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The National Emergency Disputes Provisions of the Taft-Hartley Act: A View from a Legislative Draftsman's Desk

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The National Emergency Disputes Provisions of the Taft-Hartley Act: A View from a Legislative Draftsman's Desk

Erratum

PAGE 134, LINE 4: change "(a)" to "(b)." PAGE 152, LINE 10: change "suggest" to "suggests." PAGE 236, LINE 1: change "underlined" to "italicized."

The National Emergency Disputes Provisions of the Taft-Hartley Act: A View from a Legislative Draftsman's Desk

James E. Jones, Jr.*

National emergency labor disputes which imperil the national health or safety demand an orderly and effective procedure for the settlement of differences. While Mr. Jones concedes that the current emergency disputes provisions have generally succeeded in temporarily halting strike activity, he argues that the policy behind the settlement machinery has the higher objective of encouraging responsible labor-management relations. He questions the success of the present provisions of the Taft-Hartley Act in fulfilling this higher objective. The author's extensive analysis of each of the applicable sections of Title II of the act, including their legislative history, is followed by his recommendations for procedural reform through a draft executive order and legislative bill.

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* The views expressed in this article are those of the author and do not necessarily reflect the position of the Department of Labor or any other government official.

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HIGHLY CONTROVERSIAL legislation seems to have a continuing disability which is most frustrating to the student. Seemingly, the focal points of future discussion are set in the formative stages of the law by the degree of heat with which the protagonists attack or defend various provisions and positions. Subsequent scholarly discourse centers around the major issues embodied in such statutes and less publicized details seem to receive less than their fair share of attention and exposition. Where, as in our subject, the occasions for the use of the statutory machinery are relatively few, it seems too easy for minor "nuts and bolts" to rust over in disuse and not receive adequate attention until time for a general overhauling, if then. If there is sufficient successful experience with the device (successful is defined here to be the absence of major calamity), it is quite likely that small defects will go unnoticed in any proposed rebuilding of the basic machine.

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The functions and functioning of both minor and major "nuts and bolts" of the machinery embodied in a legislative proposal are of nearly equal concern to the draftsman. The minor ones may pose more vexing, technical problems since they are rarely included in the specifications from which a writer must work.

It is submitted that the view of the lawyer when drafting legislation differs substantially from the view of a lawyer reading it.¹ Neither may comport with the law in practice. This paper proceeds from a draftsman's view of the national emergency disputes provisions of the Taft-Hartley law.

I. INTRODUCTION

Past and recent dialogue concerning the emergency disputes procedures of the Taft-Hartley law has been generally directed to the act's effectiveness or ineffectiveness, flexibility or inflexibility, and the need to do something or nothing about it. It has been carried on largely in generalities by: (1) partisans in labor or man-

¹ Drafting is a broader concept than "writing," as drafting involves some knowledge of the problems, anticipation of pitfalls and presentation of relevant choices to policy makers. See DICKERSON, *LEGISLATIVE DRAFTING*, pt. 1 (1954).

agement with obvious positions to promote; (2) politicians seeking the support of one or both partisan elements; (3) government officials with the records and promises of an administration to support and protect; (4) newspapers, reacting to public inconvenience, through reporters of varying degrees of sophistication in labor management relations; and (5) scholars, arbitrators, and other practitioners in the labor-management relations field. Without any intention to denigrate the necessary and useful contributions of 1, 2 and 3 above, the objectivity of any "expertise" coming from these quarters, except as it may be an indication of the positions of various interest groups, is necessarily suspect.

The newspaper's role in getting the "newsworthy" facts to the public, the near necessity that there be an imminent crisis in order to make such stories newsworthy, and the reporters' problems of time, access to original sources and officials, etc., are all factors which limit the acceptability of the newspaper as a source of contribution to meaningful dialogue on the technical aspects of emergency dispute problems.

The near legitimate purveyors of "the conventional wisdom,"² i.e., the practitioners in the field of dispute settlement, are to some extent afflicted with a degree of parochialism shaped by those cases in which they have been active participants. Consequently, their published interests rarely contain sufficient treatment of the "whats" and the "hows" of general dispute settlement procedures. Most creative comment concentrates on new devices with insufficient attention to the operating mechanics. This is understandable. They are busy men with other areas to tend; they have been members of boards and panels dealing with various types of disputes and know from experience how these things work or do not work. They have been active in the field for years, many of them pioneers and leaders, and the distillate of their accumulated experiences and impressions is for most purposes, including advice to the Government, usually authoritative enough.

With great respect for these experts, it is suggested that their experiences vary in time and in industries. Concepts of the proper role and functions of boards and the settlement devices vary. Such roles also vary as the concept of the particular administration varies; and, as actors in their particular dramas, board members may have only a limited view of the stage — and almost none of the

² GALBRAITH, *THE AFFLUENT SOCIETY* (1958).

backstage. Their own attitudes, actions or inactions may have, in fact, been a part of some of the problems of administration of the act's provisions.

The Labor Management Relations Act (LMRA)³ is not a model of clarity or completeness of legislative expression. This can be established by a cursory reading of almost any provision of the act selected at random. There are sins of commission, omission, and ambiguity which could not have gone unnoticed by any reasonably competent draftsman. One of the explanations most often offered is that the extremely controversial nature of the matter treated within the act makes any change of language, no matter how essential, or inconsequential, virtually impossible to obtain once such a bill reaches a certain stage in the legislative process. Minimum experience with that process will quickly verify this as a creditable explanation and possibly supply many others, ranging from those related to politics to a failure of Congress to fully appreciate the effect of an act. Consequently, we have come to expect and accept less than clarity of language in controversial statutes. However, seemingly small "defects," not worth "rocking the boat" over, often arise to haunt those who must work with the law as enacted. During the period between enactment and ultimate amendment, the administrator must either improvise with what he has in order to carry out the purpose of the act, or attempt to avoid applying those parts he believes are unworkable.⁴

The primary purpose of this study is to examine systematically the statutory device which Congress formulated to deal with emergency disputes. The draftsman's view is primarily clinical and in ideal diagnostic procedure, curatives follow, rather than precede, exhaustive examination.

In design, this article follows the structure of Title II of the act.⁵ Since the various subsections are not mutually exclusive, it has been necessary at some junctures to discuss aspects of preceding or succeeding subsections in order to cover adequately the particular problems under discussion.

³ 61 Stat. 136 (1947), 29 U.S.C. §§ 141-87 (1964) [hereinafter cited as L.M.R.A.].

⁴ Ready examples of this can be footnoted by reference to the reluctance of the National Labor Relations Board to attempt to apply the election procedures of the act to the construction industry and by the reluctance of the Board to "hear and determine" jurisdictional disputes. See *NLRB v. Radio & Television Broadcast Eng'rs*, 364 U.S. 573 (1961).

⁵ L.M.R.A. § 201, 61 Stat. 152 (1947), 29 U.S.C. §§ 171-72 (1964).

The first portion of the article discusses the relationship between the Secretary of Labor and the Federal Mediation and Conciliation Service (FMCS) in the administration of the emergency disputes procedures. Since the act leaves many gaps in administrative machinery, all aspects of the coordination of the executive functions under the law are discussed.

The second, and largest portion of this study, is devoted to identifying, with as much precision as possible, the functions which Congress intended the boards of inquiry to perform. For this purpose, substantial examination and presentation of legislative history and contemporaneous interpretations have been necessary. However, since it is strongly suggested that the administrators of these provisions of Title II have proceeded from an erroneous premise regarding such functions, ample documentation in the body of the study of the basis of such a suggestion is provided.

It is also urged that in the performance of past or suggested functions the boards of inquiry should be subject to published procedures.

The third portion of the discussion is devoted to problems in the litigation aspect of the procedures. It is suggested that there are gaps in the jurisdiction of the courts and that injunctions issued may often exceed the authority of any court to grant them.

In the fourth part there is a brief discussion of the 80-day "cooling-off period" and the role of the President after the injunction period expires. The penultimate portion is the summary and conclusion. Appended as a final effort is a draft executive order embodying suggestions for improving administration of the act in its present form, and a separate draft bill amending Title II to correct some of the problems which the study discusses.

II. THE ADMINISTRATIVE MACHINERY

A. *The Secretary of Labor, the Federal Mediation and Conciliation Service and the National Emergency Disputes Functions*

The writer has no wish to reopen the stale arguments regarding the relative merits of the establishment of the Federal Mediation and Conciliation Service as independent of the jurisdiction and authority of the Secretary of Labor, nor has he any wish to belabor the effectiveness or the intent of section 202(d)⁶ of the LMRA in

⁶ 61 Stat. 153 (1947), 29 U.S.C. § 172(d) (1964).

transferring to FMCS "all mediation and conciliation functions of the Secretary of Labor or the U. S. Conciliation Service under section 8 of the Organic Act."⁷ However, there is support for the continued authority for activity on the part of the Secretary of Labor in the dispute settlement area in the legislative history of the LMRA,⁸ in post-legislative history,⁹ and for what it is worth, in other provisions of law unaffected by section 202(d) of the LMRA.¹⁰

However, the most persuasive explanation for the continued involvement of the Secretary of Labor in these matters seems to be that his position as the only cabinet officer for labor matters virtually compels his participation in labor crises, even though both the President and his Secretary of Labor might prefer it otherwise. Of course, participation of the Secretary might be minimized or almost eliminated by the appointment of a Director of the FMCS with public status superior to that of the Secretary of Labor, or by the establishment of a White House agency for the inevitable involvement of some top administration official in crisis disputes. However, either of these alternatives tends to detract from the stature of any Secretary of Labor (making the position most unattractive if not unendurable) particularly in view of the "historical" involvement of that office in major labor disputes.¹¹

An apology may be in order for this rather extended preface, which is probably elementary to the sophisticate in the field, because it is merely prologue to what may be a rather minor point. Namely, the statute ostensibly takes the Secretary of Labor out of the direct business of dispute settlement. He is mentioned in the operative

⁷ 37 Stat. 738 (1935).

⁸ S. REP. NO. 105, 80th Cong., 1st Sess. 14 (1947); 1 U.S. NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 420 (1948).

⁹ *Hearings on S. 2216 Before the Committee on Labor and Public Welfare*, 81st Cong., 1st Sess. 13 (1949). Senator Robert A. Taft, commenting on the bill to give the President temporary powers to appoint a board of inquiry with authority to make recommendations in disputes involving ocean transportation between the U.S. and Hawaii, asserted that the Secretary of Labor already had the job of mediation.

¹⁰ The Secretary of Labor is "specifically charged to investigate the causes of, and facts relating to, all controversies and disputes between employers and employees as they may occur, and which may tend to interfere with the welfare of the people of the different states." 25 Stat. 183 (1888), as amended, 29 U.S.C. § 4 (1964). The function was transferred to the Secretary under REORGANIZATION PLAN NO. 6, 64 Stat. 1263 (1950), 5 U.S.C. § 133z-15 (1964).

¹¹ This view was concurred in by former Secretary of Labor James P. Mitchell who started the "historical" involvement of Secretaries of Labor in such disputes under this act. Interview With Former Secretary of Labor in San Francisco, Aug. 17, 1964. The first Director of FMCS, Cyrus Ching, did not agree. Interview With Former Director of FMCS, Washington, D. C., July 23, 1964.

sections of Title II only in a negative fashion and is given no function thereunder, except to the extent that section 211¹² gives the Bureau of Labor Statistics (BLS) certain data collection and service responsibilities and authority. Specifically, the Secretary is to prescribe conditions under which collective bargaining agreements collected by BLS are to be open to the public for inspection. Presumably, any service functions would be subject to the Secretary's ultimate authority to some extent, as would any other general duty of the Bureau of Labor Statistics.

While the Secretary of Labor is relieved of the burdens incident to the administration of a mediation agency, the statutory scheme of Title II of the LMRA is untidy in failing to provide for complete, coordinated performances of the functions specified in the language of the act, as well as those suggested therein. Bureaucracy, like nature, abhors a vacuum and ultimately moves to fill it.

B. Broad Promises of Policy and Limited Grants of Authority

Title II has a reasonably inclusive statement of policy for promoting sound and stable industrial peace through collective bargaining, with substantial portions devoted to the assistance which can be provided by making available adequate government facilities.¹³

¹² 61 Stat. 156 (1947), 29 U.S.C. § 181 (1964).

¹³ L.M.R.A. § 201, 61 Stat. 152 (1947), 29 U.S.C. § 171 (1964). The act states: It is the policy of the United States that —

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies. *Ibid.*

Section 202(a)¹⁴ creates the Federal Mediation and Conciliation Service as an independent agency and transfers to it certain functions from the Department of Labor. It is in section 203¹⁵ that the limitations and omissions in the FMCS functions appear, which, unless cured by "extra legal"¹⁶ practices, would tend to diminish the maximum effectiveness of the Service in the performance of the total mission of Title II.

The initial entry of an agent of the government in any labor dispute in an industry affecting commerce is by request of either of the parties for FMCS assistance, or upon the initiative of the Service "whenever in its judgment such dispute threatens to cause a *substantial interruption of commerce*."¹⁷ The Service is directed to avoid disputes having a minor effect upon interstate commerce, if other services are available, and to enter grievance disputes only as a last resort in exceptional cases.¹⁸

The primary emphasis, therefore, is on collective bargaining negotiations, and preferably, disputes of some significant national

¹⁴ 61 Stat. 153 (1947), 29 U.S.C. § 172 (a) (1964).

¹⁵ 61 Stat. 153 (1947), 29 U.S.C. § 173 (1964).

¹⁶ Use of this term is not intended to connote any impropriety.

¹⁷ 61 Stat. 153 (1947), 29 U.S.C. § 173 (b) (1964). (Emphasis added.)

¹⁸ L.M.R.A. § 203, 61 Stat. 153 (1947), 29 U.S.C. § 173 (1964). This section states:

(a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

impact. The authority, however, for intervention by the FMCS is couched in language which is broader than that embodied in the national emergency disputes provisions — “substantial interruption of commerce,” as contrasted to “imperil the national health or safety.”

It should also be noted that the Taft-Hartley Act¹⁹ defines “labor dispute” to have the same meaning as that term has in the National Labor Relations Act²⁰ (NLRA) and Norris-LaGuardia Act.²¹

Reading the act technically, the lower threshold for FMCS involvement in any labor dispute, that is, authorizing a proffer of services whenever in the opinion of FMCS a dispute threatens to cause a substantial interruption of commerce, is defeated as a basis for preventive mediation by the requirement that there be a *dispute*, rather than some more flexible condition of entry.

Recent discussions of collective bargaining developments have focused attention upon the desirability of, and some successes in, avoiding crisis bargaining by early attention to developing problems, including “early entry” by the government. At first, it would seem that FMCS has clear statutory authority for early entry into a dispute long before any crisis countdown and certainly before a threat to national health or safety is imminent. However, on the face of the statute, FMCS participation, even upon invitation of a party, depends upon the existence of a *controversy*, rather than upon the anticipation of one.

The varying specificity with which the duties of the Service are enumerated in section 203, the duties placed upon the parties to a dispute by section 204,²² and the duties imposed upon the parties to a bargaining relationship by section 8(d),²³ are formulated so

¹⁹ L.M.R.A. § 501, 61 Stat. 161 (1947), 29 U.S.C. § 142(3) (1964).

²⁰ 49 Stat. 450 (1935), as amended, 29 U.S.C. § 152(9) (1964). Section 2(9) of the National Labor Relations Act states:

The term “labor dispute” includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking, to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. *Ibid.*

²¹ 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1964).

²² 61 Stat. 154 (1947), 29 U.S.C. § 174 (1964).

²³ National Labor Relations Act, as amended, 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964) (The National Labor Relations Act was reenacted as § 101 of the L.M.R.A.). This section states:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the

that the Service's efforts are channeled into extinguishing fires — little, if anything, is directed *by the statute* to fire prevention.

The strongly implied promises in the expansive language of the statement of policy²⁴ of full and adequate government facilities and assistance in section 201²⁵ are not reflected in the functions specifically given the Service by the statute, except during the countdown before a dispute ripens in a strike or lockout.

We are aware, however, that the Service does engage in preventive mediation.²⁶ No doubt, the authority for such activity flows from the generous statement of policy, as well as the transfer

negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all of the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: The duties imposed upon employer, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. *Ibid.*

²⁴ Policy statements are not meaningless. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960); *International Ass'n of Machinists v. Cameron Iron Works, Inc.*, 292 F.2d 112, 116 (5th Cir. 1961). No doubt many cases turn on policy statements of the law, but these were the only ones found on § 203; none were found on § 201.

²⁵ 61 Stat. 152 (1947), 29 U.S.C. § 171 (1964).

²⁶ See FMCS ANN. REPS.

of the functions of the Conciliation Service that was effected with the enactment of Title II. The statutory defect is in failing to clearly provide for this activity in the enumeration of the functions of the Service.

C. *Statutory Commands without Sanctions*

It is the generally accepted canon of statutory construction²⁷ that, if at all possible, meaning is to be given to every word of the statute. Presumably, Congress does not enact meaningless words into law. In the prior discussion of section 201, an allusion was made to the implied promises of government assistance in the statute and the lack of implementing machinery or the failure of the law to assign administrative responsibilities. In section 204 we are treated to legal directives couched in mandatory language,²⁸ which for practical, if not legal reasons, are purely hortatory. But the statute is silent as to if and how these duties are to be enforced. Recognizing that the courts have found a basis for enforcing the commands of law where no sanctions are supplied by Congress,²⁹ why leave open the possibility of litigation to require a recalcitrant party to arrange conferences, or attend those arranged by the Service, or to determine that a party "had not made every reasonable effort" to make and maintain agreements, and then leave the remedy, if any, to the ingenuity of the litigants or the courts? First, the possibility that failure or refusal in any of these endeavors might constitute a refusal to bargain, an unfair labor practice under Title I of the act, at least suggests that the courts might be without jurisdic-

²⁷ SUTHERLAND, *STATUTORY CONSTRUCTION*, § 4705 (Horock ed. 1943).

²⁸ L.M.R.A. § 204, 61 Stat. 154 (1947), 29 U.S.C. § 174 (1964).

(a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall —

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.
Ibid.

²⁹ *Virginian Ry. v. System Fed'n 40, Ry. Employees Dep't*, 300 U.S. 515, 544-45 (1937); *Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930).

tion to enforce such duties.³⁰ More basically, can there be a more destructive factor to eventual agreement (which is, after all, the goal that section 204 seeks) than litigation mounted on a theory that the law orders your cooperation, and, therefore, the courts should require it? If compulsory mediation were intended by this section, a more direct route could easily be envisioned.

Given certain relationships between FMCS and boards of inquiry under sections 206 through 209,³¹ a case for the authority for compulsory mediation can be made.³² But, with this to one side, what effect are we to ascribe to section 204? It appears to add nothing to the functions of FMCS that was not covered in section 203 except for casting unenforceable duties upon the parties. The concepts are somewhat incompatible. A legal duty, as opposed to a moral obligation, necessarily implies enforceability. Perhaps the section has done no harm, or even may have proved useful. However, except for a kind of congressional, moral preachment³³ (which should not be dismissed as worthless) section 204 smacks suspiciously of surplusage. It seems that the possibility of judicial enforcement is remote, and a comparison of section 204 duties and those imposed in section 8(d) of the NLRA will probably leave the reader as dubious as the writer of the benefit of section 204.³⁴

D. Coordinating the Executive Function — Formal Delegation or Ad Hoc Improvisation?

Section 205,³⁵ providing for the establishment of the National Labor-Management Panel, is outstanding for its lack of material assistance in making meaningful the provisions of section 201.³⁶

Perhaps the Congress intended no substance in the statement of policy. That section was in S. 1126³⁷ and was adopted in conference without change. In fact, most of Title II follows the Senate

³⁰ Cf. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

³¹ 61 Stat. 155 (1947), as amended, 29 U.S.C. §§ 176-79 (1964).

³² See text accompanying notes 52-71 *infra* on powers of the board of inquiry.

³³ Cf. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956).

³⁴ See discussion of § 209 at text accompanying notes 286-87 *infra*.

³⁵ 61 Stat. 154 (1947), 29 U.S.C. § 175 (1964).

³⁶ William E. Simpkin, Director of FMCS, has recently revived the panel and started to use it to more creative ends. The panel was appointed by President Kennedy, May 25, 1963, and made its first report to the Director in July, 1964.

³⁷ 80th Cong., 1st Sess. § 205(a) (1947); 1 U.S. NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 145 (1948).

version.³⁸ The Senate report on S. 1126³⁹ reflects qualms over too much government. The committee thought the role of government should be limited to mediation except in dire emergencies. The discussion also indicated the intent to specifically exclude factfinding boards, overall mediation tribunals, and any recommendations.

It could be argued, and probably has been, that the LMRA in creating the FMCS as an independent agency, gave to it certain specific functions to perform in connection with active disputes. Therefore, to the extent that the declaration of policy of the United States in section 201 requires further implementation, the President presumably may seek other legal means to effectuate that policy, limited only by the available supply of creative innovations and funds, and the political realities within which he operates.

Regardless of the concern of the congressional committee, the dynamics of labor-management relations since 1947 have made more government participation necessary. From this juncture, it appears that the future may well place increasing strains upon the collective bargaining process that will make that "third chair at the bargaining table" permanent furniture, albeit not always occupied.

While section 201 of the LMRA provides a policy basis, even if by legislative accident, to support "creative" government assistance, it is unfortunate that the executive branch, even if it is disposed to acknowledge the need and responsibility, must "ad lib" to implement the policy. Programs are likely to be sporadic and uncoordinated, and to be considered fair game for any ambitious agency, or part thereof, that can find the slightest justification in its basic mission for undertaking some activity in the labor-management relations arena.

The Supreme Court decision in *Youngstown Sheet and Tube Co. v. Sawyer*,⁴⁰ voiding a Presidential order of seizure of the steel mills to avert an emergency created by a strike under inherent constitutional powers of the President, created some sensitiveness and caution in the use of the Presidential authority in labor-management relations. However, it has not prevented, as indeed it is not authority for any prohibition, various executive-branch ventures designed

³⁸ H.R. REP. NO. 510, 80th Cong., 1st Sess. 62 (1947); 1 U.S. NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 566-69 (1948).

³⁹ S. REP. NO. 105, 80th Cong., 1st Sess. 13, 14 (1947); 1 U.S. NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407, 420 (1948).

⁴⁰ 343 U.S. 579 (1952).

to promote industrial peace or to assist the parties in resolving particular disagreements.⁴¹

These activities have been collateral to the specific statutory procedures, and seem to stand only upon general executive authority to implement the broad policies of our labor laws.

The necessity for administrative supplementation of the legislative schemes, if they are to be at all practicable, is commonplace. In typical administrative agencies, Congress recognized the inevitable, and indeed the desirable, by authorizing the issuance of rules and regulations. In this fashion the interstices of even a poor legislative vehicle may be adequately filled.

With this in mind, the gaps in Title II might be viewed hospitably, except that the statute gives little hint regarding upon whom the primary responsibility for the national emergency disputes procedures devolves — *except* ultimately upon the President. As to any meaningful implementation of the broader, more dynamic policy concepts in section 201, the legislative history suggests that some members of Congress were unaware of any variance between the clearly implied promise of government assistance and the structure devised to administer that portion of the act.

It is suggested that the multi-agency functions under Title II, the failure to provide for any mechanisms for coordination, and the involvement of the high office of the President invite, if not require, that the President delegate the "quarterbacking." In the mind of the public and, when the public pressures of a large dispute are felt, in the mind of the Congress, it is the Secretary of Labor's job to "do something." The public expects it, demands it, and usually gets it.

Here, it is relevant to note that the President, who by the Labor Management Relations Act has certain functions, can, by another statute, delegate these functions.⁴² However, since "everybody

⁴¹ See, e.g., Exec. Order No. 10891, 25 Fed. Reg. 10525 (1960) (establishing a presidential railroad commission); see particularly, Reports to the President by the Atomic Energy Labor-Management Relations Panel, July 1, 1953 to June 30, 1954 and July 1, 1954 to June 30, 1955. See also, Exec. Order 10988, 27 Fed. Reg. 551 (1962) (employee-management cooperation in the federal service); Exec. Order 10918, 26 Fed. Reg. 1427 (1961) (establishing the President's Advisory Committee on Labor-Management Policy); Exec. Order 10946, 26 Fed. Reg. 4629 (1961) (creating the missile sites labor committee).

⁴² 3 U.S.C. § 301-03 (1964).

Section 301. *General authorization to delegate functions; publication of delegations.*

The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent

knows" that dispute settlement is the Secretary of Labor's job, little thought would be given to the question of delegating such a function to him.⁴³

On the face of the statute, any connection between the functions of the Service under sections 203 and 204 and the actions of the President or other agencies under sections 206 through 208 must be supplied by sheer imagination. The only mention of the Service in these sections is that the President files with it a copy of the board of inquiry's initial report. For all that the statute specified in sections 206 through 208, the Service could well have had no more prior involvement in the dispute than the Library of Congress.

As if to accent confusion, section 209 tosses the Service into the dispute after an injunction has been issued, to assist the parties who were put under a duty to make every effort to adjust their differences. In the next breath, it directs the President, upon the issuance of the injunction, to reconvene the board of inquiry — whose functions for sixty days and whose relationship with the Federal Mediation and Conciliation Service are not apparent at all.

of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: *Provided*, That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. Such designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part.

Section 302. *Scope of delegation of functions.*

The authority conferred by this chapter shall apply to any function vested in the President by law if such law does not affirmatively prohibit delegation of the performance of such function as herein provided for, or specifically designate the officer or officers to whom it may be delegated. This chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.

Section 303. *Definitions.*

As used in this chapter, the term "function" embraces any duty, power, responsibility, authority, or discretion vested in the President or other officer concerned, and the terms "perform" and "performance" may be construed to mean "exercise."

⁴³ In my view, if the Secretary is to coordinate these functions, a formal delegation under the law is desirable.

E. *Triggering the Emergency Dispute Procedure*

Section 206 contains the "trigger" to the national emergency disputes procedures. The term is particularly apt if one accepts one of the repeated criticisms of the act that once the procedures are started they tend to run the 80-day course. A frequent comment in explanation and support of this criticism is that the parties incorporate the procedures into their collective bargaining strategy, thus inviting or anticipating the 80-day injunction.

Section 206, authorizing the President to appoint a board of inquiry, *when in his opinion*, a threatened or actual strike, if permitted to occur or continue, would imperil the national health or safety, seems to be almost unconnected with any settlement efforts which might have been going on in other government agencies. Except that the obvious answer to the question "On what does the President base the opinion?" would be, on information obtained, at least in part, from the Federal Mediation and Conciliation Service, the emergency provisions of the act suggest that the Service is a stranger to the activities which have become a threat to the national health or safety.⁴⁴

The specific duties cast upon a board of inquiry under section 206 charge it with submitting to the President a written report, including information most, if not all, of which is likely to be already in the hands of the Service. The statute then directs the President to file a copy of the board's report with the Service and make the contents available to the public. While the filing requirement might vaguely suggest that the Service is the depository for official papers and records of the Board, it also suggests that the Service is being supplied with some information which will be useful to it in assisting the parties in discharging the duties placed upon them under section 209.

This awkwardness regarding the role of FMCS appears to be the result in part of inartful surgery performed by the 80th Congress in conference.

In Senate Bill 1126⁴⁵ as reported by the Committee on Labor and Public Welfare, section 203 emphasized and encouraged arbitration as a solution to disputes arising out of the collective bargain-

⁴⁴ The notice to FMCS that a contract will be modified or terminated is tucked away in section 8(d)(3) of Title I of the act. 61 Stat. 142 (1947), 29 U.S.C. § 158(d)(3) (1964).

⁴⁵ S. REP. NO. 1126, 80th Cong., 1st Sess. 203 (1947); 1 U.S. NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 449-50 (1948).

ing negotiations to a greater extent than under the law as enacted. Senate Bill 1126, as reported and as passed by the Senate, provided that in the event arbitration at the suggestion of the Federal Mediation and Conciliation Service was refused, "the Director shall at once notify the President and both parties to the controversy, in writing, that its efforts at mediation and conciliation have failed."⁴⁶ The minority report⁴⁷ criticized this provision as seriously weakening the functions of the Federal Mediation and Conciliation Service, relegating it to a secondary position, and tending to make it a certifying device to get disputes to the White House. The report goes on to point out that the flood of dispute cases to the White House would result either in the creation of a White House agency for disputes, or their being turned back to the Secretary of Labor; thus the conciliation functions would end where they started — with the Secretary of Labor.

The available records do not indicate why, but section 203 as it emerged from conference did not mention "arbitration" as a device to be encouraged by the FMCS.⁴⁸ When revisions of Title II are discussed, concern is still voiced that the procedure should not result in too easy access to the President; moreover, the procedure should not be automatic. It still seems that the objection to the proposal that the Service, upon the rejection of its suggestion of arbitration by either party report to the President that its efforts at mediation and conciliation had failed was, and is, a valid one; particularly if, as the minority report asserted, such a report by FMCS would preclude it from doing anything else with that dispute unless the President invoked the emergency procedure. However, in removing all references to the arbitration procedure, Congress also removed all connecting links in the statute between the FMCS's pre-emergency activity and the triggering of the emergency dispute procedures of sections 206 to 210.⁴⁹ Thus the statute seems to jump a step, and that step would have been supplied by the FMCS's notice to the President that all mediation efforts had failed.

