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James J. Graham

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# THE SETTLEMENT OF LABOR DISPUTES IN INDUSTRIES AFFECTED WITH A NATIONAL INTEREST

JAMES J. GRAHAM\*

WHAT TO DO after the eighty-day “cooling-off” period? Congress left this question unanswered when it added emergency dispute provisions to the National Labor Relations Act in 1947,<sup>1</sup> and since then much of the debate about the legislation has focused on this aspect of the problem of satisfying the public needs during labor disputes in industries affected with a national interest. However, in the opinion of this observer, a more accurate or complete description of the problem should also make reference to the prevention of emergency disputes ab initio by removing the underlying causes of such conflicts.

The legislation has not been amended since its enactment, but periodic labor disturbances, such as the recent resumption of the Atlantic-Gulf Coast longshoremen’s strike following the expiration of the injunction procured at the behest of President Kennedy, dramatically illustrate the problem and, at the same time, tend to provoke re-appraisals of the efficacy of the current legislation.

Surprisingly enough, in an area as volatile and charged with partisan and political considerations as labor-management relations there is a fair amount of agreement among both neutrals and participants on basic

\* A.B., Fordham University; LL.B., St. John’s University; LL.M., New York University.

<sup>1</sup> National Emergency Provisions of the Labor-Management Relations Act, 61 Stat. 155, 156 (1947), 29 U.S.C. §§176-180 (1958).

The statute permits the President to appoint a board to inquire into the issues involved in a labor dispute which, in his opinion, may “imperil the national health or safety.” Upon receiving the board’s report, the President may direct the Attorney General to petition an appropriate United States district court for an injunction restraining the work stoppage. The injunction granted by the court may last eighty days at most, after which period the work stoppage may recommence.

The Act also requires the National Labor Relations Board to poll the affected employees during the fifteen days prior to the expiration of the injunction, to determine if the “final offer of settlement made by their employer” is acceptable to them.

principles to be applied to emergency dispute legislation. These principles may be summarized roughly as follows:

1. The American system of collective bargaining for the most part has succeeded in maintaining industrial peace; hence,

2. The federal government should intervene actively in labor disputes only in those rare instances when the national health and safety is truly endangered.

3. On such occasions, the enabling legislation should permit the President some flexibility in his choice of procedures to be employed.

4. Greater emphasis should be placed on the resolution of disputed matters on a continuing basis during the term of the collective bargaining agreement; and finally,

5. Congress should permit the states to assert jurisdiction over those labor disputes presently subject to federal pre-emption, the impact of which, however, is primarily local.

In the light of these principles the proposed amendment to the NLRA that deserves most serious consideration is contained in a report entitled *Free and Responsible Collective Bargaining and Industrial Peace*<sup>2</sup> submitted to the Executive Branch on May 1, 1962 by the President's Advisory Committee on Labor-Management Policy. The Committee's report affirms that collective bargaining, when responsive to the public, or common interest, is an essential element of economic democracy. However, "the growing complexities of our own industrial society and the instabilities of the international setting now require that the parties recognize not only their own individual responsibilities but their joint responsibility to the society of which they

constitute an important and integral part. This calls for improved private and public procedures and techniques, and above all, for an increased measure of maturity. . . ."

Accordingly, the report places great stress on measures which, though voluntary, seem designed to encourage greater acceptance of the concept that the public has a real interest in major negotiations. For example, negotiators should employ the services of third parties for mediation, recommendations, or for the arbitration of disputed items. Labor and management should experiment more freely with techniques of fact-finding by jointly-appointed experts or by personnel drawn from their own staffs. The report urges negotiators to exchange freely data necessary for intelligent negotiations and to make joint requests for such information to the appropriate government agencies such as the Bureau of Labor Statistics of the United States Department of Labor.

The President's Advisory Committee also noted its approval of a proposed plan by the Federal Mediation and Conciliation Service to make greater use of panels of mediators, to raise the professional status of its personnel and, the parties willing, to participate at an earlier stage in the more difficult and important negotiations.

### Industry Councils

With an apparent view towards assuring a national perspective among labor and management leaders, the Committee also proposed that periodic conferences be held under government auspices, addressed to national and international influences affecting economic problems.

