

## SEIZURE AND NATIONAL EMERGENCY DISPUTES

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Can the Federal Government avoid becoming involved in a dispute between labor and management when such a dispute imperils the national health or safety? At the present time the answer, of course, is in the negative, predicated on the statutory provisions of the Labor-Management Relations Act of 1947 (Taft-Hartley Act).<sup>1</sup> When it does become involved in such a dispute, is the Federal Government properly fulfilling its required role? In seeking an answer to this question, we need to investigate the alternatives which are available to a people under a democratic free enterprise system. It is, therefore, the purpose of this paper to evaluate these alternatives and to suggest a possible solution. During the years, numerous writers have expressed their views on this subject.<sup>2</sup>

<sup>1</sup>61 Stat. 136 (1947), 29 USC Secs. 171-182.

<sup>2</sup>See Howard T. Colvin, "Mediation and Conciliation under the Labor-Management Relations Act of 1947" 1 *Labor Law Journal*, 89-93, (November, 1949); Marceau, Leroy, and Musgrave, "Strikes in Essential Industries: A Way Out," *Harvard Business Review*, XXVII, (May, 1949) 287; Harold S. Roberts, "Compulsory Arbitration of Labor Disputes in Public Utilities," 1 *Labor Law Journal*, 694-704 (June, 1950); Robert R. France, "Seizure in Emergency Labor Disputes in Virginia," VII, *Industrial and Labor Relations Review*, 347-366, (1954); Frank Elkouri, "Minimizing Production Loss from Critical Industrial Disputes," 6 *Labor Law Journal*, 123-124 (February, 1955); George W. Gobel, "An Alternative to the Strike" 6 *Labor Law Journal* 83 (February, 1955); W. Willard Wirtz, The "Choice-of-Procedures" "Approach to National Emergency Disputes," *Emergency Disputes and National Policy*, pp. 149-165 (Industrial Relations Research Association, Publication No. 15. New York: Harper & Brothers Publishers, 1955); Murray M. Rohman, "National Emergency Disputes," 8 *Labor Law Journal* 523 (August, 1957); George W. Taylor, "Any Answer to Strikes," *U. S. News and World Report*, p. 70 (October 19, 1959); John T. Dunlop, "The Settlement of Emergency Disputes," in *Readings in Labor Economics and Industrial Relations*, ed. Joseph Shister (Chicago: J. B. Lippincott, 1956), pp. 513-517; Archibald Cox, "The Taft-Hartley Act: An Evaluation of Experience," *Ibid.*, pp. 500-513; Arthur J. Goldberg, "Suggestions for a New Labor Policy," *The Reporter*, p. 27 (September 15, 1960); Stuart Rothman, "Some Principles of Labor Law Administration," a speech before the Institute of Labor Law at the Southwestern Legal Foundation, Dallas, Texas (November 18, 1960); Thomas J. McDermoth, "Ten Years of the National Emergency Procedure," 9 *Labor Law Journal* 227 (March, 1958); Robert C. Crawford, "Government Intervention in Emergency Labor Disputes in Atomic Energy," 10 *Labor Law Journal* 414 (June, 1959); Jay Cramer, "Dealing with Strikes Which Imperil National Health and Safety," 11 *Labor Law Journal* 227-234 (March, 1960); Henry Mayer, "Myth of the Emergency Strike," 11 *Labor Law Journal* 753-765 (August, 1960); R. W. Fleming, "Emergency Strikes and National Policy," 11 *Labor Law Journal* 267-276 (April, 1960); Saul Waller, "National Emergency Disputes," 12 *Labor Law Journal* 61 (January, 1961); J. H. Rothenberg, "National Emergency Disputes," 12 *Labor Law Journal* 108 (February, 1961).