Informal procedures to supply this missing link have been im-

⁴⁶ S. 1126, 80th Cong., 1st Sess. § 203 (a) (1947).

⁴⁷ S. REP. NO. 105, pt. 2, 80th Cong., 1st Sess. 29-33 (1947) (minority report); 1 U.S. NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 491-95 (1948).

⁴⁸ Compare L.M.R.A. § 203(d), 61 Stat. 153 (1947), 29 U.S.C. § 173(d) (1964), with L.M.R.A. § 203(c), 61 Stat. 153 (1947), 29 U.S.C. § 173(c) (1964).

⁴⁹ 61 Stat. 155-56 (1947), as amended, 29 U.S.C. §§ 176-80 (1964).

provided.⁵⁰ They vary somewhat depending upon the relationship between the Secretary of Labor, the Director of FMCS, and the White House in a given administration. However, the statutory uncertainties as to the responsibility for "triggering" the emergency disputes procedures have not, if critics of the act are to be credited, affected the ability of the parties to anticipate the procedures in their bargaining tactics. Consequently, it is suggested that the effect of the uncertainty has been largely to create confusion among the government officials as to the extent of their responsibilities.

The intended functions of a board of inquiry under section 206 are subject to some confusion. Popular discussion has centered around the function of any such board in advising the President regarding the existence of a threat to the national health and safety. Under the classical interpretation of the language of the act, the President must be of the opinion that such a threat exists *before* he is authorized to appoint a board of inquiry. It is recognized that there is the interpretation that the phrase "he may appoint" a board of inquiry is language of discretion. However, the more persuasive interpretation is that it is language both of discretion and of authorization.⁵¹ In any event, the verbal logic of the language would argue for the interpretation that he may exercise any discretion that he has only after the condition authorizing him to act occurs, that is, when (after) he is of the opinion that a dispute threatens or may threaten the national health or safety, he is authorized to appoint a board.

III. BOARDS OF INQUIRY — POWERS, FUNCTIONS AND PROCEDURES

A. *General Powers*

Section 207⁵² deals primarily with the composition, compensation, and powers of a board of inquiry. The only other references to its duties are in sections 206 and 209(b). There is a reference

⁵⁰ See discussion of "status reports" and other such devices at text accompanying notes 52-71 *infra*.

⁵¹ The stronger "theoretical" argument supports the latter. Given the recognition of a condition which actually imperiled the health or safety of this nation, action or non-action as a legal choice by a Chief Executive would be inconsistent with the almost inherent duty of his position.

⁵² L.M.R.A. § 207, 61 Stat. 155 (1947), 29 U.S.C. § 177 (1964). Section 207 states:

(a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act

in section 210 to the fact that the President in his report to Congress shall include the findings of the board of inquiry. This choice of language, combined with: (1) directing the board to inquire into the issues and include in its initial report *a statement of the facts* with respect to the dispute and each party's statement of its position; and (2) empowering the board to conduct hearings to ascertain the *facts* with respect to causes and circumstances of the dispute;⁵³ and (3) making sections 9 and 10 of the Federal Trade Commission Act⁵⁴ applicable to the power and duties of such boards in conducting any hearings or inquiries suggest more formal factfinding than we ordinarily assume is engaged in by boards of inquiry. At this point, it seems proper to ask to what end would any such formality be required? Generally, exacting requirements applicable to administrative findings are grounded upon the accepted ideal that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."⁵⁵ However, unless the board of inquiry is to *find* that a threat to the national health or safety exists (which function is certainly not apparent on the face of the statute), there seems no place in the law where its role would come in for court review.⁵⁶ The statute seems to place the judgment of the threat to the national health and safety first solely upon the President and then upon the courts, when they consider the Attorney General's petition for an injunction.

in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of \$50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board. *Ibid.*

⁵³ L.M.R.A. § 207(a), 61 Stat. 155 (1947), 29 U.S.C. § 177(a) (1964).

⁵⁴ 38 Stat. 722-23 (1914), as amended, 15 U.S.C. §§ 49-50 (1964).

⁵⁵ SEC v. Chenery Corp., 318 U.S. 80, 94 (1942); see also DAVIS, ADMINISTRATIVE LAW TEXT § 16.09 (1959).

⁵⁶ Some authorities suggest that the President's conclusion on this must await a report of the board of inquiry, which further suggests the board should speak to the issue. See COX & BOK, CASES ON LABOR LAW 897 (5th ed. 1962). However, it seems significant that the statute does not even require that the board's report be filed with the court in the litigation, although in practice they are filed.

Section 208,⁵⁷ as it relates to the power of the President is, on its face, primarily procedural. The language "upon receiving a report from a board of inquiry, the President may direct the Attorney General to petition any district court . . ."⁵⁸ for an injunction suggests: (1) he may not direct the Attorney General to seek an injunction without receiving a report; (2) the President may direct the seeking of an injunction immediately or very soon after a report is received; or (3) he may, in his discretion, refrain from giving any such direction even after receiving such a report.

The other portions of section 208 deal with the functions of the court, its jurisdiction, and the removal of certain limitations on the power of federal courts to grant injunctions in labor disputes. It may also suggest, or be subject to such an interpretation, at least, that the procedures of sections 206-208 are to be complied with as a condition precedent to vesting a court with jurisdiction.⁵⁹

In section 208 the court review is spelled out in language which suggests findings *de novo*. The language is virtually identical with that used in section 206 as applied to the opinion of the President prior to his appointment of a board of inquiry. No doubt, however, statements from the reports of the boards of inquiry find their way into the court actions. The question being raised, admittedly a narrow one, is that if such "statements or findings" are not subject to the formalities attendant to findings of administrative agencies, are

⁵⁷ L.M.R.A., 61 Stat. 155 (1947), as amended, 29 U.S.C. § 177 (1964). Section 208 states:

(a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out —

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 29, secs. 346 and 347). *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Many of the court actions carry a finding of fact by the court that the procedures of the act had been complied with up to that point.

they, and legal actions dependent thereupon, subject to challenge? When substantial portions of the findings of a board of inquiry are incorporated into the "findings of fact" of a court of law, unless thoroughly tested during the trial, they will have attained a status very hard to impeach upon appeal without ever having been subject to the critical scrutiny usually given to material facts upon which judicial action is based.

A closer look into the basis for injunctions, requires more substantive treatment than is possible in this discussion. The purpose here is merely to flag another element of confusion in the language of the act. The statute nowhere casts the duty upon the board of inquiry to determine the existence of a threat to the national health or safety. It can, of course, be argued that the duties of the board under section 206 are limited only by the prohibition upon the making of recommendations.⁶⁰ But the statute calls for a statement of facts with respect to the dispute, and if such facts are to include the fact of a threat to national health and safety, it argues for *more* formality in the proceedings through which such findings of fact are made.

Section 207 gives a board of inquiry considerable power of compulsion. It can sit and act anywhere in the United States and conduct such hearings, either in private or public, as it may deem necessary or proper. The language suggests that the board need not conduct any hearings, and, if it does so, they may be public or private. There is no clue as to what factors would be relevant in determining "necessary and proper." Boards are also armed with the powers of the Federal Trade Commission relating to the attendance of witnesses and the production of books, papers, and documents.⁶¹

Sections 9 and 10 of the Federal Trade Commission Act,⁶² are incorporated by reference into Title II. Undoubtedly a board of inquiry can issue subpoenas requiring attendance and testimony of witnesses and the production of books and records. The question, however, is what test of relevancy and reasonableness is to be applied

⁶⁰ This prohibition is found in § 206. The act is silent on recommendations in the final report of a board of inquiry. It is submitted, however, that the legislative history is clear that recommendations were not to be made by such boards.

⁶¹ Federal Trade Commission Act §§ 9, 10, 38 Stat. 722-23 (1914), as amended, 15 U.S.C. §§ 49-50 (1964). Such powers include the power to obtain and copy any documentary evidence of any corporation being investigated or proceeded against, the power to require the attendance and testimony of witnesses and the production of relevant documentary evidence, the right to invoke the power of the courts of the United States to compel the attendance of witnesses and the production of documents, and the power to order the taking of depositions. *Ibid.*

⁶² 38 Stat. 722-23 (1914), as amended, 15 U.S.C. §§ 49-50 (1964).

in the exercise of these powers? If the board is to determine the existence of a threat to national health and safety, the scope of its powers of compulsion may be considerably more than otherwise. It might even of necessity extend to the departments and bureaus of the government. The powers of a board of inquiry surely apply both to corporations and labor organizations. But this would not be enough if the board is to make findings on the existence of a threat to the national health and safety. If section 8 of the Federal Trade Commission Act⁶³ is applicable, and the President so directs, the affidavits presently collected by the Department of Justice before seeking an injunction could be collected by a board of inquiry, along with testimony of any representative of a government agency. It would appear that the Attorney General, upon request of a board of inquiry, could seek court assistance in compelling, for instance, the Secretary of Defense or the Director of FMCS to testify before the board.

In examining the question of compulsion, it should first be asked whether Congress clearly understood and intended that the board of inquiry should have compulsory powers which may not only extend to the disputants but might extend to agencies of the government under particular circumstances. There is no question that Congress intended the factfinding boards, as that term was understood in the 79th Congress, to be armed with subpoena powers. Senate Bill 1661⁶⁴ and H.R. 4908⁶⁵ both contained provisions granting factfinding boards certain powers of compulsion. However, those bills incorporated section 11⁶⁶ of the National Labor Relations Act relating to the investigatory powers of the NLRB. This was also true of section 4 of S. 1419,⁶⁷ introduced in the same Congress, which, at least to some extent, is a forerunner of the present bill. The boards referred to in the latter bill were even called boards of inquiry.

It is not too difficult to imagine a situation in which, despite the

⁶³ 38 Stat. 722 (1914), 15 U.S.C. § 48 (1964). This section is incorporated by reference in § 9, §§ 1, 4, *supra* note 45.

⁶⁴ 79th Cong., 1st Sess. (1945).

⁶⁵ 79th Cong., 1st Sess. (1945); see also the President's Message to Congress, 91 CONG. REC. 11332-33 (1945); section 11 of the National Labor Relations Act before the 1947 amendments. Ch. 372, 49 Stat. 455 (1935). This section is ramseyered and the portions which were in effect prior to the 1947 amendments are in Roman letters in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1677-79 (1948).

⁶⁶ 61 Stat. 136 (1947), 29 U.S.C. § 151 (1964).

⁶⁷ 79th Cong., 1st Sess. (1945).

general direction by the President to agencies of the government to cooperate with the board of inquiry, a given agency may object to disclosing information because it deems that the statute under which it operates requires the information to be kept confidential. While these situations would be rare, it seems possible to set the stage for the issuance of a subpoena by a board of inquiry running to a department of government. On the face of it, it does not seem that there is a material distinction⁶⁸ between the powers granted in the 79th Congress versions of the factfinding boards and those ultimately incorporated into the power of the board of inquiry. If anything, section 8 of the Federal Trade Commission Act⁶⁹ seems to enable a board of inquiry not only to get records, papers, and information in possession of the given department relating to the parties to the dispute but also to get personnel detailed to it, as the President may direct.

It certainly seems, however, that in any exercise of subpoena power rather extensive formal procedures would have to be observed. It would also seem possible to challenge certain actions of the board at some stage short of the Attorney General's move to obtain the 80-day injunction.⁷⁰

There is at least apparent logic in the theory, although not in the language of the act, that Congress intended the boards of inquiry to hold formal hearings on all issues and to make findings, including the finding that the dispute threatens the national health or safety.⁷¹ Under this statute, neither the President nor the Attorney General has any compulsory means of investigating or obtaining evidence to support the petition for an injunction. The Attorney General can hardly go into court alleging a national emergency and at the same time requesting the court to subpoena the persons or records necessary to establish the existence of a condition precedent to his authority to institute the action. Presumably the President and the Attorney General should know the facts before deciding the existence of a national emergency and the need to proceed for injunc-

⁶⁸ The details of the provisions differ, particularly the immunity and service of process provisions, but the differences are not material to this discussion.

⁶⁹ See note 63 *supra*.

⁷⁰ In studying the record of the 24 instances in which the emergency disputes provisions have been used, there was only one use of the subpoena powers. This occurred in the 1948 bituminous coal miners' dispute over pensions. For a listing of the 24 disputes see note 273 *infra*.

⁷¹ Many of the initial reports of boards have made findings on the "health or safety" issue, and in some instances, particularly in the earlier stages of the use of the act, fairly extensive hearings were held. (FMCS Files, first 10 disputes.)

tive relief. Under this statute, it is the board of inquiry that is armed with the necessary powers of compulsion to obtain the relevant information. However, the garbled statement of functions under Title II casts a cloud over just what these boards are supposed to do and how they are supposed to proceed.

If they are to find facts relevant to the eventual injunction action, then the statute's specific direction that mediation subsequent to the injunction is to take place with the assistance of the Federal Mediation and Conciliation Service (with no reference to any mediatory activity by boards of inquiry) contributes to statutory integrity. A board of inquiry which had subpoenaed the parties and their records and used other compulsion against them might not be the best agency for mediation.

B. Functions, Procedures and the APA

Since procedures for boards of inquiry are absent from the statute, we could look to the Administrative Procedure Act (APA)⁷² for guidance. But does the APA apply? It is clear from the definition of "agency" in section 2⁷³ of the APA that boards of inquiry are not specifically excluded unless they come within the exception for agencies composed of representatives of the parties to the dispute determined by them. However, this does not appear to excuse such agencies from promulgating their rules of procedure, publishing opinions and orders, and making matters of official record available to the affected persons under section 3.⁷⁴

The legislative history of the APA⁷⁵ indicates that the definition of "agency" was, advisedly, defined broadly as each "authority (whether or not within or subject to review by another agency) of the Government . . ." in order to cover the persons vested with the power to act because such persons could be some subordinate or semi-dependent person within the form of the organization.

Such scope would seem to cover boards of inquiry. In addition, the 1947 manual⁷⁶ on the APA, prepared by the Department of Justice, explains the exceptions. With respect to "agencies composed of representatives of the parties or the representatives of or-

⁷² Administrative Procedure Act, 60 Stat. 237 (1946), as amended, 5 U.S.C. § 1001 (1964).

⁷³ 60 Stat. 237 (1946), as amended, 5 U.S.C. § 1001(a) (1964).

⁷⁴ 60 Stat. 238 (1946), 5 U.S.C. § 1002 (1964).

⁷⁵ S. DOC. NO. 248, 79th Cong., 2d Sess. 196 (1946).

⁷⁶ ATTY. GEN. MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947).

ganizations of the parties to the dispute determined by them"⁷⁷ the manual indicated the intention to exclude agencies such as the National Railroad Adjustment Board, and agencies with a tripartite composition (industry, labor, and the public), such as the Railroad Adjustment Board and special factfinding boards. The exemption was intended to extend not only to such boards occasionally convened to determine, mediate, or arbitrate particular disputes, but to similar boards or agencies composed wholly or partly of full-time officers of the federal government.⁷⁸ The explanation was that such agencies tend to be arbitral or mediating agencies rather than tribunals. Query, with this explanation, does the language "similar boards or agencies composed wholly or partly of full-time officers of the federal government" exempt boards of inquiry from the APA even though such boards are rarely (if ever) tripartite and, by statute, are neither boards of arbitration or mediation?

Before making a judgment, an examination of the functions such boards perform is necessary. Do they engage in rulemaking, issue orders, or adjudicate within the meaning of the APA? Do they issue licenses or impose sanctions or grant relief? Such actions do not seem apparent, except where the published reports may reflect adversely upon the parties.

But, even so, what about sections 3 and 6 of the APA?⁷⁹ Even exempt agencies are required to conform to the public information provisions of section 3 unless the exception for "secrecy in the public interest" or "any matter relating solely to the internal management of the agency"⁸⁰ are met. Section 6, relating to ancillary matters, is explained in the legislative history of the APA as containing "provisions respecting various procedural rights which may be incidental to either rule making or adjudication, or *independent of either*."⁸¹

The language of the APA and its legislative history suggest that the proceedings of boards of inquiry would be subject to the relevant provisions of that act. Furthermore, it seems appropriate to raise the question of the applicability of the APA if the functions

⁷⁷ *Id.* at 10-11.

⁷⁸ *Id.* at 10-11; see also S. DOC. NO. 248, 79th Cong., 2d Sess. 196, 253, 307, 355 (1946).

⁷⁹ Administrative Procedure Act § 3 (publication of information, rules, opinions, orders and public records), § 6 (ancillary matters), 60 Stat. 238, 240 (1946), 5 U.S.C. §§ 1002, 1005 (1964).

⁸⁰ Administrative Procedure Act § 3, 60 Stat. 238, 5 U.S.C. § 1002 (1964). See also S. DOC. NO. 248, *supra* note 75, at 255.

⁸¹ *Id.* at 263. (Emphasis added.)

of the board of inquiry were slightly altered. What if such boards were required to find the existence of an emergency? If such a requirement were a condition precedent to injunctive relief, would such action by the board make it an agency which should be subject to all of the procedural safeguards of the APA? Perhaps this function would fall into the area of investigation upon which a decision to "prosecute" might be made. The decision to go ahead with injunctive action would still be discretionary with the President. However, in view of recent characterization of the President's opinion as to the existence of a threat to the national health or safety as a determination,⁸² fair procedures prior to the decision to litigate would seem even more desirable.

What if boards of inquiry were empowered to make recommendations? Such recommendations would be a part of the board's report which would be made public. If, as is often inevitable, such report and recommendations also contain some element of blame-fixing, would their publication elevate them to the dignity of a "sanction" within the meaning of the law?⁸³ If so, would such a situation make other procedures of the APA⁸⁴ appropriate for boards of inquiry?

To the extent that prior reports of such boards have censured one or both parties, was publication a "sanction"? Even if the action of the boards is not subject to judicial review by virtue of section 10 of the APA, it would appear vulnerable to attack on a due process theory if the proceedings are unfair or its findings arbitrary.⁸⁵

As the LMRA is framed, the court is empowered to issue an injunction if it finds the dispute will imperil the national health or safety. This court finding is an action *de novo* even though it is in review of the President's opinion.⁸⁶ If the court actions in these cases are based in any substantial degree upon the findings of boards of inquiry, and available opinions seem to indicate substantial reliance on such reports for certain facts, it strongly urges the desira-

⁸² *United Steelworkers v. United States*, 361 U.S. 39, 48 (1959).

⁸³ CHAMBERLAIN, DOWLING & HAYS, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* 79-92, 111-20 (1942). *But see*, note 202 *infra*.

⁸⁴ Administrative Procedure Act §§ 9-10, 60 Stat. 242-43 (1946), 5 U.S.C. §§ 1008-09 (1964). For the actual statute on the scope of review see 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1964).

⁸⁵ See, *e.g.*, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 135-47, 157-74 (1951).

⁸⁶ *United Steelworkers v. United States*, 361 U.S. 39, 43-44 (1959).

bility, if not the requirement, of some type of definite board procedures.

(1) *Adverse Publicity as a Sanction.*—Adverse publicity is considered to be among the commonplace administrative penalties. Publicity is used as a sanction by the Securities and Exchange Commission and some other agencies.⁸⁷ The extent of procedural protections necessary prior to the exercise of such a sanction is somewhat blurred. However, an actionable injury flowing from the imposition of the sanction without notice or hearing has been recognized.⁸⁸ The *Joint Anti-Fascist Refugee Comm. v. McGrath*⁸⁹ case arose upon the petitioner's suit for a declaratory judgment and injunctive relief. The court below had dismissed the case for failure to state a claim upon which relief could be granted and the reversal by the United States Supreme Court merely determined that the parties had stated a claim upon which relief could be granted. The action complained of was taken without notice or hearing. Notice and hearing are probably the most basic of our concepts of procedural fair play. In a subsequent case, the Supreme Court referred to the actions taken by the government agency in the *Anti-Fascist Committee* case as "determinations in the nature of adjudications affecting legal rights."⁹⁰ The significance of the characterization by the Court of the action as "in the nature of adjudications" is that the act complained of was the designation by the Attorney General of the petitioner organizations as communist in a list which the Attorney General then furnished to the Loyalty Review Board for use in connection with the determinations of disloyalty of government employees. The Board disseminated the list to all departments and agencies of the government. The Court said that when the acts of the government agencies were stripped of Presidential authorizations claimed for them, they stood as unauthorized publications of admittedly unfounded designations of the complaining organizations as communist.⁹¹ Their effect was to cripple the functioning and damage the reputation of those organizations in their respective communities in the nation. The complaints, on that basis, were

⁸⁷ 1 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.13, 4.04 (1958).

⁸⁸ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 135-41 (1951). Justice Frankfurter discusses the due process concept in procedures of administrative agencies in his concurring opinion. *Id.* at 149, 157-75.

⁸⁹ *Ibid.*

⁹⁰ *Hannah v. Larche*, 363 U.S. 420, 451 (1960).

⁹¹ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951).

held sufficient to charge that such acts violated the organizations' common law right to be free from defamation. Although the proceedings have been characterized as in the nature of adjudications, it seems clear the injury (or the sanction) which had been the effect of the government's action was due to the designation and publication.

*Hannah v. Larche*⁹² is significant with regard to appropriate procedures for factfinding or investigative bodies. It is not significant for what it specifically decides, namely that the rules of procedure adopted by the Civil Rights Commission were not offensive to due process for failing to afford persons accused of discrimination the right to be apprised of specific charges against them, or of the identity of their accusers, or the right to confront and cross examine witnesses appearing at the commission hearings, but for the strong suggestion that if the due process concept is to be served, even investigative hearings⁹³ should have procedures which insure fair play. The Court said:

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.⁹⁴

The significant factor here is that while general factfinding investigations⁹⁵ were not construed to require the full panoply of judicial procedures, there is no suggestion that factfinding should not have sufficient procedures to insure fair play. More significantly,

⁹² 363 U.S. 420 (1960).

⁹³ See also Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193 (1956).

⁹⁴ *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

⁹⁵ But see Davis, *supra* note 93, at 199-201. It has a useful definition of "adjudicative facts" and "legislative facts" which suggest full trial type procedures for certain hearings which may be factfinding investigations.

the appendix to the opinion⁹⁶ describes the rules of procedure governing the authorized investigative proceedings of a representative group of administrative agencies, executive departments, presidential commissions, and congressional committees. It did not purport to be a complete enumeration of the many agencies, but rather it was designed to demonstrate that the procedures which were adopted by the Civil Rights Commission were similar to those which had traditionally been used by investigating agencies in both the executive and legislative branches. The inference appears strong that, even if the board of inquiry were limited solely to fact gathering, past practices would lead to judicial expectation that such boards would have at least minimal, predetermined procedures. Under the functions given to the boards by the statute, and those performed by such boards despite the statute, basic procedural protections would seem to be required.

Mr. Justice Frankfurter, concurring in *Hannah v. Larche*,⁹⁷ made the following comment:

Were the Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides. The objectives of the Commission on Civil Rights, the purpose of its creation, and its true functioning are quite otherwise. It is not charged with official judgment on individuals nor are its inquiries so directed. The purpose of its investigations is to develop facts upon which legislation may be based. As such, its investigations are directed to those concerns that are the normal impulse to legislation and the basis for it. To impose upon the Commission's investigations the safeguards appropriate to inquiries into individual blameworthiness would be to divert and frustrate its purpose⁹⁸

The significance of the foregoing comment in the context of the discussion is that a board of inquiry may well be exercising an accusatory function regarding the responsibility of the party disputants for the failure of collective bargaining, may well be directing its inquiry into party blameworthiness, and most certainly is intending to advertise its findings. Moreover, although the statute does not specifically require it, the report of the findings of such boards enters into the litigation for the injunction. Mr. Justice Frankfurter's

⁹⁶ *Hannah v. Larche*, 363 U.S. 420, 454-85 (1960).

⁹⁷ 363 U.S. 420 (1959).

⁹⁸ *Id.* at 488.

words not only buttress the notion that the sanction of publication warrants adequate procedural protections in making the findings, but suggest that the functions of assessing blameworthiness and advertising findings would alter the nature of the Commission's function (change it from an investigatory body to something of a different nature). While recognizing that the cases discussed here are not precisely in point on the matter which concerns us, they seem strongly persuasive regarding the prudence of not only having published procedures for the boards of inquiry, but of also following such procedures in the conduct of the board's affairs.⁹⁹

(2) *Factfinding and Boards of Inquiry Distinguished — Legislative History and Contemporaneous Construction.*—The bound volumes of the legislative history of the Labor Management Relations Act,¹⁰⁰ have a paucity of information on the details of the national emergency disputes procedures. In neither the Senate nor the House do the explanation and debates contribute much to a clear understanding of congressional intent regarding the positive aspects of the national emergency disputes procedures. There are a number of "negative contributions."

Sections 206-210 of the LMRA, except for rather minor changes — principally the placing of powers in the President rather than in the Attorney General — are the same as those of S. 1126¹⁰¹ as reported and passed by the Senate. It is clear throughout that under section 206, boards of inquiry were not intended to have authority to make recommendations for settlement of disputes. However, what they are to do is under a cloud. Moreover, upon the issuance of an injunction, the act (and the bills) direct that the board be reconvened. For what? The act says merely that at the end of a 60-day period (unless the dispute has been settled by then), the board of inquiry shall report, etc. Unless one can read into the parenthetical clause some hidden directive to mediate, the statute, after directing the reconvening of the board of inquiry immediately after an injunction issues, gives no new function to the board except the writing of a final report. In fact, literally construed, the board could

⁹⁹ See *United States v. International Longshoremen's Ass'n*, Civil No. 64 Civ. 3004, S.D.N.Y., Oct. 10, 1964, for an example of a union's unsuccessful challenge to the jurisdiction of the court based upon allegations of improper board of inquiry proceedings.

¹⁰⁰ U.S. NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1948).

¹⁰¹ Compare H.R. REP. NO. 510, 80th Cong., 1st Sess. 21 (1947), with S. 1126, 80th Cong., 1st Sess. 48 (1947). See also 1 U.S. NLRB, *op. cit. supra* note 100, at 146, 274.

not report until after sixty days (unless the dispute was settled) because the *current* position of the parties must be included. Presumably *current position* means current as of the end of the sixtieth day.

There are those who advocate mediation by a board during the intervening period. There is certainly a practical argument for such activity. However, not only does the statute specifically commit post-injunctive mediation to the Federal Mediation and Conciliation Service, but it was an essential element of one of the primary objectives of the bill, if Senator Taft, as major spokesman for the intended meaning of the act, is any authority.¹⁰²

The Senate report on S. 1126¹⁰³ confused at least as much as it

¹⁰² 93 CONG. REC. 3950-52, 4265, 4393 (1947), 2 U.S. NLRB, *op. cit. supra* note 100, at 1008, 1074, 1133 (Remarks of Senator Taft).

¹⁰³ S. REP. NO. 105, 80th Cong., 1st Sess. (1947). The relevant sections of this Senate report are worth setting out in full:

SETTLEMENT OF LABOR DISPUTES

In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. In our judgment, while none of the suggestions is completely devoid of merit, the experience of the Federal Government with such devices has been such that we do not feel warranted in recommending that any such plans become permanent legislation.

Under the exigencies of war the Nation did utilize what amounted to compulsory arbitration through the instrumentality of the War Labor Board. This system, however, tended to emphasize unduly the role of the Government, and under it employers and labor organizations tended to avoid solving their difficulties by free collective bargaining. It is difficult to see how such a system could be operated indefinitely without compelling the Government to make decisions on economic issues which in normal times should be solved by the free play of economic forces. Moreover, the wartime experiment of the 30-day waiting period under the War Labor Disputes Act was not a happy one, since it was too frequently used as a device for bringing to a rapid crisis disputes which might have been solved by patient negotiation. For similar reasons except in dire emergencies the establishment of fact-finding boards or over-all mediation tribunals also cause dubious results. Recommendations of such bodies tend to set patterns of wage settlements for the entire country which are frequently inappropriate to the peculiar circumstances of certain industries and certain classes of employment

The mediation title emphasizes the importance of adjusting disputes through conferences between employers and labor organizations with the Federal Government making available to the parties in the event of an impasse the services of trained mediators. The bill provides for a Federal Mediation Service under a single Director to be appointed by the President with the advice and consent of the Senate. The personnel and functions of the present Conciliation Service in the Department of Labor are transferred to the new Service, thereby relieving the Secretary of Labor of the burdens incident to the administration of such an agency. In taking this step the committee did not overlook the fact that the prestige of the Secretary, as an adviser to the President, is often an important factor in bringing about the settlement of a dispute of national magnitude. Accordingly, the bill should not be understood as pro-

clarified.¹⁰⁴ The act (and the bill reported on) provides for a board to "inquire into the issues involved in the dispute" and to include in its report "a statement of the facts with respect to the dispute."¹⁰⁵ In view of the first two paragraphs of this section of the Senate report (excerpted in footnote 103), what kinds of "factfinding" are these boards to engage in? Reading the fourth paragraph of that excerpt along with the statute, what "advice" are they supposed to give and on what "matter"? And what are such boards supposed to do, after being reconvened, "during the period in which the Federal Mediation Service is seeking to assist the disputants in reaching a settlement"?

hibiting the Director of the new Federal Mediation Service from calling upon the Secretary of Labor for assistance in major crises.