Here, the report may be criticized justly for not going far enough. Even if the Committee contemplates separate labor-manage-

<sup>2</sup> 50 L.R.R.M. 11 (1962).

ment-government conferences for each industry, discussions concerning the cold war, unemployment statistics or foreign trade may develop a greater concern for the national interest among union and corporate officials but this will not necessarily reduce the number of major work stoppages. A supplemental statement by Judge Joseph E. O'Grady, a member of the Board of Public Accountability<sup>3</sup> appointed to inquire into the recent shutdown of the New York City newspapers, agreed that parties to a labor dispute may have moral obligations to the public and should take the public interest into consideration before deciding upon a course of action which might have a serious impact upon the public. However, Judge O'Grady also stated that, "it does not necessarily follow that these obligations . . . always outweigh in the mind of a union leader his obligations in a given situation to his members. The same applies to an employer's obligations to himself or his stockholders . . ." <sup>4</sup>

The temptation to favor self-interest presumably will be more acute the further removed union and management officials are from participation in the conferences contemplated by the President's Committee, and, hence, more subject to local pressures. For example, the same issue of the magazine that published Judge O'Grady's remarks also carried a feature on the "push button" newspaper of the future. The Los Angeles Times now has in operation automated printing devices which will ultimately reduce that newspaper's present complement of

<sup>3</sup> The other members were Judges Harold R. Medina and David W. Peck. Their report charged that the printers' strike was not a "move of last resort" but rather "a deliberate design formed by the printers' representatives as the opening gambit in negotiations." Editor and Publisher, Jan. 19, 1963, p. 58.  
<sup>4</sup> *Id.* at 59.

one-hundred and ten linotype and teletype-setter operators by at least fifty per cent.<sup>5</sup>

The answer then lies in periodic labor-management conferences, preferably with some government participation, on all practicable levels — industry-wide, regional, and/or on the plant level — designed to resolve the precipitating causes of work stoppages. The late Philip Murray, first president of the merged AFL-CIO, proposed a so-called Industry Council Plan during the Second World War for each defense industry, which would have provided for tripartite cooperation and periodic meetings for the avowed purpose of increasing production, plant efficiency and of promoting industrial harmony. Walter Reuther in 1941 proposed a similar plan for the aircraft industry. The CIO endorsed Murray's ICP but, for the most part, such overtures were greeted with apathy even in union circles.<sup>6</sup> Philip Murray reportedly complained at that time that the conservatives said his plan was communistic and the Communists said it was papal.

Though Murray's concepts of social justice admittedly owed much to the influence of the papal encyclicals, his Industry Council Plan actually was timorous compared with the "syndicalist" reform proposed by Pope Pius XI in *Quadragesimo Anno*.<sup>7</sup> Pope Pius envisioned associations of employer and union representatives in the various industries which would function as quasi-official agencies of the government in all matters of common interest.<sup>8</sup> In addition, commencing with the chairmanship in the

<sup>5</sup> *Id.* at 15.

<sup>6</sup> See *Commonweal*, Sept. 2, 1960; *Commonweal*, Aug. 14, 1942.

<sup>7</sup> Pius XI, *Quadragesimo Anno* (1931), FIVE GREAT ENCYCLICALS 125 (1939).

<sup>8</sup> *Id.* at 150-51.

1930's of the late Father John A. Ryan, the Department of Social Action of the National Catholic Welfare Conference perennially proposes for America modified versions of the formula of Pope Pius XI.<sup>9</sup> The controlling principle, of course, is that since human society constitutes a truly social and organic body "the various forms of human endeavor, dependent one upon the other," must be "united in mutual harmony and mutual support . . ." <sup>10</sup> The complex interconnection among the various sectors of the economy, the obvious inter-relationship between wages and prices, production and employment, profits and tax revenues, militate against the archaic notion that parties to collective bargaining negotiations can, or should be permitted to, conduct their business in "splendid" isolation.

Ironically, in his own industry, steel, Murray's proposal won partial acceptance in the formation of a Human Relations Committee as a result of the bitter and costly steel strike of 1959-60. The steel committee seeks to settle all labor-management quarrels during the term of the contract, free from the emotionally-charged atmosphere of negotiating sessions. In addition, the recent settlement of emergency dispute strikes in the airlines and longshore industries generally have provided for interim conferences to avoid future crisis.<sup>11</sup> George Meaney has stated that his union, a New York City plumbers' local, has had only two strikes and one lockout during the past seventy-five years, primarily because a standing committee of union and management representatives meets every two weeks to discuss grievances or common prob-

<sup>9</sup> *Id.* at 151.

<sup>10</sup> *Id.* at 144.