The hardening attitude of management, as indicated in the 1959 steel dispute, the 1960 General Electric strike, and the 1961 maritime industry strike, as well as the controversial automobile industry negotiations which have recently commenced, highlights this discussion. A multitude of problems have been and will be created by the second industrial revolution which is now in progress in this country. Coupled with the expressed intention of management to resist any further encroachment on its prerogatives, this nation will need the proper tools to blunt the threat to its welfare. Only by a free and open discussion culminating in laws which are adequate to cope with the significance of this problem can we endeavor to maintain our leadership in world affairs. One of the paramount issues which thus confronts us is the necessity of exposing the problem so we may attempt to analyze it objectively. Unfortunately, our socio-economic environment dissuades us from ferreting out a problem unless we are confronted with an immediate peril. We stave off grappling with intangibles until we are encircled by the dangers prevalent in a situation. Specifically, why has Congress shunted aside the need to amend the National Emergency Provisions of the Taft-Hartley Act? Despite the myriad of speeches and written material devoted to this topic preceding, during, and subsequent to the 1959 steel strike, Washington has been reluctant to face up to the facts.

### UNIONS AND COLLECTIVE BARGAINING

Since 1935, when Congress passed the Wagner Act, bargaining between labor and management has been accepted as the law of the land.<sup>3</sup> Both parties have now reached a maturity in their relations which would have appeared incomprehensible thirty years ago. The most appropriate term to symbolize this relationship is professionalism. Each side has expended huge sums in training and educating its representatives to the point that ostensibly each is willing to listen to the other's point of view and respect is mutually accorded the adversary.

Collective bargaining has advanced beyond the stage of a mere negotiational process. It is now a system of countervailing economic power, which requires striking a balance between two great forces: in our context, employers and unions. It operates on an assumption of stable labor relations whereby wages, hours, and working conditions are determined so that production of the employer's products may continue unhampered and unimpeded during the period of the contract. However, this stage can be achieved only through a process of persuasion—through face-to-face reasoned discussion concerning those aspects which affect both parties. Applied throughout this procedure is the assumption that both parties have agreed to discuss their relationship as equals. Each is willing to accept the other as a factor of production and each in turn is willing to delineate his share of control. This, of course, is the ideal—bilateral action. However, this goal all too frequently has received merely lip service. There has been resistance to according unions the acceptance which flows from recognition. The framework begins to disintegrate when

<sup>3</sup>More specifically, since the U. S. Supreme Court in 5 decisions upheld the National Labor Relations Act on April 12, 1937, *NLRB v. Jones and Laughlin Steel Corp.*, 301 U. S. 1; *NLRB v. Fruehauf Trailer Co.*; 301 U. S. 49; *Associated Press v. NLRB*, 301 U. S. 103; *Washington, Virginia and Maryland Coach Co. v. NLRB*, 301 U. S. 142; *NLRB v. Friedman-Harry Marks Clothing Co., Inc.*; 301 U. S. 58.

employees through their unions seek to implement the recognition clause by insisting upon expressing their views governing wages, hours, and working conditions.

At this juncture, we begin to witness the union's motivation in resorting to ultimate economic sanctions. One of the goals of the labor movement is to make strikes effective and, at the same time, unnecessary. Strikes are effective because they are expensive. Unquestionably, strikes involve an economic loss to the immediate parties, and also to the community in general, regardless of their outcome. Because strikes inflict economic losses and arouse sentiments which are not confined to the immediate parties, they bestir the public to become the final arbiter when all else fails. Yet the strike remains the only potent weapon, although a tragic one, whereby employees can exert ultimate pressure to compel an employer, or group of employers, to accede to their demands. It is only through the collective aspect of the strike that it derives its coercive power; and when this collective aspect is dissipated, its weakness becomes apparent, as witness the 1960 General Electric strike at the Schenectady plant. The labor movement today, despite its problems of racketeering, bribery, high unemployment, and those special problems associated with organizing the white collar workers, has evolved into a potent force in our democratic way of life. Responsibilities associated with a constructive labor movement dedicated to a free enterprise system and forming a natural bulwark against foreign political infiltration cannot easily develop in an atmosphere continually charged with unresolved disputes.