While the committee is of the opinion that in most labor disputes the role of the Federal Government should be limited to mediation, we recognize that the repercussions from stoppages in certain industries are occasionally so grave that the national health and safety is imperiled. An example is the recent coal strike in which defiance of the President by the United Mine Workers Union compelled the Attorney General to resort to injunctive relief in the courts. The committee believes that only in national emergencies of this character should the Federal Government be armed with such power. But it also feels that this power should be available if the need arises

We concluded, therefore, that the permanent code of laws of the United States should make it clear that the Attorney General should have the power to intervene and secure judicial relief when a threatened strike or lock-out is conducted on a scale imperiling the national health or safety. Recognizing that the right to secure injunctive relief is subject to abuses, this bill is carefully drawn to guard against excessive resort to the courts. It provides that the Attorney General should not petition a Federal court for such relief until he has convened a special board of inquiry to advise him on the matter. It also requires a finding by the court that such drastic measures are necessary as a prerequisite to obtaining a temporary restraining order or other injunctive relief. It makes interlocutory orders subject to appellate review and further provides for the board of inquiry being reconvened during the period in which the Federal Mediation Service is seeking to assist the disputants in reaching a settlement.

Should all such measures prove unavailing after 60 days have elapsed, the National Labor Relations Board is directed by the bill to poll the employees affected on the question of whether or not they wish to accept or reject the last offer of their employer. When results of such ballot are certified, the Attorney General must then ask the court to vacate the injunction. Under these provisions, any temporary restraining order or injunction would not remain in effect for more than 80 days. In most instances the force of public opinion should make itself sufficiently felt in this 80-day period to bring about a peaceful termination of the controversy. Should this expectation fail, the bill provides for the President laying the matter before Congress for whatever legislation seems necessary to preserve the health and safety of the Nation in the crisis. *Id.* at 13-15.

¹⁰⁴ The confusion seems shared by Senator O'Mahoney. See 93 CONG. REC. 4722 (1947), 2 U.S. NLRB, *op. cit. supra* note 100, at 1270 (Remarks of Senator O'Mahoney). See also 93 CONG. REC. 4154 (1947), 2 U.S. NLRB, *op. cit. supra* note 100, at 1044 (Remarks of Senator Murray).

¹⁰⁵ L.M.R.A. § 206, 61 Stat. 155 (1947), 29 U.S.C. § 176 (1964).

The Senate minority report¹⁰⁶ criticized many aspects of the dispute settlement procedures¹⁰⁷ of the bill as reported, with concentrated attention upon, among other things, its tendency to discourage arbitration. A particularly persuasive comment concerned the requirement that, upon rejection by either party of a Federal Mediation and Conciliation Service suggestion of arbitration, the Director was required to report to the President that efforts at mediation and conciliation had failed.¹⁰⁸ The board of inquiry procedures were to take over after that point. This was criticized as reducing the Service to a certifying agency for appeal to a higher level and likely to place more disputes at the door of the White House and then back to the Secretary of Labor. The minority report stated that the Service would have no further authority to assist the parties once a proposal for arbitration was refused; consequently, some other agency would have to take up where the Federal Mediation and Conciliation Service stopped. This condition, assuming the analysis was legally correct, would have obtained only during the period between notice to the President and the issuance of the injunction.¹⁰⁹

With such a legislative record, one can only speculate what, if anything, Congress intended should fill the gaps it knowingly left in the procedures. Congress was aware that, with removal of the requirement that upon rejection of arbitration the Federal Mediation and Conciliation Service was required to notify the President that mediation and conciliation had failed, there was no statutory transmission belt from the functions of the Service to the emergency procedures. Perhaps Congress removed too much. A notice from the Service to the President of a breakdown in bargaining could have been provided without tying it to a refusal of arbitration or any other factor except the judgment of the Director of the FMCS. As a practical matter, this did occur at least in the early uses of the statute.¹¹⁰ It is not unlikely that because there is no statutory link between the emergency procedures and the Director of the Federal

¹⁰⁶ S. REP. NO. 105, 80th Cong., 1st Sess., pt. 2, at 29-31 (1947), 1 U.S. NLRB *op. cit. supra* note 100, at 491-93.

¹⁰⁷ Part of the confusion regarding specific functions under these provisions stems from the term "dispute settlement procedures," which seems more an expression of hope than a general description of assigned duties suited to that end.

¹⁰⁸ These objections may have resulted in the ultimate removal of the arbitration features from the act in conference.

¹⁰⁹ See L.M.R.A. § 209, 61 Stat. 155 (1947), 29 U.S.C. § 179 (1964); see also S. REP. NO. 105, 80th Cong., 1st Sess., pt. 2, at 15 (1947).

¹¹⁰ 1948 FMCS ANN. REP. 40. In the first 10 instances of the invocation of the procedures, presidential action was preceded by a "status report" from the Director of FMCS; copies of such reports are in the FMCS files on the first 10 cases.

Mediation and Conciliation Service and/or the Secretary of Labor, that other government agencies and interested parties will exert pressure directly upon the White House for the use, or non-use, of the procedures. This lack of clarity in the role of FMCS in triggering the act, selecting and assisting boards of inquiry, and the relationship of the functions of the two entities after an injunction issues contributes to the defeat of one aim of the Taft-Hartley amendment — that of enhancing the status of the Service.¹¹¹

With discouraging monotony, it seems that useful legislative considerations of issues which perplex the lawyers and administrators, too often take place in the Congress preceding that in which the law is enacted. The weight to be given such material in establishing legislative intent for litigation purposes is not clear, but, legal theory to one side, it is often the only source of enlightenment regarding the terms as used by the legislators and witnesses as they discussed legislative proposals. The discussions of the "settlement of labor disputes" in Senate Report No. 105 on S. 1126¹¹² and the resultant Title II enacted into law by the 80th Congress, are more understandable with some legislative history of H.R. 4908¹¹³ (the so-called Case Bill) as background.¹¹⁴

¹¹¹ See text accompanying notes 171-79 *infra*.

¹¹² S. REP. NO. 105, 80th Cong., 1st Sess., pt. 2, at 13-15 (1947).

¹¹³ 79th Cong., 1st Sess. (1945).

¹¹⁴ The following is a brief, contemporaneous summary of that legislation contained in an unpublished Memorandum, Nov. 7, 1946, Legislative Files on the Case Bill, Office of the Solicitor, U.S. Dep't of Labor. (Editor's note: The citations contained in the following quotation have been reproduced as they appear in the Memorandum.):

On December 3, 1945, President Truman sent a message to Congress requesting the enactment of legislation providing for the establishment of fact-finding boards to aid in the settlement of labor disputes seriously affecting the national public interest (91 Cong. Rec. 11471-72).

The legislation which the President recommended would have empowered the President to establish factfinding boards in cases where labor disputes affecting the public interest continue without agreement being reached by the parties. These boards were to find and publish the facts in such labor disputes and to make their recommendations in accordance therewith. The pressure of public opinion was intended to insure compliance by the parties with their recommendations. As adjuncts to this process the President recommended the inclusion of cooling-off periods and the subpoena power. During the period of investigation by factfinding boards the parties to a dispute were to be required to maintain the status quo existing prior to the dispute. To aid in their investigations the factfinding boards were to be given the power to subpoena the books and records of either party.

Two bills, embodying the President's suggestions, S. 1661, and H.R. 4908, were thereupon submitted, one in each House in Congress, (91 Cong. Rec. 11705, 11709-11). These bills were immediately referred to the Labor Committees of the House and Senate. The Senate Education and Labor Committee started hearings on December 12, 1945. Included for study, along with S. 1661, were S. 1419, the McMahon bill and S. 1171, the Ball-Burton-

It is safe to assume that the 80th Congress was aware of the meaning of the term "factfinding" as customarily used during that

Hatch bill. The former was designed to provide a strengthened conciliation and mediation service within the Department of Labor. The latter was intended to set up elaborate machinery for handling all but local labor disputes, and in addition to expand the list of unfair labor practices under the National Labor Relations Act to include practices of employees and labor unions. Both of these bills were amended shortly after the start of the hearings to incorporate factfinding procedures within their provisions. In addition, the provisions of S. 1171, designed to amend the National Labor Relations Act were deleted. The hearings extended through three days in December and 14 days in January and February of 1946. Witnesses included the protagonists in the principal labor disputes then current, the heads of the largest and most influential labor and employer groups in the country, and in addition men such as William H. Davis and Dr. William Leiserson, who had had extensive experience in handling labor relations problems. The testimony of these witnesses, although not hostile, generally expressed little faith in factfinding as a means of solving the current wage disputes. Strong objections were made to both cooling-off periods and to the subpoena provisions. Most witnesses opposed the compulsory features of S. 1171. The one proposition on which there seemed to be general agreement was the proposal to strengthen the Conciliation Service (Hearings before the Committee on Education and Labor, U.S. Senate, 79th Cong., on S. 1661, parts 1 and 2).

During the period of these hearings the House Labor Committee had been holding the hearings on H.R. 4908. On January 28, 1946, the House Committee reported out an amended factfinding bill minus any provisions for cooling-off periods or for the subpoena power (H. Rept. 1493). The House Rules Committee then granted a rule permitting the substitution of H.R. 5262, the Case Bill, for H.R. 4908 on the Floor of the House (H. Res. 500). This was done after two hours of general debate, and on February 7, 1946, the Case bill, as substituted for H.R. 4908 and amended, was passed by the House (92 Cong. Rec. 1098).

H.R. 4908, as amended, would have established an independent tripartite mediation board outside the Department of Labor. This board, although having no compulsory powers, would have been given a period of 30 days within which it would endeavor to persuade disputing employers and employees to come to an agreement or submit their disputes to arbitration. During this period both parties would maintain their original positions and a violation thereof would have been prevented through the use of the criminal injunction. Under the heading of Miscellaneous Provisions, H.R. 4908 was designed to provide a Federal right of action for breach of a collective bargaining agreement, Federal penalties against secondary boycotts, and violence on the picket lines and to withdraw the protection of the National Labor Relations Act from a broad class of supervisory employees (92 Cong. Rec. 1094-1096).

The Senate Education and Labor Committee, since it had not at the time of the passage of H.R. 4908 in the House taken action on S. 1661, extended its hearings to cover those elements of H.R. 4908 which had not already been discussed in the hearings on the factfinding bills. The Committee met in single and double sessions, seven days throughout February 1946. At these hearings the controversial provisions of H.R. 4908 were thoroughly discussed with the leaders of both management and labor (see Hearings before a subcommittee of the Committee on Education and Labor, U.S. Senate on H.R. 4908). The majority of the Committee after listening to the testimony of the witnesses came to the conclusion that most of the provisions of the Case bill were unwise and would tend to increase rather than to diminish labor strife (Report on H.R. 4908, No. 1177, pp. 11-12). Some matters such as violence on the picket line and the enforcement of labor contracts it was felt

period and had they intended to provide those techniques by statute, they could have used language more clearly suited to that purpose.

should be left to be handled by local laws. The provision prohibiting secondary boycotts was deleted because the majority did not wish for a repetition of the previous history of Federal regulation in this field. The provision concerning supervisory employees was stricken because it was thought that this matter should more properly be handled by the National Labor Relations Board. The provision for factfinding boards was rejected on the ground that no new statutory authorization was needed. Finally, the provision for cooling-off periods was omitted because the history of the War Labor Disputes Act had shown this to be a useless device, difficult to enforce and of no perceptible help in preventing strikes (92 Cong. Rec., pp. 4902-4903).

On April 15 the Committee on Education and Labor reported H.R. 4908 with an amendment in the nature of a substitute (S. Rept. 1177). The substitute bill provided for the creation of an independent Federal Mediation Board in the Department of Labor to which would be transferred the conciliation and mediation functions of the Department. This Board was authorized to assist the parties to settle labor disputes through conciliation, mediation and voluntary arbitration, and to pay up to \$500 of an arbitrator's fee plus the cost of the transcript in a given dispute. Other provisions of the bill included the Aiken amendment prohibiting interference with the transportation of perishable farm products and the maintenance by the Bureau of Labor Statistics of a file of mediation, conciliation, and arbitration agreements and awards.

A minority of the Committee submitted a report in which they stated Congress should enact legislation to strengthen Federal mediation machinery and to impose legal responsibilities on labor unions and their leaders (S. Rep. 1177, pt. 2). To that end they stated they would offer six amendments to the Committee bill providing for cooling-off periods, factfinding procedures in disputes involving public utilities, making unions and employers liable in suits brought in any United States court for violations of collective bargaining agreements, making secondary boycotts violations of the anti-trust laws, excluding supervisory employees from the definition of employee in the National Labor Relations Act, and outlawing violent conduct by employees in connection with labor disputes, industrial espionage, the employment of strike-breakers, and the hiring of armed officers or guards, or the use of munitions in labor disputes, with violations subject to injunction or loss of rights under the National Labor Relations Act.

When H.R. 4908, as amended, was called up for consideration by the Senate on May 10, 1946, (92 Cong. Rec. 4902), a national coal strike had already been called. The main point of disagreement between the miners and operators in this dispute was over the establishment of a welfare fund to be financed by a royalty on each ton of coal mined. Following the introduction of H.R. 4908 on the floor of the Senate, the first amendment offered was an amendment sponsored by Senator Byrd which would have made it unlawful to pay a representative of employees anything of value except wages or union dues (92 Cong. Rec. 4904). This amendment was finally adopted in altered fashion after extended debate and over the objections of a minority (92 Cong. Rec. 5660-5661). As adopted it prohibited payments for the establishment of welfare funds except where the employer had an equal share in the administration of the fund. Following the introduction of this amendment over 30 more amendments were offered. Those adopted largely introduced the original provisions of H.R. 4908 as it passed the House. The collective bargaining contract enforcement provision was reinstated in altered language (92 Cong. Rec. 5812-16, 5829-5830) as was the provision concerning supervisory employees (92 Cong. Rec. 5805-5813). The provision against secondary boycotts was reintroduced by means of an amendment making such practices subject to the anti-trust laws (92 Cong. Rec. 5830-5836). These

The avoidance of the term "factfinding" and the specific prohibitions upon the making of recommendations for settlement in section 206 of the Taft-Hartley Act were quite deliberate, as was the arming of boards of inquiry with rather broad subpoena powers. These three factors had been fully discussed in connection with the fact-finding bills of the 79th Congress.

The President's message to Congress of December 3, 1945 contained recommendations for the adoption of various procedures for improving the government's role in assisting industry in the mediation and conciliation of labor disputes of national magnitude.¹¹⁵

amendments were the proposals of the minority members of the Committee who had dissented from the report of the majority. Two other amendments proposed by this minority were also adopted. These reintroduced cooling-off periods for those disputes over which the mediation board was given jurisdiction (92 Cong. Rec. 5798-5799) and also limited the emergency fact-finding procedure to labor disputes in public utilities (92 Cong. Rec. 5801-5805). An additional amendment by Senator Byrd and Senator Eastland making labor unions subject to the provisions of the Anti-Racketeering Act was also adopted (92 Cong. Rec. 5836-5837). H.R. 4908 passed the senate with these amendments on May 25, 1946, despite vigorous opposition (92 Cong. Rec. 5846-5847). The amended bill was agreed to by the House on May 29, 1946, and was sent to the President (92 Cong. Rec. 6035-6057). The President sent H.R. 4908 back with his veto on June 11, 1946 (92 Cong. Rec. 6798-6801).

The House sustained the President's veto.

¹¹⁵ 91 CONG. REC. 11288 (1945). The President's recommendations are as follows: I recommend that for the settlement of industrial disputes in important Nation-wide industries there be adopted the principles underlying the Railway Labor Act. The general pattern of that act is not applicable to small industries or to small local disputes in large industries. But it would be effective, as well as fair, in such widespread industries, for example, as steel, automobile, aviation, mining, oil, utilities, and communications. I do not intend to make this list exclusive. Nor do I think that local inconsequential strikes even within these industries should be included. The objective should be to cover by legislation only such stoppages of work as the Secretary of Labor would certify to the President as vitally affecting the national public interest.

In industrial disputes in such industries, where collective bargaining has broken down, and where the Conciliation Service of the Federal Government has been unable to bring the parties to agreement, and where the Secretary of Labor has been unable to induce the parties voluntarily to submit the controversy to arbitration, I recommend the following procedure:

Upon certification by the Secretary of Labor to the effect that a dispute continues despite his efforts, and that a stoppage of work in the affected industry would vitally affect the public interest, the President, or his duly authorized agent, should be empowered to appoint, within 5 days thereafter, a fact-finding board similar to the emergency board provided for under the Railway Labor Act.

I recommend that during these 5 days after the Secretary of Labor has made the above certificate it be unlawful to call a strike or lock-out, or to make any change in rates of pay, hours, or working conditions, or in the established practices in effect prior to the time the dispute arose.

The Board should be composed of three or more outstanding citizens and should be directed to make a thorough investigation of all the facts which it

The hearings before the Senate Committee on Education and Labor are particularly instructive on the issues involved in the fact-finding bills. There are extensive discussions in the Congressional Record of these issues, but unfortunately floor debate is more often for purposes other than exposition and consequently its content is rarely informative — except as to positions and generalities.¹¹⁶

Recognizing that such speculation is risky, it seems that at least a blurred outline of the disputes provisions of the bill that was to come in the next Congress, namely Title II of the Taft-Hartley Act and particularly sections 206-210, was visible in the questions and answers of witnesses in Part 1 of the Senate hearings on S. 1661.¹¹⁷ Perhaps the records of the appearances of William H. Davis, Dr. William Leiserson, and Donald R. Richberg, along with the comments of Secretary of Labor Lewis Schwellenbach, will add support to this speculation.¹¹⁸

The questioning of Secretary Schwellenbach in his appearance on S. 55¹¹⁹ and S.J. Res. 22¹²⁰ tends to reinforce this speculation.¹²¹

deems relevant in the controversy. In its investigation it should have full power to subpoena individuals and records and should be authorized to call upon any Government agency for information or assistance. It should make its report within 20 days, unless the date is extended by agreement of the parties with the approval of the President. The report should include a finding of the facts and such recommendations as the Board deems appropriate.

While the Factfinding Board is deliberating and for 5 days thereafter, it should be made unlawful to call a strike or lock-out, or to make any change in rates of pay, hours, working conditions, or establish practices, except by agreement.

The parties would not be legally bound to accept the findings or follow the recommendations of the Fact Finding Board, but the general public would know all the facts. The result, I am sure, would be that in most cases both sides would accept the recommendations, as they have in most of the railway labor disputes.

I believe that the procedure should be used sparingly and only when the national public interest requires it.

The legislation should pay particular attention to the needs of seasonal industries so that the so-called cooling-off periods can be arranged in those industries in a manner which will not subject labor to an undue disadvantage.

Ibid.

¹¹⁶ There are two volumes of hearings on the so-called Case bill which are particularly instructive: *Hearings on S. 1661 Before the Senate Committee on Education and Labor*, 79th Cong., 1st & 2d Sess., pts. 1-2 (1946); *Hearings on H.R. 4908 Before the House Committee on Labor*, 79th Cong., 1st Sess. (1946).

¹¹⁷ *Hearings on S. 1661*, *supra* note 116, pt. 1, at 6-33, 61-89, 115-39, 141-72.

¹¹⁸ *Hearings on S. 1661*, *supra* note 116, pt. 1, at 1-172 (note particularly, commentaries by Schwellenbach at 6, Richberg at 61, Davis at 115, and Leiserson at 141).

¹¹⁹ 80th Cong., 1st Sess. (1946).

¹²⁰ *Ibid.*

¹²¹ *Hearings on S. 55 & S.J. Res. 22 Before The Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess., pt. 1, at 17-88 (1947). In the hearings there is a colloquy between Senator Taft and Dr. Leiserson regarding some help from the

Senator Wayne L. Morse and Senator Robert A. Taft were very active in the questioning of witnesses as were Senators Allen J. Ellender and Samuel Donnell, among others.

This is not to suggest that the witnesses just referred to were in accord on all elements of a desirable dispute settling bill, nor that the present law embodies their suggestions. On the contrary, some of the very elements criticized by these experts are in the current law. For example: (1) the factfinding boards were given the power of subpoena;¹²² (2) the factfinding boards were not given satisfactory standards to guide them;¹²³ (3) the boards were specifically denied the power of making recommendations for settlements;¹²⁴ and (4) the duty to bargain, although imposed in mandatory language,¹²⁵ is not enforceable by sanctions.¹²⁶

(a) *Functions of True Factfinding Boards.*—Both the President and Secretary of Labor Schwollenbach recommended boards with subpoena powers to investigate disputes and make reports containing findings of fact and recommendations. The boards were to furnish an opportunity to the parties for full and fair hearings, to

latter on the drafting of the legislation then under consideration. *Id.* at 172. There is a bill in the legislative files of the Office of the Solicitor, Department of Labor (a committee print dated February 8, 1946) on the Case bill which is identified as the bill drafted by Dr. Leiserson.

¹²² *Hearings on S. 1661, supra* note 116, pt. 1 (note particularly, comments by Richberg at 74-77, Davis at 120-25, and Leiserson at 149-51). Section 207 of the act incorporates by reference §§ 9 and 10 of the Federal Trade Commission Act relating to the subpoena of witnesses, books and records.

¹²³ *Hearings on S. 1661, supra* note 116, pt. 1 (note particularly, comments by Richberg at 77, Father McGowan and Senator Morse at 97-100, Rabbi Aaron Opher and Senator Morse at 103-05, and Leiserson and Senators Ball, Ellender and Taft at 159-62). Perhaps the language of § 206 is intended to provide some standards for boards of inquiry. If so, it must be read very narrowly, which is difficult in view of the generalities used; namely, inquiry into the "issues involved in the dispute," and such report shall include a statement of the "facts with respect to the dispute," including each party's statement of its position.

¹²⁴ Section 206 of the act specifically forbids recommendation. See also *Hearings on S. 1661, supra* note 116, pt. 1 (note particularly, comments by Richberg at 75, Davis at 121-23, 133, and Leiserson at 141-42, 149, 150).

¹²⁵ L.M.R.A. § 209, 61 Stat. 155 (1947), 29 U.S.C. § 179 (1964).

¹²⁶ There was some discussion between members of the Senate committee and the experts of the desirability of an enforceable as against nonenforceable duty to bargain during the cooling-off period. Congress did not resolve the issue in the statute, and the question of sanctions remains one of legal theory. There have been no cases in which any sanctions have been applied by the courts for contempt of an injunction ordering the parties to bargain during the 80-day period. *But see* United Steelworkers v. United States, 361 U.S. 39, 53 (1959) (concurring opinion); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956); United States v. International Longshoremen's Ass'n., 116 F. Supp. 262, 265-66 (S.D.N.Y. 1953).

present evidence, to have counsel, etc.¹²⁷ The findings and recommendations would be unenforceable, except that they were to be made public and public opinion was the intended sanction. These boards were also empowered to prescribe or adopt rules and regulations to govern their procedures and the exercise of their functions.¹²⁸

Senate bill 1661¹²⁹ and H.R. 4908,¹³⁰ embodying the President's suggestions, and S. 1419¹³¹ and S. 1171¹³² all included factfinding procedures, but they varied somewhat in the degree of detail for the guidance of such boards. The bill containing factfinding provisions closest to the present act, including the use of the term "board of inquiry," was S. 1419.¹³³ But even this version was somewhat more specific than sections 206 and 207 of the present act. It required hearings on the facts and issues in the dispute, with periodic reports to the public of the factual arguments of each party. It also looked to testimony under oath, and provided subpoena powers, with a test of relevance regarding what would be necessary for a just determination. This concept, "relevance to a just determination," would have been subject to court review in seeking enforcement of a subpoena. However, this bill, unlike the present act, makes clear that the boards of inquiry were "fact gathering" agencies for the purpose of making available to the public the factual arguments of the parties.¹³⁴ Even this limited role was to be performed through hearings, and the appointment of a board was to have no effect on the rights of the parties to strike or lockout.

The bill also made clear that the Department of Labor and the new United States Board of Arbitration established therein were the *only* agencies authorized to engage in conciliation, mediation, and arbitration.¹³⁵ This limitation, stated in the bill which preceded the present act and resembling it greatly in format, seems particularly relevant respecting the intent of Congress with regard to the functions of boards of inquiry under the present act.

By far the most informative material on the functions of fact-

¹²⁷ 91 CONG. REC. 11288 (1945) (President's message); *Hearings on S. 1661*, *supra* note 116, pt. 1, at 6-7 (testimony of Secretary of Labor).

¹²⁸ S. 1661, 79th Cong., 1st & 2d Sess. § 3 (1946).

¹²⁹ 79th Cong., 1st & 2d Sess. (1946).

¹³⁰ 79th Cong., 1st Sess. (1945).

¹³¹ 79th Cong., 1st Sess. (1945).

¹³² 79th Cong., 1st Sess. (1945).

¹³³ 79th Cong., 1st Sess. §§ 4, 10(a) (8) (1945).

¹³⁴ S. 1419, 79th Cong., 1st Sess. (1945).

¹³⁵ *Id.* at § 3.

finding boards was found in the testimony of Mr. Richberg and Dr. Leiserson.¹³⁶ Dr. Leiserson, in responding to a suggestion made by Senator Fulbright that the McMahon Bill¹³⁷ seemed to fit Leiserson's description of the desirable approach, stated that the bill would make a sound basis for a law, but it left out the process. He said that the bills set up boards in various places but left out the important things, that is, what happened in between the places where the boards came in.¹³⁸ Dr. Leiserson pointed out:

The process begins with collective bargaining. Then it goes to mediation, but how to make the connection? Then arbitration, how to prevent a strike in between? Why a mediation board? Where does it begin to function?

The arbitration board? Where does it come in? The fact-finding? Where does it connect with the other devices in the process? All that is left out of the bill.

Actually, the bill (S. 1419) starts with factfinding boards of inquiry that will have authority to act while mediation and other methods are being used. But if you provided the procedure, beginning with collective bargaining, then spelling out the disagreement, to get people into the habit of doing things in an orderly manner, then mediation, then efforts to induce arbitration, and so on — if you applied those and take some of them out of the other bills, you will have a reasonably good bill.¹³⁹

The discussion which follows, between Senator Murray, Senator Taft, and Dr. Leiserson, involved a request that Leiserson assist committee counsel in drafting a bill based on the Railroad Mediation Board procedures, with such changes as might be necessary. Such a draft was drawn.¹⁴⁰ The act in its present form ignored Dr. Leiserson's comments regarding the need for coordination in procedure and contains little of the bill which he was asked to assist in preparing.¹⁴¹

Assuming (as we must) that Congress understood "factfinding" in the sense it was embodied in S. 1661¹⁴² and H.R. 4908,¹⁴³ as introduced in response to the President's message and as discussed and debated, one thing seems reasonably clear — that the complete

¹³⁶ *Hearings on S. 1661, supra* note 116, pt. 1, at 65-89, 141-72.

¹³⁷ S. 1419, *supra* note 134.

¹³⁸ *Hearings on S. 1661, supra* note 116, pt. 1, at 171.

¹³⁹ *Id.* at 171-72.

¹⁴⁰ This draft became the Committee Print of Feb. 9, 1946 on S. 1661, 79th Cong., 2d Sess. (1946).

¹⁴¹ The Leiserson Bill is found in the Office of the Solicitor, Department of Labor, Legislative File on Industrial Relations Bills.

¹⁴² 79th Cong., 1st & 2d Sess. (1946).

¹⁴³ 79th Cong., 1st Sess. (1945).

concept of factfinding is certainly *not* what is written into the Taft-Hartley Act.¹⁴⁴

Dr. Leiserson expressed what many others had voiced:

[N]ow, the term that is used to define these boards, 'factfinding' is a little misleading. Actually, if they were fact boards, they would not be very helpful in settling disputes. The theory on which they are based would not work out. . . . The theory, of course, is that the board will find the facts and when the public knows the facts, public pressure will force a settlement. . . .