<sup>11</sup> Speech by W. Willard Wirtz, 52 LAB. REL. REP. 164 (Feb. 11, 1963).

lems.<sup>12</sup>

But enthusiasm for the "continuing contact" approach is not restricted to union leaders. A study entitled *The Causes of Industrial Peace* by the National Planning Association has concluded that in every successful collective bargaining relationship studied, this practice (of periodic labor-management conferences) was a main, contributing factor.<sup>13</sup> Professor John T. Dunlop, of Harvard, has recommended that the current bargaining situation in steel should set a pattern for other industries to follow; in Professor Dunlop's opinion, none of the complex issues confronting labor-management relations today can be resolved satisfactorily "under the gun of a negotiating deadline."<sup>14</sup>

It is also noteworthy, on this score, that an important element in the maintenance of industrial peace in Great Britain has been the establishment of joint industry councils in most sectors at the top level and, in some cases, regionally.<sup>15</sup> David L. Cole, a former director of the Federal Mediation and Conciliation Service, and a prominent arbitrator, recently praised another European nation, Sweden, for evolving a harmonious, fruitful, and yet inviolate, system of collective bargaining. Government participation in Swedish labor-management relations is restricted to periodic tripartite discussions of such matters as the impact of automation, cyclical stabilism and related items affecting the economy as a whole. Sweden has no emergency dispute legislation because such

<sup>12</sup> *Id.* at 186.

<sup>13</sup> *Ibid.*

<sup>14</sup> Speech by Professor John T. Dunlop, 52 LAB. REL. REP. 65 (Jan. 21, 1963).

<sup>15</sup> See Lester, *Reflections on Collective Bargaining in Britain and Sweden*, 10 IND. & LAB. REL. REV. 375-80 (1957).

emergencies have yet to occur in that country. Mr. Cole also singled out the labor plan established between the Hart, Schaffner and Marx Company and the Amalgamated Clothing Workers of America as a form of labor-management cooperation which has served as a model for the American clothing industry. Hart, Schaffner and Marx has had no strikes for almost fifty years.<sup>16</sup>

### Amending Taft-Hartley

While emphasizing the voluntary approach, the President's Committee nevertheless acknowledged that extraordinary measures might be necessary in cases of major disputes involving whole or important segments of critical industries and proceeded to recommend, in several respects, revision of the current emergency dispute legislation.

Instead of a Board of Inquiry the President would have authority, in his discretion, to appoint an Emergency Dispute Board at any stage of the crucial negotiations upon the recommendation of the Director of the Federal Mediation and Conciliation Service. In addition to conducting a hearing on the question whether the dispute threatens the national health and safety, the President would be empowered to direct the board to mediate the dispute, to work closely with the federal mediators and to propose recommendations for settling the dispute.

On the basis of the board's report, the President would have final authority (subject, of course, to judicial review) to determine if such a threat exists and, if so, to declare a national emergency. The President then might direct the Attorney General to procure a court order enjoining the strike

<sup>16</sup> Lecture by David L. Cole originally delivered at Harvard University, American Federationist, Feb., 1963, p. 7.

or lockout in whole, or "to the extent practicable," in part, but in no event for longer than eighty days.

In addition, during the emergency period the board would be permitted, in the discretion of the Chief Executive, to announce publicly its findings of fact and proposed settlement recommendations, and also to recommend to the parties terms or conditions of employment which should be put into effect during the injunction period on a concurrent or retroactive basis.<sup>17</sup>

The President's Committee also concurred in the widely-held view that the last-offer ballot procedure has proved to be ineffective, and perhaps harmful to serious negotiations, and should be eliminated.<sup>18</sup>

The Committee correctly noted that its formula is mild in comparison with other proposed solutions for the emergency dispute problem. The more extreme among these have included: (1) a plan for submitting to the electorate in a national poll the decision as to whether a national emergency strike should be permitted to resume after the injunction period<sup>19</sup> and, (2) the delegation to an administrative agency, such

<sup>17</sup> Messrs. Meaney, Dubinsky, Harrison, Keenan, McDonald and Reuther demurred at this point on the grounds that such recommendations would be "ineffective and illogical." They suggested instead that the President should be accorded the power to compel the institution during the injunction period of whatever terms and conditions of employment he deems to be equitable.

<sup>18</sup> See Givens, *Dealing with Emergency Labor Disputes*, 34 TEMP. L.Q. 17, 32 (1960); Pierson, *An Evaluation of the National Emergency Provisions*, EMERGENCY DISPUTES AND NATIONAL POLICY, 145 (1955); Rehmus, *The Operation of the National Emergency Provisions*, 62 YALE L.J. 1047 (1952).