### THE NATIONAL EMERGENCY PROVISIONS

In 1947, Congress intended to carry out the mandate of the people toward enervating the potentials of a strike on the public, through two approaches. One was separating the United States Conciliation Service from the Department of Labor, and establishing an independent Federal Mediation and Conciliation Service. Despite the small number of specialists—approximately 200—operating under its jurisdiction, this agency has made a worthwhile contribution towards maintaining a peaceful climate of labor-management relations. Nevertheless, its influence is limited to the extent that the parties are willing to accept the proffered services. Furthermore, by the provisions which established the agency, its services are restricted. It may voluntarily offer its facilities if the threatened dispute will seriously affect interstate commerce; or the parties may request the assistance of the service, which may or may not be granted. In either event, the Commissioner assigned to the dispute can only adopt a role which is consistent with the attitude of the parties. Where the issues have reached the stage of principles, the impasse will then be broken only by the strike. Congress did not assign more powers to the Service because it sought to surround the collective bargaining process with the greatest freedom possible. The prevalent belief at the time was—and to a large extent still is today—the fear that the parties would tend to rely more and more upon governmental intervention.

The second approach of Congress in 1947 was to pass the National Emergency Provisions of the Taft-Hartley Act—providing for an 80-day cooling-off period. Since its passage, the act has been invoked approximately seventeen times, in several

instances before a strike actually took place and in others after a strike had commenced.<sup>3a</sup>

Briefly summarizing Sections 206-210 of the Act, it authorizes the President of the United States to take certain steps when he believes a threatened or actual strike or lockout imperils the national health or safety.

a. He may appoint a fact-finding board to investigate the issues and submit a written report, without recommendations, which is then publicized.

b. He may then authorize the Attorney General to apply for an 80-day injunction. The granting of such an order lies within the discretion of the court whether the actual or threatened dispute imperils the national health or safety. In the 1959 steel strike, Justice Douglas of the United States Supreme Court, in a dissenting opinion, rejected the contention that the strike imperiled the safety of the nation. However, eight of the justices supported the judgment of the District Court granting the injunction.

c. During the injunction, which insures that the status quo is maintained, the parties are directed to resume collective bargaining in good faith and operations are resumed under the terms of the expired collective bargaining agreement.

d. At the expiration of sixty days, if the dispute remains unsettled, the same board of inquiry reports to the President the current position of the parties and the efforts which have been made for settlement, as well as the employer's last offer. Again such report is made public.

e. During the next fifteen days—between the 60th and 75th day of the injunction period—the National Labor Relations Board conducts a vote by secret ballot of each affected employee, to determine whether he desires to accept such offer.<sup>4</sup>

f. Within five days after the vote, between the 75th and 80th day, the results are certified by the Attorney General.

g. The Attorney General then moves to dissolve the injunction, which action the District Court must take.

The die is now cast. Once the injunction is dissolved, the parties are again free to resume either the strike or lockout, and the threat to the nation is renewed.<sup>5</sup> The President is then required to submit a comprehensive report to Congress including his recommendations, for such action as the Congress might deem appropriate. At this stage of the proceedings it would be an exaggerated illusion to believe that Congress would be inclined to exercise the necessary degree of deliberation in its considerations. Any contemplated legislation would not receive the study requisite to such an important issue. Congress is accustomed to working in a slow and un-

<sup>3a</sup>On June 26, 1961, a strike in the maritime industry caused President Kennedy to proceed to invoke the emergency provisions of the Act by appointing a fact-finding board as the first step toward securing an 80-day injunction. Thereafter, on July 3, 1961, a petition was filed in the Federal District Court by the U. S. Attorney General requesting such injunction. This is the eighteenth time that the Government has been forced to resort to the injunction under the Labor-Management Relations Act of 1947, to protect the health and safety of the nation.

<sup>4</sup>Unions maintain that such an election is not legally binding, on the grounds that a contract can only be executed by the Union's duly designated officials. Pamphlet No. PR-112, "The 1959 Steel Strike," p. 52, United Steelworkers of America, Pittsburgh, Pa.

