412 F. Supp. 192, 195-98 (D.N.J. 1976).

90. 550 F.2d at 905. The appellants in *Super Tire [II]* contended that the federal issue was not properly raised before the state supreme court, or if raised, was not properly decided. The court responded that the federal issue was indeed properly raised, as indicated in the briefs, and while it may not have been discussed, it was nonetheless

tion to strikers."[91] Reasoning that unemployment compensation is more disruptive to the collective bargaining process than welfare benefits, the court concluded that if the former was not preempted, then the latter were necessarily also not precluded: the "greater includes the lesser."[92]

V. IMPLICATIONS OF *HODORY* AND *FRANCIS*

In May and June of 1977 the Supreme Court issued two decisions on related issues that suggest, albeit indirectly, that the preemption issue of state aid to strikers remains in need of adjudication.[93] In *Ohio Bureau of Employment Services v. Hodory*[94] the Supreme Court upheld an Ohio statute denying unemployment compensation to workers whose unemployment was "due to a labor dispute" but who neither participated in, had any interest in, nor stood to gain anything from a strike.[95]

---

decided since the Supreme Court would not have entertained jurisdiction if the validity of the state law had not been timely drawn in question on federal grounds or if there had been no "decision" in favor of the validity of the state law. The Third Circuit did not discuss why it considered the Supreme Court to have reversed its strong position in the original *Super Tire* case which clearly called for adjudication of the preemption issue. *Id.* at 906-08.

91. *Id.* at 906.

92. *Id.* at 908.

93. The Second Circuit cited these cases, Ohio Bureau of Services v. Hodory, 431 U.S. 441 (1977) and Batterton v. Francis, 432 U.S. 416 (1977), as indicating that *Kimbell* did foreclose the preemption issue. New York Tel. Co. v. New York State Dep't of Labor, 566 F.2d at 391 n.2.

94. 431 U.S. 471 (1977).

95. Hodory was laid off because his steel plant could not obtain sufficient coal due to a coal miners' strike. Both the mine and Hodory's plant were owned by U.S. Steel, although Hodory was not in the same union as the mine workers. *Id.* at 473. Unlike the laws of most states, Ohio's statute, OHIO REV. CODE ANN. § 4141.29(D)(1)(a) (1973), contained no escape clause for workers such as Hodory who were unemployed involuntarily due to a strike at another plant owned by the same employer. Only North Carolina has as restrictive a statute as Ohio. N.C. GEN. STAT. § 96-14(5) (1973). *See In re* Abernathy, 259 N.C. 190, 130 S.E.2d 292 (N.C.), *cert. denied*, 375 U.S. 161 (1963). The Ohio statute was amended in 1975 to create a less harsh result for workers such as Hodory, but the amendment was not retroactive.

Most other states followed the format in the draft bills of the Social Security Board after the passage of the Social Security Act. The pertinent language reads:

> An individual shall be disqualified for benefits when unemployed due to a labor dispute unless he is not participating in or financing or directly interested in the labor dispute . . . and he does not belong to a grade or class of workers of which, immediately before commencement of the stoppage, . . . were participating . . . .

Social Security Board, Draft Bills for State Unemployment Compensation of Pooled Funds and Employer Reserve Account Types (Rev. Ed. 1937). In addition, several states grant compensation when unemployment is the result of a lockout rather than a strike. *See* ARK. STAT. ANN. § 81-1105(f) (1976); CAL. UNEMP. INS. CODE § 1262 (Deering 1956), *construed in* Bunney's Waffle Shop, Inc. v. California Empl. Comm'n, 24 Cal. 2d 735, 151 P.2d 244 (1944); COLO. REV. STAT. § 8-73-109 (1973); KY. REV. STAT. § 341.360(1) (Supp.

Upholding the state's right to withhold unemployment compensation,[96] the Court stated that "the fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act intended to restrict the States' freedom to legislate in this area."[97] The Court nevertheless deliberately refrained from considering whether federal labor laws preempted such state action.[98] The Court did recognize, however, the detrimental effect of unemployment compensation on employers:

> [I]t must be recognized that effects less than pushing the employer to bankruptcy may be rationally viewed as undesirable. The employer's costs go up with every laid-off worker who is qualified to collect unemployment. The only way for the employer to stop these rising costs is to settle the strike so as to return the employees to work. Qualification for unemployment compensation thus acts as a lever increasing the pressures on an employer to settle a strike.[99]

The Court further noted that these impacts on the employer must be given consideration when evaluating the Ohio statute: "the Court must view its consequences, not only for the recipient of benefits, but also for the contributors to the fund and for the fiscal integrity of the fund."[100]

1976); MD. ANN. CODE art. 95A, § 6(e) (1969); MICH. COMP. LAWS ANN. § 421.29(8) (Supp. 1976); OHIO REV. CODE ANN. § 4141.29(D)(1)(a) (1973); PA. STAT. ANN. tit. 43, § 802(d) (Purdon 1964); UTAH CODE ANN. § 35-4-5(d) (1974), *construed in* Teamsters Locals 222 & 976 v. Board of Rev., Dept. of Empl. Sec., 10 Utah 2d 63, 348 P.2d 558 (1960).