The actual value of such boards is that they pass judgment on the issues . . . and they marshal the facts to support their opinion. . . . It is a judgment-passing board, a board that passes on the merits of the dispute; only instead of compelling obedience, the award is made in the form of a recommendation.¹⁴⁵

The true nature of factfinding boards (*i.e.*, to pass judgment) was clearly understood by the discussants. Some witnesses preferred limiting the role of the boards to factgathering but their discussion with the Senators indicated that all clearly understood the difference in concepts.¹⁴⁶

Senator Morse remarked that he had been unable to find many factfinding reports that did not have, between the lines, recommendations. He indicated that this left such reports open to attack as biased, and that he thought the direct approach desirable.¹⁴⁷

To close our tortuous search for the functions of boards of inquiry, we need to examine H.R. 4908.¹⁴⁸ The report of the majority discussed its reasons for rejecting factfinding, even as applied to the limited area of public utility disputes.¹⁴⁹ The majority doubted the effectiveness of public opinion in obtaining acceptance of recommendations in the atmosphere generated by the debates. It feared that such a procedure might mark the first steps toward government arbitration. It objected to the compulsion of subpoena powers and cooling-off periods, and felt that the imposition of detailed mandatory procedural requirements would be ill-advised and would remove the incentive of the parties to resolve their own problems. The bill as reported left the creation of factfinding boards to the existing authority of the President and the Secretary of Labor.

¹⁴⁴ It is submitted, however, that the "judgment passing" function is intended to be performed by the boards under existing law.

¹⁴⁵ *Hearings on S. 1661, supra* note 116, pt. 1, at 142-43.

¹⁴⁶ *Hearings on S. 1661, supra* note 116 (remarks by Richberg at 75, Senator Morse at 97-98, 108, Father McGowan at 97, and Rabbi Opher at 103).

¹⁴⁷ *Id.* at 98.

¹⁴⁸ 79th Cong., 2d Sess. (1946).

¹⁴⁹ S. REP. NO. 1177, 79th Cong., 2d Sess. 5-8 (1946).

The minority views, set forth in Part 2 of Senate Report No. 1177¹⁵⁰ offered amendments to the bill including a provision for factfinding commissions for public utilities disputes. The amendment, which was incorporated in H.R. 4908,¹⁵¹ limited the factfinding commissions' recommendations to wages, hours, and working conditions, but permitted the commissions' report to *describe* other issues which might be in dispute. No subpoena powers were provided, nor were there any requirements for full and fair hearings.

The so-called Case Bill,¹⁵² which was finally passed by both houses of Congress and vetoed by the President, contained limited factfinding provisions — not only limited to public utility disputes but limited to making recommendations on wages, hours, and working conditions.

The 80th Congress, which was to spawn the Taft-Hartley law, was convened against the backdrop of the extensive consideration of factfinding bills which had preoccupied the 79th Congress. It was reported that on the day the 80th Congress convened, no less than 17 bills dealing with labor policy were dropped into the hopper of the House of Representatives.¹⁵³

The President's state of the union message to the 80th Congress called for action to prevent jurisdictional disputes, prohibit certain secondary boycotts, provide machinery to help solve disputes arising under existing contracts, and provide a temporary commission to study the whole labor management relations field. Here the administration at least stepped back from, if it did not abandon, "factfinding" under a specific statute with the full panoply of subpoena powers, full and fair hearings, and recommendations for settlement, which were embodied in S. 1661¹⁵⁴ and H.R. 4908¹⁵⁵ of the 79th Congress.

Secretary of Labor Schwollenbach, testifying before the Senate Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22¹⁵⁶ made these comments on factfinding:

I think it is a device which, under proper management, can be successfully used in the future as it has been in the past. I think the

¹⁵⁰ 79th Cong., 2d Sess. 9-10 (1946) (signed by Senators Ball, Taft and H. A. Smith).

¹⁵¹ 79th Cong., 2d Sess. (1946).

¹⁵² *Ibid.*

¹⁵³ See MILLIS & BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 363 (1950).

¹⁵⁴ 79th Cong., 2d Sess. (1946).

¹⁵⁵ 79th Cong., 2d Sess. (1946).

¹⁵⁶ 80th Cong., 1st Sess. (1947).

. . . Department's success in this activity has been the manner in which such boards have been appointed and their reports used. There have been five basic principles which have been followed:

First, fact finding has been used only in those cases where, after study, I have determined that factfinding would be of value. In other words, those cases in which there were actual disputes of fact, and in which, if the facts were studied by an impartial board, the results of such study would be of value to the parties in negotiation.

Second, no board has been appointed until both sides of the controversy had become convinced that there would be value in the use of the board. This has meant that we have had cooperation from the parties. They have not held off and refused to give the board members necessary facts which they felt that the board should consider.

Third, the boards have been appointed after consultation with both sides and approval of the members of the boards by both sides. This has resulted in further confidence.

Fourth, the members of the boards have been selected on the basis of their familiarity with the particular industry involved and the dispute.

Fifth, the board's recommendations have not been forced upon parties after they have been made. In other words, I don't tell the parties after I receive the reports that this report is it and must be accepted; I send each side a copy of the report and tell them that in my opinion it should be used and considered in further negotiation. In short, I do not convert the board from a mere factfinding function into an arbitration function.¹⁵⁷

In response to questioning, the Secretary went on to point out that the factfinding function was a part of the conciliation process of the Department of Labor.

The Secretary indicated that he was not opposed to the factfinding as contained in S. 1661,¹⁵⁸ but that he had learned a lot more about how to use factfinding boards and how to set them up during the interim between his statement on S. 1661 of December 12, 1945 and his January 29, 1947 appearance.

In a discussion with Senator Ives,¹⁵⁹ he indicated that the factfinding board, so called, was derived from the court of inquiry plan under the old English system¹⁶⁰ and that the British were trying gradually to get away from the term factfinding and use instead

¹⁵⁷ *Hearings on S. 55 & S.J. Res. 22, supra* note 121, at 40.

¹⁵⁸ 79th Cong., 2d Sess. (1946).

¹⁵⁹ *Hearings on S. 55 & S.J. Res. 22, supra* note 121, at 43.

¹⁶⁰ See STEWART & COOPER, *FACT FINDING IN INDUSTRIAL DISPUTES* 31 (1946); *Industrial Courts Act, 1919*, 9 & 10 George 5, c. 69. The Minister of Labour has authority to make rules regulating the procedures of a Court of Inquiry. Factfinding boards created under the authority of the Secretary of Labor also had rules of procedure. Gen. Order No. 11, Jan. 8, 1946, revised Jan. 13, 1947.

"board of inquiry." In the discussion on the use of recommendations by such boards, Senator Ives asked whether the Secretary considered having such boards merely ascertain the facts and report them to him, with the idea that he would take those facts and publicize them, leaving the determination based on such facts to rest either with the Secretary or with public opinion, or both.¹⁶¹

The significance of this colloquy, if it has any, is that Senator Ives, along with Senators Ellender, Ball, and Taft, played a major role in the legislative action resulting in Taft-Hartley. In fact, they were the Senate managers for the bill eventually passed in conference with the House. The discussions of such men with witnesses in committee hearings are often more enlightening as to the details of legislation than more formal documents such as committee reports or conference reports.

It is clear from a reading of sections 206-210 that the act does not embody true "factfinding" in the sense that term was used in the debates and hearings of the 79th and 80th Congresses. The specific prohibition upon recommendations for settlement establishes that much. However, some elements of the device are embodied in the act. Unfortunately, very little attention was devoted to the details of these sections during the consideration of S. 1126 and H.R. 3020¹⁶² in the 80th Congress, the bills from which the law was concocted. Neither bill was introduced until after the hearings ended.¹⁶³

But a close look at S. 1419¹⁶⁴ and H.R. 4908¹⁶⁵ strongly suggests that they were the forerunners of Title II of the Labor Management Relations Act. This Title, in substantially the form as enacted, was in S. 1126¹⁶⁶ as introduced in the 80th Congress by Senator Taft. Senator Taft, along with Senators Ball and Smith, also offered the factfinding amendments to H.R. 4908 as passed by the 79th Congress.

The attention to the details of factfinding as evidenced by the hearings and debates on the so-called Case Bill and the active par-

¹⁶¹ See *Hearings on S. 55 & S.J. Res. 22*, *supra* note 121, at 43-44.

¹⁶² 80th Cong., 1st Sess. (1947).

¹⁶³ H.R. 3020, 80th Cong., 1st Sess. (1947) (introduced by Mr. Hartley); *Hearings Before the House Committee on Education and Labor on Amendments to the National Labor Relations Act*, 80th Cong., 1st Sess. (1947). See 93 CONG. REC. 3423 (1947); S. 1126, 80th Cong., 1st Sess. (1947), introduced by Senator Taft, 93 CONG. REC. 3834 (1947).

¹⁶⁴ 79th Cong., 1st Sess. (1945).

¹⁶⁵ 79th Cong., 1st Sess. (1945).

¹⁶⁶ 80th Cong., 1st Sess. (1947).

ticipation in these deliberations by Senator Taft, *et al.*, are persuasive arguments that Title II was "knowingly and willingly" drafted. The procedural hiatus created by the lack of any formal notice from the Director of FMCS to the President that mediation efforts have failed, which notice along with the arbitration provisions was eliminated in conference, may also have been with knowledge and intent.

Sections 206-210 of the Taft-Hartley Act, as they prescribe the duties of boards of inquiry, embody a curious collection of functions and powers. It was an attempt to create a new device, eclectic in content. First, of course, recommendations are prohibited, in spite of what seemed to be the weight of testimony that recommendations around which the force of public opinion could be marshalled were essential to the effectiveness of the factfinding device. Second, in the face of the vigorous opposition to subpoena powers from representatives of management, labor, and the public, such powers are included. Third, when compulsory attendance of witnesses and production of books and records were assumed in the considerations, it was generally suggested that there should be requirements of "full and fair hearings" and sufficient standards to limit the factfinding body to relevant inquiries. Section 207 of the act as it relates to any hearings makes them discretionary¹⁶⁷ and there is no hint of the imposition of any procedural requirements. Moreover, section 206 directs inquiry into the issues in dispute. It then requires that the report include a statement of facts with respect to the dispute, including each party's statement of his position.¹⁶⁸

The drafting technique of defining a term by the use of the artful "shall include" does not *exclude* anything reasonably related to the subject. Further, the specific exclusion of recommendations argues that if other limitations were intended Congress would have said so. Finally, section 207 empowers the boards to sit and act and hold hearings, public or private, as it may deem necessary to *ascertain the facts with respect to the causes and circumstances of the dispute.*

It is submitted that the language of this combination of powers

¹⁶⁷ There are, of course, limits on the exercise of discretion, and the parties would seem to be entitled to a full board decision on the issue of hearing and procedures. *United States ex rel. Hintopoulos v. Shaughnessy*, 233 F.2d 705 (2d Cir. 1956); *Avila-Contreras v. McGranery*, 112 F. Supp. 264 (S.D. Cal. 1953); *Chavez v. McGranery*, 108 F. Supp. 255 (S.D. Cal. 1952), *aff'd*, 220 F.2d 857 (9th Cir. 1955).

¹⁶⁸ See *United States v. National Marine Eng'rs' Ass'n*, 294 F.2d 385, 390 (2d Cir. 1961).

authorizes a board to pass judgment on the parties and assess blame for the impasse (or realistically, assess which was more unreasonable than the other). To this extent such a sanction would be potentially as effective, in a negative way, as recommendations for settlement. It is noteworthy that the committee report specifically rejects compulsory arbitration, *the establishment of factfinding boards*, the creation of an overall mediation tribunal, and the imposition of specified waiting periods.¹⁶⁹ The bill did include an 80-day cooling-off period but the distinction between a waiting period and a cooling-off period is a matter of timing. The report dealing with emergency disputes reveals a reliance on the force of public opinion during the 80-day period which presumably would be marshalled around the initial report of the board. The theory of this device necessarily views the public report as a sanction. In view of this intended effect, which is reflected in many initial reports of such boards, the proceedings of boards of inquiry should at least comply with the minimal due process provisions of the APA.¹⁷⁰

Section 209(a)¹⁷¹ puts a positive duty on the parties to bargain and to cooperate with the Federal Mediation and Conciliation Service, but specifies no sanctions for failure to comply. There is a theory of judicial enforcement of a clear legal duty although no sanction is supplied by law¹⁷² but it is doubtful that its invocation would aid FMCS in mediation. This section, along with Senator Taft's explanations and the comments of others,¹⁷³ seems to make clear that the 60-day period is to allow time for the Mediation Service to bring about a collective bargaining agreement between the parties; the duty here, as well as in section 204, runs to the *Service*, not the board of inquiry.

The legislative history¹⁷⁴ provides no clue as to the functions expected of the reconvened board of inquiry between the issuance of an injunction and the writing of its final report.¹⁷⁵ Literally,

¹⁶⁹ S. REP. NO. 105, 80th Cong., 1st Sess. 13-15 (1947).

¹⁷⁰ See text accompanying notes 87-99 *supra*, dealing with publicity as a sanction.

¹⁷¹ See note 286 *infra*.

¹⁷² *Virginian Ry. v. System Fed'n 40, Ry. Employees Dep't*, 300 U.S. 515 (1937).

¹⁷³ S. REP. NO. 105, *supra* note 169; 93 CONG. REC. 3951-52, 3955 (1947) (remarks of Senator Taft). See also 93 CONG. REC. 4154 (1947) (remarks of Senator Murray), and in particular 93 CONG. REC. 4265 (1947) (remarks of Senators Morse and Taft); 93 CONG. REC. 4390 (1947) (remarks of Senator Taft).

¹⁷⁴ See authorities cited notes 169, 173 *supra*.

¹⁷⁵ It could be argued on a narrow legal basis that, legislative history to the contrary notwithstanding, a board in the final report could make recommendations. Section 209 does not specifically forbid such recommendations, but the clear weight of the accumulated legislative history of two Congresses indicates it was not so intended.

a board could sit each day and hold hearings or conduct other investigations "to ascertain the facts with respect to the causes and circumstances of the dispute." It could, conceivably, take day to day "soundings" on efforts being made for settlement, including requiring the presence of the parties to report on such efforts. This would certainly complicate any assistance the Federal Mediation and Conciliation Service could give the parties. It is also apparent that if the aim of enhancing the status of the FMCS is to be achieved,¹⁷⁶ it is the Service that should occupy the foremost position in administering the emergency disputes procedures. No such clarity of functional responsibility is discernible from the face of the statute. As between the so-called Case Bill,¹⁷⁷ S. 55,¹⁷⁸ and the Taft-Hartley law, the latter gives the Federal Mediation and Conciliation Service the least amount of formal control over the emergency dispute situation.¹⁷⁹

(b) *The Administration of Factfinding Boards and Boards of Inquiry — Contemporaneous Procedures.*—The actual procedures followed in administering sections 206-210 can only be established through examination of the practices in the instances in which the act has been used. The picture so gained would be subject to the usual limitations of accuracy inherent in "historical" research.

The act is silent as to the relationship of a board of inquiry to any federal entity other than the President. Read literally, it would appear that the President or his designee must direct and coordinate the activities of such boards and the other agencies which have operational responsibilities under the statute, and to the extent that the boards' functions are not prescribed by law, nor prohibited thereby, they are delineated by the President. The question then arises, are such boards' members in fact directly responsible to the President and subject only to his direction and control, or, are they, through formal delegation and practice, with or without overt congressional ratification, subject to the control of other federal agencies?

The Federal Mediation and Conciliation Service acts as the administrative agent of a board of inquiry (at least for housekeeping

¹⁷⁶ See 93 CONG. REC. 3955 (1947) (remarks of Senator Taft). In addition, many of the bills in the 79th Congress, and S. 55 in the 80th Congress had as one of their purposes the strengthening of the mediation service. See, e.g., S. 55, 80th Cong., 1st Sess. § 1 (1947).

¹⁷⁷ H.R. 4908, 79th Cong., 2d Sess. §§ 3-4 (1946) (as passed).

¹⁷⁸ 80th Cong., 1st Sess. § 1 (1947).

¹⁷⁹ Of course, under S. 1661, 79th Cong., 1st Sess. §§ 1-4 (1945) (as introduced), and S. 1419, 79th Cong., 1st Sess. § 5 (1945) (as introduced), the service would have had even less authority since it would have remained as part of the Department of Labor.

purposes). It must pay the bills and provide other services. This raises legal questions as to the nature of a board of inquiry. Of course, the individual members are federal employees, albeit special employees within the definition of that term in Title 5 of the United States Code.¹⁸⁰ However, the relationship of the board as an entity to FMCS is less than clear.

On the face of the statute, members of the board of inquiry are responsible directly to the President, keeping in mind that the President, in another statute, has ample authority for delegating responsibility.¹⁸¹ However, the actual operation of a board may be to some extent controlled by the requirements that the Federal Mediation and Conciliation Service must pay its bills, provide for compensation of the board members, and supply services and personnel to assist the board in the performance of its functions. Under these circumstances, what control, if any, is appropriate for the Federal Mediation and Conciliation Service to assert over a board of inquiry? In the case of an intransigent board of inquiry, what could the Service do to delimit the scope, duration, or nature of its investigation? These questions are raised without regard to certain practical answers which may inhere in the system. Whether or not they are more than academic questions, it would be helpful to know how they could be met or avoided under present law, if any problem of a "runaway" board did occur. Moreover, in any revision of Title II, it seems that they ought to be anticipated and resolved by the statute.

Contemporaneous construction of a statute is generally considered to have great weight in determining its meaning. When administrative practices of long standing conform to the contemporaneous construction, the weight to be given the interpretation becomes stronger. It can also be argued that when Congress appropriates funds for the administration of a program by an agency, particularly with full explanation of the method of operation intended, and continues over a period of years to so appropriate funds, it has confirmed and ratified the executive action.¹⁸²

¹⁸⁰ 60 Stat. 810 (1946), 5 U.S.C. § 55 (a) (1964); 60 Stat. 808 (1946), 5 U.S.C. § 73 (b) (2) (1964). See also 18 U.S.C. § 202 (1964).

¹⁸¹ 3 U.S.C. § 301 (1964).

¹⁸² See *Fleming v. Mohawk*, 331 U.S. 111, 116 (1947); *Brooks v. Dewar*, 313 U.S. 354, 361 (1941); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937); *Wells v. Nickles*, 104 U.S. 444, 447 (1882). *But see* *Greene v. McElroy*, 360 U.S. 474, 505-07 (1959) (hearing procedures). Congressional ratification cannot be implied from continued appropriation of funds to finance activities (hearing procedures) where the description of the activities is insufficient to constitute notice to Congress of

With these concepts in mind, the following materials were examined: (1) the first and second reports of the Federal Mediation and Conciliation Service for the fiscal years 1948 and 1949;¹⁸³ (2) selected appropriation hearings for Federal Mediation and Conciliation Service budgets;¹⁸⁴ (3) the appropriation bills for that agency from 1949 to 1963;¹⁸⁵ (4) the report of the Joint Committee on Labor Management Relations,¹⁸⁶ pursuant to section 401 of the Taft-Hartley Act; and (5) hearings related to such report.¹⁸⁷

The reports,¹⁸⁸ along with selected hearings and debates on S. 249¹⁸⁹ were also scrutinized. Senate Bill 249 was a bill intended to rewrite the Labor Management Relations Act of 1947.

There have been other attempts at major revisions and amendments of that act, notably in 1953. However, somewhat arbitrarily, the exploration has been limited to the materials from the 81st Congress, with the exception of the Federal Mediation and Conciliation Service appropriation bills. Post-1949 interpretations can hardly qualify as "contemporaneous" with the statute enacted in June of 1947, although discussions during subsequent attempts to amend the act would contribute to the establishment of the "continuousness" of an interpretation.

(i) *FMCS — Filling the Procedural Gaps.*—The first annual report of the Federal Mediation and Conciliation Service,¹⁹⁰ as a preface to the summary of the disputes during 1948 which had occasioned the use of sections 206-210, reported that the service had reluctantly played a more active role in the settlement of disputes than the language of the act required.¹⁹¹

their nature. While FMCS reports and the three early reports (two in 1948, one in 1951; see discussion of § 210 — the President and Congress *infra* p. 215) of the President to Congress on national emergency disputes referred to boards of inquiry, they did not sufficiently describe board procedures to provide any basis for ratification.

¹⁸³ 1948 & 1949 FMCS ANN. REPS.

¹⁸⁴ See authorities cited notes 212-13, 215, 218 *infra*.

¹⁸⁵ See authorities cited note 224 *infra*.

¹⁸⁶ S. REP. NO. 986, 80th Cong., 2d Sess. (1948).

¹⁸⁷ *Hearings Before the Joint Committee on Labor-Management Relations*, 80th Cong., 2d Sess., pts. 1-2 (1948).

¹⁸⁸ *Hearings on S. 249 Before a Subcommittee of the Senate Committee on Labor and Public Welfare*, 81st Cong., 1st Sess., ser. 49, pts. 1-6 (1949).

¹⁸⁹ 81st Cong., 1st Sess. (1949).

¹⁹⁰ 1948 FMCS ANN. REP.

¹⁹¹ *Id.* at 40-59. This report states:

The congress imposed no special statutory duties upon the Service in the national emergency provisions of the act (§§ 206-210) other than to assist the parties in reaching a settlement in national emergency disputes (§ 209(a)). However, the experience of the Service with the background of

The summaries of the several instances in which the procedures were used during 1948 contain evaluations of the effectiveness of the procedures. Those cases were the atomic energy dispute,¹⁹² the meat packing dispute,¹⁹³ the first bituminous coal dispute,¹⁹⁴ the telephone dispute (long lines),¹⁹⁵ the maritime dispute,¹⁹⁶ the second bituminous coal dispute,¹⁹⁷ and the longshore dispute on the Atlantic coast.¹⁹⁸ Since this article is primarily concerned with powers, procedures, and functions under the law, "effectiveness" will be left for another day.

Suffice it to note here that the Service expressed reluctance to

such disputes, the issues involved and the positions of the parties thereon, and its knowledge of facts required by other agencies of Government called upon to perform functions prescribed by the national emergency provisions, have made it necessary for the Service to play a more active role in the administration of those provisions than appears to be required by the language of the act. The Service plays this role reluctantly, because it is fully aware of the fact that its value to the public as a mediation agency should not be jeopardized by any activity associating it with law-enforcement provisions. On the other hand, it was clear that if the national emergency provisions of the act were to be given practical, realistic and efficient administration, in order that the national safety and health might be protected, it could not withhold from other agencies of Government that administrative and informational assistance which they requested.

Thus, the Service is called upon, with respect to labor disputes it is engaged in mediating, to furnish information to the President, boards of inquiry, and the Attorney General, all of whom have duties to perform under the national emergency provisions of the act. It should be emphasized that the Service scrupulously refrains from participating in the decision or policy making of such other agencies of Government and restricts its assistance to them to the furnishing of information.

It is evident that the central position occupied by the Service in national emergency labor disputes, before and during the injunction period and even after the discharge of the injunction, qualify [*sic*] it perhaps better than any other agency of Government excepting the Chief Executive, to report on the disputes which occurred during the past year. In view of the fact that no other agency of Government has the responsibility of making an over-all report of this character, the Service will undertake to do so as briefly as possible.

In recounting events which occurred in the national emergency disputes discussed in this report, the Service should not be understood to be assessing blame or responsibility on either unions or employers or their representatives, for acts committed, damage done, or failure to take any particular course of action. It is no part of the duty or authority of the Service to do so. In this account the Service has endeavored to restrict itself to facts which were given publication in Government documents, to private publications of news and to other sources which were, more or less, matters of public knowledge.

Id. at 40-41.

¹⁹² *Id.* at 41-42.

¹⁹³ *Id.* at 42-43.

¹⁹⁴ *Id.* at 43-45.

¹⁹⁵ *Id.* at 45-46.

¹⁹⁶ *Id.* at 46-49.

¹⁹⁷ *Id.* at 49-51.

¹⁹⁸ *Id.* at 51-54.

engage in any activity associating it with the law-enforcement procedures and *refrained* from participating in the policy-making or decision-making of the other agencies (*i.e.*, the President, the boards of inquiry, and the Attorney General). However, from a practical rather than a legal point of view, it did interpret the statute to require the Service to supply other agencies with information.¹⁹⁹ As indicated earlier, the President could direct the Federal Mediation and Conciliation Service and other agencies to supply boards of inquiry with information. However, the Service, because of its central position, undertook to fill the void with respect to the overall reports on national disputes activity.²⁰⁰

In the summary of experiences, the first annual report of the FMCS asserts that Congress attempted for the first time a "rather detailed exposition of the duties and activities"²⁰¹ of such a Service. Noting that one year provided an insufficient basis for legislative recommendations, the Director evidenced his intent to be prepared to make such recommendations when called upon. He then noted that it is the function of an annual report to bring matters which may warrant consideration and study in connection with further legislation to the attention of Congress, and set forth observations²⁰²

¹⁹⁹ See text accompanying notes 61-71 *supra*, dealing with subpoena powers.

²⁰⁰ No doubt other related agencies also undertook to "fill the void." See, *e.g.*, U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 963, WORK STOPPAGES CAUSED BY LABOR-MANAGEMENT DISPUTE IN 1948, at 23-25 (1948); U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, REP'T NO. 169, NATIONAL EMERGENCY DISPUTES UNDER THE LABOR MANAGEMENT RELATIONS (TAFT-HARTLEY) ACT 1947-1962 (rev. 1963).

²⁰¹ 1948 FMCS ANN. REP. 54.

²⁰² 1948 FMCS ANN. REP. 55-58:

Boards of inquiry.—The current provisions of the act (§ 208(a)) make the submission of a report by a statutory board of inquiry a condition precedent to the President requesting the Attorney General to apply for an injunction. If the dispute threatens a national stoppage of critical proportions, it becomes necessary for the President to appoint the board a sufficient period of time in advance of the deadline date in order to afford it an opportunity to convene, to investigate, to hold hearings, to prepare and submit its report, and to give the Attorney General a reasonable opportunity to apply to the courts for an injunction in anticipation of a stoppage. Experience under the current provisions demonstrates that approximately 10 days to 2 weeks is required, as a minimum, to enable boards of inquiry satisfactorily to perform their statutory duties in most national emergency situations.

The Service has found that appointment of a board of inquiry in advance of a stoppage deadline and the scheduling of hearings before such a board, has the effect of interfering with the collective bargaining of the parties, particularly in relationships in which it is traditional not to reach a settlement until the eleventh hour. Mediation cannot be performed effectively when either the representatives of the Service or of the parties are before a board of inquiry, or when the parties await the report of the investigations of such a board. Further, the record will disclose that the relatively short

relating to national emergency disputes for the attention of Congress in its review of the law.

It would at least appear that both the Director of the Federal Mediation and Conciliation Service and the Secretary of Labor

period of time afforded to such boards to investigate the facts relevant to a dispute has exposed them to criticism and has afforded them insufficient time to operate at maximum efficiency and effectiveness.

Experience has also demonstrated that despite the great national importance of several disputes, relatively little publicity was given to, or public notice taken of, the reports of boards of inquiry. This may have been due to the fact that these boards were forbidden to make recommendations which might reasonably be expected to be given wide publicity, and restricted themselves to an exposition of the issues in controversy and the positions of the parties thereon. Although the facts relevant to a dispute may not have been known in the detail in which they were set forth in the reports of the boards of inquiry, it is believed that they were generally matters of public knowledge. Apparently the Congress required board of inquiry reports to be submitted and made public because of the desirability of mobilizing public opinion behind a settlement of the controversy. This desire has not been fulfilled to a satisfactory degree.

It should also be observed that under current provisions of law, if the Federal Mediation and Conciliation Service does not make a public recommendation of settlement (a procedure it will normally refrain from adopting because nonacceptance of its recommendation might destroy its future usefulness to the parties) a dispute might well run the 60-day period prior to the deadline date and the 80-day period of the injunction — a period of 20 weeks — without any public recommendation of settlement calculated to bring public opinion to bear on the parties.

Use of the injunction.—It is the experience of the Service that in some of the national emergency disputes occurring in the last year the issuance of an injunctive order did much to forestall a national crisis and to assist in achieving a peaceful settlement. Similar claims for the utility of injunctions, such as are provided in current law, as a means of protecting the national welfare, cannot be made in respect of other national emergency disputes. Indeed, the final report of the board of inquiry in the maritime dispute involving the Pacific coast longshoremen's union observed that the employers and unions in that dispute regarded the injunction period as a "warming up" rather than a "cooling off" period (p. 27). National emergency disputes vary widely in their facts and circumstances, and it is unlikely that any machinery can be devised that will guarantee satisfactory handling in all situations.

One of the conclusions which the Service is undoubtedly justified in drawing from its experience of the last year is that provision for an 80-day period of continued operations, under injunctive order of a court, tends to delay rather than facilitate settlement of a dispute. Parties unable to resolve the issues facing them before a deadline date, when subject to an injunction order, tend to lose a sense of urgency and to relax their efforts to reach a settlement. They wait for the next deadline date (the date of discharge of the injunction) to spur them to renewed efforts. In most instances efforts of the Service to encourage the parties to bargain during the injunction period, with a view to early settlement, falls on deaf ears. Further, the public appears to be lulled into a sense of false security by a relatively long period of industrial peace by injunction and does not give evidence of being aware of a threat to the common welfare which would produce a climate of public opinion favorable to settlement. Whether this experience dictates the desirability of a shorter injunction period or an injunction period of indefinite duration, the Service expresses no opinion at this time.

