APPENDIX.—PETITIONS INSTITUTED ON 08/24/1998—Continued

TA–W	Subject firm (petitioners)	Location	Date of petition	Product(s)
34,884	Duro Inc.\Pioneer Finish (UNITE)	Fall River, MA	08/05/1998	Ladies' Apparel.
34,855	Modern Industrial Plastic (USWA)	Brookville, OH	08/10/1998	Automotive Plastic Parts.
34,886	Austin Apparel, Inc (Comp)	Phenix City, AL	07/24/1998	Tee Shirts.
34,887	Malden Mills Industries (Wrks)	Lawrence, MA	07/30/1998	Fabrics for Home Furnishings & Apparel.
34,888	Forbes Medical, LLC (Wrks)	Konawa, OK	08/05/1998	Orthopedic Supports.
34,889	AAF–McQuay (UAW)	Louisville, KY	08/12/1998	Air Filtration Systems.
34,890	Goslin-Birmingham (Wrks)	Birmingham, AL	08/05/1998	Heaters, Evaporators, Liquor Boxes.
34,891	AM-Cut (Wrks)	Opa Locka, FL	07/24/1998	Children's Sportswear.
34,892	Philips Semiconductors (Comp)	Albuquerque, NM	08/06/1998	Semiconductor Wafers.
34,893	Gintex Ltd (UNITE)	Pittston, PA	08/10/1998	Ladies' Garments.
34,894	Doris Jay (Wrks)	Miami, FL	08/04/1998	Ladies' Dresses and Sleepwear.
34,895	Genesco, Inc (Comp)	Nashville, TN	07/30/1998	Western Boots.
34,896	Paxar Woven Label (UFCW)	Paterson, NJ	08/07/1998	Woven Labels for Garments.
34,897	Weslock Brand Co (Comp)	Compton, CA	08/12/1998	Residential Door Locks.
34,898	Cablelink, Inc (Comp)	Kings Mountain, NC	07/24/1998	Molded and Flat Ribbon Cable.
34,899	Matsushita Television Co (Wrks)	San Diego, CA	08/6/1998	Color Televisions.
34,900	Oki Semiconductor Mfg (Comp)	Tualatin, OR	08/12/1998	DRAM Memory, Logic Device Circuits.
34,901	Topps Safety Apparel (Wrks)	Greensburg, KY	07/24/1998	Men's Shirts, Pants, Vests, Aprons, Jack.
34,902	Durham 2000 Corp (Comp)	Danville, VA	07/24/1998	Socks, Slipper Socks.
34,903	EIS Brake Div. of Moog (Comp)	Berlin, CT	07/24/1998	Brake Hoses.
34,904	Pairs Accessories, Inc (UNITE)	Allentown, PA	08/11/1998	Men's and Ladies' Fashion Belts.
34,905	Gear Fashions (Wrks)	Gottenborg, NJ	08/08/1998	Coats.
34,906	Fairchild Semiconductor (Wrks)	South Portland, ME	08/17/1998	Wafer Semiconductors.
34,907	Sweet-Orr and Co., Inc (UGWA)	Dawsonville, GA	08/10/1998	Men's and Boys' Shirts.
34,908	Globe Business Furniture (Wrks)	Hendersonville, TN	08/10/1998	Office Furniture.

[FR Doc. 98–25260 Filed 9–21–98; 8:45 am]
BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

Federal-State Unemployment Compensation Program: Unemployment Insurance Program Letter Interpreting Federal Unemployment Insurance Law

The Employment and Training Administration interprets Federal law requirements pertaining to unemployment compensation (UC) as part of its role in the administration of the Federal-State UC program. These interpretations are issued in Unemployment Insurance Program Letters (UIPLs) to the State Employment Security Agencies. The UIPL described below is published in the **Federal Register** in order to inform the public.

UIPL No. 41–98

UIPL No. 41–98 provides guidance on the prevailing conditions of work requirement found in Section 3304(a)(5)(B) of the Federal Unemployment Tax Act. Since it has been 30 years since the Department's last issuance on this provision, the Department is concerned that not all States remain aware of or properly apply it. Therefore, UIPL No. 41–98 is being issued to advise States of the requirements of the prevailing conditions of work provision and to provide additional guidance. Except for the discussion of the contract of employment, UIPL No. 41–98 does not modify the Department's previous issuances on this matter, UCPL No. 130 and UIPL No. 984, which are also being published as attachments to UIPL No. 41–98.

Dated: September 11, 1998.

Raymond L. Bramucci,

Assistant Secretary of Labor.

U. S. Department of Labor

Employment and Training Administration, Washington, D.C. 20210

CLASSIFICATION: UI

CORRESPONDENCE SYMBOL: TEUL

DATE: August 17, 1998.

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 41–98

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM: GRACE A. KILBANE, Director, Unemployment Insurance Service

SUBJECT: Application of the Prevailing Conditions of Work Requirement

RECISSIONS: None

EXPIRATION DATE: Continuing

1. *Purpose.* To remind States of the requirements of the prevailing conditions of work provision of the Federal Unemployment Tax Act (FUTA) and to provide additional guidance.

2. *References.* Section 3304(a)(5)(B), FUTA; Unemployment Compensation Program Letter (UCPL) No. 130; and Unemployment Insurance Program Letter (UIPL) No. 984.

3. *Background.* Section 3304(a)(5)(B), FUTA, requires, as a condition of employers in a State receiving credit against the Federal unemployment tax, that unemployment compensation (UC) shall not be denied to any otherwise eligible individual for refusing to accept new work—

If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; [1]

The Department previously issued guidance on the prevailing conditions requirement in 1947 in UCPL 130 [2] and in 1968 in UIPL No. 984. Although both issuances remain in effect, the Department is concerned that, because they were issued a long time ago, not all States remain aware of them or properly apply them. This concern arises from several training sessions and conferences where the prevailing conditions requirement was discussed. The Department also learned of a State-conducted survey on the prevailing conditions requirement which indicated that many States were not examining fringe benefits. When the Advisory Council on Unemployment Compensation queried States on their eligibility provisions, it notably did not ask about the prevailing conditions requirement

[1] Two other requirements exist in Section 3304(b)(5), FUTA: UC may not be denied for refusing new work if the position offered is vacant due directly to a strike, lockout or other labor dispute or if ''as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.''

[2] UCPL 130 was later incorporated in the Department's Benefit Series, 1–BP–1, BSSUI, September 1950.

and only a few States mentioned that requirement in their responses. Also, in the 30 years since the most recent UIPL was issued, the labor market has undergone significant changes, notably in the increase in temporary workers and the importance of fringe benefits. Therefore, this UIPL is being issued.

Section 4 of this UIPL offers a brief summary of UCPL 130 and UIPL 984 (both attached). It also emphasizes that the prevailing conditions requirement applies to certain voluntary quits and clarifies UIPL 984's discussion of a ''contract of employment.'' Section 5 discusses one aspect of adjudicating prevailing conditions issues. Section 6 addresses a change in the labor market—the increase in temporary work—and its relation to the prevailing conditions requirement. Except for the discussion of the contract of employment, this UIPL does not modify UCPL 130 or UIPL 984, both of which remain in effect.

This UIPL contains the minimum requirements States must meet to conform with the prevailing conditions requirement. Nothing prohibits States from interpreting State law provisions implementing the prevailing conditions requirement in a manner more favorable to the individual worker.

4. *Discussion.*

a. *In General.* To determine if the offered work is suitable, States conduct a two-tiered analysis. First, the work must be suitable to the individual considering his or her previous wage and skill levels. Whether the work is suitable under this test is generally a matter of State law.[3] Second, the work must meet the requirements of Section 3304(a)(5)(B), including the ''prevailing conditions of work'' requirement. As discussed below, the prevailing conditions requirement applies not only to refusals of work, but also to separations from employment involving a refusal of ''new work.'' It does not matter why the individual refused new work not meeting the prevailing conditions requirement; if the work does not meet the prevailing conditions requirement, compensation may not be denied.

According to UIPL 984, the prevailing conditions requirement is designed to assure that an individual cannot lose rights to compensation because of a refusal of substandard work. Also according to UIPL 984, the purpose of the requirement is to prevent, among other things, depressing wage rates or other working conditions to a point substantially below those prevailing for similar work in the locality. The provision requires a liberal construction to effectuate its purpose.

b. *Definition of New Work.* The prevailing conditions of work requirement applies whenever an offer of ''new work'' is refused. Under UIPL 984, ''new work'' includes:

(1) An offer of work to an individual by an employer with whom the worker has never had a contract of employment,

(2) An offer of reemployment to an individual by a previous employer with whom the individual does not have a contract of employment at the time the offer is made, and

(3) An offer by an individual's present employer of:

(a) Different duties from those the individual has agreed to perform in the existing contract of employment; *or*

(b) Different terms or conditions of employment from those in the existing contract.[4]

UIPL 984 further provides that ''an attempted change in the duties, terms, or conditions of the work, *not authorized by the existing employment contract,* is in effect a termination of the existing contract and the offer of a new contract.'' (Emphasis added.) UIPL 984 did not, however, recognize that, if an employer requires a contract providing for constantly changing conditions, then the prevailing conditions requirement would be nullified. A common-sense understanding of the term ''new work'' includes performing different work, even if the employment contract provides for performing such different work. Further, by accepting this as a condition of obtaining employment, the individual would, in effect, be forced to waive the protections under the prevailing conditions requirement as a condition of accepting a job. For these reasons, UIPL 984 is supplemented by the following: No contract granting the employer the right to change working conditions may act as a bar to determining that ''new work'' exists.

A refusal of new work may occur when the individual is already unemployed or it may be the cause of an individual's separation from employment. When the refusal is the cause of an individual's unemployment, States must assure that issues adjudicated as ''voluntary quits'' under State law are also adjudicated, when appropriate, under the prevailing conditions of work requirement. An individual may not be disqualified for voluntarily quitting or for refusing an offer of otherwise suitable work when the new work does not meet the prevailing conditions of work in the locality.

c. *When States Must Investigate Prevailing Conditions.* The State has an affirmative duty to assure an offer of new work meets the prevailing conditions requirement before denying UC if:

(1) The individual specifically raises the issue,

(2) The individual objects on any grounds to the suitability of wages, hours, or other offered conditions of new work, or

(3) Facts appear at any stage of the administrative proceedings which put the agency or hearing officer on notice that the conditions of the new work might be substantially less favorable to the individual than those prevailing for similar work in the locality.

To conduct a prevailing conditions inquiry, States must determine what constitutes ''similar work'' and ''prevailing wages, hours, or other conditions,'' and whether the offered work is ''substantially less favorable'' to the particular claimant than the prevailing wages, hours, or conditions of similar work in the locality.

d. *Similar Work.* Under UCPL 130, similarity of work is determined by examining the ''operations performed, the skill, ability, and knowledge required, and responsibilities involved.'' States should not rely on job titles alone, which are sometimes misleading. In some occupations the similarity of the work cuts across industry lines. (For example, many accounting functions are similar regardless of the industry.) The nature of the services within an occupation may vary depending on the degree of skill and knowledge required. UCPL 130 continues—

''[s]imilar work'' is basically a common sense test * * *. On the one hand, the comparison should not be so broad as to result, for example, in the finding of a prevailing wage which bears no relation to those generally paid for some of the kinds of work being compared. On the other hand, the distinctions should not be so fine as to leave no basis for comparison with other work done in the locality * * *.