For a persuasive discussion of why lockouts should be treated as strikes for the purposes of unemployment compensation, see Carney, *supra* note 3, at 499.

96. Hodory argued that the Ohio statute conflicted with provisions of the Social Security Act and violated the due process and equal protection clauses of the fourteenth amendment, claiming that the states may not deny benefits to workers who are unemployed through no fault of the worker. Hodory based this argument on 42 U.S.C. § 503(a)(1) (1970) which requires the Secretary of Labor to make no certification for payment of federal funds to state unemployment compensation programs unless state law provides for methods of administration that the Secretary finds are reasonably calculated to insure full payment of unemployment compensation "when due." Hodory argued that payment was "due" him. Although Hodory also pointed to the legislative history of the Social Security Act, to draft bills issued by the Social Security Board, and to previous language of the Court, *see* California Dep't of Human Resource Development v. Java, 402 U.S. 121, 130 (1971), the Court nonetheless indicated that numerous other 'innocent' claimants are disqualified and that the solvency of the unemployment compensation funds is crucial to the state. 431 U.S. at 489-90.

97. *Id.* at 488-89.

98. In a footnote at the beginning of the opinion, the Court stated, "at no point in this litigation has appellee claimed that 4141.29(D)(1)(a) conflicts with or is preempted by any provision of the National Labor Relations Act . . . . We do not today consider or decide the relationship between that Act and a statute such as 4141.29(D)(1)(a)." *Id.* at 475 n.3.

99. *Id.* at 492.

100. *Id.* at 491.

Although the Court upheld Ohio's action by applying the rational basis test, it noted that the key consideration in evaluating Ohio's approach is state neutrality in labor disputes.[101] By highlighting the effects of the state aid to strikers (or those laid off due to a strike), the Court indirectly affirmed its position in *Super Tire* that the preemption issue remains in need of court adjudication.[102] For while *Hodory* is not a labor law preemption case, the language used by the Court in reaching its decision suggests that state benefits to strikers do interfere with the national labor policy of neutrality and, as such, should be preempted.

The subsequent *Batterton v. Francis*[103] decision also indicates that the *Kimbell* case did not shut the door on preemption adjudication. In *Francis*, the Supreme Court upheld an HEW regulation that gave states participating in the Aid to Families with Dependent Children—Unemployed Fathers (AFDC-UF) program the option of denying benefits to families if the unemployed father would be ineligible for state unemployment compensation.[104]

Francis focused on the extent to which the Secretary of HEW could allow the states to determine the eligibility of unemployed workers for AFDC-UF. The 1968 amendment to section 407(a) of the Social Security

101. The Court stated that "regardless of our views of the wisdom or lack of wisdom of this form of state 'neutrality' in labor disputes, we cannot say that the approach taken by Ohio is irrational." *Id.* at 492.

102. By again stressing the destructive effects of state aid to strikers, the Court appears to indicate that probative evidence is not necessary before the preemption issue can be reached.

103. 432 U.S. 416 (1977).

104. The original suit in 1971 (*Francis*[I]), prior to the HEW regulation, challenged a Maryland regulation that denied benefits to families if the father was ineligible for unemployment compensation. The two original plaintiffs, one ineligible because unemployed due to a strike and the other discharged because of misconduct, alleged that the regulation violated the equal protection clause. While the district court sustained the constitutionality of the regulation, it nonetheless invalidated the state regulation because it was contrary to HEW regulations which defined eligibility through an hours-of-work test. 340 F. Supp. 351 (D. Md. 1972). The Supreme Court affirmed the decision. 409 U.S. 904 (1972). HEW subsequently revised its regulations to allow the states the option of prescribing such limitations. The express purpose of the revised regulation was to nullify the district court's ruling. When the state moved to dissolve the court's injunction, however, the district court denied the motion on the ground that HEW's amended regulation was in conflict with the federal statute. The court held that the state violated the statute by denying aid to those persons unemployed due to misconduct, because those individuals are necessarily unemployed within the meaning of the statute: "a father who is discharged for cause by his employer *is* unemployed." 379 F. Supp. 78, 81 (D. Md. 1974) (*Francis*[II]) (emphasis in original). Further, the court held that the statute was also violated by denying aid to strikers because the federal regulation giving the state that authority impermissibly delegated to the states the ability to set standards in violation of the express purpose of the Act—to provide a national uniform standard. *Id.* at 82. *See also* Batterton v. Francis, 432 U.S. at 420-24.