<sup>5</sup>On four occasions, strikes were resumed or occurred after dissolution of the injunction. U. S. Department of Labor, B.L.S. Report No. 169, February, 1961.

hurried manner, and it is questionable whether the interests of the parties or of the nation would be sufficiently protected under these circumstances.

### THE PUBLIC INTEREST

The primary interest of the Congress in enacting the 80-day cooling-off period as contained in the Taft-Hartley Act was two-fold. One was to protect the public interest, and the other was to create a climate in which the disputants would have another opportunity to reassess their positions. It was believed that when an impasse was reached after protracted negotiations, and resort was had to a strike or lockout to enforce certain proposals, a cooling-off period would tend to restore equilibrium and calm aroused tempers and frayed nerves. During this period, discussions would be renewed and exploratory talks continued with a view to eventually reaching a mutually acceptable agreement. Most importantly, the nation would be receiving the goods and services it required.

However, the weakness inherent in these sections of the Act is the failure to provide for a contingency where the parties decide to resume the strike or lockout after the injunction is dissolved. It should be recognized that the motives of Congress were laudable in seeking to place the parties in a position to continue collective bargaining negotiations during the injunction period. Free collective bargaining is the cornerstone of labor-management relations, and any action which interferes with this process must be eschewed. Basically, all authorities are agreed on this aspect. Nevertheless the issue which has received criticism is the failure of Congress to anticipate a breakdown of free collective bargaining and to provide for the necessary controls where such action impinges on the public interest. Therefore, the interest of the third party in a labor-management dispute requires consideration. The choice of free collective bargaining versus the public interest cannot be shunted into the background much longer.

Immediately following the 1959 steel dispute many voices were raised, both in and out of Congress, for remedial legislation. Yet the statute books are bare of any new provisions to cope with this situation.

### CHOICE OF PROCEDURES

President Kennedy, in one of his pre-election debates with former Vice-President Nixon, made the following statements with regard to this matter:

The President should be given other weapons to protect the national interest in case of national emergency strikes beyond the injunction provision of the Taft-Hartley Act.

I would give him four or five tools, not only the fact-finding committee that he now has under the injunction provisions, not only the injunction, but also the power of the fact-finding commission to make recommendations, recommendations which would not be binding, but nevertheless would have great force and public opinion behind them. One of the additional powers I would suggest would be seizure. There might be others. To state my view precisely, the President should have a variety of things he could do.<sup>6</sup>

<sup>6</sup>Item in Dallas Morning News, October 14, 1960, p. 10.

The choice-of-procedures or "arsenal" approach has been advocated by a number of authorities. In this group are those who favor government intervention, but feel that the nature of the intervention should not be clearly apparent to the parties involved. These endorse giving the President discretion as to when to intervene in the dispute, as well as alternatives between seizure or the injunction;<sup>7</sup> or appointment of a board of inquiry with power to recommend a settlement.<sup>8</sup> Another group advocates that labor and management agree on a method of settling the dispute themselves, with the government acting as a catalyst in helping to set up procedures.<sup>9</sup> Voluntary arbitration is advanced by George W. Taylor (who headed the fact-finding board in the 1959 steel strike). Secretary of Labor Goldberg, author of the labor-management committee plan, once suggested that it be given the job of settling national emergency strikes. However, when the panel met, it decided it would not function as a dispute settler, a collective bargaining agency, or a negotiating group in labor-management contract talks.<sup>10</sup>

There is no doubt that the arsenal approach, while weak, is superior to the present situation. It does attempt to encourage collective bargaining whereby final settlement would be achieved directly by the parties. I am not opposed to granting the President a choice of procedures. I am, however, disturbed by the lack of legislation, as of the present time, to protect the public interest in the event a strike or lockout is renewed following the dissolution of the 80-day injunction.