The UCPL goes on to say that the question of what is similar work should not be determined on the basis of what constitutes conditions of work such as the hours of employment, the permanency of the work, unionization, or benefits, since such factors beg the question at issue: what is ''similar work?'' Rather, the determination of what constitutes similar work will be made on the basis of the similarity of the operations performed, the skill, ability and knowledge required, and the responsibilities involved.

The determination of similar work applies to work performed in the ''locality''. Under UCPL 130, the locality consists of work in the competitive labor market area in which the conditions of work offered by an employer affect the conditions offered for similar work by other employers because they draw upon the same labor supply. If no similar work exists in the locality, the State may, but is not required to, examine work outside the competitive labor market.

e. *Prevailing Wages, Hours and Conditions of Employment.* Once similar work is identified for the locality, the State must focus on what wages or hours are most prevalent and what conditions are most common for similar work in the locality.

Under UCPL 130, the phrase ''conditions of work'' refers to the express and implied provisions of the employment agreement and the physical conditions under which the work is performed, as well as conditions that arise at work as a result of laws and regulations, such as coverage for workers' compensation. The phrase ''conditions of work'' encompasses fringe benefits such as life and group health insurance; paid sick, vacation, and annual leave; provisions for leaves of absence and holiday leave; pensions, annuities and retirement provisions; and severance pay. It also encompasses job security and reemployment rights; training and promotion policies; wage guarantees; unionization; grievance procedures; work rules, including health and safety rules; medical and welfare programs; physical conditions such as heat, light and ventilation; shifts of employment; and permanency of work.

States may not disregard any of these factors when investigating a ''prevailing

[3] The exception is for extended benefits where ''suitable work'' must meet the requirements of Section 202(a)(3)(C) of the Federal-State Extended Unemployment Compensation Act.

[4] The basis for this position is discussed in UIPL 984.

conditions'' issue. An individual may not be denied UC for refusal of work if the wages, hours, or any other material condition or combination of conditions of the work offered is substantially less favorable to the individual than those prevailing in the locality for similar work.

f. *Substantially Less Favorable to the Individual.* UCPL 130 describes the language ''substantially less favorable to the individual'' as presenting a definite but not inflexible standard based on the conditions under which the greatest number of employees in an occupation are working in the locality. It does not preclude the denial of benefits because of the existence of minor or purely technical differences that would not undermine the existing labor market conditions or would not have an appreciable adverse effect on the individual. In borderline cases where it is not clear whether the difference is material or the facts cannot be precisely determined, the general rule of liberal interpretation of remedial legislation indicates that the claimant should be given the benefit of the doubt.

In the prevailing conditions context, the question is whether *any material condition or combination of conditions* render the work substantially less favorable to the worker than similar work in the locality. Factors to be considered are the actual conditions in question, the extent of difference between the offered work and similar work, and the effect such differences have on the worker. When conditions can be converted into a monetary value, these can be compared as part of the wage package or wage rate. The value to the worker of health insurance, pension, paid vacations, and holidays, for example, is readily ascertainable and provides an objective basis for comparing the conditions of employment and determining the prevailing labor standards and thus the suitability of the offered work.

5. *Adjudicating a Prevailing Conditions Issue.* Before an individual is disqualified from the receipt of UC due to a refusal of suitable work, the State must determine:

(1) That there was a *bona fide* offer of work;

(2) That, under State law, the work is suitable to the individual in terms of the individual's previous wage and skill levels;

(3) That the wages, hours, and other conditions of the work were not substantially less favorable to the individual than those prevailing in the locality; and,

(4) That, under State law, there was not good cause for refusing the offer.

The information needed to determine items (1), (2) and (4) is usually readily available. As a result, the State may be able to decide that an individual is eligible without adjudicating the often time-consuming prevailing conditions issue. For example, if the job offer was not *bona fide,* the work was not reasonably suitable to the individual, or there was good cause for refusing work, then there is no need to adjudicate prevailing conditions issues. Conversely, if the State determines the individual would be ineligible under any of items (1), (2) or (4), then it must adjudicate any prevailing conditions issue before denying the individual.

Similarly, when the refusal of an offer of new work involves the application of a State's voluntary quit provisions, there is no need to adjudicate a prevailing conditions issue when the individual is determined to be otherwise eligible. However, the State must adjudicate any prevailing conditions issue before denying the individual.

6. *Temporary Work.* Since UCPL 130 and UIPL 984 were issued, the use of temporary or contingent workers has greatly expanded. One of the incentives for employers to use temporary workers is that these workers reduce employer costs since they often do not enjoy the wages, hours, and other conditions enjoyed by their permanent counterparts. Temporary workers may be ineligible for fringe benefits and they may not be trained for higher-skilled jobs. By avoiding the costs associated with permanent workers, employers could be depressing precisely those factors considered ''prevailing conditions'' within the FUTA labor standards: fringe benefits, health insurance, promotion policies, etc.

Just as it applies to other refusals of work, the prevailing conditions requirement applies to refusals of offers of temporary work. The fact that the work is temporary should generally be sufficient to trigger a prevailing conditions inquiry. Also, as noted in item 4.b., ''new work'' may not be limited by an employment contract which grants the employer the right to change employment conditions. Therefore, a refusal of temporary work in the form of a new assignment from a temporary help firm is also subject to the prevailing conditions requirement.

As noted in item 4.d., what constitutes similar work is not determined on the basis of the conditions of work such as the hours of employment, the permanency of the work, or benefits. (These factors are considered only after the question of similar work has been decided.) Accordingly, temporary work should not be compared only to similar temporary work. Instead, it must be compared with all work, temporary and permanent, in a similar occupational category.

Temporary work is not *per se* unsuitable under the prevailing conditions requirement. If, for example, the norm for a particular occupation in a locality is temporary work, then temporary work is the prevailing condition of such work. As another example, when temporary help firms are involved, an individual so desiring may work continuously. The State must collect the necessary facts to determine the specifics in each case.

Also, the short-term duration of temporary work may be a voluntary or favorable condition for some individuals. If the State establishes through fact finding that this is the case for an individual, than the work offered is ''not less favorable to the individual'' than the work prevailing in the locality.

7. *Action.* Appropriate staff, including higher and lower appellate authorities, should be provided with copies of this UIPL. Action should be taken to assure that the prevailing conditions requirement is applied as described in this UIPL, UIPL 984 and UCPL 130.

8. *Inquiries.* Please direct inquiries to the appropriate Regional Office.

In Reply Refer to File No. 13:AS:I

Federal Security Agency, Social Security Administration, Washington 25, D.C.

Bureau of Employment Security

January 6, 1947.

Unemployment Compensation Program Letter No. 130

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

Principles Underlying the Prevailing Conditions of Work Standard

The attached statement of ''Principles Underlying the Prevailing Conditions of Work Standard'' is an offshoot of the series of statements on the principles underlying the major disqualifications which the Bureau has issued. The most recent, ''Principles Underlying Labor-Dispute Disqualification,'' was sent to you in Unemployment Compensation Program Letter No. 124. The others were sent with Unemployment Compensation Program Letters Nos. 101, 103, and 107.

In ''Principles Underlying the Suitable-Work Disqualification'' there is a concise discussion of the prevailing wage standard, pages 7–11. The attached statement is a more extended exploration of the same field. Throughout the discussion, the interpretations, the applications of the law, and the suggested solutions to problems are all based on labor-market patterns, common usage of terms by employers and labor, and upon the administrative need for short, simple methods. Whereas ''Principles Underlying the Suitable-Work Disqualification'' stops short of suggesting definite practical techniques, the present statement tries to reach solutions which will be equally applicable at the local office and at the appeal levels.

The great need in this field is for usable wage information. In the attached statement, we have suggested a few sources. We should like to pass on to other State agencies helpful techniques which you might be able to send us for use in developing sources of data and using such data. We are greatly interested in receiving not only such devices and methods as you have found valuable, but any comments, criticisms, and suggestions you may have concerning the attached statement. We are here merely opening up a field that poses both technical and administrative difficulties. It is only by pooling our mutual thinking that we can hope to overcome those difficulties.

We are sending extra copies of this letter and the attachment for distribution to the appeals and claims personnel and to other interested personnel. A limited number of additional copies are available upon request.

Sincerely yours,

R. G. Wagenet,

Director.

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Principles Underlying the Prevailing Conditions of Work Standard

Preface

The following study of the prevailing conditions of work provisions in the State unemployment compensation acts was prepared by the technical staff of the Bureau of Employment Security. It discusses the interpretation of these provisions in the State Acts and presents the views which the Interpretation Service Section of the Bureau believes most reasonable.

In the final analysis, the interpretation of the prevailing conditions of work provisions in the State Acts, if they are to be consistent with the corresponding provisions in the Internal Revenue Code, depends on the meaning of the requirement in section 1603 (a)(5)(B) of the Internal Revenue Code, as amended. The specific meaning of the requirement in the Internal Revenue Code is for the determination of the Federal Security Agency. This statement is an effort by the Bureau of Employment Security to assist the State agencies in their administration of the prevailing conditions of work provisions, which have always presented many difficult problems.

Principles Underlying the Prevailing Conditions of Work Standard

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Principles Underlying the Prevailing Conditions of Work Standard

Introduction

All of the State unemployment compensation acts provide that benefits shall not be denied an otherwise eligible individual for refusing to accept new work ''if the wages, hours, or other conditions of the work are substantially less favorable to the individual than those prevailing for similar work in the locality.'' This provision in the unemployment compensation acts is one of the most difficult to administer. Its application can best be understood in relation to the other benefit provisions in the State acts.

General Benefit Provisions

In order to be eligible for benefits under the State acts a claimant must meet the requirements of the law. Among other things he must be able to work and available for work; that is, he must be currently in the labor market. If he does not stand ready, willing, and able to accept suitable work during the week for which he has filed claim, he is ineligible for benefits.

In addition, though eligible, the worker may be subject to denial of benefits if his unemployment is due to a labor dispute, if he was discharged for misconduct connected with the work, or if he left his work voluntarily or has refused suitable work without good cause. Denial of benefits in such cases follows on the theory that the worker's unemployment is not due to a lack of suitable job opportunities.

These disqualifying provisions are in the nature of exceptions to the general remedial purpose of the acts. They deny benefits only if the claimant's action falls directly within the limits of the exception when all the facts and circumstances are considered. Under most State laws, for example, the claimant is subject to denial of benefits for refusing work only if the work was suitable and he refused it without good cause. Moreover, in determining whether the work was suitable for the claimant, most of the State acts specifically provide for consideration of the degree of risk involved to his health, safety, and morals; his physical fitness and prior training; his experience and prior earnings; the length of his unemployment and prospects of securing local work in his customary occupation; and the distance of the work from his residence.