Last offer ballots (§ 209(b)).—In every national emergency dispute to

would again be "filling a void" left by the statute if the Secretary of Labor also went before the Congress with suggestions regarding the national emergency disputes procedures.²⁰³

In spite of the disclaimer regarding participation in decisions or policy-making of the other agencies made by the Director of the Federal Mediation and Conciliation Service, the 1948 report suggests that the Director filled the transmission gap between mediation under sections 201-204 and the provisions for triggering the emergency procedures under 206-210, at least to the extent of re-

date the results of a ballot conducted by the National Labor Relations Board pursuant to § 209(b) of the act have been overwhelmingly for rejection of the employer's last offer. For reasons which need not be elaborated here it is fair to assume that the likelihood of any ballot in the future having a contrary result, [*sic*] is small and remote. These ballots are expensive to conduct, and the experience of a year demonstrates that they do nothing to promote settlement of a dispute. To the contrary, they are a disrupting influence in collective bargaining and mediation. The last or final offer of an employer which the National Labor Relations Board is under an obligation to submit to ballot, is not likely to be the ultimate offer in fact, on the basis of which a settlement will be reached. Most decidedly this was the case in the disputes involving the Oak Ridge National Laboratories, the West coast maritime and longshoremen's unions and the Atlantic coast longshoremen's union. Unions and their membership appear to regard such last offers as counteroffers in bargaining, which, if accepted, mean a repudiation of union leadership. Experience with the strike ballots required by the War Labor Disputes Act as well as the Labor Management Relations Act, 1947, discloses that workers are not likely to repudiate their representatives in the course of contract negotiations.

A vote turning down an employer's last offer places additional obstacles and difficulties in the way of a settlement. Union representatives must necessarily accept the vote as a mandate from the rank and file of workers that they may regard as practicable and possible bases of settlement only those offers of employers substantially more favorable than the one rejected. With foreknowledge of this consequence, employers tend to keep in reserve, and not to represent as a last offer which may be submitted to ballot, concessions which might result in a settlement. Union leadership and employees, aware that employers assess the situation in this manner, act accordingly. Thus, the mandatory last offer ballot sets into action a cycle of tactical operations by both parties which cancel each other out and delay serious efforts to arrive at a prompt resolution of their differences.

The national emergency dispute provisions discussed above (§ 209(b)) require the National Labor Relations Board to conduct a ballot of employees on the last offer of their employers. Section 203(b) directs the Service in the generality of cases within its jurisdiction to suggest to the parties that they agree to submit the last offer of the employer to a secret ballot of the employees. The experience of the Service with this provision has not been such as to justify the conclusion that it has contributed materially to the settlement of disputes. *Ibid.*

²⁰³ Presumably, congressional acceptance of the role of the Service in national emergency disputes, as related by its Director, gives affirmance to such role as a proper one. Both the Secretary of Labor and the Director of FMCS testified on S. 249. *Hearings on S. 249, supra* note 188, pt. 1.

porting to the President the existence of an impasse.²⁰⁴ The evidence in the FMCS files on the first ten disputes confirms this.²⁰⁵

In the report of the Joint Committee on Labor Management Relations,²⁰⁶ the majority expressed high praise for FMCS Director Ching's administration of the Service. In Senate Report No. 986,²⁰⁷ the Director's activities were cited with approval.²⁰⁸ An interpretation (imputed to him) of his role and its handicaps was also cited and some of his suggestions for changes in the emergency board provisions were recommended for adoption.²⁰⁹

²⁰⁴ 1948 FMCS ANN. REP. 45 (The Telephone Dispute), 46-47 (Maritime Labor Dispute), 49-50 (Second Bituminous Coal Dispute).

²⁰⁵ See, e.g., 1948 FMCS ANN. REP. 41-54.

²⁰⁶ S. REP. NO. 986, 80th Cong., 1st Sess., pt. 1, at 35 (1947).

²⁰⁷ S. REP. NO. 986, 80th Cong., 2d Sess., pt. 3, at 15-22 (1948).

²⁰⁸ The Committee Report stated:

Great credit should be given to the Service for its efforts in bringing about settlement of strikes and threatened strikes which assumed national importance. Director Ching has personally intervened in all disputes in which the national emergency sections of the Act were invoked. His efforts had much to do with the early settlement of the 1948 East Coast Shipping strike as well as in preventing strikes in atomic energy plants and the nationwide operation of Western Union Telegraph Company. *Id.* at 15.

²⁰⁹ The Committee Report characterized the Director's role and his recommendations for change as follows:

There have been seven national emergency disputes with injunctions granted in the four maritime cases, atomic energy, and coal. Obviously there has not been sufficient experience for evaluation of each of the respective steps that the act provides in such cases. Had the provisions been used to successfully prevent only one threat to the Nation's safety and health, they would have demonstrated their merit. They were used successfully in several cases. Therefore, in the committee's opinion the national emergency provisions must be retained.

The Director of the Federal Mediation and Conciliation Service has pointed out a phase of the emergency procedure which he considers to be a handicap to his efforts to mediate disputes. When a strike deadline has been set and he is convinced that the national health or safety will be affected, he must start the machinery for obtaining the injunction about a week before the strike date. This time is necessary for the appointment of the emergency board, its hearings, preparation of its report, and the Attorney General's application for an injunction. It has been the Director's experience that upon the appointment of the emergency board, the parties cease all efforts to reach a settlement and start preparing their case for the emergency board. That period just before the strike deadline, which has traditionally been one in which settlement is often reached, is therefore lost for conciliation efforts. If the act were amended to permit the President to direct the Attorney General to seek an injunction when upon the advice of the Director of the Mediation and Conciliation Service he is of the opinion that the threatened strike or lock-out will imperil the national health or safety, without the intervention of the emergency board, the Director's objection is met. The emergency board could then be called into existence upon the issuance of the injunction. This change would not affect the policies and purposes of the provisions and in the committee's opinion should be made.

In the cases so far, the vote upon the last offer has been of little value. It has presented great practical problems for the NLRB and in each instance

Presumably, congressional acceptance of the role of the Service in emergency disputes as related by its Director gives affirmance to such role as a proper one. These contemporaneous interpretations of sections 206-210 of the act suggest the following points: (1) the Federal Mediation and Conciliation Service occupied the "central position" in national emergency labor disputes and had undertaken to fill certain gaps in the law which had to be filled if the provisions were to be efficiently and realistically administered although its role was not that of over-all coordination of executive actions; (2) the Director of the Service, when he was convinced that an imminent dispute would affect the national health or safety, acted to start the machinery for obtaining an injunction and the facts reported by FMCS to the President formed the principal basis for his opinion on the threat to national health or safety; (3) despite less than airtight drafting of section 209, it was intended that boards of inquiry make *no* recommendations for settlement of disputes; and (4) the primary purpose of reports of the boards was to mobilize public opinion. Without the authority to make recommendations and without sufficient publicity, such reports had failed in this purpose.

It might be noted that the Service expressed its reservations regarding the performance of (1) and (2); indeed, some of the testimony regarding the extent of its responsibility for "pulling the trigger" is confusing.

It is fair to conclude that recommendations for settlement were associated in the thinking of the participants of this era with "fact-finding" in a manner which distinguished that device from the activities of the board of inquiry, although the intended functions of the boards of inquiry remained less than clear.

(ii) *Financing Board of Inquiry Activity.*—As is too often the case, the answers to substantive puzzles in legislation are buried in

the vote has been overwhelmingly against acceptance of the offer. Such result must be anticipated, for the calling of a strike of such magnitude as to invoke the national-emergency procedure will usually involve a strong union. The fact that not a single vote was cast in one of the west coast maritime referenda is illustrative. The committee recommends that sections 209(b) and 210 be amended to eliminate the requirement for a ballot conducted by the NLRB on the last offer of the employer.

A further suggestion has been made that the emergency board be permitted to make recommendations as well as find the facts in these disputes. That alternative to the act's procedure was considered at length by the committee who drafted the act, and rejected by them as being in fact compulsory arbitration with public opinion providing the compulsion. The committee does not believe, in view of the success of the present procedure, that any case has been made for the adoption of that which was rejected by the committees who framed the law. *Id.* at 21-22.

obscure hearings on appropriation bills. With luck, some answers are found right in the actual appropriations acts.

From 1949 to 1963, the language of the relevant appropriations acts providing funds for the Federal Mediation and Conciliation Service makes express mention of boards of inquiry. Until 1958, FMCS's appropriations acts included a subject matter category labeled "boards of inquiry."²¹⁰

²¹⁰The following are examples of the form of the Federal Mediation and Conciliation Appropriations Acts. These examples are selected because they also show a change in the maximum per diem authorizations for the payment of boards of inquiry members. FMCS Appropriation Act, 1949, 62 Stat. 406 (1948):

Salaries and expenses: For expenses necessary for the Federal Mediation and Conciliation Service to carry out the functions vested in it by the Labor-Management Relations Act, 1947 (Public Law 101, approved June 23, 1947), including expenses of the Labor-Management Panel as provided in section 205 of said Act; temporary employment of arbitrators, conciliators, and mediators on labor relations at rates not in excess of \$35 per diem; expenses of attendance at meetings concerned with labor and industrial relations; the purchase of one passenger automobile; printing and binding; services as authorized by section 15 of the Act of August 2, 1946 (5 U.S.C. 55a); deposits in the Treasury for penalty mail (39 U.S.C. 321d); and payment of claims pursuant to section 403 of the Federal Tort Claims Act (28 U.S.C. 921); \$2,940,000.

Boards of inquiry: To enable the Federal Mediation and Conciliation Service to pay necessary expenses of boards of inquiry appointed by the President pursuant to section 206 of the Labor-Management Relations Act, 1947 . . . , including printing and binding; services as authorized by section 15 of the Act of August 2, 1946 (5 U.S.C. 55a); and rent in the District of Columbia, \$150,000. This title may be cited as the "Federal Mediation and Conciliation Service Appropriation Act, 1949."

FMCS Appropriation Act, 1951, 64 Stat. 656 (1950):

Salaries and expenses: For expenses necessary for the Service to carry out the functions vested in it by the Labor-Management Relations Act, 1947 (29 U.S.C. 171-180, 192), including expenses of the Labor-Management Panel as provided in section 205 of said Act; temporary employment of arbitrators, conciliators, and mediators on labor relations at rates not in excess of \$75 per diem; expenses of attendance at meetings concerned with labor and industrial relations; printing and binding; services as authorized by section 15 of the Act of August 2, 1946 (5 U.S.C. 55a); health service program as authorized by law (5 U.S.C. 150); and payment of tort claims pursuant to law (28 U.S.C. 2672); \$2,949,700.

Boards of inquiry: To enable the Service to pay necessary expenses of boards of inquiry appointed by the President pursuant to section 206 of the Labor-Management Relations Act, 1947 (29 U.S.C. 176-180, 182), including printing and binding; services as authorized by section 15 of the Act of August 2, 1946 (5 U.S.C. 55a); and rent in the District of Columbia, \$50,000. This title may be cited as the "Federal Mediation and Conciliation Service Appropriation Act, 1951." This chapter may be cited as the "Labor-Federal Security Appropriation Act, 1951."

FMCS Appropriation Act, 1962, 75 Stat. 609 (1961):

For expenses necessary for the Service to carry out the functions vested in it by the Labor-Management Relations Act, 1947 (29 U.S.C. 171-180, 182), including expenses of the Labor-Management Panel as provided in section 205 of said Act; expenses of boards of inquiry appointed by the President pursuant to section 206 of said Act; temporary employment of arbitrators, conciliators, and mediators on labor relations at rates not in excess of \$100 per diem; and

The statute is silent regarding who is to pay the expenses of the boards of inquiry. However, this deficit in drafting was cured from the very beginning by the appropriations act²¹¹ for the Federal Mediation and Conciliation Service and this authorization carried forward to the present.²¹²

The hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives²¹³ are particularly instructive regarding financial arrangements for boards of inquiry. In the budget submitted to Congress there is a specific section for boards of inquiry. It was also indicated in the testimony by the Director that funds were specifically earmarked for such boards.²¹⁴

Of particular interest was the discussion²¹⁵ of the increased funds requested by the Service for special factfinding boards. There was an item of \$40,000 in the budget for special factfinding boards appointed by the Director. Those funds were not to be earmarked, although the Service indicated its intention to do so. The colloquy between the congressmen and the Director and other representatives of the Service made it clear that these factfinding boards were voluntary boards which were distinct from boards of inquiry. Director Ching asserted that the monies requested for boards of inquiry were to pay their expenses which were charged to the Service under the law. He pointed out that the factfinding boards of which they were speaking were boards set up by the parties at the request of the Service. Although the parties agreed to use the board, neither side was bound by any of its findings; and furthermore, the action of the board did not contemplate anything other than the filing of a report with the parties.

The discussion clarified the intended relationship between factfinding boards appointed by the Director and the national emergency disputes provisions, pointing out that the factfinding boards

Government-listed telephones in private residences and private apartments for official use in cities where mediators are officially stationed, but no Federal Mediation and Conciliation Service office is maintained; \$4,973,000.

²¹¹ 62 Stat. 406 (1948).

²¹² See *Senate Hearings on H.R. 5728*, 80th Cong., 2d Sess. 223-35 (1948) for fiscal year 1949 (testimony of Cyrus Ching, Director of FMCS); see also *Hearings Before the Subcommittee on Appropriations, House of Representatives, on the Department of Labor-Federal Security Agency Appropriations Bill for 1949*, 80th Cong., 2d Sess., pt. 1, at 360-71 (1948).

²¹³ *Hearings Before the Subcommittee of the House Committee on the Department of Labor-Federal Security Agency Appropriations for 1951*, 81st Cong., 2d Sess., pt. 5, at 1029-46 (1950).

²¹⁴ *Id.* at 1030.

²¹⁵ *Id.* at 1030-34.

of the Director of the Service might be similar in technique to the factfinding boards used by the President, albeit both are outside of the national emergency disputes provisions of the law. The Director of the Service pointed out that neither factfinding technique precluded subsequent use of the national emergency disputes procedures. It was suggested that, as a matter of timing, it might be possible to get settlements or have strike activity postponed on the basis of a factfinding board without getting into the national emergency phases.

One of the difficulties was that, without money, the Service was hampered in suggesting the factfinding technique. The Director described one situation in which he had to recommend a board and then suggest to the parties that they pay for it, since the Service could not defray the expenses. It was suggested that where the factfinding technique seemed desirable, and the Service had no funds to support such a technique, the only alternative, as was the case in the 1949 Steel situation, was to throw the dispute into the White House, which everyone felt was undesirable. The 1949 steel board had to be paid out of White House funds.

The authority for the Service²¹⁶ to appoint factfinding boards was clearly recognized in these hearings. It was pointed out that many such boards had been appointed in the past through the Department of Labor, that the device was not new, and that the compensation had been paid by the Department. Some concern was voiced regarding the statutory authority for this type of activity and it was pointed out that section 203(c)²¹⁷ of the law authorized the Director of FMCS, if he could not bring the parties to agreement by conciliation within a reasonable time, to seek to induce the parties voluntarily to use other means for settling the dispute. One congressman wanted it clearly pointed out that the record should clearly disclose the legislative authority for the expenditure of public funds in the hiring and paying of individuals outside the government service and the so-called factfinding procedure.²¹⁸

With regard to the amounts of money available to pay professional umpires, one of the congressmen was doubtful that they were justified in taking such a broad view of the authorizations as claimed by the Service.²¹⁹ He suggested, however, that in order to find out

²¹⁶ *Id.* at 1042.

²¹⁷ 61 Stat. 153 (1947), 29 U.S.C. § 173(c) (1964).

²¹⁸ *Hearings, supra* note 213, at 1042.

²¹⁹ *Id.* at 1043.

how far such authorization actually went, he would probably have to go back to the basic law setting up these activities under the old Department of Labor.²²⁰

There was also some concern about the authority of the President to appoint factfinding boards and an expression that such boards were extra-legal. The Service avoided the question as to the law under which the President was operating when he appointed factfinding boards. However, in response to questions regarding the limitations on the amounts that could be paid by the Service, the Committee was directed to section 15 of Public Law 600 adopted in the 79th Congress,²²¹ which enabled heads of any department, when authorized in an appropriation or other act, to procure the intermittent services of experts or consultants or organizations without regard to civil service classification law, but limited the pay to the equivalent of the highest per diem rate payable under the classification act²²² unless other rates were specifically provided in the appropriation or other law.²²³

This discussion of financing suggests possible congressional ratification of the activities of the Federal Mediation and Conciliation Service both in the administration of the board of inquiry functions and in the factfinding area.²²⁴ If the old saying "he who pays the piper calls the tune" has any validity, the congressional approval of the Federal Mediation and Conciliation Service's appropriations for the national emergency disputes boards of inquiry activities would certainly establish that agency as the one with control of such boards. However, this unbroken appropriation chain that provides the Service with funds for paying the expenses of boards of inquiry, which boards, under the substantive law, are appointed by and report to the President, creates an anomalous situation for FMCS. It is re-

²²⁰ That law would provide little guidance on the issue. See 37 Stat. 738 (1913).

²²¹ 60 Stat. 810 (1946), as amended, 5 U.S.C. § 55 (a) (1964).

²²² 63 Stat. 959 (1949), as amended, 5 U.S.C. §§ 1111-16 (1964).

²²³ *But see* text accompanying note 182 *supra*.

²²⁴ In Pub. L. No. 759, 64 Stat. 657 (1950), of the 81st Congress, 2d Session, the Federal Mediation and Conciliation Service received exactly the amounts requested — \$50,000 for boards of inquiry and \$40,000 for factfinding boards. For other appropriation acts see the following: 76 Stat. 361 (1962) (87th Cong., 2d Sess.); 74 Stat. 755 (1960) (86th Cong., 2d Sess.); 73 Stat. 339 (1959) (86th Cong., 1st Sess.); 72 Stat. 457 (1958) (85th Cong., 2d Sess.); 71 Stat. 210 (1957) (85th Cong., 1st Sess.); 70 Stat. 423 (1956) (84th Cong., 2d Sess.); 69 Stat. 397 (1955) (84th Cong., 1st Sess.); 68 Stat. 434 (1954) (83d Cong., 2d Sess.); 67 Stat. 245 (1953) (83d Cong., 1st Sess.); 66 Stat. 358 (1952) (82d Cong., 2d Sess.); 65 Stat. 208 (1951) (82d Cong., 1st Sess.).

sponsible, at least for "housekeeping purposes," for a creature over which it does not, and perhaps should not, have any direct control.

In the first report of the FMCS, the Director vigorously disclaimed any participation in the decision or policy making of the agencies charged with responsibilities under the national emergency disputes provisions of the statute, specifically mentioning the President, boards of inquiry, and the Attorney General.²²⁵ In the hearings in 1949 on S. 249, the FMCS asserted by memo²²⁶ that even

²²⁵ See 1948 FMCS ANN. REP. 20-21.

²²⁶ *Hearings on S. 249, supra* note 188, pt. 1, at 67:

The Service has been requested to comment on the suggestion that it be transferred to the Department of Labor for housekeeping purposes in the light of the stated position of the Director of the Service that its absorption by the Department for all general purposes would seriously impair the effectiveness of Government mediation. This position was taken on the ground that large sections of the employer groups who require mediation services, if industrial peace is to be promoted, regard the Department of Labor and its top officials, whether or not justifiably, as biased and favorable to the interests of unions in any conflict between unions and management.

The Service most earnestly believes that those reasons which counsel against a transfer of the Service to the Department, generally, apply with equal force to the transfer of the Service to the Department for housekeeping purposes.

Housekeeping usually refers to those administrative management functions having to do with the hiring and firing of personnel, the formulation and justification of budget estimates and the control of the obligation of funds. Control of any one of these functions would have a vital effect upon the basic substantive policies and programs of the Service.

Policies and programs are formulated and administered by personnel. It is generally recognized that the official who has the power of appointment of personnel is in a most strategic position to control policy and program. A Director of the Service, with bureau status, would not have any effective control over its policies and programs if the appointment, promotion, transfer, discipline, assignment, and separation powers over personnel were lodged in his superior officer. A transfer for housekeeping purposes would give the Secretary of Labor full and final control over the selection and assignment of personnel within the Service. Under such circumstances, independence, with respect to the formulation and execution of policies and operations, would be an illusion. The transfer of the mediation function for housekeeping purposes, in fact and in truth, would not be to a new bureau in the Department of Labor, but to the Secretary of Labor and to the particular Assistant Secretary, to whom he would assign immediate superintendence over the operations of that bureau.

The same considerations apply to budgeting. Budgeting is synonymous with planning. Planning encompasses both policies and programs. That official who controls the budget or who approves or has veto power over the budget of the Service determines its policies and programs.

Similarly, with respect to the control of the obligation of funds. [*sic*] A Secretary of Labor in a position to withhold funds from expenditure for desired purposes or to veto certain expenditures would as surely control policies and programs as if the mediation function were transferred directly to the Secretary of Labor instead of to a bureau in the Department.

It is apparent, from the above, that housekeeping is a deceptive term if it includes control over the matters referred to above.

It should be understood that the effective operation of a mediation service

"housekeeping" control might affect its independence from the Department of Labor.

The argument, somewhat persuasive, could be applied to FMCS's control for "housekeeping purposes" of boards of inquiry. Its applicability might depend upon the extent of the activity of the particular board and its willingness to follow the suggestions of the Service regarding the proper role, function, and scope of the board's inquiry. More active participation of a given board in dispute settlement, or more vigorous use of its powers of compulsion, or junctures into more traditional factfinding or mediation functions could place the Service in the position of desiring to exercise some control of board action, which it might effectuate through control of the purse and of personnel. If not, the Service might be blamed by the parties for failure to exercise appropriate restraint upon the board of inquiry; either might be unfortunate for the Service's posture of neutrality.

To date, the problem seems entirely academic. It could be of more substantial importance, however, if the often suggested amendment putting the appointment of a board *after* the injunction or "status quo order" and expanding its functions to include factfinding with recommendations, stepped-up mediation, and other techniques of dispute settlement were adopted.²²⁷

The national debates concerning the use of factfinding boards as a means of settling industrial disputes which occurred during the consideration of the Thomas Bill²²⁸ in 1949 provide a source of

aside from the actual work of mediation involves budget planning, the formulation of basic policies, the supervision and control of personnel and the prudent and efficient expenditure of funds. A transfer for housekeeping purposes would repose in the Secretary of Labor effective control either directly or indirectly over all such functions. It would lodge in the Secretary power over all policies, programs, and operations of the Service to the same extent as though a full transfer of the mediation function were made to the Office of the Secretary of Labor. *Ibid.*

²²⁷ See, e.g., S. 249, 80th Cong., 1st Sess. (1947) (as introduced); although this bill would have placed the Department of Labor in the housekeeping role, the analogy appears to be appropriate. See also S. REP. NO. 99, 81st Cong., 1st Sess., pt. 1, at 63-65 (1949) (accompanying S. 249); S. REP. NO. 99, *supra* at 53-62 (minority views). In particular, see S. REP. NO. 99, *supra* § 302, at 61, relating to the amendment offered as Title III which directed emergency boards to seek to induce parties to reach an agreement in settlement of disputes. Although the report including its recommendations for settlement was due in 30 days, the time could be extended by agreement between the parties with the approval of the board. Moreover, the boards were directed to continue in existence after making the report for the purpose of mediating the dispute should the parties request its services. See REPORT OF THE PRESIDENT'S ADVISORY COMMITTEE ON LABOR MANAGEMENT RELATIONS ON "FREE AND RESPONSIBLE COLLECTIVE BARGAINING" *passim* (1962).

²²⁸ S. 249, 81st Cong., 1st Sess. (1949).

contemporaneous interpretation of the present statute. The contributions are somewhat negative, however, in that they concern suggested changes in the act as interpreted by those proposing or opposing such changes. It may be inferred, however, that those matters under consideration as changes were absent from, or unclear in, the present law.

The extensive support for amendments permitting emergency boards to make definite recommendations²²⁹ for settlement certainly frustrates any legal argument that Congress permitted recommendations in the final reports of such boards under section 209 of the present law by failing to specifically prohibit them.

There is also evidence, in addition to the language of the act and the explanations of its sponsors in the 80th Congress, that the functions of boards of inquiry under present law were not intended to include mediation. FMCS Director Ching suggested that they be free to make recommendations, to mediate, to do anything to get the case settled. Senator Taft wanted to be sure that he understood Mr. Ching's position as approving the theory that such boards should seek to induce the parties to settle, which he characterized as mediation again. He went on to point out his understanding of the experts of the 1947 hearings, that mediation was one thing and fact-finding was another and that they should be kept separate. Director Ching confirmed his rejection of that theory, and asserted that in his opinion the boards should have powers of mediation, of factfinding, and of recommendation.²³⁰

There is little clarity, as yet, in the discussions regarding the functions of boards of inquiry in "factfinding" without recommendations and with no more standards than the law presently provides. Bona fide factfinding was employed by the Service and the President, and specific congressional ratification of its use by the Service is implicit in its approval of the FMCS's funds earmarked for factfinding as distinguished from the expenses of boards of inquiry.²³¹

One interesting by-play of the 1949 hearings was the role of the Director of the Federal Mediation and Conciliation Service and the Secretary of Labor in the legislative process. Director Ching in the first annual report of the Service staked out for the Service a future

²²⁹ S. 249, *supra* note 228, passed the Senate June 30, 1949, with the Taft amendment providing authority for the boards to make recommendations and to engage in mediation; however, the amendment was not enacted into law. See also S. REP. NO. 99, 81st Cong., 1st Sess., pt. 1, 35-37, 63-65 (1949); S. REP. NO. 99, *supra* pt. 2, 55-62.

²³⁰ *Hearings on S. 249, supra* note 188, at 77.

²³¹ See, e.g., *Hearings, supra* note 213, at 1030-46.

role in making legislative recommendations.²³² He then proceeded, while disclaiming that they were recommendations, to make what some Senators mistook for legislative recommendations.²³³ The entire tenor of his response in this regard seemed unmistakable. He expressed opposition to provisions of S. 249,²³⁴ as introduced, which had been endorsed by Secretary of Labor Tobin as the administration's bill.²³⁵

This possibility of conflict within the executive family certainly puts the question of whether it is possible to have independent or co-equal executives with policy responsibilities in the same area. This may be primarily a problem of the Chief Executive and of no substantial consequence. It is a continuing possibility, however, whenever there are independent agencies operating in a common area.

In the first and second annual reports of the FMCS and in the 1949 hearings, the Director of the Service tried to walk a thin line between "reporting the experience of the agency" while avoiding legislative recommendations. By 1949 he denied that recommending either retention or repeal of provisions of the act was part of his function. He did, however, affirm his opinion that, if the act were retained, certain amendments should be made to eliminate procedural weaknesses.²³⁶

In the 1949 report of the FMCS, it is stated that much of the important activity of the Service will take place unreported and unnoticed.²³⁷ In fact, disclosure of the mere holding of discussions could be a breach of confidence, it was asserted. The chief stock and trade of mediators, and perhaps of the Service itself, is asserted to be the confidence of the parties.

Recall that the first annual report of the Service pointed out the gaps in the national emergency disputes provisions, which the Service reluctantly undertook to fill. Concern was registered lest the more active role jeopardized its value as a mediation agency, and the desire to remain aloof from the enforcement aspects of the law was clearly manifested.²³⁸

²³² See 1948 FMCS ANN. REP. 54.

²³³ *Hearings on S. 249, supra* note 188, at 53-106.

²³⁴ *Hearings on S. 249, supra* note 188.

²³⁵ *Id.* at 31-32.

²³⁶ 1949 FMCS ANN. REP. 6-7. See Director Ching's lectures on labor management relations at 1-10 (see excellent discussion of factfinding at 5-8).

²³⁷ 1949 FMCS ANN. REP. 23-24.

²³⁸ 1948 FMCS ANN. REP. 40-41.

From these two reports, considered against the background of the legislative history of the act which shows the functions which boards of inquiry were not intended to perform, an explanation of the need for the limited function left to such boards begins to emerge.

C. *The Proper Function of the Board of Inquiry*

If factfinding in the traditional sense of the word, including recommendations and mediation or other efforts to induce the parties to settle a dispute, is a function *denied* boards of inquiry (as indeed the law and legislative history so indicate), and if boards are limited to the functions prescribed upon the face of the statute,²³⁹ it would appear that they perform an unnecessary fact-gathering function.

The information that such boards are likely to gather will, along with much more, probably already be known by the Federal Mediation and Conciliation Service, and, in most instances be embodied in any report by the Service to the President before he names a board of inquiry. However, prior preoccupation with the contribution of boards of inquiry to facts and the confusion between the functions of true factfinding boards and the role, never actually explained if actually understood, of boards of inquiry under the Taft-Hartley Act, obscured the value of the statutory functions of such boards. In Title II of the Taft-Hartley Act, Congress adopted only parts of the theory of true factfinding, and seemingly the least effective parts at that. Although granting powers of compulsion, it withheld powers of recommendation and, on the naked face of the statute, withheld even the powers of judgment. Hence, in essence the board of inquiry is literally relegated to gathering facts and presenting them to the President and to the public. Such a limited role may not even give the public a firm rallying point, unless the reasonableness of one side is so obvious or the presentation by a board of inquiry is such that judgments have in fact been made by such board. In any event, the Federal Mediation and Conciliation Service could not perform functions that boards of inquiry may perform and still remain useful for the accomplishment of its primary mission.