<sup>19</sup> Rothenberg, *National Emergency Dispute: A Proposed Solution*, 65 DICK. L. REV. 1 (1960); see also, Givens, *Professor Rothenberg's Proposed Solution for National Emergency Disputes: A Reply*, 65 DICK. L. REV. 201 (1961).

as the NLRB, the authority, *inter alia*, "to determine appropriate bargaining units to avoid exercise of monopolistic power by unions" and to determine when strike votes should be called.<sup>20</sup>

The President's Committee nevertheless regretted that further intrusions by the government into the collective bargaining process need be made at all. The Committee did not recommend any measures for protecting the public interest if the strike (or lockout) resumes after the "cooling-off" period, beyond repeating the current provision in Taft-Hartley for a report to the congress by the President with "such recommendations as he may see fit to make for consideration and appropriate action."<sup>21</sup>

Mild though they are, the Committee's proposals, if enacted into legislation, will answer much of the criticism of the current statute and might well satisfy the country's needs for many years to come. To begin with, there is some question as to how often a labor dispute actually imperils the national health or safety. It is true that Presidents Truman, Eisenhower and Kennedy all have indicated no great reluctance to invoke their emergency dispute powers; but the statute, though permissive, confronts the President with the hard choice of either seeking an eighty-day injunction or doing virtually nothing in the face of a disruption in production which might conceivably endanger, even slightly, this country's position in the international "cold war."

It is also true that while the judiciary has guarded the right of the district courts under section 208 of the Act to make their own determinations as to whether the national

health or safety is imperiled by the stoppage, the courts, apparently in every case, have acceded to the President's requests.<sup>22</sup> The courts in making such determinations may be influenced by the same balancing of interests which motivate the President; but another factor is the decision by the United States Supreme Court in *United Steelworkers of America v. United States* that there is "no room in the statute" for less than a blanket injunction.<sup>23</sup> In a sense, the statute interferes with the traditional equity powers of the federal courts<sup>24</sup> and calls upon the courts to "rubber stamp" the executive determinations.<sup>25</sup>

On the other hand, considering the enormous size of this country, a valid argument can be made that no labor dispute to date has endangered, or foreseeably could endanger, the national health or safety.<sup>26</sup>

There is, moreover, the serious question of what criteria should be utilized to determine that such an emergency exists; the non-economic effects of a major stoppage, e.g., nationwide revulsion for collective bargaining might be just as harmful as the economic impact.<sup>27</sup>

<sup>22</sup> See *United States v. United Steelworkers of America*, 202 F.2d 132 (2d Cir. 1953) where the court granted an injunction at the behest of President Truman restraining a strike at a single plant of the American Locomotive Company.

<sup>23</sup> 361 U.S. 39, 43 (1959).

<sup>24</sup> *Id.* at 70 (dissenting opinion).

<sup>25</sup> See Comment, *Injunction of Strikes Affecting National Health and Safety*, 62 W. VA. L. REV. 284 (1959).

<sup>26</sup> See Goldberg & Barbash, *Labor Looks at the National Emergency Provisions*, EMERGENCY DISPUTES AND NATIONAL POLICY, 117 (1955); Heron, *Industry Looks at the National Emergency Provisions*, EMERGENCY DISPUTES AND NATIONAL POLICY, 128 (1955).

<sup>27</sup> Wirtz, *The Choice of Procedures Approach to National Emergency Disputes*, EMERGENCY DISPUTES AND NATIONAL POLICY, 163 (1955); Hildebrand, *An Economic Definition*, EMERGENCY

<sup>20</sup> Cooper, *Protecting the Public Interest in Labor Disputes*, 58 MICH. L. REV. 873, 883 (1960).

<sup>21</sup> Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 156 (1947), 29 U.S.C. §176 (1958).

In any event, many spokesmen for labor and management (including the members of the President's Advisory Committee) are in agreement that emergency disputes provisions, of any kind, should be used sparingly.<sup>28</sup> The late Senator Robert A. Taft, who was the sole author of the emergency dispute provisions,<sup>29</sup> said during the 1947 legislative debates that the contemplated peril to the national health or safety was "a condition which, it is anticipated, will not often occur. . . ."<sup>30</sup>

But assuming that the history of presidential intervention under sections 206-210 has been fully justified, an analysis of the proposals of the Advisory Committee reveals much more substance than is apparent at first glance. In general, a wider choice of procedures would be made available to the President. Professor (now Solicitor General of the United States) Archibald Cox has said that the chief advantage of the flexible approach to settling emergency disputes "lies in the capacity for preserving uncertainty as to the form and extent of government intervention."<sup>31</sup> It is almost axiomatic that collective bargaining becomes aimless if the negotiators are aware that at a certain point in the dispute settlement terms will be dictated by an outside party.

For this reason, and also because compulsory arbitration in the few states that have enacted such legislation has not proved

noticeably successful in maintaining industrial peace, such proposals have received few endorsements.<sup>32</sup> Related to compulsory arbitration and subject to the same objections is the recent proposal by Mr. Bernard Baruch for a court of labor-management relations to decide disputes still unresolved after the "cooling-off" period.<sup>33</sup> Labor-management conflicts, unlike ordinary litigation, do not lend themselves easily to judicial determination.<sup>34</sup>

Perhaps the most important feature of the Committee's substantive proposals would permit the President to seek an injunction for a period of time less than eighty days and, if practicable, on a limited basis. Presumably, emergency dispute situations may arise where the parties, in cooperation with the government, will be able and willing to devise a formula for resumption of only critical operations in order to avoid a blanket injunction (the union) and, to procure some injunctive relief (the employer(s)).