The law does not specify the exact weight to be given these and any other considerations which may be relevant to the determination because whether a job is suitable for a particular worker and whether he had good cause for refusing it can only be determined on the basis of the facts in the case. Thus, the actual determination of whether a claimant is subject to disqualification for refusal of suitable work without good cause is left to the discretion of those charged with the administration of the act. The same is true of the availability provision and the other general disqualification provisions in the State acts.

Mandatory Labor Standards

As mandatory minimum standards, however, all of the State unemployment compensation laws in conformity with section 1603(a)(5) of the Internal Revenue Code, as amended, provide that an otherwise eligible individual shall not be denied benefits for refusing new work:

(A) If the position offered is vacant due directly to a strike, lockout or other labor dispute;

(B) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or

(C) If as a condition of being employed the individual would be required to join a company union or to resign or refrain from joining any bona fide labor organization.

These requirements have been extended to all refusals of work in most of the State acts by providing that ''notwithstanding any other provisions of this Act, *no work shall be deemed suitable* and benefits shall not be denied under this Act to any otherwise eligible individual for refusing to accept new work'' unless it meets these three conditions. Clearly, ''no work'' is broader than ''new work'' and claimants are not subject to denial of benefits for refusing a job which does not meet any one of the three conditions under such a provision. Under some laws, the three labor standards requirements and the general criteria for determining whether work is suitable also apply to the determination of whether the claimant is subject to denial of benefits for voluntarily leaving work without good cause.

Relation to General Benefit Provisions

Inasmuch as the labor standards provisions are mandatory, they impose a duty on those administering the State act to assure themselves that the work offered meets these minimum standards before denying the claimant benefits for refusing work, regardless of whether he raises the issue. Inasmuch as they are minimum standards, they apply to all denials of benefits for refusal of offers of or referrals to new work regardless of his reasons for refusing the job.[1] If the job is vacant as a direct result of a labor dispute it does not matter, for example, whether the claimant refused it on principle, because he was afraid of bodily harm in crossing the picket line, or because the employer wanted him to start work on Friday, the 13th. He is not subject to denial of benefits under the suitable work disqualification in any case. Neither may he be held ineligible for benefits because he is unwilling to accept work which does not meet these three minimum conditions. For example, a punch press operator who is unwilling to accept less than $.80 an hour may not be held ineligible for that reason if lower wages would be substantially less favorable than those prevailing in the locality for such work.

The labor standards provisions relate primarily to the conditions on the job as compared with conditions in like jobs and the manner in which they would affect the claimant. The availability and suitable work provisions, on the other hand, turn primarily on the nature of the work and the claimant's qualifications, circumstances, and prospects. Thus work which meets the labor standards provisions may not satisfy the suitable work criteria and may not be work which the claimant need stand ready to accept. For example, a job as stenographer though it meets the labor standards requirements is not suitable for a file clerk who cannot type and take shorthand. Similarly, a job as a cook's helper which pays prevailing wages for such work is not suitable for an assistant chef who has been earning $60 a week and has prospects of earning as much again. Unless the work satisfies both the suitable work criteria and the labor standards requirements, the claimant is not subject to disqualification for refusing it and is not ineligible for benefits if he is available for a substantial amount of other work which is suitable for him.

Purpose of the Standards

Of the three labor standards requirements, the first, which prevents denial of benefits for refusal of work if the job offered is vacant due directly to a labor dispute, was designed to preserve the neutrality of the State agency in labor disputes. The third, which prevents denial of benefits if the worker as a condition of being employed is required to join a company union or resign from or refrain from joining a bona fide labor organization, was designed to deter any effort to use unemployment compensation to impede or destroy labor organizations. The second, which prevents denial of benefits if the wages, hours, or other conditions are substantially less favorable to the individual than those prevailing for similar work in the locality, was designed to prevent the unemployment compensation system from

[1] Similarly, as in most States, where they are not limited to new work, the labor standards requirements apply to all denials of benefits for refusal of offers or referrals to any work by an otherwise eligible individual, regardless of whether he raises the issue or of his reasons for refusing the job.

exerting downward pressure on existing labor standards. It was not intended to increase wages or improve the conditions under which workers are employed, but to prevent any compulsion upon workers, through denial of benefits, to accept work under less favorable conditions than those generally to be obtained in the locality for such work.

Order of Discussion

It is with this second labor standard requirement that we are concerned in the succeeding discussion. The key words and phrases in this requirement are: ''similar work,'' ''locality,'' ''prevailing,'' ''substantially less favorable to the individual,'' and ''wages, hours or other conditions of work.'' The interpretation given these phrases and the manner in which they are applied in each case determine whether the purpose intended will be achieved. Each of these words and phrases will be discussed in turn. Inasmuch as the requirement is intended to reflect labor market conditions, their interpretation should be based on existing labor market patterns and usage and they will be considered in that light.

Similar Work

Similarity of work can best be judged on the basis customarily used by employers and employees as a result of industrial experience: by occupation and grade of skill. As used in prior legislation, ''similar work'' has in fact been held to mean work in the same trade or occupation. Superficially this would seem to mean that a job is to be compared with others known by the same title.

However, job titles are sometimes misleading. Different occupation and grade designations are often used in different establishments for the same work. Conversely, the same titles are sometimes used for different kinds of work. *The actual comparison of jobs must therefore be made on the basis of the similarity of the work done without regard to title: that is, the similarity of the operations perforated, the skill, ability and knowledge required, and the responsibilities involved.*

Industry Relationships

In some occupations the similarity of work cuts across industry lines and the differences in the manner in which the work is done are relatively minor. Bookkeepers and boiler operators, for example, are likely to do much the same kind of work whether employed by a grain elevator company, a manufacturing concern or a retail clothing establishment. Either would be hired by establishments in almost any industry providing they had the necessary experience with the particular bookkeeping system or the heating plant in use and the required degree of skill. This essential similarity of work which cuts across industrial lines is generally true of most office, janitorial and clerical occupations and to some degree of unskilled common labor.

In most occupations, on the other hand, there is likely to be considerable variation in the work done in different industries, in parts of industries or even in particular types of establishment within an industry. There are marked differences, for example, in the work of a glazier in the construction industry and one in the automobile or the furniture industry; and within the furniture industry between the work of a glazier on wooden furniture and one who works on metal furniture. Similar differences exist in the nature of the work done by a waiter in a ''greasy spoon'' and one in a hotel dining room and between the work of a dress saleswoman in a bargain basement and a sales person in a dress salon. Thus even where there is an essential similarity, differences in the nature of the tools used, in the size and quality of the material worked on, or in the clientele to be served, may create characteristic differences in the work which are important to both employers and employees. Such differences are generally to be found in the mass-production-process and service occupations.

Skill Grade

The nature of the services rendered may also be differentiated within an occupational category by the degree of skill and knowledge required. The work of a head bookkeeper in a large concern who sets up the bookkeeping system and assumes responsibility for it, is clearly different from that of a bookkeeper in charge of ''accounts payable'' or a posting clerk in the department. These differences are reflected in the wages and other conditions in their respective employments. The work of a regular sales person who must have a thorough knowledge of the merchandise and who assumes responsibility for the stock is likewise to be distinguished from that of a rush-hour or counter clerk who is not required to have any specialized knowledge or who only accepts payment for articles selected by the customer.

The degree of distinction made within an occupation requiring the same basic skills depends to some extent on the degree to which the occupation is concentrated in the area. Where there is a heavy concentration, the workers become highly specialized and employers seek such specialization. As a result, minor differences in the work done are commonly recognized both on the job and in the hiring process.

On the other hand, the fact that ''similar'' makes allowance for some difference though it implies a marked resemblance must also be given weight. Too fine a distinction is likely to result in a comparison of identical rather than similar work. Generally, distinctions should be made within an occupation only when important differences in the performance of the job outweigh the essential similarity of the work.

In skilled trades a number of long-established and commonly recognized grades such as learners, apprentices, and journeymen will usually be found. There may also be special groups such as handicapped or superannuated workers which must be taken into account where there are actual differences in the tasks performed and the speed and skill required. However, the work should not be distinguished on the basis of the kind of individual ordinarily hired for the job, since it is the *work* and not the *worker* which is to be compared under the law.

Basis of Determination

In conclusion, ''similar work'' is basically a common sense test. The degree of similarity required in any particular instance should be calculated to carry out the general purpose and spirit of the proviso. On the one hand the comparison should not be so broad as to result, for example, in the finding of a prevailing wage which bears no relation to those generally paid for some of the kinds of work being compared. On the other hand, the distinctions should not be so fine as to leave no basis for comparison with other work done in the locality and thus make meaningless the determination of the ''conditions prevailing'' for comparable work. Neither should the question of what is similar work be determined on the basis of other factors which are conditions of work within the meaning of the provisions, as for example, the hours of employment, the permanency of the work, unionization, or vacation, sickness, and retirement benefits. These other factors must be considered, but only after the question of what is similar work is decided. If they were considered in determining what is similar work, such considerations would beg the very question at issue: what *conditions* generally prevail for similar work?

Sources of Information

The determination of what constitutes similar work is not difficult in occupations which have long been subject to union agreement. As a result of collective bargaining, the occupational duties and skill grades covered by agreement are usually well defined. Moreover, inasmuch as the definitions are based on industrial experience and the customs of the trade, they are applicable to nonunion as well as union work in the locality.

In occupations and localities where the work in question has not been defined by mutual agreement between employers and employees, it is necessary to look to other sources. Guidance may also be derived from the job definitions and classification practices used by State and Federal agencies responsible for wage and hour data or the enforcement of minimum standards for various occupations, the employment service, employer groups, labor organizations and the claimant's own experience. In the absence of such guidance a good general test of the similarity of the work is whether the duties and the skills required are sufficiently the same so that the workers employed in each of the jobs being compared could readily perform any of the others.

Locality

''Locality'' like ''similar work'' is a somewhat indefinite term. Apart from any special reference to a particular place it means only a relatively limited geographic area. As used in the labor standards provisions it is an integral part of the concept of ''the conditions prevailing for similar work.'' But while it is clear from the context that the conditions offered are to be compared with the conditions for similar work in the locality where the work is to be done, the nature and size of the area are not defined.

Arbitrary Definition

At first glance the use of arbitrary area limits such as city or county lines may appear persuasive because it seems easy to administer. Support for such interpretation is to be found in the public construction statutes in which the area for comparison of wages paid for similar work is generally defined as the State or civil division in which the work is to be performed. The phrase ''immediate vicinity'' in the Congressional Act of 1862 governing the wage rates of unclassified navy yard employees has likewise been interpreted in terms of a 50-mile radius about the yard.

These definitions were adopted in large part to meet court objections to the use of so indefinite a term as ''locality'' where penal provisions are involved. This objection does not apply to the unemployment compensation laws nor is the same usage applicable. Unlike the public construction acts the unemployment compensation laws are not penal statutes. Unlike the Navy Yard Act, they do not deal with only one type of industry which is ordinarily concentrated in urban districts. Unemployment compensation agencies have occasion to deal with almost every kind of industry and with a variety of occupations, skilled and unskilled, organized and unorganized, which center in areas of varying size.