## SEIZURE

During the 1952 steel dispute President Truman issued Executive Order 10340, which directed Secretary of Commerce Sawyer to seize the plants and facilities of the steel companies.<sup>11</sup> It might be significant to review some of the highlights of the ensuing court litigation.

In April, 1952, three steel companies commenced proceedings against Secretary of Commerce Sawyer for a temporary restraining order and a declaratory judgment. Judge Holtzoff of the United State District Court for the District of Columbia ruled that in balancing equities, the gravity of the nation-wide emergency problem did not justify the issuance of a restraining order. Therefore the motion was denied.<sup>12</sup> The next move by the industry was to sue on April 29, 1952, for a preliminary injunction against the continued seizure and possession of their properties. This second motion was predicated on the threat that the Government intended to make certain changes in the terms and conditions of employment which would cause them irreparable harm. Judge Pine differentiated the original motion before Judge Holtzoff and the instant one, as being in a materially different posture. He granted the injunction on the ground that there was no inherent power residing in the President which sanctioned the seizure. The following day, April 30,

<sup>7</sup>Cox, *op. cit.*

<sup>8</sup>Davey, *op. cit.*

<sup>9</sup>Dunlop, *op. cit.* This view is supported by Walter Reuther.

<sup>10</sup>Item in *The Wall Street Journal*, March 22, 1961, p. 1.

<sup>11</sup>17 Federal Register 3139 (1952).

<sup>12</sup>"Steel Seizure Cases," Commerce Clearing House, A Special Report—June 3, 1952, *Emergency Labor Law*, p. 62.

the government appealed Judge Pine's ruling. In a closely divided decision, the United States Court of Appeals stayed the lower court's preliminary injunction pending an appeal to the Supreme Court, but rejected a request to prohibit the government from changing the prevailing terms and conditions of employment without the consent of the parties. On May 3, the companies appealed to the Supreme Court, which agreed to hear argument and at the same time ordered the government to refrain from changing employment terms unless the parties mutually consented thereto.

History-making arguments echoed in the courtroom of the United States Supreme Court on May 12 and 13. Mr. Justice Black, speaking for a majority of six, stated that the President had no authority under the Constitution to seize industrial private property by Executive Order on the premise that a work stoppage was imminent as a result of a labor dispute. Mr. Justice Black, in his concurring majority opinion, indicated that there did not exist any statutory authority for the seizure of private industries.<sup>13</sup>

It might be fruitful to briefly indicate the grounds on which the other four justices relied for their rulings. Justice Frankfurter rested his decision primarily upon the legislative history of the Taft-Hartley Act. He indicated that Congress had considered the possibility of granting the President explicit power to seize at the end of the 80-day emergency period but had decided not to bestow such powers. Thus, he reasoned that Congress had explicitly legislated against the use of the seizure power by the President under such circumstances. It was logical to conclude, therefore, that the President could not seize in the face of a statute which, in effect, directed him not to seize.

Justice Jackson was similarly impelled. In addition, he joined in opposing the President because he did not believe the emergency was sufficiently serious to warrant such drastic action. Justice Burton likewise concurred, but specifically added that his decision would have been different in a situation comparable to that of an imminent invasion or threatened attack.

On the other hand, Justice Clark affirmatively stated that the President did have constitutional power to seize, and that the emergency was sufficiently serious to warrant the use of such stringent powers. However, the remedy available consisted of the statutory provisions of the Selective Service Act without resort to the constitutional powers. Thus, it scarcely can be said that the President's power to seize in *future* was foreclosed.

## REMEDIAL LEGISLATION

The national emergency provisions of the Labor Management Relations Act of 1947 have been invoked by the President in seventeen labor disputes since its passage.<sup>13a</sup> The industries which were involved included stevedoring, atomic energy installations, bituminous coal, meatpacking, communications, maritime shipping, non-ferrous metals, steel fabricating and basic steel.<sup>14</sup> Will Congress wait

<sup>13</sup>Youngstown Sheet and Tube Company v. Sawyer, 343 U. S. 579.