A board of inquiry is indeed a part of the enforcement aspects

²³⁹ Boards of inquiry are to inquire into the issues and report the facts, including the parties' statements of their positions and after 60 days, report current position, efforts and settlement of the dispute, and another statement by the parties of their position — including the employer's last offer. L.M.R.A. § 209, 61 Stat. 155 (1947), 29 U.S.C. § 179(b) (1964).

of the emergency disputes procedures. As an *ad hoc* board armed with powers of compulsion, it can obtain necessary information, perhaps even from the Service, although the use of compulsion here might be damaging. A board need not, and perhaps should not, be overly concerned with maintaining the rapport with the parties which would be necessary for mediation. That function, the mediation function, falls back upon the FMCS after the injunction issues.

A board of inquiry, while adding little if anything to knowledge of the facts under a restricted view of its functions, performs the ceremonial role required by the act's procedures of preparing the "guillotine" as it were. In its functions leading up to the initial report, it performs a preparatory ritual which is clear warning to the parties and to the public that the government is about to use, or may use, its big stick. The use of this compulsion, the injunction, and the attendant emotionalism surrounding its use in labor disputes, all contribute to casting the board of inquiry somewhat in the role of the prison warden just before an execution.

Representatives of the FMCS, in discussing the need for authority to increase the pay of persons who perform such functions, alluded to the enormous expendability of persons who perform functions such as arbitration, factfinding, and the like.²⁴⁰ When one adds to that the continuing hostility of the labor movement to the national emergency disputes procedures, with its injunction, there is plausibility in the role of boards of inquiry in providing the necessary buffer between the permanent and continuing mediation and conciliation functions of the Service and the sporadic enforcement aspects of the law.

If, in the past, experts have been hypercritical of the boards of inquiry for failing to make meaningful contributions to dispute settlement, then it seems that such criticisms proceeded somewhat from a misapprehension of the contribution of even the stripped-down functions of such boards. Various boards have tried to perform in a manner which would answer the criticisms rather than sticking to a mere ministerial function.

This is not to suggest that the functions of fact-gathering, position-stating, etc., make no contribution to dispute settlement. The mere fact of having to go on record and having one's arguments recorded and reported, may have some effect upon the parties. It is doubtful that such effect is measurable, or if, indeed, the reports are in such fashion that the public would read them, or understand

²⁴⁰ *Hearings, supra* note 213, at 1042-43.

them even if they were read. So it would seem that the judging role is a vital one for a board even if its view of its functions is the restricted one of merely gathering and reporting the facts.²⁴¹

The statutory mandate to these boards does not charge them with "finding the facts" as that term is understood in a legal sense. The vague wording of the functions of boards of inquiry only comes close to this in giving them the necessary power to "ascertain the facts."²⁴² If Congress had intended them to engage in "finding of fact," it certainly had language before it in other parts of the act precisely designed for that.²⁴³ It seems clear that the limited role of boards of inquiry was intended. That role has less to do with obtaining facts and settlement than with providing a procedural device separate from the Federal Mediation and Conciliation Service or other agencies of the government, whereby the government shifts from its role as mediator and conciliator into a role of enforcer.

IV. THE 80-DAY INJUNCTION AND THE JURISDICTION OF THE COURTS

A. *Some Litigation Problems*

The manner in which section 208²⁴⁴ is drafted, particularly in view of the effect of the Norris-LaGuardia Act²⁴⁵ on the traditional equity jurisdiction of the federal courts in labor disputes, literally read, raises some rather curious problems. The terminology "upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out . . ." creates questions of timing, discretion, limitations on the authority of the President to direct and the Attorney General to petition, as well as questions of limitations on the jurisdiction of the court. The language also establishes a condition precedent to the exercise of the President's authority, namely, the receipt of a report from the board of inquiry.

The "upon receiving" language raises the issue of the length of time a President may wait before he exercises his discretion to direct

²⁴¹ Most of the 24 initial reports of the boards of inquiry have passed "judgment" upon the behavior of the disputants, albeit in widely varying degrees. Most boards have also found the urge to attempt settlement through mediation irresistible.

²⁴² L.M.R.A. § 207, 61 Stat. 155 (1947), 29 U.S.C. § 177 (a) (1964).

²⁴³ See 73 Stat. 544 (1949), 29 U.S.C. § 160 (1964) (see particularly §§ 160 (c)-(p)).

²⁴⁴ 61 Stat. 155 (1947), 29 U.S.C. § 177 (1964).

²⁴⁵ 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1964).

the Attorney General to seek an injunction. Since the President need not direct the Attorney General to sue at all, one might assume that he could take as much time as he desired between the receipt of the report and the exercise of his discretionary authority. On the other hand, however, the general structure of the dispute-settling procedures and the history of the act strongly suggest that the entire chain of events was intended to take place within a given period. If this be so, then the President would be under some duty to exercise his discretion within a reasonable time²⁴⁶ after the receipt of the report from the board of inquiry. The issue of reasonableness is one that would seem subject to a challenge upon litigation if the President waited too long.

The language of section 208(a)²⁴⁷ is also subject to an interpretation that it is a limitation upon the authority of the President, as well as upon the jurisdiction of the court. Since the Norris-LaGuardia Act divested the federal courts of jurisdiction to enjoin a labor dispute except under very limited circumstances, it is necessary that the statute reconfer jurisdiction upon the courts to grant the remedy provided for in the Taft-Hartley Act. Upon the face of the section, the restoration to the district courts of the power to enjoin labor disputes is a qualified or conditional one. In the language of subsection (a), the President is only authorized to direct the Attorney General to petition the district court or courts which have jurisdiction over the parties engaged in the strike or lockout. It would follow also that, upon the direction of the President to the Attorney General to institute suit in the appropriate courts, the Attorney Gen-

²⁴⁶ The question of timeliness of this discretion was of concern to the Government in the 1954 Atomic Energy Dispute. Exec. Order No. 10542, 19 Fed. Reg. 4117 (1954). The injunction action was not instituted until a month after the receipt of the board report. Initial concern was evidenced regarding the continued validity of the report after such a lapse of time. *United States v. Union Carbide & Carbon Corp.*, Civil No. 2456, D. Tenn., Sept. 7, 1954.

²⁴⁷ 61 Stat. 155 (1947), 29 U.S.C. § 178(a) (1964).

(a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out —

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate. *Ibid.*

eral's authority would be limited to petitioning those courts which have jurisdiction of the parties. This interpretation seems strengthened by the fact that the language reads further that if the court finds the requisite standards set forth in sections 208(a)(i-ii) to exist, then it shall have jurisdiction to grant the injunction. The only identification of the court empowered to act in the fashion permitted by the statute is the court that would have jurisdiction of the parties.

While section 208(b) is a specific waiver of the limitations of the Norris-LaGuardia Act, the subsection begins with "In any case," and, since it is obviously not a general waiver of the provisions of the Norris-LaGuardia Act, it must be read to mean in any *such* case, referring, therefore, to the cases arising under the conditions specified in section 208 of the act.²⁴⁸ The cases referred to then would be those instituted by the Attorney General at the direction of the President, after receipt of a report from a board of inquiry, in the district court or courts *having jurisdiction of the parties*. It would seem, therefore, that the jurisdiction of a court (power) to grant the injunctive relief requested is dependent upon the jurisdiction of the court (territorial) over the parties involved in the dispute.

B. *Jurisdiction of the Courts*

There are numerous provisions in Title 28 of the United States Code that deal with jurisdiction of the district courts. In section 1345,²⁴⁹ the act provides "except as otherwise provided by act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by act of Congress."²⁵⁰ This provision, or one substantially similar, goes back at least as far as 1911.²⁵¹ While the term "jurisdiction" is used variously, it seems pertinent that the removal of (or limitation on) jurisdiction referred to in the Norris-LaGuardia Act seems to go to the actual power and authority of the courts of the United States with regard to injunctions in labor disputes.²⁵² Section 208 of the Taft-Hartley Act seems to be a limited restoration of such

²⁴⁸ It could be read "in any event" but that reading would not seem to alter the interpretation.

²⁴⁹ 28 U.S.C. § 1345 (1964).

²⁵⁰ *Ibid.*

²⁵¹ See 28 U.S.C. § 1345 (1964) (revisor's note of the legislative history).

²⁵² See 47 Stat. 70 (1932), 29 U.S.C. § 102 (1964).

power, that is, it vests the court with jurisdiction to enjoin such strike or lockout and to make other orders as may be appropriate. Such limited jurisdiction seems to be conditional. The conditions are that the court should have jurisdiction of the parties, that it must find that the strike or lockout affects an entire industry or substantial part thereof, and that if permitted to occur or continue, it would imperil the national health or safety.

No special provision is made for service of process upon a defendant in any district outside of that court "with jurisdiction of the parties." It is significant to note that sections 1692, 1694, and 1695²⁵³ of Title 28 deal with service of process in situations in which the defendant may not be a resident of the district in which the action is commenced. Where it so intended, Congress has also recognized special situations in dealing with venue of the district courts under chapter 87 of Title 28.²⁵⁴

It is reasonably clear that a suit to enjoin a strike or lockout under section 208 of the Taft-Hartley Act is one requiring in personam jurisdiction. The statute makes this clear by seeming to limit the power to grant the injunction to that particular court. Congress clearly has the power to authorize a suit under federal law to be brought in any inferior federal court and to provide that the process of every district court shall run to every part of the United States.²⁵⁵ On the language of section 208, however, no such specific authorization has been given.

As the Supreme Court said in *Robertson v. Railroad Labor Bd.*²⁵⁶

In a civil suit *in personam* jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons. Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district, *Harkness v. Hyde*, 98 U.S. 476; *Ex parte Graham* 3 Wash. 456; and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. *Toland v. Sprague*, 12 Pet. 300, 330. Such was the general rule established by the Judiciary Act of September 24, 1789, c. 20 section 11, 1 Stat. 73, 79, in accordance with the practice at the common law. *Piquet v. Swan*, 5 Mason 35, 39 *et seq.* And such has been the general rule ever since. *Munter v. Weil Corset Co.*, 261 U.S. 276, 279. No distinc-

²⁵³ 28 U.S.C. §§ 1692, 1694-95 (1964).

²⁵⁴ 28 U.S.C. §§ 1391-93 (1964).

²⁵⁵ *United States v. Union Pac. R.R.*, 98 U.S. 569, 604 (1878); *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838).

²⁵⁶ 268 U.S. 619 (1925).

tion has been drawn between the case where the plaintiff is the Government and where he is a private citizen.²⁵⁷

In this case there was an attempt to require the defendant to respond to a subpoena served upon him by the marshal for the Northern District of Ohio in Cleveland, where he was a citizen and an inhabitant, commanding him to appear at the office of the board in Chicago, Illinois. The defendant appeared specially by an attorney and challenged the jurisdiction of the board over him and declined to appear and testify. Thereupon the suit was begun by the board in the Federal District Court for Northern Illinois. A summons issued by the court directing the defendant to appear and answer was likewise served upon him in Cleveland by the marshal for the Northern District of Ohio. His attorney again appeared and moved to quash the service on the ground that, being an inhabitant of Ohio and served there, the defendant was not subject to the jurisdiction of the federal court in Illinois. The Supreme Court sustained the defendant, pointing out that by the general rule in personam jurisdiction of the district court has been limited to the district of which the defendant is an inhabitant or in which he can be found. The Court indicated the instances in which Congress had made clearly expressed exceptions to the general rule of in personam jurisdiction. No such exceptions appear in the national emergency disputes provisions.²⁵⁸

The Supreme Court also went on to deal with venue in the *Robertson* case, pointing out that section 51 of the Judicial Code was a general provision regulating venue.²⁵⁹ The Court pointed out that a part of the general provision regulating venue pertinent to the case before it, with certain inapplicable exceptions, provided that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."²⁶⁰ This seems equally pertinent in the

²⁵⁷ *Id.* at 622.

²⁵⁸ It should be noted that this 1925 Supreme Court case is still very much alive. It was quoted with approval in a dissenting opinion by Mr. Justice Black in *National Equip. Rental Ltd. v. Szukhent*, 375 U.S. 311, 328 (1964) and followed in *Kadet-Kruger & Co. v. Celanese Corp. of America*, 216 F. Supp. 249 (N.D. Ill. 1963). *But see Goldlawr v. Heiman*, 369 U.S. 463 (1962).

²⁵⁹ See the revisor's notes tracing § 51 of the Judicial Code back to 36 Stat. 1101 (1911) which contained the section entitled "Section 51 of the Judicial Code." 28 U.S.C. § 1391 (1964).

²⁶⁰ *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 623 (1925). See *Male v. Atchison, T. & S.F. Ry.*, 240 U.S. 97 (1916); *Macon Grocery Co. v. Atlantic Coast Line Ry.*, 215 U.S. 501 (1910); *Galveston, H. & S.A. Ry. v. Gonzales*, 151 U.S. 496 (1894). Compare *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898); *Stone v. United States*, 167 U.S. 178 (1897); *In re Hohorst*, 150 U.S. 653 (1893).

discussions of section 208 of the Taft-Hartley Act. It is obvious that jurisdiction, in the sense of personal service within a district where suit has been brought, does not dispense with the necessity of proper venue. It is equally obvious that proper venue does not eliminate the requisite personal jurisdiction over the defendant. The general provision as to venue contained in the Judicial Code has been departed from in various specific provisions²⁶¹ which allow the plaintiff, in actions not local in nature, some liberty in selection of venue. The rule applies even where it may result in barring the jurisdiction of every federal court because all of the defendants are indispensable parties.²⁶²

The Court has said:

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless.²⁶³

The Court in this case also stated that the general rule of equity is that all persons with a material interest, either legal or beneficial, in the subject matter of the suit are to be made parties to it.²⁶⁴ Moreover, if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter but not made parties to the suit, the court may dismiss the action on its own motion although the issue is not raised by the pleadings or suggested by counsel.²⁶⁵ Although this was an injunction matter, it involved circumstances which were substantially different from a national emergency dispute. It is also a 1902 case. None the less, the basic principle is still valid.²⁶⁶ The Court indicated that, with regard to indispensable parties, the cases did not rest on the ground of juris-

²⁶¹ *E.g.*, 28 U.S.C. §§ 1333, 1392-96 (1964).

²⁶² *Swan Land & Cattle Co. v. Frank*, 148 U.S. 603 (1893); *Barney v. Baltimore City*, 73 U.S. (6 Wall.) 280 (1867); *Shields v. Barrow*, 58 U.S. (17 How.) 130, 140-42 (1854). Compare *Camp v. Gress*, 250 U.S. 308, 311, 314 (1919); *Clearwater v. Meredith*, 62 U.S. (21 How.) 489 (1859); see Judicial Code §§ 50, 52, 63 Stat. 101 (1949).

²⁶³ *Minnesota v. Northern Sec. Co.*, 184 U.S. 199, 246 (1902).

²⁶⁴ *Id.* at 235.

²⁶⁵ *Ibid.* See also FED. R. CIV. P. 19(a)-(b).

²⁶⁶ *Charles Keeshin, Inc. v. Farmers & Merchants Bank*, 199 F. Supp. 478, 486 (W.D. Ark. 1961), quoting *Washington v. United States*, 87 F.2d 421, 427 (9th Cir. 1936).

diction, but upon the much broader ground that no court could adjudicate directly upon a person's right unless the party was either actually or constructively before the court.

A search of the legislative history of the Taft-Hartley Act uncovered no meaningful discussion of the details of the jurisdiction of the court under the provisions of section 208. It is clear, however, that the curious language with regard to jurisdiction has been recognized as a problem in litigation. In the 1948 maritime industry dispute,²⁶⁷ suit was instituted in three district courts in the same dispute.²⁶⁸ Again, as late as the atomic energy dispute of 1954,²⁶⁹ consideration was given to instituting actions in two district courts.²⁷⁰

It seems easy to determine the reason for the institution of multiple suits in these cases. The records reveal that there were multiple unions involved and they, being subject to the jurisdiction of different courts, were less likely to waive a jurisdictional challenge than defendants in suits involving multiple employers.

In the first seven instances in which the act was used, only four involved injunctions — the atomic energy dispute, the coal miners' pension dispute, the maritime dispute, and the dock workers' dispute. Of the four, three involved multiple-party disputants and in the two in which the unions were multiple, litigation was instituted in the respective courts having jurisdiction over the areas in which the unions' national offices were located. This is an interesting aside in view of the voluminous number of employers in the coal dispute and in the 1948 dock workers' dispute.

C. Injunction by Sufferance

The question is whether in view of the peculiar conditional jurisdiction bestowed upon the courts by section 208, actions with multiple-party disputants instituted in a district court that lacks jurisdiction over all the parties could be subject to fatal challenge?

A threshold difficulty in unscrambling this question is determining the legal limits of terms such as "strike or lockout" and

²⁶⁷ See Exec. Order No. 9964, 13 Fed. Reg. 3009 (1948).

²⁶⁸ *United States v. National Maritime Union*, 15 CCH Lab. Cas. 73870 (S.D. N.Y. 1948); *United States v. National Maritime Union*, 22 L.R.R.M. 2306 (N.D. Ohio 1948); *United States v. Warehousemen's Union*, 78 F. Supp. 710 (N.D. Cal. 1948).

²⁶⁹ See Exec. Order No. 10542, 19 Fed. Reg. 4117 (1954).

²⁷⁰ *United States v. Union Carbide & Carbon Corp.*, Civil No. 2456, E.D. Tenn., Sept. 7, 1954. Subsequently, at the hearing on the injunction, representatives of the union waived venue for the defendant-union local located in Kentucky and thereby voluntarily submitted to jurisdiction of the court.

"the parties" to any such strike or lockout. In the multiple-party-disputant industry-wide strike, if the strike universe or unit is the entire industry, then no single district court would have jurisdiction over all of the parties. If the strike were limited to an employer-employee representative relationship within the jurisdiction of a single district court, such a limited strike unit would rarely "affect an entire industry or substantial part thereof." Moreover, except in special circumstances, a strike in a single steel plant or company or of a single shipping line would rarely "imperil the national health or safety."²⁷¹

There are many other problems connected with the definition of the unit over which various sections of the provisions for the settlement of national emergency disputes operate. These include the area covered by strike notices which must be filed with the FMCS thirty days prior to the termination of the contract or modifications thereof, the area over which the NLRB last-offer ballot will be conducted and counted, and the possible variances between the entities represented by those who bargain and the entities subject to a contract once agreed upon and executed.²⁷² The situation is not improved by use of the term "labor dispute" in sections 206, 207, and 209, as if the confines of "any such strike or lockout" and "labor dispute" were coterminous. Unhappily, in a multi-employer, multi-union, nationwide dispute, neither a "macro" nor a "micro" interpretation of the confines of the dispute yields a satisfactory result.

Fortunately, perhaps, this paradox has not played any substantial part in the twenty-four cases²⁷³ in which the art has been in-

²⁷¹ There have been instances in which a small portion of an industry or single company operation has been held to meet the test. See *United States v. American Locomotive Co.*, 109 F. Supp. 78 (W.D.N.Y. 1952), *aff'd*, 202 F.2d 132 (2d Cir.), *cert. denied sub nom.* *United Steelworkers v. United States*, 310 U.S. 915 (1953). There have also been others such as the 1948, 1954 and 1957 atomic energy disputes, but they would seem to constitute a distinguishable class.

²⁷² A ready example of the latter comes to mind in the longshore industry bargaining. Generally, the N.Y. Shipping Ass'n is the bellwether settlement and the "outports" follow along afterwards, although the bargaining units are entirely different.

²⁷³ The cases are: Longshore Dispute, Atlantic and Gulf Coasts, 1964; Boeing Company Dispute, 1963; Lockheed Aircraft Corporation Dispute, 1962-1963; Longshore Dispute, Atlantic and Gulf Coasts, 1962; Aircraft Industry Dispute, 1962; Maritime Dispute, Pacific Coast, 1962; Maritime Dispute, Atlantic, Gulf and Pacific Coasts, 1961; Steel Industry Dispute, 1959; Longshore Dispute, Atlantic and Gulf Coasts, 1959; Atomic Energy Dispute, 1957; Longshore Dispute, Atlantic and Gulf Coasts, 1956-1957; Atomic Energy Dispute (second), 1954; Atomic Energy Dispute (first), 1954; Longshoremen's Dispute on the Atlantic Coast, 1953; American Locomotive Company Dispute, 1952; Nonferrous Metals Dispute, 1951; Bituminous-Coal Miners' Contract Dispute, 1949-1950; Dockworkers' Dispute, 1948; Bituminous-Coal Miners' Contract

voked. It does, however, seem curiously at war with the horn-book concept of jurisdiction in injunction matters. It is generally understood that the power of a court of equity to grant writs of injunction antedates specific legislative sanction and is not ordinarily a statutory grant to a court.²⁷⁴ Jurisdiction of the necessary parties is essential to the power of the court to issue an injunction; but, where such parties are within or subject to its jurisdiction, the injunction may operate outside of the territorial limits of the court.²⁷⁵ However, an injunction will not issue against a person not within, or subject to the jurisdiction of the court, nor a person not before the court as a defendant, except where he is an attorney, agent, servant, or successor in office. In addition, under the general rules, jurisdiction to grant an injunction cannot be conferred by the parties where the facts are not such as to give the court jurisdiction. If the court cannot try a cause except under particular conditions, the law withholds jurisdiction unless the conditions exist.²⁷⁶

If the remedy of the court could not be implemented without being binding upon certain parties, it would seem that such parties would be very necessary. If such necessary party-defendants are not subject to the jurisdiction of the court, the court would not be able to lawfully proceed without them.²⁷⁷

Assuming that the problem of the limits of the strike or lock-out or dispute did not exist, and assuming that the district court's jurisdiction over the cause is not dependent upon its *first* having jurisdiction over all of the parties, what might otherwise be a fatal defect in the statute can be cured by voluntary action of the parties.²⁷⁸ Even under these circumstances, the statute places the government in an awkward position. Instead of arming the government with the wherewithal to delay at least for an 80-day period these large-scale disputes, the government's power to act in some circumstances would seem to exist by sufferance of the defendants. If,

Dispute, 1948; Maritime Industry Dispute, 1948; Telephone Dispute, 1948; Bituminous-Coal Miners' Pension Dispute, 1948; Meatpacking Dispute, 1948; Atomic Energy Dispute, 1948. For a synopsis of these cases see FMCS PRESIDENTIAL BOARDS OF INQUIRY CREATED UNDER NATIONAL EMERGENCY PROVISIONS OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 *passim* (rev., April 1965).

²⁷⁴ See *Perkins v. Lukins Steel Co.*, 107 F.2d 627 (D.C. Cir. 1939), *rev'd on other grounds*, 310 U.S. 113 (1940); 43 C.J.S. *Injunctions* § 12 (1945).

²⁷⁵ See 43 C.J.S., *op. cit. supra* note 274, § 168.

²⁷⁶ See 21 C.J.S. *Courts* § 85 (1940).

²⁷⁷ See 43 C.J.S., *op. cit. supra* note 274, § 175.

²⁷⁸ This, no doubt, is what has occurred, particularly where the multiple-party has been the employer. See authorities cited note 260 *supra*.

in a multi-employer, multi-union, nationwide dispute, necessary parties outside the territorial limits of a given district decline to accept service of process for want of jurisdiction, the government, at the very least, would be forced to institute simultaneous actions in as many courts as there were separate geographical groupings of parties involved. No doubt, some provisions for consolidating these cases could be made, but the inconvenience and expense to which the government and the parties may be put would seem considerable.²⁷⁹

If, on the other hand, we consider the problem of jurisdiction of the parties along with the confines of the strike or dispute problem, there could be situations in the multiple-party, nationwide strikes in which the government could not get an injunction under the language of this statute because of want of jurisdiction in any district court.²⁸⁰

It is recognized, on the basis of the empirical record, that the material discussed above is analogous to the aerodynamic theory of flight as applied to bumble bees.²⁸¹ However, it seems that a critical analysis of the statutory language would be incomplete without these observations. In addition, any revisions of the Taft-Hartley Act ought to include language directed to correcting this situation.

Most criticisms of the injunction as a weapon in the arsenal for disputes settlement bemoan its ineffectiveness, as well as its unfairness to the employees. Without entering the lists regarding the merits of such criticisms, it is submitted that an equally strong reason for eliminating it as a primary tool under the Taft-Hartley Act is the gross inconvenience and possible impotence of the device if successful procedural challenges were mounted. If the dispute or strike were called to a halt for a temporary period by mandatory command of the statute, as in the Railway Labor Act,²⁸² all of the aforementioned horrors would be avoided. Although the power of an injunction stands behind the mandatory command of the Rail-

²⁷⁹ See 28 U.S.C. § 1406(a) (1964), regarding transfer to the appropriate district court where venue is laid in the wrong district. See also *Goldlawr v. Heiman*, 369 U.S. 463 (1962).

²⁸⁰ It should be noted that 38 Stat. 736 (1914), 15 U.S.C. § 22 (1964), dealing with venue and personal jurisdiction in antitrust actions, provides that process may be served in the district of which a corporation "is an inhabitant, or wherever it may be found." No such provision is included in § 208 of the Taft-Hartley Act; in fact, it is silent on the procedural aspects of venue and personal jurisdiction.

²⁸¹ GALBRAITH, *AMERICAN CAPITALISM* 1 (1952).

²⁸² 44 Stat. 580 (1926), 45 U.S.C. § 155 (1964).

way Labor Act,²⁸³ it is only necessary to police this command in the specific situations where the command is ignored. Under such circumstances, it would seem much easier to go into the requisite court and secure the injunction against the party ignoring the command of the statute. This approach seems to have the advantage of convenience as well as equity.

It is recognized that in the twenty-two instances in which the government has successfully sought Taft-Hartley injunctions, no successful challenge has been raised to the exercise of such jurisdiction by the court, though many involved multiple-party defendants who may not have been subject to the jurisdiction of the court. It might be argued that the results of those cases would tend to negate the application of the concepts mentioned in the proceedings under section 208. However, in examining the cases under this provision, no instance has been found in which the parties had sought to challenge the jurisdiction on the basis of the matters discussed here. Whether such a challenge could be mounted successfully, any critical analysis of the statute should point out these lurking difficulties so that any future legislation on dispute settling can protect the public interest and the rights of the party disputants.

D. *Status Quo Ante*

A problem of more substantial, practical consequence, is the failure of section 208 specifically to authorize the courts to impose upon the parties, particularly upon the employers, the obligation to maintain the status quo. The significance of the *status quo ante* is essential to the integrity of the cooling-off concept. It is also a necessary condition if prohibition of the strike is to have any semblance of equity.²⁸⁴

The court have imposed status quo conditions, as well as permitted modifications thereof, acting upon an equitable theory and the implied authority to impose the conditions as necessary and appropriate orders.²⁸⁵

Clarity in drafting would dictate that the language of the stat-

²⁸³ *Ibid.*; *Virginian Ry. v. System Fed'n 40, Ry. Employees Dep't*, 300 U.S. 515 (1937).

²⁸⁴ The status quo has already been criticized as unfair since it forces the employees to work under the conditions of the prior contract, which conditions are the substance of their disagreement with their employer.

²⁸⁵ *International Ass'n of Machinists v. Boeing Co.*, 315 F.2d 359 (9th Cir. 1963); *Seafarer's Int'l Union v. United States*, 304 F.2d 437 (9th Cir.), *cert. denied*, 370 U.S. 924 (1962).

ute make clear the authority to impose this essential condition. The matter of retroactivity has also created some serious problems, but resolution of this element in the collective bargaining relationship imposes threshold problems of policy regarding the desirable balance between the parties to an agreement — a matter of specifications for the law rather than clarity and integrity in the drafting of the statute.

E. During the Cooling-Off Period

Some of the problems and confusion in section 209²⁸⁶ have already been touched upon in discussing the preceding provisions. As noted in connection with section 204,²⁸⁷ the statute places the parties under a duty to make every effort to adjust and settle their differences. The terminology of the two sections varies somewhat, but these variances are not material. It seems the prime purpose served by reiterating the duty in section 209 is to make more apparent the authority of the court to include in its injunction a directive to the parties to make every effort to adjust and settle their differences. Since section 208 empowers the court to make such other orders as may be appropriate, section 209 gives a clear legal basis for the appropriateness of an order directing the parties to bargain. It has become a matter of standard practice for the injunction order to include such a directive. While no one would seriously quarrel with the desirability of such an order by the court, particularly since it is coupled in the statute with the indication that settlement efforts are

²⁸⁶ 61 Stat. 155 (1947), 29 U.S.C. § 179 (1964):

(a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

Ibid.