Defining ''locality'' by some arbitrary device such as city and county lines or a 50-mile radius about the establishment, without regard to the labor market pattern of the occupation, will in many instances fail to effect the intent of the prevailing conditions provisions. In some cases the area will be too large. In others, too small. If it is too large, it is likely to include more than one area of concentration for the same kind of work. In such cases, generalization of the conditions prevailing in several different areas of concentration is not likely to reflect the conditions actually to be obtained in any one of them. Similarly, if the limits are too narrow, the determination will reflect conditions prevailing in only part of the area in which those attached to the occupation ordinarily seek employment.

Competitive Labor Market Area

Results in better accord with the purpose of the labor standards provisions can be achieved by interpreting ''locality'' in terms of the area of immediate labor market competition for similar work. It is the variation in wages and other conditions in their customary occupation within the competitive labor market area in which they normally expect to obtain employment which immediately affects workers. Accordingly, ''locality'' as used in the labor standards provisions in the Internal Revenue Code and the State unemployment compensation acts may be defined as the *competitive labor market area in which the conditions of work offered by an establishment affect the conditions offered for similar work by other establishments because they draw upon the same labor supply.* The term ''area'' as used in section 103.50 of the Wisconsin statutes which provides that the hours of work on public highway projects shall be no longer than those prevailing for such work in the area is similarly defined as the locality from which labor for any project within such area would normally be secured. Definition of locality in terms of the competitive labor market area is also in accord with the practice of most unemployment compensation agencies insofar as can be discerned from the administrative decisions.

Basic Considerations

In establishing the competitive labor market locality for an occupation the dominant considerations are the location of the establishments employing similar services, the area from which (regardless of civil and political boundaries) workers are normally drawn to supply the needs of these establishments, the commuting practices and ease of transportation in the area, and the customary migration pattern of the workers in the occupation.

Urban Occupations

Because most industries tend to cluster in towns and cities, urban and metropolitan districts, including the suburbs and outlying area within ordinary commuting distance, generally constitute the locality for most industrial occupations. In some places two or three nearby communities with similar industrial activities may constitute a single locality for many occupations. Mill or mining communities in which the companies draw their employees from the surrounding territory in competition with each other are a good example. Similarly, heavy industrialized urban districts such as the San Francisco Bay area in which there are a number of communities within easy transportation distance of each other may constitute a single locality for occupations common to the entire area.

An extensive urban or metropolitan district may on the other hand encompass several localities for occupations in which the workers do not move freely from one community to another. The San Francisco Bay area, for example, apparently encompasses several different labor markets for domestic work in which different conditions may prevail because there is no direct competition for labor among employers or between those seeking such work in different communities. The same situation probably exists in other large urban districts such as the Chicago or New York Metropolitan areas and in many other fields of employment. To take an extreme example, the competitive labor market for pinboys in neighborhood bowling alleys may be no wider than several square city blocks. However, whether there is one or several labor market localities in an urban district for an occupation will vary from one place to another with the size of the district, the location of the establishments employing such services, the nature and customs of the industry and the commuting practices of the workers in the occupation.

The difference between determining the extent of the competitive labor market locality for similar work and determining whether the job a claimant was offered is within reasonable travel distance from his home is discussed below under the heading ''Distance to Work.''

Interurban and Rural Occupations

The competitive labor market for some kinds of work is not limited to urban districts and may encompass more extensive areas. In the logging occupations, for example, the entire lumbering region in which an offer of better wages by one of the operating companies at the beginning of a season would draw off workers from the other camps or cause them to improve their conditions to meet the competition—would constitute the competitive labor market area. Similarly, the area in which structural steel workers or stone cutters ordinarily move from job to job and from the contracting companies ordinarily recruit such workers may be regional or even Nationwide.

Like variations are to be found in agricultural occupations. Thus, the immediate competitive labor market area for canning occupations would usually be more limited than that for field hands, while the customary migration pattern for the fruit and vegetable pickers involved will usually be more extensive. To follow the parallel further, while the competitive labor market area for poultry farm hands may be smaller than that for dairy hands in some places, the reverse may be true in other parts of the country where the poultry industry is more widespread and dairy farms are not clustered over large areas but scattered in small groups.

Distance to Work

The size of the labor market locality should not be confused with the distance a claimant can reasonably be expected to travel to work. The first turns on the nature of the occupation and the economic character of the area. The second depends on where the claimant lives, his circumstances and past work history. The two have little relation to each other. In large labor market areas, for example, the distance from one end to the other may be greater than a claimant can reasonably be expected to travel to and from work. Where the labor market area for the occupation is very small, on the other hand, it may be reasonable in view of transportation facilities to expect claimants to travel outside the labor market area. Some claimants may live far from the locality in which the job is offered. Some may have good cause for refusing jobs beyond the immediate vicinity of their homes. Others can reasonably be expected to commute a considerable distance in view of their past work histories and present circumstances. Regardless of the claimant's situation, however, the labor market locality in which offered work is compared with similar work to determine the conditions prevailing for the occupation remains the same.

Determination and Sources of Information

There are no hard and fast rules for determining the locality for an occupation except that all of the factors which enter into the labor market pattern for such work should be considered in making the determination. A working knowledge of the nature of the occupation and the industries and kinds of establishments which employ such workers will usually be sufficient to indicate the relative size and general outline of the area. Information available from other

agencies and groups which have occasion to deal with the same problems and the means to conduct a more complete study will also prove useful. In cases where the inclusion or exclusion of borderline districts or establishments would result in a substantially different determination, expert opinion and more thorough investigation may be necessary. Once the locality for the occupation has been determined, however, it can be applied in all future cases involving offers of similar work within the area, unless substantial changes in the industrial pattern of the area or the occupation become apparent.

Prevailing

Meaning

While the prevailing standard was not applied to all conditions of work in earlier legislation, the standard has had long and extensive statutory use. As applied to wage rates, its meaning was relatively well settled by administrative practice and court decisions prior to the enactment of the unemployment compensation laws. It may be assumed that those who framed the unemployment compensation acts were familiar with the legislative and court history of the standard. In the absence of evidence to the contrary, or of usage more appropriate to the intent of the provision, the standard in the unemployment compensation laws may therefore be construed on analogy to generally accepted usage under the prevailing wage provisions in prior legislation.

Under the earlier public construction statutes it has generally been accepted that the prevailing rate of wages means one specific rate for a given occupation in a given locality and not a number of rates all of which are prevailing. The prevailing minimum wage requirement in the Walsh-Healey Act of 1936, though it presents a somewhat different standard, has likewise been interpreted to mean a single monetary figure in accordance with prior usage. It has also been generally accepted that ''prevailing'' means the most outstanding or commonly-paid rate, and that the prevailing rate of wages for a given occupation and locality is a fact and its ascertainment a matter of investigation.

It may therefore be said as to each of different conditions of work to which the standard applies under the unemployment compensation acts: (1) *that a specific condition of work is implied in each instance* and not, for example, a range of wages or hours; (2) *that the prevailing condition is that which most commonly obtains in the locality for similar work;* and (3) *that the determination of the prevailing condition is a matter of investigation.*

Number of Employers vs. Number of Employees

From time to time there has been some question as to whether the prevailing standard in the unemployment compensation acts is to be applied in terms of the conditions under which the largest number of workers are employed or in terms of the conditions offered by the greatest number of employers. In some instances the conditions of work offered by the greatest number of employers has apparently been used because the information could more readily be obtained in that form. Where all the establishments involved are about the same size so that the greatest number of workers in the occupation are necessarily employed by the greatest number of employers, the result is much the same whichever test is used, if all the workers in the same establishment are employed under the same conditions. However, where the establishments are not the same size or the conditions within the establishments vary, the results are likely to differ widely depending on whether the test used is the conditions under which the largest number of workers are employed or the conditions offered by the greatest number of employers.

This issue has not apparently arisen under other laws. Under the public construction statutes, for example, the prevailing standard has customarily been applied in terms of the rate paid the largest number of workers. Justification for this usage under the unemployment compensation acts is also to be found in the traditional use of the terms ''prevailing wages'' and ''prevailing conditions of work'' by economists and other social scientists as meaning the wages and other conditions under which the largest number of workers are employed. The chief merit of using the largest number of workers lies, however, in the fact that it sets up the standard most consonant with the purpose of the prevailing conditions of work provisions. This can best be illustrated in terms of wages since that is generally the most important factor in the employment relation.

The upward or downward pressure which an employer exercises on the conditions offered for similar work in the competitive labor market locality is directly related to the number of workers he employs. An offer of better wages by a large establishment which employs several hundred welders will draw such workers from almost every establishment in the locality which pays less. Moreover, it will force employers who pay less to increase their wages if they wish to retain their employees and attract new workers. A similar increase in the wages offered by a shop which employs two or three welders will have little if any effect on the general level of wages in the occupation. Conversely, a cut in wages by a large establishment is likely to result in a reduction in the wages paid by other employers, while a similar decrease by a single small employer will have little effect on existing rates.

In other words, it is not the number of employers or how many different rates are paid but the number of jobs at each rate and level of wages which directly affects the individual worker's position in the labor market. By establishing the prevailing wage on the basis of the amount paid the largest number of workers, existing conditions in the labor market are, therefore, more truly reflected. Moreover, because each rate is weighted in proportion to the number of workers employed at that rate, the cumulative effect of the wages paid by numerous small employers is balanced against the wages paid by larger establishments.

As a general rule it may therefore be said *that the prevailing wages, hours,* and other conditions of work are those under which the largest number of workers engaged in similar work in the locality are employed.

Methods of Determination

Under the public construction acts, the rate paid a larger number of workers than any other—that is the most common or modal rate—has generally been recognized as that prevailing where a majority of the workers in the occupation are employed at the same rate. The mode is also generally used where less than a majority, but as much as 30 percent or 40 percent of the workers are paid at the same rate.

In the event that less than 30 percent or 40 percent are paid at the same rate, the average of all the rates paid weighted by the number of workers at each rate [2] is generally used rather than the mode. The New York Public Construction Act, for example, provides that the average shall be used if less than 40 percent of the workers in the occupation are paid at the same rate. Under the Federal Davis-Bacon Act the average is used if less than 30 percent are paid at the same rate.

As applied to wages and hours and such other conditions as can be measured in numbers, a combination formula of this kind best carries out the intent of the prevailing conditions of work provisions to prevent denial of benefits for refusal of work if the conditions are substantially less favorable than those generally to be obtained in the locality for similar work. This follows because each of the two methods, the mode and the average, is used under the circumstances to which it is most applicable.

The indented material below provides a more complete explanation of the methods of determining the prevailing condition of work. It may be skipped by those interested in the broader aspects of the subject.

The mode is used so long as one condition of work clearly prevails over all others and is therefore most representative of those to be obtained in the locality. This method has the merit of utilizing a condition of work which actually exists as the standard. It also has the advantage of being relatively easy to use because it requires no calculation beyond ascertaining which of the existing conditions is most widespread.