To the extent that this approach is utilized the emphasis in the legislation will be placed solely on the need to protect the public. The rigid construction of sections 206-210, as presently written, for all practical purposes gives an overwhelming advantage to management in the economic test of strength by depriving the union, albeit for a limited period of time, of its only potent weapon, the right to strike.

In the same vein, the proposed revisions of the statute permitting the presidential board actively to intervene before, during and after the injunction period will affirm

DISPUTES AND NATIONAL POLICY, 6 (1955).

<sup>28</sup> See Givens, *Dealing with Emergency Labor Disputes*, 34 TEMP. L.Q. 17, 36 (1960); Heron, *op. cit supra* note 26, at 128.

<sup>29</sup> See Kleiler, *A Legislative History of the National Emergency Provision*, EMERGENCY DISPUTES AND NATIONAL POLICY, 107 (1955).

<sup>30</sup> 93 CONG. REC. 6860 (1947) (remarks by Senator Taft).

<sup>31</sup> Cox, *Strikes and the Public Interest*, Atlantic Monthly, Feb. 1960, pp. 48-51.

<sup>32</sup> *But see* speech by A. H. Raskin, 52 LAB. REL. REP. 65 (Jan. 21, 1963); Speech by Paul L. Styler, 51 LAB. REL. REP. 208 (Oct. 25, 1962).

<sup>33</sup> See speech by W. W. Wirtz, 52 LAB. REL. REP. 164 (Feb. 11, 1963).

<sup>34</sup> See Cooper, *Protecting the Public Interest in Labor Disputes*, 58 MICH. L. REV. 873, 878 (1960).



the dispute aspect of the emergency as opposed to the present implication that an offense has been committed by the union against the national interest. The new approach would also endorse the theory that the public weal should be served by attempting to remove the underlying causes of the emergency stoppage as well as by terminating the stoppage itself.

Likewise, the announcement by the board of the facts of the dispute, especially when the negotiations are deadlocked, will satisfy the right of the public to be informed and, as a consequence, will also generate a certain amount of pressure on the more obdurate of the parties. For various reasons, labor-management negotiators, as a rule, are mutually reluctant to permit full press coverage of the negotiations, so that the public generally must rely for some knowledge of the crucial facts upon partisan advertisements in the daily press and in magazines. There will be situations, of course, as the Advisory Committee apparently realized (for example, a settlement may be imminent) where the President, in his discretion, may decide that such disclosure of the facts would not be in the public interest.

The proposed amendment to the statute which will permit the President to authorize the board, if he deems such action to be desirable, to make non-binding recommendations is itself quite substantial. Experience has shown that the probability that such recommendations will be forthcoming in the event of a bargaining impasse tends to hasten settlement to (1) protect the integrity of the collective bargaining process and, (2) preserve the reputations of the negotiators as negotiators. On the other hand, third-party recommendations sometimes enable both sides to emerge from a hopeless deadlock without losing face. This may have

been a vital factor in the acceptance of Mayor Robert F. Wagner's recommendations by the representatives of the printers and the publishers prior to the termination of the lengthy New York publishers' strike-lockout.

Such recommendations need not be restricted to unimaginative compromises of opposing positions. They may take the form of so-called "mediators' proposals" which constitute a calculated guess as to what the parties would agree to, ultimately and respectively, at the point of economic exhaustion.<sup>35</sup> Secretary of Labor W. Willard Wirtz has said that if the Taft-Hartley Board, appointed by President Kennedy during the recent dock dispute, had had the power to make recommendations, the walkout which followed the expiration of the injunction might have been prevented.<sup>36</sup>

The power of a presidential board to make recommendations has existed with generally good results in the field of atomic energy since 1948.<sup>37</sup> In that year, President Truman created the Atomic-Energy Labor-Management Relations Panel to which the Atomic Energy Commission delegated its jurisdiction over labor-management relations. The Panel, like the Missile Sites Labor Commission, established by President Kennedy on May 26, 1961, operates in a field where the government has a cost interest in collective bargaining between contractors and their employees, and also a vital interest in uninterrupted operations.<sup>38</sup> Consequently,

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<sup>35</sup> See *Christian Science Monitor*, Feb. 28, 1963, p. 1.

<sup>36</sup> Speech by W. W. Wirtz, 52 *LAB. REL. REP.* 52 (Jan. 14, 1963).