²⁸⁷ See text accompanying note 28 *supra*.

to be conducted with the assistance of the FMCS, court enforcement of any such order creates some curious problems of possible conflict.

In section 8(a)(5)²⁸⁸ the employers, and in section 8(b)(3)²⁸⁹ the unions, are made subject to unfair labor practices for refusing to bargain collectively. Section 8(d)²⁹⁰ contains extensive definitions of the duty to bargain collectively, which includes, among other things,

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .²⁹¹

Since, presumably,²⁹² the issues in dispute under the emergency disputes provisions would be the negotiation of a contract, any order of the court pursuant to or as a part of an injunction directing the parties to bargain would be directing them to do an act the failure of which would be subject to charges of an unfair labor practice before the National Labor Relations Board (NLRB).

The problem presented by an order of the court as a part of an injunction directing the parties to bargain under circumstances where one party refused to bargain is whether such party would be subject to a contempt citation before the court issuing the injunction, as well as to the filing and prosecution of a charge before the NLRB. It could be argued that the exclusive primary jurisdiction of the NLRB would preclude the federal court from moving into the area covered by the prohibitions of the act, and therefore the district court acting under section 208 would be divested of jurisdiction to punish for activity which would also be an unfair labor practice. The argument would continue that the remedy or

²⁸⁸ National Labor Relations Act § 8(a)(5), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1964).

²⁸⁹ National Labor Relations Act § 8(b)(3), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(3) (1964).

²⁹⁰ National Labor Relations Act § 8(d), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158(d) (1964).

²⁹¹ *Ibid.*

²⁹² Although negotiation of a contract presumably would be involved in a national emergency dispute, query: is it not possible that other labor disputes, such as a nationwide jurisdictional dispute between two unions in the maritime industry, could also precipitate a national emergency? Under these circumstances, would such a dispute be subject to the reach of §§ 206-208 of the Taft-Hartley Act?

penalties intended to be imposed upon a party for an unfair labor practice were those embodied in Title I of the act and that it was not intended that the party also be subject to discipline by a court acting under section 208. While the argument is not without difficulty, it does not seem possible to dismiss it out of hand. Section 10(a) of the act²⁹³ empowers the NLRB to prevent any person from engaging in any unfair labor practice listed in section 8, and directs that the power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. While empowering the court to order the parties to bargain under section 208 does not offend the provisions of section 10(a) directly, the enforcement of this order by a contempt citation would seem to conflict with the exclusive primary jurisdiction of the NLRB. Recognizing that the court's order and the provisions of the law administered by the NLRB are designed to accomplish the same things, they would still present the problem of "a multiplicity of tribunals and a diversity of procedures . . . quite as apt to produce incompatible or conflicting adjudications as . . . different rules of substantive law."²⁹⁴ If this line of cases regarding the exclusive primary jurisdiction of the NLRB is applicable, then the reasoning of such cases would prohibit federal courts from intervening in unfair labor matters except by way of review or on application of the NLRB. While such an approach would limit the ability of the court to secure the integrity of its orders, it would not be the first time that Congress had created an anomalous situation in labor law.²⁹⁵

Section 209(b) of the LMRA contributes to the confusion in the statute in that the phraseology suggests that the President is to reconvene the board of inquiry when the court issues an injunction order. However, the board is given no specific function to perform until the end of a 60-day period. Thus, the statute seems to direct the immediate reconvening of the board of inquiry to sit idly by for sixty days until the time to make its final report. No doubt the efforts of such boards to mediate have been justified on the basis of this directive that the board be reconvened.

²⁹³ National Labor Relations Act § 10(a), as amended, 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1964).

²⁹⁴ *Garner v. Teamsters Union*, 346 U.S. 485, 490-91 (1953).

²⁹⁵ *E.g.*, *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957); *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957), creating the "no man's land," in which the Court noted that Congress was free to change the situation at will.

There is another basis for possible conflict in the statute. During the time that the directive — that the parties make every effort to settle the dispute — is outstanding,²⁹⁸ section 209(b) requires the parties at some point, prior to the last day of the 60-day period, to state their respective positions and the employer to submit his last offer of settlement. Since the directives to bargain collectively presumably would continue for the remainder of the eighty days of the injunction period, if in fact the employer's submission was his very last offer, then would it not raise questions of refusal to bargain during the remaining twenty days? As a practical matter, such an offer is the source of considerable difficulty because, among other reasons, it is rarely the last offer and consequently the matters upon which employees vote are likely to be changed considerably by the time the balloting process is completed.

With regard to the last-offer ballot, much has been written and no further discussion is necessary here; but it should be noted that in addition to the consensus on its ineffectiveness and its interference in the bargaining process, the mechanics of such a ballot create some problems for the NLRB. Since an employee universe for NLRB purposes, such as certification of a bargaining unit or recognition of the existence of certain bargaining units, is different from the dimensions of the "dispute," the tallies on acceptance or rejection in a multi-employer situation are based on the constituent units as formulated by the NLRB rather than on the basis of the "dispute" as ill-defined in the emergency procedures. The statute also leaves the NLRB with the problem of fashioning rules to govern the conduct of the secret ballot. No doubt, the general rules applicable to elections in representation matters are applied in some fashion to this ballot and this may well be quite appropriate. However, it would have been simple enough for the Congress to direct that the NLRB apply such rules as would be appropriate and exclude any possibility for confusion regarding this ballot.

The vain hope was that this device would contribute to settlement of disputes. But the spectre of membership acceptance of terms rejected by the union leadership raises the issue of acceptance or rejection of unionism. The result has been to focus the energy and attention of the parties on the "campaign" and to obstruct the bargaining process. This would seem to have been a fairly pre-

²⁹⁸ It should also be noted that, in addition, Title I of the act imposes a continuing duty to bargain.

dictable result since it was intended that acceptance of the employer's offer by the employees would terminate the strike.²⁹⁷

The law is silent on the mechanics of termination of the strike by employee acceptance of the last offer. In fact, it is silent on the legal effect of any such acceptance. As a practical matter, the effect seems unpredictable. Acceptance by a close vote could well result in splintering the union rather than resolving the dispute. The NLRB voting units for acceptance may differ from the voting units for deciding to strike, which relate to the union's organization for internal political affairs. Given multiple-employers, differing offers and agreed settlements by some of the employers and the union, a vote for acceptance on lesser terms than agreed upon might well represent a minority of the union members. Since such a minority vote could not be a rejection of the union leadership, it not only would not settle the employer-employee dispute, but it could precipitate an intra-union dispute.

V. THE PRESIDENT AND THE CONGRESS

Section 210 consists of two sentences,²⁹⁸ which seem to say in simple language that when the NLRB certifies to the Attorney General the result of the election, or when settlement is reached, whichever happens sooner, the Attorney General is to seek discharge of the injunction in the court and the court is to grant the discharge. After the motion is granted, the President is to submit to the Congress a full and comprehensive report of the proceedings and to make such recommendations as he may see fit for consideration or appropriate action. Unfortunately, as the wind-up of a rather complicated series of transactions, section 210 brings with it some of the problems of the preceding provisions. First, what seems on the face of the language to be a proceeding clearly limited to a total of eighty days, may, as a matter of practical necessity, run longer. The manner in which section 209 is drafted permits the report of the

²⁹⁷ See generally 2 U.S. NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1008 (1948).

²⁹⁸ 61 Stat. 156 (1947), 29 U.S.C. § 180 (1964):

Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

board of inquiry (this is the second report) at the end of the 60-day period. In addition, the NLRB may *within* the succeeding fifteen days take a secret ballot, and *within* five days thereafter certify the results to the Attorney General, and upon the certification of the results of the ballots or the reaching of a settlement, whichever occurs sooner, the Attorney General is to move the court for the discharge of the injunction. If, in each instance, the acting governmental agent takes the maximum time allotted, then the certification of the results of the ballots would reach the Attorney General on the eightieth day. Unless he is prepared to move the court immediately on that day, and, as a practical matter, unless he or his representatives can get the certification and get to the court at that time, the total proceedings are likely to take more than eighty days. A number of times the injunctions were not discharged until after the eightieth day, and in one case not until months thereafter.²⁹⁹

While the preceding discussion relates to the problems latent in the mechanics of the operation of the provision, the most often encountered difficulty in section 210 is in the directive that the President *shall* submit to the Congress a full and comprehensive report of the proceedings. While the language of the statute seems abundantly clear that the President *shall* (a mandatory term) submit to Congress a full and comprehensive report, there is support in the legislative history of the act for the position that such reports were to be submitted by the President only if the procedures had run their full course and no settlement had been reached during the 80-day period.³⁰⁰

In the two reports filed by the President in 1948,³⁰¹ it seems apparent that the interpretation was that section 210 was mandatory. In the report of the President on the labor dispute at Oak Ridge National Laboratory,³⁰² the President's letter begins: "Pursuant to the Labor Management Relations Act, 1947, it is my duty to report to the Congress concerning the labor dispute *which recently existed* at the Oak Ridge National Laboratory."³⁰³ On August 5, 1948, the President reported on the labor dispute in the bitum-

²⁹⁹ United States v. UMW, 89 F. Supp. 179 (D.D.C. 1950).

³⁰⁰ S. REP. NO. 105, 80th Cong., 1st Sess. 15 (1947); *but see* H.R. REP. NO. 510, 80th Cong., 1st Sess. 569 (1947).

³⁰¹ H.R. DOC. NO. 726, 80th Cong., 2d Sess. 1 (1948); H.R. DOC. NO. 738, 80th Cong., 2d Sess. 1 (1948).

³⁰² See H.R. DOC. NO. 726, *supra* note 301, at 1.

³⁰³ *Ibid.* (Emphasis added.)

inous coal industry³⁰⁴ and the introductory sentence of his message to Congress is exactly the same. The President's report on the labor dispute in the nonferrous metal industry in the message to Congress, February 14, 1952, also begins in exactly the same way.³⁰⁵ In the report on the bituminous coal industry, both of the coal disputes of 1948 are covered. In none of these instances was there a resumption of the strike after the expiration of the injunction, although in the 1948 atomic energy dispute, the settlement was not reached until four days after the injunction was dissolved. In the 1951 nonferrous metal dispute, the strike ended four months before the President reported to Congress. Thus, although it is often suggested that the Presidential report to the Congress is to be made only if the dispute is unsettled after the procedures have run, in the three earlier instances in which a report was filed by the President, the disputes had ended prior to the filing of the report, and in no instance was there any strike activity after the injunction expired.

The fourth instance of a Presidential report on an emergency dispute³⁰⁶ is in a recent dispute in the maritime industry. It is interesting that in this dispute the injunction was dissolved on the 25th of September, but the effective date of the injunction was the 21st of September, which was the eightieth day of the cooling-off period. This was an instance in which the NLRB certification of the election was not filed with the Attorney General until the eightieth day. Here again, there is no indication of any strike activity following the dissolution of the injunction, and the President's report to Congress indicated that all the disputes had been settled by the time the report was filed.

On the basis of experience, there would seem to be no rational explanation for the filing of reports by the President with Congress in some instances and the failure to file such reports in others, except that after the dispute has been disposed of, the impetus to perform administrative actions, though clearly commanded by the statute, is diminished. In addition, there being no agency with central responsibility for attending to the details of the procedures under sections 206-210, of the LMRA, it is always easy to assume that some other agency legitimately involved in the activity is performing the particular function. A further and perhaps more practical explanation is that even though a statute commands or uses

³⁰⁴ See H.R. DOC. NO. 738, *supra* note 301, at 1.

³⁰⁵ H.R. DOC. NO. 354, 82d Cong., 2d Sess. 1 (1952).

³⁰⁶ 108 CONG. REC. 956 (1962) (Message from the President).

language of command directed toward the President, who is to enforce this command? Also, what is the point of the filing of a report that would be primarily a chronology of events with perhaps the various reports of the board of inquiry and the certification of the NLRB attached, if there is no intention to suggest any legislative action to Congress? There is one reason, perhaps insignificant in terms of practical effect, which is that the statute directs that the act be done. Compliance with the statute presents no substantial difficulty and failure to comply by the august office of the President contributes to a climate which makes disregard of the law in more substantial things easier to excuse.

VI. SUMMARY AND CONCLUSIONS

Title II of the Taft-Hartley Act, which received advanced billing as the provisions for the settlement of labor disputes, is a mixed bag of fragmented devices and incomplete theories, some of which are at war with each other.

The scheme of the settlement producing device is concocted of six basic elements, all of which depend in varying degrees upon the force of public opinion for their effectiveness: (a) Presidential action heralding a national emergency and appointing a board of inquiry; (b) an initial board report aimed at the parties through the public; (c) an injunction and cooling-off period; (d) a second board report, again to be made public, including the employer's last offer; (e) employee balloting upon the last offer with the threat of employee rejection of the union leadership; and, (f) discharge of the injunction, with a Presidential report to Congress transmitting the prior reports of the board of inquiry and his recommendations for remedial action.

The theory underlying this device misjudges the power of the various publics³⁰⁷ upon which it relies and the effectiveness of the devices provided to mobilize those opinions. The design is an inept one. At the outset, the grand promise of the declaration of policy is not sufficiently implemented in the specific grant of functions to the Federal Mediation and Conciliation Service. The operative language of the agency's authority depends upon "disputes" which clouds the mandate for "preventive mediation" — by far the most promising of the Service's activities.³⁰⁸

³⁰⁷ (1) The general public through the news media, (2) the peers of the party disputants, (3) union members, and (4) members of Congress.

³⁰⁸ L.M.R.A. § 201(c), 61 Stat. 153 (1947), 29 U.S.C. § 171(c) (1964). This section promises adequate governmental facilities for assistance *inter alia* in *avoiding*

The policy pronouncement looks to the advancement of collective bargaining by making available full and adequate governmental facilities for arbitration, as well as conciliation and mediation. The provision regarding the functions of the Service avoids including arbitration as one of the specific devices to be recommended by the Director. It does include the last offer ballot, a device not noted for its contribution to sound and stable industrial peace. It is suggested that arbitration of grievance disputes, as opposed to new contract terms and interest disputes, is to be encouraged. However, the term "arbitration"⁸⁰⁹ is avoided in the language.

Then there is the command of the statute in section 204 that the parties bargain in good faith. It seems to be a nonenforceable duty — a conceptual conflict; and any enforcement attempt would raise questions of consistency with the exclusive jurisdiction of the National Labor Relations Board. The duty, which smacks of surplusage when considered with section 8(d), is repeated in part in different language in section 209.

Other than its general disuse, one comment only on section 205 — it fails to reflect, particularly where the general welfare of the country might be affected by controversies, that four distinct interests might warrant representation: labor, management, government, and some neutral representatives of the "public interest." It is suggested that representatives of the government, particularly if they come from dispute-settlement-oriented agencies, may have a certain parochialism which will manifest itself in a view that may differ from the disinterested "objective" view of a knowledgeable neutral.

Although the procedures for settlement of national emergency disputes begin with section 206, section 202(d) is most relevant to a discussion of the defects built into the statute. First, the attempted insulation of the Secretary of Labor and the White House from major labor disputes by establishing an independent Federal Mediation and Conciliation Service was a misunderstanding of the essentially political nature of dispute settlement by government intervention.

Second, there was a failure to appreciate that the governmental structure, with the Secretary of Labor as the only cabinet level of-

controversies and also working out contracts to prevent *subsequent controversies*. These are policy "pegs" for preventive mediation, but in specifying duties and functions, the statute fails to be expansive enough.

⁸⁰⁹ See L.M.R.A. § 203(c), 61 Stat. 154 (1947), 29 U.S.C. § 173(c) (1964). Compare L.M.R.A. § 203(d), 61 Stat. 154 (1947), 29 U.S.C. § 173(d) (1964).

ficial for labor affairs, would ultimately dictate the involvement of the Secretary in any substructure (*i.e.*, statutory dispute settlement machinery) which involved the President.

Third, there was a failure to anticipate that the political pressure toward, and political value of, settling major labor disputes would make it nearly impossible for an active Secretary of Labor to refrain from involvement. Consequently, the statute creates practical problems for the President in securing and retaining either an able Secretary of Labor or an able Director of FMCS, or both.³¹⁰ It is not suggested that the problem is insurmountable, but it is merely pointed out that it is a "personnel problem" which the statutory scheme foists upon the President and his executive family.

The attempt to remove the Secretary from the dispute settling arena was an abortive one. It failed to remove the Secretary's authority to investigate the causes of and facts relating to all controversies between employers and employees as they may occur and which may tend to interfere with the welfare of the people of the different states.³¹¹ Admittedly, since the passage of the Taft-Hartley Act, this specific investigative function was lodged in the Commissioner of Labor Statistics. But the 1950 action transferring all functions of other Departmental officers to the Secretary, which is more recent than the Taft-Hartley Act, leaves little doubt about the Secretary's legal authority.

Moreover, the President is authorized to delegate to officials appointed with the advice and consent of the Senate any function that is vested in the President by law.³¹² The act did not limit any existing right of the President to delegate, but wholly excluded from its scope any presidential functions which are by statute affirmatively prohibited from delegation.³¹³ Under this statute, even some matters of judgment or discretion were intended to be subject to delegation.³¹⁴

It would be simple for the President to delegate the functions

³¹⁰ Former Secretary James P. Mitchell, who viewed the FMCS as a part of his domain despite the Taft-Hartley Act, related that upon being approached regarding his interest in being Director of FMCS he indicated that he would only consider the job with the absolute assurance that the entire dispute-settling activity would be under his jurisdiction. (Interview, in San Francisco, Aug. 17, 1964).

³¹¹ Act of June 13, 1888, 25 Stat. 183, as amended, 29 U.S.C. § 4 (1964), as amended by Reorganization Plan No. 6, 63 Stat. 1069 (1949), 5 U.S.C. § 133z-15 (1964).

³¹² 3 U.S.C. §§ 301-03 (1964).

³¹³ See 2 U.S. CODE CONG. & AD. NEWS 2931 (1950) (legislative history).

³¹⁴ *Id.* at 2932; *but see*, 35 OPS. ATT'Y GEN. 17, 19 (1925).

committed by the Taft-Hartley Act to presidential action to his Secretary of Labor. This would still comply with the strictures of the Taft-Hartley Act regarding the freedom of the Service from the jurisdiction and authority of the Secretary of Labor, yet formally provide for cabinet level coordination of national emergency disputes activity.³¹⁵

If the "opinion" of the President is the "triggering" device for the emergency procedures, the statute failed to indicate who supplies the "cartridge." The attempts by the government lawyers, aided and abetted by the courts,³¹⁶ to convert presidential expression of an opinion and consequent action to a "finding" of legal significance, emphasizes the theoretical conflicts of the device. Since the statute provides no transmission belt between the President and FMCS, although practice has supplied one, it leaves the basis for the President's opinion, or finding, dangling in mid-air. The board of inquiry and its investigation comes *after* the President's first action, and the board is the only entity supplied by the legislature with the power (subpoena) to assemble those facts upon which that action ought to depend. But the statute³¹⁷ does not give to the board the function of determining the existence of a threat to the national health or safety. Since there is little evidence of factual requirements before appointing a board, logic has led many boards, with or without a request from the government, to make findings on that issue. Rarely, however, have such boards solicited information from the government departments that would be in the best position to assess the threat to national health or safety before making initial reports. Any such solicitation, usually by the Department of Justice, has generally occurred during the preparation of, or after, the initial report and is done in connection with the government's litigation. It is assembled *after* the decision on the threat to the health or safety has been made and is rarely considered in making that judgment.³¹⁸ This makes the information supplied by departments subject to the charge that it is self-serving.

³¹⁵ Informal coordination by the Office of the Secretary has been publicly acknowledged. See, *e.g.*, *Steel Dispute*, 1959; *Maritime Disputes*, 1961, 1962.

³¹⁶ See, *e.g.*, *United Steelworkers v. United States*, 361 U.S. 39, 48 (1959) (Frankfurter, J., concurring); *United States v. National Maritime Union*, 196 F. Supp. 374, 381 (S.D.N.Y. 1961) (finding of fact No. 3). Subsequent to *Steelworkers*, the Government's complaints and memoranda in support thereof allege that the President's action is a "finding."

³¹⁷ L.M.R.A. § 206, 61 Stat. 155 (1947), 29 U.S.C. § 176 (1964).

³¹⁸ See *United Steelworkers v. United States*, 361 U.S. 39, 48 (1959). There, the concurring opinion asserts that the President's judgment was presumably based upon the affidavits of his Cabinet officers. The presumption was unwarranted.

Noting that after the board reports, the President, in his discretion, may or may not direct the Attorney General to seek injunctive relief, it has been stated that the President *twice* exercises his judgment regarding the existence of the emergency. In more cases than not, the decision to seek the injunction is made before the board of inquiry is appointed and preparation for the litigation proceeds simultaneously with board of inquiry activity, if it does not begin before it. There is a second opportunity for the exercise of presidential judgment, but even when exercised it has little relationship to facts relating to health or safety. If the board reports enter into it at all, it is because they report matters relating to expectations of settlement.

If then, facts relating to the threat to national health or safety are for the board to determine, the statutory device has the board in the wrong place in the sequence of events. If not, then its statements regarding the health or safety of the nation are unnecessary, unwarranted and, perhaps, presumptuous.

The statute³¹⁹ then gives the board a vague mandate regarding its duties, while specifically prohibiting it from performing what is generally accepted as the most useful function — making recommendations. These facts which the board is to assemble in its report are not only to be made public by the President, but he is to file a copy with the Service. This suggests two premises: (1) that there might be some useful information provided by a board report to FMCS, and (2) that the report will be a rallying point for public opinion to induce a settlement.

The first premise is dubious. FMCS will, if it has been involved in the mediation activity, have more facts than will be included in such reports. The second must proceed from mistaken optimism. First, one must look to the total scheme of the statute to define authority for the boards to produce a report which contains elements upon which public opinion could operate.

The statute³²⁰ itself cripples the potential effectiveness of a board report as a medium for crystallizing public opinion by prohibiting recommendations for settlement. The practices of boards of inquiry have blunted the remaining effectiveness of reports, primarily because of a general misconception of the functions of such boards in the statutory scheme.

The emphasis seems to have been more upon modifying the

³¹⁹ L.M.R.A. § 206, *supra* note 317.

³²⁰ *Ibid.*

functions to fit preconceived notions of the desirable, rather than strict performance of those committed by the theory and the language of the act to boards of inquiry.

Ad hoc, expendable boards of inquiry were to use the hearing to determine and expose the facts and circumstances which created the impasse and brought the nation to the brink of peril. A primary purpose of a report was to pass judgment upon the parties' conduct and permit public censure. As enforcers, members of such boards would probably become *persona non grata* to both labor and management. Thus, they were likely to be ineffective as mediators. More significantly, it is improbable that persons who could be most effective in this role could be dependent upon either labor or management for their livelihood. Thus, professional arbitrators, who have largely been used in this capacity, were poor choices.

The primary frame of reference for the performance of the board of inquiry function has been the "factfinding" legacy of the War Labor Board era. Therefore, the conception of board members as primary *positive* elements of the settlement process has been erroneous. The board phase of the procedure, particularly that leading up to the initial report, is designed as a negative (enforcement) factor in the inducement of settlement. Therefore, the failure to appreciate the potential of the existing process has resulted in the failure to consistently utilize it in the manner of its design.

Section 207 of the LMRA gives the boards the power of subpoena. For what purpose? If recommendations are out, what useful purpose does subpoena power serve? Under past boards, it has served none. It has been used only once. However, if judgment of the parties is one function of a board report, then subpoena powers make sense, even without recommendations. Such power makes less sense if mediation is the mission. Compulsory mediation without any powers of recommendation seems even less logical than the existing roles played by the boards. Under either view of these functions and powers, there ought to be at least minimal procedures governing the conduct of hearings or inquiries.

Even a limited view of the board's functions (restricted to reporting the facts and circumstances surrounding the dispute and the positions of the parties in the initial report, and the current positions of the parties and efforts made for settlement in the final report) argues for a trial-type hearing.³²¹ However, such a hearing might

³²¹ Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 199 (1956). Davis categorizes facts, for purposes of determining when a trial-type hearing

be too rigid for the collective bargaining context in which the board of inquiry process takes place. But certainly some formality of procedure ought to be observed. However, under the grant of power,³²² the board may conduct such hearings, public or private, as it deems necessary or proper and, consequently, may decline to conduct any hearings at all. If its function is so important in providing for the national health or safety, it is difficult to imagine the situation in which hearings on so vital a matter could be deemed unnecessary. Of course, it would always appear to be proper to hold hearings, but the phrasing of the power in the disjunctive suggests that it is not a grant of flexibility regarding the nature of the hearings, but rather discretion in the board as to the propriety of any hearings at all. It has been so interpreted.³²³

Perhaps the lack of any stated procedures flows as much from the statutory lapse in failing to designate the agency responsible for the administration of the overall dispute machinery as from the failure to grant specific rule-making authority to the boards or to make the APA clearly applicable. The *ad hoc*³²⁴ character of such boards would suggest that any permanent rules would have to be devised by some permanent agency, and in such rules the emphasis should be on flexibility. On the face of the statute³²⁵ the only "agency" with authority would seem to be the President. However, on the record of congressional acquiescence through appropriations to FMCS for board of inquiry activities, a case could be made for the performance of the function by the Service. Recognizing that a board of inquiry would be a governmental authority of itself under the APA, there is nothing to preclude FMCS or the President from devising rules that will be recommended to such boards and from publishing such rules in the Federal Register as those

is required, as legislative facts and adjudicative facts. Determination of the latter — described as facts about the parties and their activities, businesses, and properties, and usually answering such questions as who did what, where, how, why, with what motive or intent — requires what the APA calls a determination "on the record after opportunity for an agency hearing."

³²² L.M.R.A. § 207, 61 Stat. 155 (1947), 29 U.S.C. § 177 (1964).

³²³ See *United States v. International Longshoremen's Ass'n*, Civil No. 64 Civ. 3004, S.D.N.Y., Oct. 10, 1964.

³²⁴ Neither the *ad hoc* nor the emergency character of the board of inquiry activities should excuse the absence of minimal procedural protections. The device is permanent and its occasional use fairly predictable — 24 times in 17 years. The existence of a stand-by procedure would add another element of predictability, but this only diminishes the board's ability to mediate, to bring about a settlement, which is not the actual function of the board.

³²⁵ L.M.R.A. § 206, *supra* note 317.

which will be so recommended. The boards could then refer to them, or adopt such parts as would be relevant, in issuing the notice of hearings to the parties.

Perhaps the most paradoxical provision of the statute is section 208. The government has never failed in its twenty-two attempts to obtain injunctions, but in all but six instances³²⁶ the jurisdiction of the courts over all of the parties to the dispute was open to challenge. In sixteen of the successful injunction actions³²⁷ there were multiple defendants, and it is questionable whether the courts in such instances could have exercised jurisdiction over all parties except with their consent.

As an example, in one of the bituminous coal miners' disputes³²⁸ there were over ninety operators and operator associations. The litigation was instituted in the District Court for the District of Columbia. Many of the associations and operators not only did not reside within the territorial limits of the district court, but engaged in no business there. While efforts (not entirely success-

³²⁶ Atomic Energy Dispute, 1948, 1957; American Locomotive Dispute, 1952; Republic Aircraft Dispute, 1962; Lockheed Aircraft Dispute, 1962-63; Boeing Aircraft Dispute, 1963; Longshore Dispute, 1964.

³²⁷ United States v. International Longshoremen's Ass'n, Civil No. 64 Civ. 3004, S.D.N.Y., Oct. 10, 1964; United States v. Boeing Airplane Co., Civil No. 5783, W.D. Wash., Jan. 25, 1963; United States v. Lockheed Aircraft Corp., Civil No. 62-1575-JWC, S.D. Cal., Dec. 3, 1962; United States v. International Longshoremen's Ass'n, Civil No. 62C 3350, S.D.N.Y., Oct. 10, 1962; United States v. International Ass'n of Machinists, Civil No. 62C 662, E.D.N.Y., June 15, 1962; United States v. Seafarers Union, 204 F. Supp. 686 (N.D. Cal.), *modified*, 304 F.2d 437 (9th Cir.), *cert. denied*, 370 U.S. 924 (1962); United States v. National Maritime Union, 196 F. Supp. 374 (S.D.N.Y.), *aff'd sub nom.* United States v. National Marine Eng'rs' Ass'n, 294 F.2d 385 (2d Cir. 1961); United States v. United Steelworkers, 178 F. Supp. 297 (W.D. Pa.), *aff'd*, 271 F.2d 676 (3d Cir.), *aff'd per curiam*, 361 U.S. 39 (1959); United States v. International Longshoremen's Ass'n, 177 F. Supp. 621 (S.D.N.Y. 1959); United States v. Goodyear Atomic Corp., Civil No. 3994, S.D. Ohio, May 15, 1957; United States v. International Longshoremen's Ass'n, Civil No. 115-40, S.D.N.Y., Nov. 24, 1956; United States v. Union Carbide & Carbon Corp., Civil No. 2456, E.D. Tenn., Aug. 27, 1954; United States v. International Longshoremen's Ass'n, 116 F. Supp. 255, 116 F. Supp. 262 (S.D.N.Y. 1953) (Weinfeld, J.); United States v. American Locomotive Co., 109 F. Supp. 78 (W.D.N.Y. 1952), *cert. denied*, 344 U.S. 915 (1953), *aff'd sub nom.* United States v. United Steelworkers, 202 F.2d 132 (2d Cir. 1953); United States v. International Union of Mine Workers, Civil No. 3675, D. Colo., Sept. 5, 1951; United States v. United Mine Workers, 89 F. Supp. 179, 89 F. Supp. 187 (D.D.C. 1950), *appeal dismissed*, 190 F.2d 865 (D.C. Cir. 1951); United States v. United Mine Workers, 77 F. Supp. 563 (D.D.C. 1948); *aff'd*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949); United States v. International Longshoremen's Ass'n, Civil No. 47-157, S.D.N.Y., Aug. 21, 1948; United States v. International Longshoremen's Union, 78 F. Supp. 710 (N.D. Cal. 1948); United States v. National Maritime Union, Civil No. 25686, N.D. Ohio, June 14, 1948; United States v. National Maritime Union, Civil No. 46-299, S.D.N.Y., June 14, 1948; United States v. Union Carbide & Carbon Chem. Corp., Civil No. 1093, E.D. Tenn., March 19, 1948.