The average, on the other hand, is used where the largest number of workers employed at the same wages or hours or other condition of work does not constitute a substantial proportion of the total number in the occupation. Where this occurs, the condition under which the largest number of workers are employed in the occupation may not always be representative of those generally to be obtained. In such cases results in better accord with the purpose of the prevailing conditions of work provisions can usually be achieved by using the weighted average. In the case of wages, for example, this method, because it reflects the entire range of wages and the number of workers employed at each level of earnings, usually

[2] i.e., each rate is multiplied by the number of workers employed at that rate, and the sum of the totals is then divided by the total number employed in the occupation to obtain the average rate.

yields a wage which is more representative of those generally to be obtained in the locality than that paid any relatively small proportion of the workers in the occupation.

However, since conditions like seniority rights, which cannot be measured in numbers, cannot be averaged, the mode must of necessity be used in determining the prevailing condition of work where such factors are involved, even though only a small percentage of the workers in the occupation are employed under the same condition. The mode also should be used in determining the wages or hours prevailing for similar work even though there may be relatively few employed under the same condition, if the information necessary to calculate the average is not available. Conversely, where the average is known, but the information necessary to obtain the mode cannot be obtained, it may be necessary to use the average wage or the average number of hours as the standard for comparison even though a substantial number of workers may be employed at the same wages or hours.

Use of Class Intervals.—In determining the mode it is often simpler to divide the entire range of wages or hours or other conditions existent in the locality into class intervals rather than count the number of workers employed under each particular condition. For example, the number of workers employed at different wage rates may be ascertained on the basis of 2-cent or 5-cent or 10-cent class intervals depending on how great the amounts involved are. That is, the number of workers employed at different rates may be reported in terms of the number receiving 60 to 64.9 cents an hour, the number receiving 65 to 69.9 cents an hour, and so forth rather than the number receiving 60 cents an hour, the number receiving 60.5 cents an hour, the number receiving 61 cents an hour and so on. If the information is received in this form and the actual mode is not known (1) the modal point in the most numerous class may be determined through the use of one of the statistical formulas designed for that purpose, or (2) the mid-point of the most numerous class may be used with due allowance for the fact that it is only an approximation.

The weighted average may also be derived on the basis of class intervals (1) by multiplying the mid-point of each class interval by the number in the class, adding the totals, and dividing the result by the total number of workers involved or (2) by using one of the shorter statistical formulas designed for the purpose.

Sources of Information

Ordinarily the factual information needed to ascertain the conditions prevailing in the locality for similar work can be obtained from labor and employer organizations, from representative employers and employees, from the Employment Service, or from other Government agencies which are responsible for the collection of data on wages and hours, the enforcement of minimum labor standards in various occupations, or the administration of industrial safety codes and the like. If conditions in the occupation are fairly stable, information once obtained may prove useful over a considerable period. This is particularly true in the case of occupational wage rates which, in normal times, are likely to remain unchanged over long periods. It may therefore prove useful to construct tables of occupational rates and keep them on hand for ready reference. These should be amended from time to time as better or more current information becomes available.

The determination of the conditions prevailing in the locality for similar work is comparatively simple where most of the workers in the occupation are employed under uniform collective bargaining agreements or where the conditions are governed by custom or law. More extensive investigation and more careful examination of the data available is usually required where there are relatively few workers employed at the same wages or hours or other conditions of work. Even in such cases, though, sufficient information can generally be obtained to enable a reasonably accurate approximation.

Thus where only the range of wages or hours is known a point nearer the middle than the bottom of the range may be used as a rough estimate since there are normally few workers at either extreme. If there is reason to believe that a larger number than usual are nearer the top or the bottom of the range the estimate may be moved up or down accordingly.

Similarly, where the most complete and accurate information available is not entirely current, allowance may need to be made for any noticeable upward or downward trend which may have taken place in the meantime. In other instances in which accurate information of the conditions under which such workers are currently employed in the locality is lacking, typical offers made through the Employment Service or other channels may provide some guidance. The claimant, if he is familiar with the conditions which generally obtain for such work in the particular labor market locality, may also be able to provide some information.

In each case, though, it is for the unemployment compensation agency or tribunal to sift the data and to make the determination on the basis of the best information available.

Substantially Less Favorable

Purpose

Many of the conditions of work to which the prevailing standard is applied under the unemployment compensation acts, like seniority and safety provisions, do not lend themselves to exact comparison. In considering factors of this kind it cannot always be determined whether one condition or combination of conditions is less favorable than another. Even in the case of wages and hours which can be more exactly compared, the wages or hours which in fact prevail cannot always be definitely determined. Nor can the conditions of a job in question always be foretold with certainty. The rate of earnings, for example, will in many instances depend on the individual's ability. Working hours may also be subject to variation under different circumstances so that even the employer cannot say exactly what they will be. Moreover, a condition which is important in one occupation and locality may be relatively unimportant in another. For example, the use of ventilators to draw off fumes is important in a chemical plant and the height of a chamber to which he is assigned may be important to a miner. Both are relatively unimportant, however, in office work.

A certain amount of leeway has therefore been allowed in the application of the prevailing standard under the unemployment compensation acts by providing that benefits shall not be denied otherwise eligible individuals for refusing work if the wages, hours, or other conditions *are substantially less favorable to the individual* than those prevailing.

Effect

The provision thus presents a definite but not an inflexible standard. It does not preclude the denial of benefits for refusal of work where only minor or purely technical differences are involved which would neither undermine existing labor market standards nor have any appreciably adverse effect on the worker. It also allows a reasonable margin for error where the conditions prevailing in the locality for similar work or the corresponding conditions of the work offered cannot be exactly ascertained. But the basis of comparison in each instance, insofar as they can be determined, is still the conditions under which the greatest number of workers in the occupation are employed in the locality.

Application

The meaning of the words ''not substantially less favorable to the individual'' cannot be defined in terms of any fixed percentage, amount or degree of difference. Both the actual condition in question and the extent of the difference, as well as its effect on the worker, must be considered in each case.

If the conditions of the work the claimant refused and those prevailing are known, it is usually easy to determine whether the difference is of a material or substantial nature or is of no real consequence. In borderline cases where it is not clear whether the difference is material, the general rule that remedial legislation is to be liberally interpreted and applied in favor of those it was intended to aid would indicate that the claimant be given the benefit of the doubt. Similarly, when the facts cannot be precisely determined, the claimant would not be subject to denial of benefits for refusing work unless it is reasonably certain that the conditions on the job are not substantially less favorable than those prevailing.

Substandard Employment

There are some situations in which the prevailing standard provisions are not directly applicable though the work is unsuitable because the conditions of employment are substandard. Thus, though the conditions prevailing for similar work in the locality will ordinarily be better than the minimum standards set by State or Federal law, investigation may occasionally reveal that the wages, hours or other conditions prevailing in a particular occupation and locality are below the applicable legal minimum. In such cases where the

conditions of the work offered are in violation of law, even though they are not substantially less favorable than those prevailing, the claimant has good cause for refusing the job under the general suitable work provisions in the State acts. It is well settled that one law should not be so applied as to cause or result in the violation of another.[3]

Similarly, the claimant generally has good cause for refusing a job if the wages or other conditions are far less favorable than those in most other kinds of work in the locality, for which he is qualified, even though the job or the work in question is not covered by State or Federal wage and hour legislation. In view of the wages and other conditions generally to be obtained in the locality in other employments which the claimant is able to perform, such work would ordinarily be unsuitable and the claimant would have good cause for refusing it under most State acts. Payment of benefits in cases of this kind is also in accord with the intent of the prevailing conditions of work provisions to prevent operation of the unemployment compensation acts to depress the general level of working conditions through denial of benefits for refusal of substandard employment, though they may not come squarely within the letter of the provisions.

Wages, Hours or Other Conditions—Wages

Wages vs. Wage Rates

In the public construction acts the prevailing standard has generally been applied in terms of the prevailing ''rate of wages'' or the prevailing ''rate of per diem wages.'' It has been argued that the word ''wages'' as used in the prevailing conditions of work provisions in the unemployment compensation acts also means the wage rate.

Support for this view is found in the fact that the hours of work, which in conjunction with the wage rate largely determine the earnings of most workers, are specifically set forth as a separate consideration. Accordingly, the provisions that benefits shall not be denied for refusal of work if the wages are substantially less favorable than those prevailing have at times been taken to mean that the hourly wage rate may not be substantially less than that prevailing.

This usage may be appropriate for the purpose of establishing the minimum rate which may be paid workers in various occupations under government supply and construction contracts. However, it is not the purpose of the prevailing conditions of work provisions in the unemployment compensation acts to establish a minimum rate which may be paid, but to prevent downward pressure on existing conditions and to give the claimant the benefit of conditions which are not substantially less favorable to him than those prevailing in the locality for similar work. Comparison in terms of wage rates alone is not always sufficient to accomplish this purpose.

Factors Affecting Earnings

Earnings are frequently affected not only by the wage rate and the hours of work, but also by the method of payment, the overtime practices and various extra bonuses and premiums. For this reason, workers generally look to both the rate and the total weekly earnings in determining whether they will accept a particular job or continue to seek other work. Similarly, employers do not merely announce the rate of pay but also emphasize total earnings. In addition, all methods of payment do not lend themselves to comparison in terms of wage rate. Though most workers are now paid at hourly or piece rates, some are still paid a flat daily or weekly wage regardless of the hours put in or the amount of work done. It is only by taking all of the factors which would affect the claimant's earnings and those of most workers in similar employment in the locality into consideration that it can be determined whether the wages offered are less favorable than those prevailing.

Basis of Comparison

Thus, where most of the workers in a particular occupation and locality are not paid on the basis of the amount of production or sales completed or the hours of work put in, but are paid a monthly or yearly salary, as is frequently true in the case of managerial and professional employees as well as farm hands, the wage comparison must be made in terms of their total monthly or yearly earnings including any remuneration received in addition to the base salary. Similarly, if the hours in the occupation are irregular and most of the workers are paid at hourly or piece rates or on a percentage basis as in the case of longshoremen, home workers and many taxicab drivers, the comparison must be made in terms of hourly or piece rates or on a percentage basis. In such cases, the fact that the hours are irregular and unscheduled prevents any further comparison of earnings.

However, in the great majority of occupations in which the workers are paid fixed or variable rates or commissions, so that their earnings depend in large part on the actual hours of work, both the wage rates and the weekly wages can be compared and both need to be taken into consideration to determine whether the wages offered are less favorable than those prevailing.

Where some of the workers are paid at other than time rates or receive variable incentive wages in addition to the hourly base rate, the various rates may be compared in terms of average straight time hourly earnings. In such cases, the average straight time hourly earnings may be derived by dividing the weekly wage minus overtime earnings by the weekly hours of work less the overtime hours. If other nonproduction bonuses or premiums are paid in addition to overtime, these would also have to be subtracted from the weekly wage before dividing.

Conversely, where the weekly wages are not directly comparable because of differences in the hours of work, the prevailing weekly wage may be derived by multiplying the prevailing hourly earnings by the prevailing hours of work. If the hours usually include overtime, the overtime earnings would also have to be taken into account in determining the prevailing weekly wage. For this purpose prevailing overtime earnings may be estimated on the basis of the usual overtime rates and practices in the occupation and locality. Any other nonproduction premiums or bonuses customarily paid workers in the occupation would likewise have to be taken into consideration in such cases in determining the prevailing weekly wage.