<sup>13a</sup>The 1961 maritime strike is the eighteenth time it has been invoked.

<sup>14</sup>B.L.S. Report No. 169, *op. cit.* p. 1.

until an emergency has actually ground the wheels of this nation's industry to a complete halt before it will act? The interests of the public require that serious consideration be given to this problem before we are confronted with appalling losses. Congress, as our elected representatives, cannot shirk this responsibility. Fourteen years have elapsed since the initial provisions were incorporated into the Taft-Hartley Act, and the time now has arrived to further implement its provisions in this respect. Must we behoove ourselves to act only when subversive aspects are involved?

As a nation we are dedicated to fostering free collective bargaining. However, when the parties are unable or unwilling to adjust their differences in a labor dispute, the public's interest is superior to those of the individuals directly involved in that dispute. Under such circumstances, the President must have weapons with which to control the impasse for the benefit of all the people.

In 1954, I urged that such legislation be considered by Congress in the event the President was required to utilize it.<sup>15</sup> Again, in 1957, I proposed that certain legislation be considered by Congress.<sup>16</sup>

The provisions which I advocate are designed to permit the parties to engage in free collective bargaining and to reach an agreement which is mutually acceptable to both parties. The need for Federal intervention perhaps may never be resorted to, if the parties realize and are aware that the President has the power to implement the process. However, in the event mutuality of agreement is lacking, then legislation should be available to guide the parties in their search for a voluntary amicable resumption of negotiations.

I, therefore, propose legislation which includes both recommendations and seizure.<sup>17</sup> Basically, I would recommend that the Congress retain the main provisions of Sections 206-210 of the Act. During the first 60 days, the fact-finding board would continue its efforts to mediate the dispute. However, at the conclusion of this period, if the parties have failed in their efforts to compromise the issues, then the board would publicize its recommendations. Public pressure, through the various media of communication, as well as the influence of the President's office, might at this juncture have an important impact. Nevertheless, in the event the parties at the conclusion of the 80-day period still retain their positions, the injunction would be dissolved; and under the revised provisions of the Act, the government would apply for a writ of seizure. Such seizure order, if granted, would direct the government to take physical possession of the plants and facilities, without prejudice to the continuation of private negotiations between the parties. The order also would require employees to continue working under the same terms and condi-

<sup>15</sup>Rohman, *The Influence of Wage Stabilization Boards on Collective Bargaining in the Steel Industry*. University of Colorado, 1954.

<sup>16</sup>Rohman, *op. cit.* Once before, on Nov. 24, 1956, a Taft-Hartley Act injunction was secured by the Attorney General for an 80-day period (in the maritime industry).

<sup>17</sup>See Max Rosenn, "State Intervention in Public Utility Labor Disputes," 12 *Labor Law Journal* 395: "Compulsory Arbitration has a tendency to discourage collective bargaining while seizure has a tendency to promote it. . . . Wages and working conditions are frozen. Labor is unhappy and since outsiders are operating the utility (company), management is also unhappy. Strong pressures are thus exerted on both employees and employers to negotiate their differences, while at the same time, the public is not being deprived of its public utility service."



tions existing prior thereto. Any settlement subsequently achieved would be retroactive to the date of seizure. In the event of a prolonged failure to adjust their differences, such seizure would be continued with the right of adequate compensation as determined under due process of law.

### CONCLUSION

It should be evident that this procedure would only be used under circumstances where no other course of action would suffice. It is definitely an emergency situation wherein the negotiational process has become impaired. The only alternative is to permit the parties to carry out their economic sanctions to a point where the nation would be the victim of its own free collective bargaining process. Such an event must never be permitted to occur. The public, through its government, does have a right superior to those of the disputants; and when the occasion arises, this right must be exercised. It is hoped that Congress will arouse itself to the point where it will undertake to pass needed remedial legislation in this area of labor-management relations. Under these circumstances, if such legislation did exist, the parties would strive to adjust their differences, so that it might never become necessary to implement its provisions.