<sup>37</sup> See Givens, *Dealing with Emergency Labor Disputes*, 34 *TEMP. L.Q.* 17, 32 (1960).

<sup>38</sup> Johnson, *Dispute Settlement in Atomic Energy Plants*, 13 *IND. & LAB. REL. REV.* 38 (1959).

the Panel and the Missile Sites Labor Commission enjoy much broader powers, short of compelling arbitration, than those contemplated by the Advisory Committee report with which we are concerned here.

Since the Emergency Dispute Board, unlike the Panel and the Missile Sites Labor Commission would be an *ad hoc* group with a new complement of members, perhaps for each dispute, it is tempting to conclude that an existing agency such as the NLRB might be a more satisfactory alternative.<sup>39</sup> The NLRB personnel, so the argument goes, would be able to anticipate and work to resolve emergency disputes in the embryonic stage. On balance, however, such an alternative should be rejected both on the merits and as politically inexpedient. A board composed of distinguished neutrals who are expert in the problems of a particular industry presumably can be more objective in their approach, and thus more persuasive than full-time government employees.

Furthermore, though criticism of the Atomic Energy Panel, for the most part, has been favorable,<sup>40</sup> there is some evidence of reliance by the parties to an undetermined extent in their negotiations upon government intervention.<sup>41</sup> This weakness, if it does exist, may be justified for atomic energy operations (and missile sites) since it is still the position of the Atomic Energy Commission that labor-management relations in that field must be accorded special treatment,<sup>42</sup> but it might prove intolerable in other industries.

<sup>39</sup> See Cooper, *supra* note 34, at 883.

<sup>40</sup> See Crawford, *Government Intervention in Emergency Disputes in Atomic Energy*, 10 LAB. L.J. 414 (1959); Johnson, *supra* note 38, at 51. *But cf.* Browne, *The Missile Sites Labor Commission and the Derogation of the Taft-Hartley Act*, 48 A.B.A.J. 121 (1962).

<sup>41</sup> Johnson, *supra* note 38, at 39.

<sup>42</sup> *Ibid.*

The proposals of the President's Advisory Committee admittedly fall far short of providing the President with an "arsenal of weapons" like that which is available to the Governor of Massachusetts.<sup>43</sup> The disadvantages of compulsory arbitration have already been noted. Plant seizure as a method of settling emergency disputes would seem to be a drastic alternative but, surprisingly, this approach if used in conjunction with other measures so as to preserve the element of uncertainty, has received a fair amount of support in responsible circles.<sup>44</sup> It is true that seizure of the struck plants by the government during the injunction period, while perhaps unnecessary for the protection of the public interest, certainly would announce dramatically that the objective of the act is not to punish one party and to aid the other. Seizure in some cases might result, however, in an undue advantage to the union.

In addition, there is the enormous administrative difficulty of effectuating the seizure and the insurmountable difficulty of persuading the congress to accord such power to the President *in futuro*. The mutual confidence required for such legislation rarely has existed between the legislative and the executive branches of the government in this century.<sup>45</sup> Admittedly, congress consti-

<sup>43</sup> Mass. Gen. Laws ch. 150B, §§1-7 (1957). The Massachusetts statute, popularly known as the Slichter Law after the late Prof. Sumner Slichter who was instrumental in its enactment, provides for a wide assortment of measures including compulsory arbitration and seizure for certain disputes that endanger "the public health and safety."

<sup>44</sup> See Givens, *supra* note 37, at 27; Cox, *Seizure in Emergency Disputes*, EMERGENCY DISPUTES AND NATIONAL POLICY, 242 (1955); Proposal by Senator Jacob Javits, 52 LAB. REL. REP. 91 (Jan. 28, 1963) (advocating a limited form of seizure).

<sup>45</sup> Fleming, *The Search for a Formula*, EMERGENCY DISPUTES AND NATIONAL POLICY, 221 (1955).

tutionally could delegate such power to the President.<sup>46</sup>

The political obstacles would also defeat the minor form of seizure, *i.e.*, compulsory imposition of terms and conditions of employment during the emergency period, recommended by the labor representatives on the President's Advisory Committee. But, in the last analysis, seizure, compulsory arbitration or related measures, or legislation remedying the underlying causes of the particular dispute, can be made available to the President on an *ad hoc* basis as the need arises.<sup>47</sup>

The moderate proposals advanced by the President's Advisory Committee will have the two-fold advantage of procuring *some* reform of the existing legislation without endangering the collective bargaining process. Except for the limited exceptions by the labor representatives noted above, only one member of the twenty-one member Advisory Committee, Henry Ford, II, dissented from the Committee's report.<sup>48</sup> This near unanimity is not without significance from

<sup>46</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>47</sup> Recently President Kennedy signed into law a joint resolution of the congress which had the immediate effect of averting a nation-wide rail strike. The resolution, the first of its kind, provides for compulsory arbitration of the two major bargaining issues, the mechanics of which are expected to consume 180 days commencing August 28. At the end of that period either party will be permitted to resort to "self help," *i.e.*, strikes or lockouts, in the unlikely event that the secondary issues have not been resolved through the bargaining process 54 LAB. REL. REP. 3 (Sept. 2, 1963) (The railroads are not subject to the provisions of the Labor Management Relations Act and the "emergency" aspects of a labor stoppage in that industry, though not unrelated, obviously present problems far more acute than those with which we are concerned here.)