Basis of Determination

Implicit in the comparison of both the hourly rate and the weekly wages is the general rule that *the wages offered will ordinarily be substantially less favorable to the worker than those commonly to be obtained in the locality for similar work if either the hourly or weekly earnings are substantially lower than those prevailing.* If, for example, the work in question is usually done on a full-time basis, the wages entailed in an offer of part-time work would usually be substantially less than those of most workers in similar employment even if the hourly rates were the same. The wages he would earn in part-time employment would therefore be substantially less favorable than those prevailing in the occupation for a worker who is seeking full-time work. Similarly, if the hourly rate were substantially less than that prevailing, the wages would generally be substantially less favorable than those of most workers in similar employment. This would hold true even though the job paid higher weekly wages than most such jobs because the hours of work were longer.

In such cases, the conditions of the work offered would be substantially less favorable than those prevailing both because the hourly rate was lower and the weekly hours were longer than those generally to be obtained. The claimant would not therefore be subject to denial of benefits whether either or both factors were taken into account.

Other Considerations

In some cases, however, a true comparison may require further analysis. Other factors that affect the weekly and hourly wages may also have to be taken into consideration. Thus the payment of overtime or other nonproduction premiums and bonuses over and above those ordinarily paid such workers in the locality may have a bearing on whether the hourly rate of earnings is actually less favorable than that prevailing. To illustrate: most of the workers in the occupation may be paid at straight time rates with nothing additional for overtime, and the prevailing hourly rate may be $.70 an hour, the prevailing weekly hours of work 48, and the prevailing weekly wage $33.60. The job in

[3] From another point of view it might also be held (1) that the conditions ''prevailing'' for similar work means those *legally* prevailing, (2) that only conditions of work which meet the applicable State and Federal statutory standards should be considered in deterring the conditions prevailing for similar work, and (3) that conditions which violate Statutory standards do not meet the requirements of the prevailing conditions of work provisions. Under such an interpretation, the prevailing conditions of work provisions would also prevent denial of benefits to claimants who refused work under conditions which were in violation of the law.

question, on the other hand, may pay only $.65 an hour. At straight time rates this would amount to only $31.20 for a 48 hour week and would be substantially less favorable than the wages prevailing for similar work in the locality. However, the wages may not be less favorable if other factors enter the picture. If, for example, the job paid time and a half after 40 hours, the worker would earn $33.80, which is somewhat more than the prevailing wage for the same work week. In effect, he would be earning a bit more than the prevailing rate of $.70 an hour.

In other instances, the provision of special benefits over and above those received by most workers in similar employment in the locality may make the wages as favorable as those prevailing. Thus the fact that the worker would be paid for vacation and sick leave has been taken into consideration in determining whether the wages were substantially less favorable than those of most workers in the occupation. It should be remembered, however, that such benefits may not outweigh the difference in the money wages the worker would earn the year around. In addition, while workers may appreciate benefits of this kind if they are afforded in addition to the usual wage, they may prefer to receive the difference between the wages paid and the usual wages for such work in money rather than in other forms because of the greater freedom it gives them to purchase the goods, leisure or services they want.

Customary Industrial Practices

The question of differential payments for evening or night work in the form of equal pay for shorter hours or a higher rate or additional bonus may also arise. If such differentials are ordinarily paid they need to be taken into account. Accordingly, a claimant who refuses employment on the night shift at the wages which are ordinarily paid for day work but which are substantially less favorable than those prevailing for night work, would not be subject to denial of benefits under the prevailing conditions of work provision. A like result would be reached where there were established differentials for jobs involving special risks to health or safety beyond those ordinarily incurred in the occupation, as in the case of mine operations carried on in water. In cases of this kind, there may also be some question as to whether the work is similar to the less dangerous or easier operations with which it is being compared. But the same result as to payment or denial of benefits should be reached whether the jobs are held to be different with different wages prevailing for each, or whether the work is considered similar and the practice of paying a differential rate is taken into account.

Temporary or Seasonal Fluctuations

In some occupations it may also be necessary to allow for temporary differences or seasonal fluctuations in hourly and weekly earnings both in determining the prevailing wage and in determining whether the wages offered are substantially less favorable than those of most workers in similar employment. It is ordinarily expected, for example, that the earnings of department store sales workers who are paid a commission in addition to their hourly rate, will reach a peak during the winter holidays and be relatively low during the summer lull. Similar variations are to be found in the garment trades and in many other occupations in which the hours of work and consequently the weekly earnings are reduced during the off season. Since all of the establishments involved will not be affected simultaneously or to the same extent it is best to determine the prevailing wage in such cases on the basis of a normal period whenever possible, and to compare the wages offered with those prevailing in terms of the normal earnings of other workers in the establishment. If the experience of other workers in similar employment offered in the establishment indicates that the earnings in the job will average as much as those of most workers in the occupation and that the fluctuations will be no more frequent and no greater than is ordinarily to be expected in such employment in the locality, due allowance may be made for such differences. If, however, the wages do not average as much as those of most workers or the fluctuations are so extreme as to render the earnings even more uncertain than those of most such workers, the conditions of the work offered may be substantially less favorable than those generally to be obtained for similar work.

Progressive Wage Scales

A somewhat different problem is presented where most of the workers in the occupation are paid on the basis of progressive wage scales such as are frequently used by large establishments and incorporated in union agreements. In certain industries and plants, for example, inexperienced workers are hired at a minimum entrance rate and their wages increased during the training period until they are receiving as much as other workers in the department. Experienced workers may likewise be hired at a minimum job rate and their wages gradually increased up to the maximum rate paid by the plant for such work. In some cases the increases may be based on length of service with the employer; in some cases, on merit (i.e., usually skill and experience and speed); in others, on a combination of both.

Where progressive wage scales prevail, workers cannot ordinarily expect to be hired at the wages currently being paid the greater number currently employed in the occupation because many of those employed have received periodic increases based on the length of time they have worked in the same establishment. Accordingly, where progressive wage scales prevail, the determination of whether the wages offered are substandard is generally made not on the basis of the prevailing *wage*, but on the basis of the prevailing *wage scale*. Determination of the prevailing wage scale involves consideration of at least three factors: (1) *the prevailing entrance rate;* (2) *the basis on which the rates are increased;* and (3) *the amount and frequency of the increases.* The need for considering all three of these factors when applying the prevailing wage standard where progressive scales are involved can readily be illustrated.

One illustration may be found where the rate increases in a particular occupation and locality are based on length of service alone, and new employees are almost invariably hired at the entrance rate. In such cases an offer of work at the prevailing entrance rate for inexperienced workers, or the prevailing minimum job rate for experienced workers, would not ordinarily be considered substandard inasmuch as most of the workers in the occupation are hired on the same basis and at the same rate. Nevertheless the wage scale offered may still be substantially less favorable to the worker. For example, if the greater number of workers in the occupation are hired at $.70 an hour and move up to $1.10 within a year, an offer of $.75 with increases up to a maximum of only $.90 after a year on the job would be substantially less favorable than the prevailing scale of rates.

On the other hand, where workers are not always hired at the entrance rate, and rate increases depend at least in part on skill and experience, it may be that a worker with prior experience in the occupation can expect to be hired at more than the entrance rate. In such cases an offer of work at the minimum rate might well be substantially less favorable than that prevailing for a worker who has formerly earned a rate above the minimum or the middle of the range. Investigation will usually reveal the customary hiring practice in regard to workers with varying degrees of prior experience and skill and whether the entrance rate and the rate scale are as favorable to the claimant as those prevailing.

Method of Wage Payment

Aside from its effect on the amount the worker earns, the method of wage payment is itself an important condition of work. Workers frequently have justified objections to employment under a different method of payment than that to which they are accustomed and long and bitter strikes have been fought over changes from time work to piece work and the introduction of incentive wage systems. Even though the wages offered equal those of most workers in similar employment, it may therefore be necessary to determine whether the method of payment is substantially less favorable than that prevailing.

As a condition of work, the method of wage payment may be substantially less favorable to the worker than that prevailing: (1) if it would yield substantially lower earnings than the prevailing method; (2) if the earnings would be more irregular or less certain than under the prevailing method; or (3) if it would require the worker to work faster or under greater tension than the prevailing method of payment. Generally, however, the customary practice of the trade in the locality in which the work offered will govern the decision as to whether a system of payment found objectionable by workers is substantially less favorable than that prevailing.

Hours

In occupations in which the hours are not scheduled by the employer, either directly or indirectly, they are not a condition of the work and do not enter into consideration in

determining whether any of the conditions of the work offered are substantially less favorable than those prevailing in the locality for similar work. Where the hours are regulated by the employer, they are second in importance only to wages. Together with the wage rate and the method of payment they largely determine the worker's earnings. In themselves, they determine the time the worker must put in on the job and the time he has for his own needs and leisure.

Aside from their effect on the worker's earnings, the hours of the work offered may be substantially less favorable than those prevailing in the locality for similar work, if they are substantially longer, or less convenient. If ''wages'' as used in the prevailing conditions of work provisions is deemed to mean only wage rates and not weekly wages, it may also be held that substantially shorter hours than those prevailing, which would result in lower earnings, are substantially less favorable to a claimant who is seeking full-time employment.

Weekly Hours of Work

Inasmuch as most workers are employed at regular hours which are limited by industrial practice and custom, it is not usually difficult to ascertain the hours prevailing in the locality for similar work and to determine whether the hours of the work offered are substantially longer than those prevailing. Generally it is not necessary to consider the possibility of extra overtime in making the determination. If, however, a considerable amount of extra time beyond the regular weekly schedule is frequently required of workers in the occupation or the evidence indicates that it would be required on the job in question, that would also have to be taken into account. In such cases the past experience of other workers in the establishment may offer some guidance as to whether the hours would average more than those of most workers in like employment or be so much more irregular as to be substantially less favorable.

Temporary or Seasonal Fluctuations

As indicated in the discussion of wages, the hours of work in some occupations are also subject to seasonal fluctuations. In the needle trades, for example, the workers generally put in long hours during the rush season, particularly in the fall. During dull periods when work is slow, many are laid off and others work only a short week; that is, less than the normal weekly schedule. In such cases, it is generally best to compare the hours of the work offered with those prevailing on the basis of the normal work schedule and to make allowance for temporary or seasonal fluctuations. Again, the experience of other workers in the establishment may offer some guidance as to the extent of the fluctuations in the job offered as compared with those ordinarily to be expected and whether the hours would on the whole be no longer than those of most workers in similar employment.

Some care may have to be exercised to distinguish between temporary changes and fluctuations of this kind and permanent increases or reductions in the hours of work. The distinction would be especially important if the wage determination is made only in terms of wage rates since an offer of work which regularly involves shorter hours than those prevailing would ordinarily result in lower earnings even if the rates were the same.