Act[105] had concentrated on taking away some of the power that had originally rested with the states.[106] The amendment provided for "unemployment" to be defined by standards prescribed by the Secretary rather than by the states.[107] The Court held that while the amendment delegated the power to define unemployment to the Secretary, the Secretary was not required to exercise this power. The Court stressed that decision-making by the states is not violative of the purposes of the Act: "the goal of greater uniformity can be met without imposing identical standards on each State."[108] A strong dissent by Justices White, Brennan, Marshall, and Stevens pointed to the legislative record as a clear indication that Congress intended the Secretary to create a federal definition of "unemployment." They argued that allowing the states to define the terms for purposes of eligibility defeats the purpose of the amendment and "invites the very diversity in coverage that the 1968 amendment was designed to prevent."[109]

Francis is significant to the labor policy preemption issue in several respects. First, the Court sanctioned the denial of benefits to strikers when it noted that HEW has "incorporated a well known and widely applied standard for 'unemployment'" by allowing states to exclude those ineligible for unemployment compensation.[110] Such exclusion is clearly within HEW's authority, for "[e]xclusion of individuals who are out of work as a result of their own conduct and thus disqualified from state unemployment compensation is consistent with the goal of AFDC-UF—namely, to aid the families of the involuntarily unemployed."[111] Moreover, the Court qualified its approval of the regulation by stating the regulation was valid "to the extent it allows the States to determine that persons disqualified under unemployment compensation laws are not 'unemployed' under § 407(a)."[112] This leaves open the question of whether a striker can be "unemployed" section 407(a)—and thus receive benefits—when not disqualified from receiving unemployment compensation. If *Kimbell* had foreclosed any further discussion of preemption, the Court undoubtedly would not have left open such fundamental issues.

105. 42 U.S.C. § 607(a) (1970).
106. 432 U.S. at 430 (discussing 42 U.S.C. § 607(a) (1970).
107. *Id.*
108. *Id.* at 431.
109. *Id.* at 437.
110. *Id.* at 428. The Court had previously indicated that the "feature of involuntariness is often linked with unemployment" and that "state unemployment compensation programs generally confine their benefits" in the same manner. *Id.*
111. *Id.* at 428-29.
112. *Id.* at 429.

VI. State Economic Aid to Strikers: the Preemption Issue

Under the principles enunciated in *Machinists*, the crucial question regarding state economic aid to strikers is whether, by granting such benefits, the state has denied to the employer an economic weapon which Congress intended him to have. If Congress has considered economic pressure used during peaceful strikes to be off-limits to state regulation, then state action affecting such weapons is clearly an interference with the balance of power struck by Congress in federal labor policy and, as such, is preempted.

The starting point, of course, is congressional intent. The Second Circuit, in finding a congressional intent not to preempt state action, ignored the underpinnings of the federal labor law which contemplate economic warfare as a necessary and often decisive factor in collective bargaining.[113] Congressional inaction in this area and action in related areas are not dispositive of congressional intent in light of the foundations of the federal labor policy. As the First Circuit indicated when it found congressional intent ambiguous, "[t]he most that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances."[114]

While congressional intent is ambiguous regarding the specific issue of unemployment compensation or welfare benefits, it is crystal clear regarding economic pressures used in collective bargaining that are neither protected nor prohibited: "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests."[115] By ignoring the implications of state aid to strikers on the balance of power struck by Congress, the Second Circuit ignored the "extent to which federal labor policy and the federal Act have preempted state regulatory authority to police the use by employees and employers of peaceful methods of putting economic pressure upon one another."[116]

The loss of salary incurred by the striker is a necessary balance to the loss of production incurred by the struck employer. An employee cannot

113. *See* notes 24-38 & accompanying text *supra*.

114. Grinnell Corp. v. Hackett, 475 F.2d 449, 457 (1st Cir. 1973).

115. *Machinists*, 427 U.S. at 140 n.4, *quoting* Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972).