<sup>48</sup> Mr. Ford agreed, however, that the "last-offer" ballot procedure should be eliminated.

the political standpoint.

### Federal Pre-Emption

There can be no question that a labor dispute might constitute a local calamity and at the same time adversely affect the national interest without falling within the purview of sections 206-210. For example, it has been estimated that the recent work stoppage among the New York newspapers cost the city's economy more than \$100,000,000.<sup>49</sup> The strike-lockout "had a vital effect on the economic life of this great city of New York."<sup>50</sup> In addition, among the thousands of far-reaching effects of the "brownout" (several interim newspapers did appear on the stands) was the ability of the city government to pass quietly into law some highly controversial measures.<sup>51</sup>

However, according to Secretary of Labor Wirtz<sup>52</sup> and President Kennedy<sup>53</sup> the newspaper situation could not be considered a national emergency dispute in the light of past practice, the legislative history of Taft-Hartley and the language of the statute itself.

Several states, among them Massachusetts, have attempted to fill the vacuum, in part, with legislation aimed at curbing local emergencies. The constitutionality of such legislation, however, has been somewhat doubtful since a 1951 decision by the United States Supreme Court striking down a Wisconsin statute which substituted compulsory arbitration for strikes, both violent and peaceful, by utility workers.<sup>54</sup> In the Wis-

<sup>49</sup> *Christian Science Monitor*, March 9, 1963, p. 1.

<sup>50</sup> Remarks by President Kennedy, 52 LAB. REL. REP. 231 (March 4, 1963).

<sup>51</sup> *Christian Science Monitor*, March 9, 1963, p. 7.

<sup>52</sup> 52 LAB. REL. REP. 52 (Jan. 14, 1963).

<sup>53</sup> *Christian Science Monitor*, March 9, 1963, p. 1.

<sup>54</sup> *Amalgamated Ass'n of St., Electric Ry. & Motor Coach Employees of America v. Wisconsin Employment Bd.*, 340 U.S. 383 (1951).

consin case the Court cited *Consolidated Edison Co. v. NLRB*<sup>55</sup> for the proposition that federal labor legislation encompasses all industries affecting interstate commerce and thus pre-empts concurrent state regulation.

Since its enactment in 1947, the Slichter Law has been invoked in less than ten disputes but the mere existence of the law and the threat that it represents has been a contributing factor to settlements in many other negotiations in Massachusetts. Aside from the question of its constitutionality, the Slichter Law can be criticized on several other grounds, most of which become academic if the need to invoke its procedures seldom arises. On the whole, comment has been favorable.<sup>56</sup> Furthermore, there is no evidence that the integrity of the collective bargaining process has suffered as a result and the fact remains that since 1947 the health and safety of no community in Massachusetts has been imperiled during a labor dispute.

### Conclusion

No adequate discussion of measures for settling labor disputes in industries affected with a national interest can ignore the underlying causes of such disputes. Few authorities on labor-management relations today will deny that the emergency dispute

provisions of the NLRB have proved to be ineffective, for the most part, and perhaps harmful in maintaining industrial peace. But, more important, a fair number of management and neutral spokesmen seem to concur in the view that the 1947 amendments have failed, not because congress omitted procedures for the post "cooling-off" period, but because congress, during a period of industrial turmoil that was not conducive to objectivity in approach, enacted legislation that was, in fact, punitive and one-sided.

While it would be futile to attempt to overlook partisan considerations in this area, the report of the President's Advisory Committee shows that partisan interests and the public welfare can be accommodated by reasonable men. The bulk of the language in the report concentrates on the *dispute* aspect of national emergencies and suggests voluntary procedures designed to avert, or at least reduce, the gravity of industrial disputes before they reach the crucial stage.

Adoption of the extraordinary measures proposed by the President's Committee also will preserve the vitality of the collective bargaining process by providing the President with a flexible choice of procedures which focus on persuasion or the generation of the pressure of public opinion, rather than on direct compulsion, as methods of resolving emergency disputes. At the same time, the new powers to be accorded to the President for delegation to an Emergency Dispute Board will affirm the right of the public to be represented continuously in major negotiations after a crisis arises.