In addition, any general change in the regular hours of a substantial number of workers in the occupation may also affect the prevailing hours determination. Thus, if the hours of a considerable number of workers are increased, reexamination may reveal, for example, that a greater number are now employed on a 48-hour schedule than any other, whereas a 44-hour week had previously prevailed. Similarly, if the hours of most of the workers in the occupation are reduced an offer of work at the hours which previously prevailed may now be substantially less favorable than those currently prevailing.

Arrangement of Hours

The hours of the work offered may also be substantially less favorable if they are less convenient than those prevailing in the locality for similar work. Thus, if most workers in the occupation work a 40-hour week on the basis of 5 8-hour days with Saturday and Sunday off, an arrangement whereby the worker would be required to put in 5 7-hour days and 5 hours on Saturday may be substantially less favorable to the individual than that prevailing because it leaves him only 1 day a week free even though the total number of hours is no longer than those of most workers.

Similarly, second or third shift work would generally be substantially less favorable if most of the workers in the occupation were employed on the first shift. It is because the second and third shifts are recognized as less convenient by both employers and employees that differentials are frequently paid for such work. Special payments of this kind, like extra pay for evening or holiday work, do not generally affect the hours determination. However, where the shift differential takes the form of shorter hours for equal pay, longer hours than those prevailing for second or third shift work might well be held substantially less favorable to the claimant.

There would, of course, be no question under the prevailing conditions of work provisions as to whether any shift was substantially less favorable than another if a relatively equal number of workers were employed on all shifts. In such circumstances no one shift could be said to prevail. If, however, a fairly equal number are employed on the first and second shift, an offer of work on the third shift might well be deemed substantially less favorable to the worker than the prevailing hours of work—unless such workers are generally hired on the least desirable shift and earn the right to move up to an earlier shift only as they acquire seniority. In the latter instance, the fact that the right to work on an earlier shift depends on the worker's seniority would itself be a condition of work. In such cases, determination of the prevailing arrangement of hours would be a matter of determining the shift on which the workers in the occupation are customarily hired in the locality rather than the shift on which the greater number are currently employed.

Subject to the same exception, a split shift which involves working at two different times of the day, or a swing shift which involves changing over between two different shifts at stipulated weekly intervals, would generally be substantially less favorable to the worker than the prevailing arrangement of hours if a straight shift prevailed; and a rotating three-shift arrangement would generally be substantially less favorable if either a straight shift or a swing shift prevailed. Other factors such as the hours involved and the claimant's circumstances may also enter into the determination, however. Thus, if the workers in the occupation are generally hired on the third shift, a rotating shift involving change over between the third, second and first shifts might not be substantially less favorable to the individual provided he was able to work on all three shifts and the constant change in hours would not affect him adversely.

Other Factors

Whether lesser differences such as the time a shift begins and ends or in the length of the lunch hour, etc., render the hours of work substantially less favorable to the individual also depends on the nature and extent of the difference and on the claimant's circumstances. Thus, if the claimant would be required to report to work at 6:30 a.m. whereas most workers in like employment did not begin to work until 9:00 a.m., the hours might well be held substantially less favorable than those prevailing. But a difference of a half hour or three-quarters of an hour in the time the shift started might not be material if it would adversely affect the claimant. In other cases the omission of rest periods granted most workers in like employment and differences in the length of the lunch hour or the starting hour may be compensated by other circumstances such as the fact that the workers are seated on the job or the existence of lunchroom facilities on the premises.

Generally, though, it will not be necessary to go into questions of this kind. The hours characteristic of the occupation in the particular locality will usually govern the decision as to whether an inconvenient shift or arrangement of hours is substantially less favorable to the individual.

Other Conditions of Work

As ordinarily used, the phrase ''conditions of work'' refers to the provisions of the employment agreement, both express and implied, and the physical conditions under which the work is done pursuant to the agreement. It is also applied at times to conditions which arise from actual work on the job as a result of laws and regulations which are not within the employer's control. So interpreted, the phrase ''conditions of work'' includes such factors as coverage by the State workman's compensation and unemployment compensation acts and the Federal old-age and survivors insurance provisions.

In General

Under either interpretation, the phrase encompasses not only wages and hours but such other factors as:

1. Group insurance against industrial accident, sickness or death;
2. Paid sick and annual leave, and paid vacations;
3. Provisions for unpaid leave of absence and for holiday leave or payment;
4. Pensions, annuities and other retirement provisions;
5. Severance pay;
6. Job seniority and reemployment rights;
7. Training, transfer and promotion policies;
8. Minimum wage guarantees;
9. Union membership provisions, representation and coverage;
10. Grievance procedures and machinery;
11. Work rules and regulations;
12. Health and safety rules, devices and precautions;
13. Medical and welfare programs;
14. Sanitation; and
15. Heat and light and ventilation.

Moreover, while the list set forth above by way of illustration of the more common factors which may be important in various occupations and localities is extensive, it is by no means all inclusive. There are many other factors which may be important in certain occupations and localities.

In Particular Occupations

Thus in outdoor employments, if it appears that the claimant would be required to work in all kinds of weather, it may be important to ascertain if most workers in like employment in the locality are required to be on the job regardless of the weather and if some shelter or protection is generally provided. In inspection jobs and in the case of stock chasers and many other employments, the weight of the parts or materials the worker may have to lift without mechanical aid may be important. In longshoreman's work and in the case of deliverymen and movers the size of the crew is often a matter of negotiation.

In the needle trades, questions may arise as to the state of repair in which machines are kept or whether the worker would be required to fix his own machine, since a poorly adjusted machine results in spoilage and lower earnings at piece rates and the time spent repairing the machine is lost to the worker. In the textile industry, the number of machines or bobbins the worker is required to tend is frequently an issue. In coal mining the height of the chamber in which the work is done, the presence of water or gas, the frequency with which the mine is inspected, and the amount of timbering or other nonproductive work required may be important.

Varying Importance

Because of the innumerable variations in the conditions under which workers are employed in various occupations and localities, and because many of the conditions other than wages and hours are so closely interrelated with the nature of the work, it is not possible to discuss them without going into the details of particular trades and industries. Nor can any generalization be made about the relative importance of many of these conditions without considering them in relation to each other. Thus the lack of a guaranteed minimum weekly wage may be a technical rather than a material difference if the worker would in all probability regularly earn as much or more than the amount guaranteed to most workers in like employment in the locality. Similarly, the importance of a seniority provision would depend on whether it only dictated the order in which workers in the occupation would be laid off or also determined promotions and transfers from one department or shift to another.

Basis of Determination

In general, however, the question under the prevailing conditions or work provisions as to conditions other than wages or hours is whether the conditions of the work offered are substantially less favorable to the claimant than those prevailing in any important respect. The claimant is not subject to denial of benefits for refusal of work if the wages, hours, or any other material condition or combination of conditions of the work offered is substantially less favorable to him than those prevailing in the locality for similar work.

If there is reason to believe that the conditions of the work offered are less favorable than those prevailing for similar work in the locality in any important respect, it is for the agency to investigate. The issue in each case must be decided on the basis of all the relevant facts and the best information available.

In reply refer to UODA.

U.S. DEPARTMENT OF LABOR

Manpower Administration
Bureau of Employment Security

Unemployment Insurance Program Letter No. 984, September 20, 1968

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

SUBJECT: Benefit Determinations and Appeals Decisions Which Require Determination of Prevailing Wages, Hours, or Other Conditions of Work

REFERENCES: Section 3304(a)(5)(B) of the Federal Unemployment Tax Act; *Principles Underlying the Prevailing Conditions of Work Standard,* September 1950, BSSUI (originally issued January 6, 1947 as Unemployment Compensation Program Letter No. 130)

Purpose and Scope

To advise State agencies and appeal authorities of the interpretation of the phrase ''new work'' for the purpose of applying the prevailing wage and conditions-of-work standard in section 3304(a)(5)(B) of the Federal Unemployment Tax Act, particularly in relation to an offer of work made by an employer for whom the individual is working at the time the offer is made.

This letter is prompted primarily by a current problem arising from a number of recent cases in which findings were not made with respect to the prevailing wages, hours, or other conditions of the work, because apparently it was not considered that ''new work'' was involved.

Federal Statutory Provision Involved

Section 3304(a)(5) of the Federal Unemployment Tax Act, the so-called labor standards provision, requires State unemployment insurance laws, as a condition of approval for tax credit, to provide that:

''compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

* * * * *

''(B) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;''

Legislative History

The prevailing wage and conditions-of-work standard, originally in section 903(a)(5)(B) of the Social Security Act and since 1939 in section 3304(a)(5)(B) of the Federal Unemployment Tax Act applies only to offers of ''new work.''[1] The hearings before Congressional committees and the reports of these committees furnish little aid in construing the term.[2] The Congressional debates, however, clearly indicate that the labor standards provision was included in the bill for the protection of workers.[3] The objectives of the provision are clearly set forth by the Director of the Committee on Economic Security, which prepared the legislation:

''* * * compensation cannot be denied if the wages, hours or other conditions of work offered are substantially less favorable to the employee than those prevailing for similar work in the locality. The employee cannot lose his compensation rights because he refuses to accept substandard work. That does not mean that he cannot be required to accept work other than that in which he has been engaged; but if the conditions are such that they are substandard, that they are lower than those prevailing for similar work in the locality, the employee cannot be denied compensation.''[4]

It is plain that the purpose of section 3304(a)(5)(B) is to prevent the tax credit from being available in support of State unemployment compensation laws which are used, among other things, to depress wage rates or other working conditions to a point substantially below those prevailing for

[1] Many State laws extend its application by specifying that ''no work shall be deemed suitable'' which fails to satisfy the standard.

[2] The Report of the Committee on Ways and Means on the Social Security Bill (H.R. 7260), House Report No. 615, 74th Cong., 1st Session, page 35, uses the term ''new job'' and this is copied in the Report of the Senate Committee on Finance, Senate Report No. 628, 74th Cong., 1st Session, page 47, but the term ''new job'' is itself ambiguous and there is no indication that it was used by either committee in a narrow or exclusive sense.

[3] See statement of Senator Harrison, Congressional Record, Vol. 79, p.9271.

[4] HEARINGS BEFORE THE COMMITTEE OF WAYS AND MEANS, HOUSE OF REPRESENTATIVES, 74th Cong., 1st Sess., on H.R. 4120, pp. 137–38.

similar work in the locality. The provision, therefore, requires a liberal construction in order to carry out the Congressional intent and the public policy embodied therein. Interpretation is required, for the term ''new work'' is by no means unambiguous. But any ambiguity should be resolved in the light of such intent and public policy.

Interpretation of ''New Work''

For the purpose of applying the prevailing conditions-of-work standard in section 3304(a)(5)(B) of the Federal Unemployment Tax Act, an offer of new work includes (1) an offer of work to an unemployed individual by an employer with whom he has never had a contract of employment; (2) an offer of re-employment to an unemployed individual by his last (or any other) employer with whom he does not have a contract of employment at the time the offer is made; and (3) an offer by an individual's present employer of (a) different duties from those he has agreed to perform in his existing contract of employment, or (b) different terms or conditions of employment from those in his existing contract.[5]

This definition makes the determination of whether an offer is of ''new work'' depend on whether the offer is of a new contract of employment. This we believe is sound.