116. 427 U.S. at 154.

work and strike at the same time, since the right to strike requires strikers to cease working and forego their pay.[117] State aid to strikers has the same effect as a paycheck since it allows strikers to receive economic benefits while on strike and thus neutralizes the economic strength of management to withstand the strike by withholding salaries. Such aid impermissibly interferes with the no-pay weapon granted by Congress to the employer. Unemployment compensation, in fact, turns the no-pay weapon against the employer, since in almost all states the unemployment compensation fund is maintained solely by employer contributions[118] which increase as the number of strikers drawing compensation increases. The employer suffers a double loss; he not only loses the economic advantage of withholding pay but is also penalized by being forced to pay unemployment benefits to his own strikers.[119]

This analysis is compatible with that of Harvard professor Archibald Cox,[120] adopted by Justices Powell and Burger in *Machinists*,[121] and by the Hawaiian district court in *Hawaiian Telephone*.[122] Cox maintained that only neutral state laws affecting the labor area—i.e., not accommodating the special interests of management, labor, or the public—were within a state's power. When special interests were accommodated, the balance of power "struck by Congress" was presumably upset and thus preempted.[123] The payment of benefits to strikers accommodates the special interests of strikers. It neutralizes an economic weapon left to the employer which was to serve a crucial function in maintaining the balance of power in the collective bargaining process.

The First and Third Circuits have reasoned that welfare benefits fulfill different needs than do unemployment compensation funds, and that such benefits intrude less on the collective bargaining process. In *ITT Lamp Division of International Telephone & Telegraph Corp. v. Minter*,[124] the First Circuit reasoned that welfare benefits meet more basic subsistence needs and thus address a more fundamental social need than unemployment compensation, which is not based on demonstrated need

117. Hoover Co. v. NLRB, 191 F.2d 380, 389 (6th Cir. 1951).

118. For a discussion of how the unemployment system operates, *see* note 51 *supra*.

119. As indicated by the district court in *Hawaiian Tel. Co.*, the strikers position when such benefits are extended is "heads I win, tails you lose!." 405 F. Supp. at 290.

120. Cox, *supra* note 115.

121. 427 U.S. at 156 (Powell, J., concurring).

122. Hawaii Tel. Co. v. Hawaii Dep't of Labor & Indus. Relations, 405 F. Supp. 275 (D. Hawaii 1976). After adopting Professor Cox's analysis, the Hawaiian court concluded that because the Hawaii stoppage of work clause inquired directly into the success or failure of the strike to close down an employer's business, it accommodated the interests of one group and must be struck down. 405 F. Supp. at 284.

123. Cox, *supra* note 115 at 1355-1356.

124. 435 F.2d 989 (1st Cir. 1970).

but on prior earnings.[125] The Third Circuit, in considering *Super Tire* on remand, also followed this rationale.[126] Those courts failed to consider that the impact to the employer is the same if the striker receives either unemployment compensation or welfare benefits since both are direct subsidies giving strikers an economic advantage by impermissibly rebalancing the economic strengths of the parties. Both types of economic aid interfere with the no-pay weapon granted to the employer. The Supreme Court in *Super Tire* recognized the impact of welfare on the collective bargaining process and indicated that such "need" distinctions are not relevant to the preemption question, since "it is the basic eligibility for assistance that allegedly prejudices [the employers'] economic position."[127]

States cannot rely on the local interest exception[128] to authorize the granting of either kinds of benefits. As indicated by *Machinists*,[129] the state interest exception most clearly applies to violence and public safety situations. A striker who utilizes his right to strike peacefully does not fall into this category. Moreover, underlying the principle that economic warfare is a crucial force in collective bargaining is the necessary recognition that the tenacity of the individual parties in withstanding the economic pressures is a determinative force in resolving the labor dispute. The economic weakness of a union is therefore not a sufficient state interest for the granting of aid. As the Supreme Court explained in *Machinists*:

> [S]elf-help is of course also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable . . . . "[T]he Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak . . . . It cannot be said that the Act forbids an employer . . . to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining."[130]

VII. Conclusion

In the time that has elapsed since the 1974 *Super Tire* decision, several courts have focused on the issue of whether state economic aid to strikers is preempted by federal labor policy. Although the Supreme

125. *Id.* at 995.
126. 550 F.2d at 908.
127. 416 U.S. at 125 n.7.
128. *See* notes 34-38 & accompanying text *supra*.
129. *Id.*.
130. 427 U.S. at 147, *quoting* H.K. Porter Co. v. NLRB, 397 U.S. 99, 109 (Harlan, J., concurring).

Court's ambiguous decision in *Kimbell* led at least one court to consider that state action is clearly not preempted, the recent *Hodory* and *Francis* decisions suggest that the Supreme Court did not intend to foreclose the issue. Lower federal courts should again begin the resolution of whether such aid is preempted. The Supreme Court in *Machinists* has given these courts the appropriate framework in which to decide the issue. If those principles are properly applied, courts will be forced to look at the narrow question of whether the state interferes when it grants aid to strikers and thus neutralizes the major economic weapon which management employs to counterbalance a strike—loss of salary. If courts apply the Supreme Court's reasoning and language as developed during the past four years, they are likely to conclude that loss of salary is an economic weapon of management that Congress intended to leave unrestricted, and interference with this weapon through state economic aid is preempted.

Joanna Moorhead