The President's Committee did not discuss the question of pre-emption but its reservation of the proposed extraordinary measures to "major disputes involving whole or important segments of critical industries"

<sup>55</sup> 305 U.S. 197 (1938).

<sup>56</sup> See Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Fleming, *The Search for a Formula, EMERGENCY DISPUTES AND NATIONAL POLICY*, 221 (1955); Wirtz, *The Choice of Procedures Approach to National Emergency Disputes*, EMERGENCY DISPUTES AND NATIONAL POLICY, 163, 165 (1955); Comment, *Injunction of Strikes Affecting National Health and Safety*, 62 W. VA. L. REV. 284, 289 (1959); see Shultz, *The Massachusetts Choice-of-Procedures Approach to Emergency Disputes*, 10 IND. & LAB. REL. REV. 359 (1957).

should encourage legislation according some emergency dispute powers to the states. The Massachusetts approach to such problems, though extreme in some respects, incorporates to a remarkable degree the element of flexibility that most critics agree is basic to emergency dispute legislation. It might furnish a satisfactory model for other states to follow if permitted by the congress to do so. But the resolution of work stoppages that affect the public health and safety or which have more subtle but no less tragic effects, like the New York newspaper stoppage, is a problem for the states to decide, each in its own way.

Finally, the need for more drastic federal legislation in this area, even on an *ad hoc* basis, might never be necessary if the "increased measure of maturity" called for by the President's Advisory Committee becomes a reality in our system of collective bargaining. The American economy, to this day, anticipates and accepts a certain amount of industrial conflict as part of the price to be paid for the maintenance of distinct and separate spheres of influence in employment relationships.<sup>57</sup> While statistics do show that the incidence of strikes in this country has declined in recent years and presumably will continue to decline, the strike weapon will not "wither away." Resort to economic strength is still an important feature of the industrial relations systems of the United States and Canada. This is not so in most other non-totalitarian nations

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<sup>57</sup> ROSS & HARTMAN, *CHANGING PATTERNS OF INDUSTRIAL CONFLICT* 169 (1960). "[T]he solution of our labor problems must rest on a free economy and on free collective bargaining . . . we recognize that right (to strike upon contract expiration) in spite of the inconvenience and in some cases, danger, to the people of the United States which may result from the exercise of such right. . . ." 93 CONG. REC. 3835-36 (1947) (remarks by Senator Taft).

around the world, especially in Western Europe.<sup>58</sup>

According to Pope Pius XI, "this accumulation of power, the characteristic note of the modern economic order, is a natural result of limitless free competition which permits the survival of those only who are the strongest, which often means those who fight most relentlessly, who pay least heed to the dictates of conscience. . . ."<sup>59</sup> Though the Pope was concerned primarily with the exploitation of the working classes by the captains of industry, his strictures would seem to have relevance also to those situations when labor possesses the economic leverage.

Arbitrator David L. Cole has described collective bargaining in the United States as "still primitive and crude in many instances."<sup>60</sup> Cole urged greater acceptance of labor-management cooperation during the term of a collective bargaining agreement.<sup>61</sup>

The growing complexities of our industrial life and the instabilities of international relations were cited by the President's Advisory Committee as justification not only for more government intervention but, primarily, for greater rapport between the two partisan sectors of our economy. According to Professors Hartman and Ross, both

(Continued on page 319)

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<sup>58</sup> ROSS & HARTMAN, *op. cit. supra* note 57, at 168-81.

<sup>59</sup> Pius XI, *Quadragesima Anno* (1931), FIVE GREAT ENCYCLICALS 125, 153 (1939).

<sup>60</sup> "Collective bargaining, of its very nature, impels both parties to look more or less exclusively to their own narrow advantage. . . ." Statement by the Department of Social Action of the National Catholic Welfare Conference, 72 *Commonweal*, Sept. 16, 1960, pp. 495-96.

<sup>61</sup> Lecture by David L. Cole originally delivered at Harvard University, *American Federationist*, Feb. 1963, p. 7.

## LABOR DISPUTES

*(Continued)*

unionism and collective bargaining in the United States are moving in a continuous process of evolution and cannot be viewed in the light of doctrines that may have been valid twenty years ago.<sup>62</sup>

The following statement by Mr. Justice Brandeis, written in 1921, anticipated the current debates over emergency dispute legislation and is apropos for the conclusion of this discussion.

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<sup>62</sup> ROSS & HARTMAN, *op. cit. supra* note 57, at 5.

Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community . . . [it is the] function of the legislature [to] substitute processes of justice for the more primitive method of trial by combat.<sup>63</sup>

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<sup>63</sup> Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (dissenting opinion).