All work is performed under a contract of employment between a worker and his employer. The contract describes the duties the parties have agreed the worker is to perform, and the terms and conditions under which the worker is to perform them. If the duties, terms, or conditions of the work offered by an employer are covered by an existing contract between him and the worker, the offer is not of new work. On the other hand, if the duties, terms, or conditions of the work offered by an employer are not covered by an existing contract between him and the worker, the offer is of a new contract of employment and is, therefore, new work.

It is not difficult to agree that ''new work'' clearly includes an offer of work to an unemployed individual by an employer with whom he has never had a contract of employment; that is, an employer for whom he has never worked before. If the worker has never had a contract of employment with the offering employer, the fact-finding and the application of the test are simple.

But if the phrase ''new work'' were limited to work with an employer for whom the individual has never worked, it is plain that the purpose of section 3304(a)(5)(B) would be largely nullified. It can make no difference, insofar as that purpose is concerned, that the unemployed worker is offered re-employ ment by his former employer rather than employment by one in whose employ he has never been. It can make no difference either in the application of the test. The question is whether the offer of re-employment is an offer of a new contract of employment. If the worker quit his job with the employer, or was discharged or laid off indefinitely, the existing contract of employment was thereby terminated. An indefinite layoff, that is, a layoff for an indefinite period with no fixed or determined date of recall, is the equivalent of a discharge. The existence of a seniority right to recall does not continue the contract of employment beyond the date of layoff. Such a seniority right is the worker's right; it does not obligate the worker to accept the recall and does not require the employer to recall the worker. It only requires the employer to offer work to the holder of the right, before offering it to individuals with less seniority.

Any offer made after the termination is of a new contract of employment, whether the duties offered to the worker are the same or different from those he had performed under his prior contract, or are under the same or different terms or conditions from those which governed his last employment. There is not, however, a termination of the existing contract when the worker is given a vacation, with or without pay, or a short-term layoff for a definite period. When the job offer is from an employer for whom the individual had previously worked, inquiry must be made as to whether the contract with the employer was terminated, and if so, how?

Although it has been more difficult for some to see, the situation is no different when an individual's present employer tells him that he must either accept a transfer to other duties or a change in the terms and conditions of his employment, or lose his job. Applying the test, it is clear that an attempted change in the duties, terms, or conditions of the work, not authorized by the existing employment contract, is in effect a termination of the existing contract and the offer of a new contract. Not only is this a sound application of legal principles, but it is thoroughly in harmony with the underlying purpose of the prevailing conditions of work provision. That purpose would be largely frustrated if benefits were denied for unemployment resulting from the worker's refusal to submit to a change in working conditions which would cause these conditions to be substantially less favorable to a claimant than those prevailing for similar work in the locality. The denial of benefits in such circumstances would tend to depress wages and working conditions just as much as a denial of benefits for a refusal by an unemployed worker to accept work under substandard conditions. If a proposed change in the duties, terms, or conditions-of-work not authorized by the existing employment contract were not ''new work,'' prevailing wage and conditions-of-work standard could be substantially impaired by employers who hired workers at prevailing wages and conditions, and thereafter reduced the wages or changed the conditions, thereby depriving workers of the protection intended to be given them by the prevailing wage and conditions-of-work standard. The terms of the existing contract, so important in this situation, are questions of fact to be ascertained as are other questions of fact.

The following are examples of offers of new work by the employer for whom the individual is working at the time of the offer:

a. A worker employed as a carpenter is offered work as a carpenter's helper as an alternative to a layoff.

b. A bookkeeper is transferred to a job as a typist.

c. The hours of work of a factory worker employed for an 8-hour day are changed to 10 hours a day.

d. A worker employed with substantial fringe benefits is informed that he will no longer receive such benefits.

e. A worker employed at a wage of $3 an hour is informed that he will thereafter receive only $2 an hour.

In each of these cases either the offered duties are not those which the worker is to perform for the employer under his existing contract of employment, or the offered conditions are different from those provided in the existing contract.

Applying the Prevailing Conditions-of-Work Standard

The prevailing wage and conditions-of-work standard does not require a claims deputy or a hearing officer to inquire into prevailing wages, hours, or working conditions in every case of refusal of new work, or to determine in every such case in which he denies benefits whether the wages, hours, or other conditions of offered work are substandard. This would be unnecessarily burdensome. However, a determination must be made as to prevailing conditions of work when (1) the claimant specifically raises the issue, (2) the claimant objects on any ground to the suitability of wages, hours, or other offered conditions, or (3) facts appear at any stage of the administrative proceedings which put the agency or hearing officer on notice that the wages, hours, or other conditions of offered work might be substantially less favorable to the claimant than those prevailing for similar work in the locality.

State agency determinations and decisions at all levels of adjudication must reflect the State agency's consideration of prevailing conditions of work factors when pertinent. In particular, referees' decisions as to benefit claims must contain, in cases where issues arise as indicated above, appropriate findings of fact and conclusions of law with respect to the prevailing conditions-of-work standard. This is so whether the State ultimately determines the worker's right to benefits under the refusal-of-work provision of the State law or some other provision, as, for example, under the voluntary quit provision. Since the Federal law requires, for conformity, that State laws include a provision prohibiting denial of benefits for refusal of new work where the conditions of the offered work are substantially less favorable to the individual than the conditions prevailing for similar work, there cannot be, under the State law, a denial in such circumstances regardless of the provision of State law under which the ultimate determination is made.

[5] The ''group attachment'' concept is outside the scope of this letter. ''Group attachment'' arises under the provisions of an industry-wide collective bargaining agreement between a group of workers and a group of employers whereby workers cannot be hired directly by individual employers but are referred to employers by a hiring hall on a rotational basis and under which each worker has a legally enforceable right to his equal share of the available work with such employers. See *Matson Terminals Inc.* v. *California Employment Commission,* 151 P. 2d 202, discussed in the Secretary's decision with respect to Washington dated December 28, 1949, and the Secretary's decision in the California conformity case. Benefit Series, FSLS 315.05.1.

In applying the labor standards, the State agency must determine first whether the offered work is ''new work.'' If it is ''new work'' a determination must be made as to (1) what is similar work to the offered work, and (2) what are the prevailing wages, hours, or other conditions for similar work in the locality, and (3) whether the offered work is substantially less favorable to the particular claimant than the prevailing wages, hours, or other conditions. The key words and phrases in this standard (''similar work,'' ''locality,'' ''substantially less favorable to the individual,'' and ''wages, hours, and other conditions of work'') are discussed in detail in the Bureau's statement, *Principles Underlying the Prevailing Conditions of Work Standard,* Benefit Series, September 1950, 1–BP–1, BSSUI (originally issued January 6, 1947 as Unemployment Compensation Program Letter No. 130).

Please bring this letter to the attention of State agency and Appeal Board personnel engaged in benefit claim adjudication at all levels.

RESCISSIONS: None.

Sincerely yours,

Robert C. Goodwin,

Administrator.

[FR Doc. 98–25257 Filed 9–21–98; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–02379; 02379B; 02379C]

Amended Certification Regarding Eligibility To Apply for NAFTA Transitional Adjustment Assistance

In accordance with Section 250(a), Subchapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), the Department of Labor issued a Certification for NAFTA Transitional Adjustment Assistance on August 10, 1998, applicable to all workers of Boise Cascade, Emmett Plywood, Emmett, Idaho. The notice will be published soon in the **Federal Register**.

At the request of the company, the Department reviewed the certification for workers of the subject firm. New findings show that worker separations occurred at the subject firm's Cascade, Idaho plant. The company also reports that worker separations will occur at the Horseshoe Bend, Idaho facility when it closes September 30, 1998. The workers at the Cascade and Horseshoe Bend, Idaho facilities process logs into green lumber that is used in the manufacturing of plywood. The production of green lumber at Boise Cascade's Cascade and Horseshoe Bend, Idaho plants contribute to the production of plywood at Boise Cascade's Emmett Plywood, Emmett, Idaho plant. Accordingly, the Department is amending the certification to cover workers at the subject firms' Cascade and Horseshoe Bend, Idaho plants.

The intent of the Department's certification is to include all workers of Boise Cascade adversely affected by imports from Canada.

The amended notice applicable to NAFTA–02379 is hereby issued as follows:

All workers of Boise Cascade, Emmett Plywood, Emmett, Idaho (NAFTA–02379), Cascade, Idaho (NAFTA–02379B) and Horseshoe Bend, Idaho (NAFTA–02379C) who became totally or partially separated from employment on or after May 5, 1997 through August 10, 2000 are eligible to apply for NAFTA–TAA under Section 250 of the Trade Act of 1974.

Signed at Washington, DC this 3rd day of September, 1998.

Linda G. Poole,

Acting Program Manager, Policy and Reemployment Services, Office of Trade Adjustment Assistance.

[FR Doc. 98–25262 Filed 9–21–98; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

The following parties have filed petitions to modify the application of mandatory safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Independence Coal Company

[Docket No. M–98–79–C]

Independence Coal Company, HC 78 Box 1800, Madison, West Virginia 25130 has filed a petition to modify the application of 30 CFR 75.1002 (location of trolley wires, trolley feeder wires, high-voltage cables and transformers) to its Justice No. 1 Mine (I.D. No. 46–07273) located in Boone County, West Virginia. The petitioner proposes to use high-voltage longwall mining equipment. The petitioner asserts that the nominal voltage of the longwall power circuit(s) would not exceed 4,160 volts. In addition, the petitioner asserts that the specific terms and conditions listed in this petition would be followed and proposed revisions that specify initial and refresher training regarding these terms and conditions for its approved Part 48 training plan would be submitted to the District Manager within 60 days after the proposed decision and order becomes final. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

2. Mettiki Coal Corporation

[Docket No. M–98–80–C]

Mettiki Coal Corporation, 293 Table Rock Road, Oakland, Maryland 21550 has filed a petition to modify the application of 30 CFR 75.1002–1 (location of other electric equipment; requirements for permissibility) to its Mettiki Mine (I.D. No. 18–00621) located in Garrett County, Maryland. The petitioner proposes to use nonpermissible low horsepower testing and diagnostic equipment within 150 feet from pillar workings. The petitioner asserts that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

Request for Comments

Persons interested in these petitions are encouraged to submit comments via e-mail to ''comments@msha.gov'', or on a computer disk along with an original hard copy to the Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, 4015 Wilson Boulevard, Room 627, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before October 22, 1998. Copies of these petitions are available for inspection at that address.

Dated: September 17, 1998.

Patricia W. Silvey,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 98–25309 Filed 9–21–98; 8:45 am]

BILLING CODE 4510–13–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Advisory Committee on Construction Safety and Health; Notice of Open Meeting

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

SUMMARY: Notice is hereby given that the Advisory Committee on Construction Safety and Health (ACCSH) will meet October 7 and 8, 1998, at the Frances Perkins Department of Labor Building, 200 Constitution Avenue, N.W., Washington, D.C. This meeting is open to the public.

DATES: This ACCSH meeting will be held on October 7 and 8, 1998 as