³²⁸ Contract Dispute, 1949-50.

ful) were made to serve each of them with process, they were not obliged to respond to extra-territorial service. Refusals by a substantial number of them could have defeated the effective jurisdiction of any single district court to proceed. The less serious consequences of such a situation would be to force the government to institute litigation in the requisite number of district courts to cover the parties, as the government did in the 1948 maritime dispute and prepared to do in the 1954 atomic energy dispute where multiple-union defendants were involved.

A more serious possibility, in a situation where resort to many district courts was required because of challenges, would be that the fragmentation of the litigation would permit the argument that the *dispute* which a single court sought to enjoin would not affect a "substantial part of an industry" and would not "imperil the national health or safety." A successful challenge on this ground would render the government powerless to reach those very disputes which Congress clearly intended to cover.

Past successes suggest that such challenges are unlikely, and, if made, unlikely to prevail. However, the possibility places the government in the ridiculous posture of relying upon the acquiescence of the defendants, particularly employer defendants, for its power to protect the health or safety of the nation from the perils of major labor disputes.

A major factor contributing to the problem is the lack of a definition of the disputes subject to the emergency provisions and the indiscriminate use of the terms "dispute" and "strike or lockout" throughout the statute. A reasonably adequate discussion of the problem of definition, or definitions, of strike or disputes which imperil the national health or safety would require more space than prudence cautions would be warranted in this discussion. It is suggested, however, that the law-in-action definition urges that we adopt a more honestly descriptive term to cover disputes which require government intervention.

Because the maintenance of the *status quo ante*, a basic element in any equitable theory of a court enforced cooling-off or waiting period, depends upon court interpretation of the terms "such orders as may be appropriate," and "incidental to its injunctive authority," the terms and conditions under which the employees must remain at, or return to work, is committed to court discretion. Although *status quo* is ordered in most cases, it can be modified by court

order.³²⁹ Modifications may be both appropriate and necessary, but the discretionary authority in the courts opens, albeit obliquely, the area of collective bargaining to the inexperienced courts rather than the expert NLRB. This, along with court orders to bargain in good faith, contributes to the problem of "multiplicity of tribunals . . . quite as apt to produce . . . conflicting adjudications as are different rules of substantive law."³³⁰

The necessity of fashioning an injunctive order sufficiently flexible to cover the dispute results in generalities which potentially infringe the rights of nonparticipants in the disputes and exceed the authority of the courts. Such orders generally enjoin strike activity in the industry subject to the action (*e.g.*, the maritime industry, the atomic energy industry). The courts have been reluctant to clarify the scope of these over-reaching orders even upon request of counsel.³³¹ Such over-reaching contributes to disrespect for the law and adds substance to the allegations that it is unfair to labor organizations.

The unfortunate drafting ambiguities in section 209 do not seem sufficient justification for independent mediation activities by the boards of inquiry. Granted, there is no prohibition on such action in the statute, but the legislative history is quite clear that FMCS was to be enhanced by the act, for post-injunction mediation is specifically committed to it. Board of inquiry invasion of that area conflicts with this announced purpose of the law.

The situation is not improved if the President, in appointing a board of inquiry, requests that they engage in mediation.³³² That merely becomes official denigration of the Service. Perhaps it is only a matter of appearance, but if mediation assistance by a board of inquiry is desirable, the Director of the Service should be allowed to request it. Appearance and reality are not unrelated.

There is an inherent conflict in the functions which a board must perform even under the narrow interpretation of its role and the view that it should not engage in mediation. Excluding the subjective intent of the board members as a factor, certain tech-

³²⁹ *International Ass'n of Machinists v. Boeing Co.*, 315 F.2d 359 (9th Cir. 1963); *Seafarers Union v. United States*, 304 F.2d 437 (9th Cir.), *cert. denied*, 370 U.S. 924 (1962).

³³⁰ *Garner v. Teamsters Union*, 346 U.S. 485, 491 (1953).

³³¹ *United States v. National Marine Eng'rs Beneficial Ass'n*, Civil No. 61-2347, S.D.N.Y., July 3, 1961, *aff'd*, 294 F.2d 385 (2d Cir. 1961); *United States v. Union Carbide & Carbon Co.*, Civil No. 2456, E.D. Tenn., Sept. 7, 1954.

³³² 1962 Longshore Dispute and to a lesser extent in the 1961 Maritime Dispute.

niques of inquiring into the facts of a dispute are indistinguishable from mediation. A request that the parties rank the issues in the order of their importance is a legitimate and perhaps indispensable device for obtaining the positions of the parties. It seems, also, by its very nature, to have a mediatory effect, and it has been used by those boards which eschew any mediation function, as well as those which are openly and notoriously engaged in the practice of the art.

The last-offer ballot device warrants no further condemnation here. In addition to near unanimous recognition that it is ineffective and disruptive, suffice it to note that it also creates administrative problems and adds to legal confusion.³³³

Section 210 of the statute is distinguished by misuse and disuse. In situations in which settlements occur prior to the end of the statutory period, rarely does the government seek discharge of the injunction as soon as the dispute is settled. Moreover, in some instances *nunc pro tunc* orders have been necessary, seemingly because of forgetfulness.

Contrary to informed belief,³³⁴ there have been reports to Congress on emergency disputes. It is clear on the face of the law that the President should file such a report in all cases in which the entire procedures are utilized.

It can be argued that in cases where settlement is reached prior to the final report of the board, so that no report is made and no NLRB ballot taken, no Presidential report to Congress is required, but it is equally, if not more persuasive, that the statute intends a report whenever an injunction has been necessary. Practice has followed neither this nor any other discernible theory.

With some cynicism, one can ask: why get excited if the rights of disputants in national emergency dispute situations are not protected to the letter? Have they not by their own conduct created a "public nuisance detrimental to the public interest?"³³⁵ Perhaps so, but Mr. Justice Holmes' admonition to the court seems equally applicable to the entire government in national dispute situations: "Great cases . . . are so charged with importance and feeling, that . . . they are apt to generate bad law. We need, therefore, to stick closely to the letter of the law we enforce in order to keep . . .

³³³ For example, what legal effect would acceptance by employees have? How, in a multi-employer, single-union situation could acceptance be determined?

³³⁴ Giardino, *National Emergency Strike Legislation*, NEW YORK UNIVERSITY 16TH ANNUAL CONFERENCE ON LABOR, 233, 241 (1963). See also notes 304-06 *supra*.

³³⁵ *United Steelworkers v. United States*, 361 U.S. 39, 61 (1959).

controversy from being shaped by the intense interest which the public rightfully has in it."³³⁶

My own concern for integrity in our emergency disputes process in providing for the protection of the party disputants in the law and under the law stems from two, perhaps old-fashioned, concepts: (1) a basic test of the extent to which men are civilized is the measure of justice they accord to the most despicable offender during those periods of stress when motives of self-preservation urge them to resort to easy expediency, and (2) under a government which aspires to be one of laws, there is no more important responsibility, with the exception of self-preservation, than the government's obligation to take care that it observes the law to the faithful execution thereof.

While the statutory machinery, though inept, has been a success, if a temporary halt to strike activity is the aim of the law, its ideals are more than that.⁶ They look to encouraging responsible and mature labor management relations, wherein public-minded employers and union officials insure the public interest in the private pursuit of their own goals. To this end, both the disputants and the public deserve more than a farcical charade under vague rules which are sometimes subverted by the parties as well as by the representatives of the government. Orderly procedures under existing law would be a salutary palliative. However, the remedy lies not in expedient stretching of the law, but rather in thoughtful revision.

APPENDIX A EXECUTIVE ORDER

Assuming that legislation to revise Title II of the Taft-Hartley Act will not be recommended, the present situation could be improved by executive action along the following lines: (1) a delegation of authority from the President to the Secretary of Labor to coordinate and direct the activities of the Executive Branch in national emergency dispute situations and in insuring that full and adequate government facilities are made available to facilitate the settlement of labor disputes; (2) the establishment of rules published in the Federal Register to govern the setting up of boards of inquiry; and (3) the promulgation of rules of procedure to govern the proceedings of such boards.

³³⁶ *Id.* at 62. (dissenting opinion.)

An executive order along the lines of the following draft would accomplish the aforementioned improvements:

EXECUTIVE ORDER No. _____

WHEREAS section 1 of the Labor Management Relations Act of 1947 declares:

Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce and

WHEREAS, full and adequate government facilities can be more effectively made available to assist in the settlement of disputes through a coordinated program, marshalling the resources of the several government departments and agencies under the direction of the Secretary of Labor; and

WHEREAS, the Mediation Service can more effectively perform the functions of facilitating a settlement between the parties if it is free from involvement in the essentially enforcement aspects of the national emergency disputes provisions of the Act; and

WHEREAS, experience under the national emergency provisions of the Act have demonstrated a need for more orderly and coordinated procedures;

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution of the United States, by the Labor Management Relations Act of 1947, and particularly sections 176-180 of Title 29 of the United States Code; and by section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

The authority of the President to direct and coordinate the ac-

tivities of the Executive Branch of the Government essential to the orderly processing of national emergency disputes under sections 176-180 of Title 29 of the United States Code are hereby delegated to the Secretary of Labor. Provided, however, this shall not be construed to delegate to the Secretary of Labor presidential authority, whenever in his opinion a strike or lockout, or threatened strike or lockout, imperils the national health or safety, to appoint a board of inquiry; the authority to direct the institution of a suit for injunctive relief; nor the making of a report to Congress under the Labor Management Relations Act of 1947.

PART I

PROCEDURES FOR EVALUATING THE ISSUE OF A THREAT TO THE NATIONAL HEALTH OR SAFETY OCCASIONED BY A LABOR DISPUTE

Section 1. No less than 15 days after receipt of a notice of the existence of a dispute pursuant to section 158(b)(3) of Title 29 United States Code, in a situation which could lead to a labor dispute which might threaten the national health or safety, or whenever in his judgment a collective bargaining situation or threatened or actual labor dispute could develop into a dispute threatening the national health or safety, the Director of the Federal Mediation and Conciliation Service shall notify the President and the Secretary of Labor in writing and shall so advise the parties.

Section 2. Upon receipt of such notices from the Director of Federal Mediation and Conciliation Service, the Secretary of Labor shall immediately solicit from relevant departments and agencies of the Government information regarding the impact, or potential impact of a strike or lockout upon the activities within the cognizance of such departments or agencies which would threaten the national health or safety. The parties to any such dispute shall also be invited to submit relevant information regarding the issue. Such information shall be by sworn affidavit executed by appropriate authority, and filed with the Secretary of Labor within such time, not to exceed 7 days as he shall designate.

Section 3. The Secretary of Labor, within three days of receipt of such information, shall, after consultation with the Director of the Federal Mediation and Conciliation Service, file a report with the President regarding the status of the dispute and the likelihood

of settlement, which report shall include copies of the information obtained regarding the national health or safety.

Section 4. The several departments and agencies of the Government shall cooperate with the Secretary of Labor in the discharge of these duties and, upon his request, furnish to him such information in their possession relative to the discharge of such duties, and shall detail from time to time such officials and employees to the Secretary of Labor as he may direct.

PART II

RULES OF PROCEDURE FOR BOARDS OF INQUIRY³⁸⁷

Section 1. Whenever a board of inquiry is appointed pursuant to section 176 of Title 29 of the United States Code, the following rules for the conduct of its proceedings shall be applicable (or advisable):

A. Appointment of Emergency Boards of Inquiry. Emergency boards of inquiry shall be appointed by the President in connection with any labor dispute whenever in his judgment the health or safety of the nation may require it to be done.

B. Hearing to Be Public. Whenever such a board has been appointed it shall hold a public hearing on the issues in dispute, and the facts and circumstances surrounding it, unless the parties agree to present their case in writing. The record made at such hearing shall include all documents, statements, exhibits and briefs, which may be submitted, together with the stenographic record. The parties shall have the right to attend the hearings with such persons as they desire, and the hearing shall be open to any other person who wishes to attend, including representatives of the press and other news media.

The board shall have authority to make whatever reasonable rules are necessary for the conduct of an orderly public hearing. The board may exclude persons other than the parties at any time when in its judgment the expeditious inquiry in the dispute so requires.

C. Participation by Board in the Hearing. The board may, on its own initiative, at such hearing, call witnesses and introduce docu-

³⁸⁷ These rules, in a large part, were taken from "Rules of Procedure for Emergency Boards of Inquiry," issued by the Secretary of Labor, January 10, 1947. Published in Part 6, 29 C.F.R. 4331-32 (Supp. 1947). Separate, but similar, rules were in effect for fact finding boards, pursuant to the Secretary's General Order No. 11, January 8, 1946, revised January 13, 1947.

mentary or other evidence, and may participate in the examination of witnesses for the purpose of expediting the hearing or eliciting material facts.

D. Participation by Parties in Hearing. The interested parties or their representatives shall be given reasonable opportunity: (a) to be present in person at every stage of the hearing; (b) to be represented adequately; (c) to present orally or otherwise any material evidence relevant to the issues; (d) to ask questions of the opposing party or a witness relating to evidence offered or statements made by the party or witness at the hearing, unless it is clear that such questions have no material bearing on the credibility of that party or witness or on the issues in the case; (e) to present to the board oral or written argument on the issues.

E. Stenographic Records. An official stenographic record of the proceedings shall be made. A copy of such record shall be available for inspection by the parties, and copies may be purchased by the parties from the court reporter.

F. Rules of Evidence. The hearing may be conducted informally. The receipt of evidence at the hearing need not be governed by the common law rules of evidence.

G. Facilities Available to Board. The board may during the proceedings consult with the Office of the Secretary of Labor or his designated agents for the purpose of obtaining information pertaining to any issue concerning wages, hours, or other conditions of employment. (Such information may include information in the possession of other governmental agencies.)

Emergency boards shall be serviced, including the making available of personnel and facilities of the several Departments and agencies, through the offices of the Secretary of Labor and the Director of the Federal Mediation and Conciliation Service.

H. Requests for the Production of Evidence. The board does have the power of subpoena. It shall request the parties to produce any evidence it deems relevant to the issues. Such evidence should be obtained through the voluntary compliance of the parties, if possible.

I. Questions as to Extent of Board's Authority. If during the proceedings a question arises as to the extent of the authority of the board to inquire into the facts, or as to the interpretation of the order

setting up the board, the board may recess the hearing and consult with the Secretary or his designated agent for the purpose of obtaining clarification.

J. Findings of the Board.

(1) After the conclusion of the hearing the board shall submit to the President an original and copies of its report which shall state its findings regarding the issues in dispute, the facts and circumstances surrounding the issues, the possibility of settlement and assessing the responsibility for the impasse which threatens the national interest.

(2) The time for filing findings may not be extended except upon consent of the President.

(3) If, upon receipt of the report of the board, the President directs the Attorney General to seek injunctive relief pursuant to section 180 of Title 29 of the United States Code, copies of the board's report, together with the affidavits of statements regarding the national health and safety, shall be transmitted to the Department of Justice for purposes of litigation.

Section 2. Boards of inquiry shall be reconvened, upon notice from the Secretary of Labor, not less than 50 days after the issuance of the injunction, unless the Director of the Federal Mediation and Conciliation Service shall request, and the President directs, that such boards, or members thereof, be made available for assisting the Service in mediating the dispute. *Provided:* that if the dispute is settled before the date for the filing of the board's report, the Director shall promptly report the settlement to the President, the Secretary of Labor, and the Attorney General, and the Attorney General shall promptly move the court for the discharge of the injunction.

Section 3. To the extent practicable, the rules of procedure applicable to the boards of inquiry in making their initial reports shall govern the conduct of any such proceedings necessary to the making of the final report.

Section 4. Upon the discharge of the injunction under section 210, the Secretary of Labor shall coordinate and direct the preparation of a full and comprehensive report of the proceedings to be presented to the President for submission to Congress, along with recommendations as he may deem appropriate.

APPENDIX B

STATEMENT IN EXPLANATION OF A DRAFT BILL
"AMENDING THE LABOR MANAGEMENT RELATIONS
ACT OF 1947, AS AMENDED, WITH RESPECT TO CON-
CILIATION OF LABOR DISPUTES IN INDUSTRIES AF-
FECTING COMMERCE, NATIONAL EMERGENCIES, AND
FOR OTHER PURPOSES"

The primary focus of this study on the national emergency provisions has been upon the adequacy of the statute to accomplish its pronounced purposes with the devices which it utilizes. Of necessary concern have been the procedures whereby administrators have sought to give the statute practical meaning. As a consequence of this approach, it is unnecessary to make an independent "sortie" into the realm of value judgments which would be necessary in deciding what new and different "tools" from the available "arsenal" should be included in any revised law. Therefore, both because it is already available and because of the commanding stature of the participants, the draft relies on the recommendations of the President's Advisory Committee on Labor-Management Policy in its report on "Free and Responsible Collective Bargaining and Industrial Peace"³³⁸ for those elements which would ordinarily be the major policy specifications from which a draftsman would work. The mechanics, however, in which draftsmen often see many policy issues to which they can rarely get policy makers to address themselves, have been supplied by the draftsman. Thus, the draft is an amalgam of the present Title II, the recommendations of the President's Advisory Committee on Labor-Management Policy, and the draftsman.

The draft is presented in ramseyer form for convenience of comparative consideration.

Key to Ramseyer

(1) Italicized language is new language added to Title II by the proposed bill.

(2) Language in brackets is in the present Title II, but omitted by the draft bill.

³³⁸ PRESIDENT'S ADVISORY COMM. ON LABOR-MANAGEMENT POLICY, A REPORT ON FREE AND RESPONSIBLE COLLECTIVE BARGAINING AND INDUSTRIAL PEACE (1962).

(3) Unbracketed language not underlined is language in the existing LMRA which is not changed by this draft bill.

Declaration of Policy

Section 201 of the draft bill adds a new subsection (a). The subsection reaffirms in positive terms our national policy favoring free collective bargaining. However, it emphasizes the responsibility of the parties to the public or common interest in the exercise of their freedom of choice. The draft bill also adds in paragraph (c) specific language making clear that the responsibility of the government includes the encouragement of the parties to make effective use of private techniques for mediation, recommendations of crucial issues, and comparative analyses of particular problems. It also specifies in subsection (d) that government facilities may be provided for furnishing assistance to the parties for developing facts and making pertinent data available which will facilitate sound and equitable collective bargaining decisions and to encourage fact-finding.

These changes are significant in that (1) it is now a matter of declared national policy that a sense of social responsibility to the common interest is a part of the obligation of the parties to a labor dispute; and (2) legislative recommendation of the use of new and different techniques of factfinding, or other third party assistance, clothes these techniques with a greater degree of approval and also provides the basis for the maintenance of staff and facilities for the Service.

Functions of the Service

There is a new section 202 which establishes sufficient authority in the Secretary of Labor to set up and conduct a program of study and research and to coordinate the activities of the government so that the policy declarations regarding the making available of full and adequate government facilities to promote industrial peace can be realized. The provision gives specific responsibility to one agency and authorizes the others to extend to it full cooperation.

Section 203 has not changed the power or authority of the Service. However, some of the language has been omitted and different language added. The matter deleted relates to the transfer of the agency from the Department of Labor and the establishment of its independence. Since this has been effected, the surplusage has been eliminated from the provisions. In addition, a new sub-

section (d) has been added, which is taken from section 8 of the Organic Act³³⁹ and is the mediation power which was transferred to the Director of the Service.

One major change made in section 204 (which was the old section 203) with regard to the functions of the Service is the addition of language which would permit early entry into a dispute by the Service, either on its own motion or the request of the parties. The Service is authorized to proffer its assistance in a dispute, or a collective bargaining relationship, whenever in its judgment mediation and conciliation would assist the parties to a collective bargaining relationship in avoiding an impasse which might precipitate a strike. Thus, the facilities of the Service can be activated at any point in a relationship at which its service might be useful. In those situations in which it is known that the parties are going to have difficulty reaching an agreement, corrective measures may be undertaken early enough to prevent a strike.

Another principal change is to add collective bargaining relationships to the operative language of the Service's authority to proffer assistance in order to make it clear that the exercise of its functions does not depend solely on the existence of a labor dispute. Thus, preventive mediation without any active controversy is more clearly authorized, if not directed.

The present act directs the Director of the Service to seek to induce the parties to settle disputes by voluntary means including an employee secret vote on the employer's last offer. This provision has been eliminated and the recommendation that the Director seek to induce the parties to submit the issues in dispute to fact-finding arbitration is substituted in lieu thereof. This provision was eliminated from the section to make it consistent with the philosophy underlying the elimination of the last-offer ballot from section 209. Since this device has come under attack as a means for circumventing the exclusive bargaining status of the union, and under section 209 procedures has been criticized as providing an excuse for "electioneering" rather than collective bargaining, it seems desirable to remove the provision from both of these sections. It has been recognized that resort to such a device could be had without its specific inclusion if pursuant to a suggestion of the Service or the parties agree to the utilization of such a device.

Prior section 204 has been eliminated in its entirety. The principal provisions of section 204 commanded the parties to do es-

³³⁹ 37 Stat. 738 (1913).

essentially the same things which they are required to do under Title I in fulfilling the duty to bargain collectively. We have, therefore, added to section 8(d) of Title I, which defines and describes the duty to bargain, the obligation of the parties to participate fully and promptly in any meetings undertaken by the FMCS.

National Labor Management Panel

The provision providing for the creation of a National Labor Management Panel has been revised to increase the compensation for such members to \$100 per day. Provision is also made for the establishment of regional panels which would be composed in a fashion similar to the national panel.

Under the present statute, the panels were limited to advising the Director of the Service on the avoidance of industrial controversies, particularly with reference to those affecting the general welfare of the country. Under the draft bill, the panels need not be so limited in function and may perform other services as may be appropriate.

National Emergency

The major changes made by this draft are those having to do with national emergency disputes.

Section 206 is substantially changed and the substitute authorizes the Director of FMCS to recommend to the President the appointment of an Emergency Dispute Board. The Director may make such a recommendation whenever a collective bargaining situation, a threatened or actual strike, or a lockout in a major or critical industry could develop into a dispute threatening the national health or safety. This provision is somewhat broader than the present law in that it enables the Service to recommend, and the President to appoint, an emergency dispute board when the collective bargaining situation looks as though it is going to develop into a strike that threatens the national health or safety. It should be noted that this "early entry" via an emergency dispute board is in addition to the authority under section 204 for early entry on the part of the Mediation Service. Thus, both the facilities of the Service and the second step of an emergency dispute board may be utilized under the draft substantially in advance of any actual emergency.

It should be pointed out that the language of the draft speaks of "a major or critical industry or part thereof." No attempt has

been made in the draft to delimit these terms. Presumably, with the broad authority to review the action of the President in an emergency dispute situation which was given the courts under the draft, the "major or critical" nature of the industry may also be subject to review by the courts under section 208.

The President may appoint such boards at any time he deems appropriate. The boards are to attempt to bring about voluntary settlements through mediation and conciliation, and may perform such other appropriate functions as the President may from time to time direct. Upon request of the parties, the direction of the President, or upon its own motion with the permission of the President, the boards can make recommendations for settling disputes. The timing, the content, and the number of reports which any board might make are, for the most part, left flexible. The President is authorized to direct such a board to hold hearings on the question of whether an actual or threatened labor dispute would imperil the national health or safety.

Section 207 provides for the declaration of a national emergency dispute. After the receipt of the board's report on the question of the threat to the national health or safety, the President, if in his opinion such a threat exists, is authorized to declare the existence of a national emergency dispute.

The present law, although requiring an initial report of the board of inquiry prior to the institution of action for an injunction, does not authorize such boards to inquire into the existence of a threat to the national health or safety. In the draft, the authority to declare a national emergency is conditioned upon the receipt of a report from an emergency dispute board on the question of the existence of the threat. More often than not under past procedures, the initial activities of the boards of inquiry have been limited to the bare minimum necessary to file a report which will activate the injunctive procedure. Under the draft, hearings must be held on the specific question of the threat to a national emergency, although it is the President's opinion, after receipt of a report on the matter, which determines whether or not a national emergency dispute exists and shall be declared.

There is some doubt that a hearing by a board of private citizens is the most appropriate forum in which to determine the existence of a threat to the national health or safety. Generally, the kind of information which would validate the presidential opinion on the existence of such a condition is that in the possession of pub-

lic officials, largely of the executive family, including the executives of certain States. However, such a proceeding, with possible tripartite board membership, may contribute a large measure of "co-operative voluntarism" to the procedures which is lacking under the present law. In addition, such a hearing would be the device for "making a record" and could replace the affidavits of various public officials which are used to substantiate the action for an injunction under present law. It would, at the same time, provide a forum for the unions, or other interested persons, to make or add to the record on the issue of the national emergency character of the labor dispute.

Upon the declaration of such an emergency, the President is authorized to direct the parties to such a dispute to continue or resume operations in whole, or to the extent practicable, in part, until an agreement regarding the dispute is reached, but not for a period of more than eighty days. The emergency dispute board is authorized to continue its mediation and conciliation efforts, to make findings of facts, and to make recommendations to the parties and to the public at the discretion of the President for settlement of the issues in dispute. Recommendations may be made regarding the effective date of adjustments. The board is also authorized to recommend to the parties, at any time, changes which should be put into effect during the 80-day period. The draft provides for flexibility in reports from the board to the President regarding the disposition of the dispute or the progress being made.

Section 208 provides for judicial review. It is phrased so that any interested person either aggrieved by an order of the President issued under his authority in section 207, or by the failure or refusal of a person to comply with such an order, may petition the court for review or enforcement. The Norris-LaGuardia prohibition on the jurisdiction of the Federal courts in labor disputes is set aside and provision is made for appropriate review of the court action.

It should be noted that section 207 authorizes the President to direct the parties to resume operations and contains a mandate which operates directly upon the parties, as is the case under the Railway Labor Act. Although it might appear that this format invites litigation, it should be pointed out that the enforcement of the mandatory language of the Railway Labor Act ultimately rests upon court action if either of the parties fails or refuses to comply with the mandate of the statute and the offended party complains. To date, the Government has pursued an action for enforcement

of the Railway Labor Act in only three instances, and only two of these under the emergency board procedures.³⁴⁰

Under the draft, presidential declaration will suffice, if the parties are willing. If either party refuses to comply, the objecting party may resort to court action to obtain enforcement. Moreover, under the procedure sections of the draft the term "interested person" is broad enough to include, and does include, the Government. Thus, compliance may be obtained by voluntary action or by judicial enforcement at the instigation of either party or the federal government. In addition, any objecting party may seek review of the order without first resorting to non-compliance and such review would in effect test the validity of the government action.

The draft does not use the term "injunction," although it provides for enforcement, as well as review, of the President's orders and the federal courts are given necessary jurisdiction and authority to make the statute effective. Although the change may be largely an exercise in semantics, in view of the history of the injunction, the mere elimination of the term from the statute may be considered an improvement. In addition, if the procedure works half as well as the comparable procedure under the Railway Labor Act, governmental action in enforcement of presidential orders may be limited to the role of an intervener, or *amicus curiae*, in litigation instituted by one of the parties to the dispute. Moreover, to the extent that procedures are provided for reviewing the decisions and actions of the sovereign, even in an emergency situation, a vital process of the democratic society is preserved.

It should be noted that the language providing for enforcement and review of the orders does not limit the scope of the courts' consideration of the emergency dispute procedures. It can be anticipated that in those cases in which there is a real difference of opinion regarding the emergency character of the dispute, the objecting party will seek to have every aspect of the procedure reviewed, including the reasonableness of the President's opinion. It is in such instances that the record made in the hearings before the emergency dispute boards on the matter of the threat to the national health or safety may become most important.

Section 208(a) and (b) have been revised to expand the territorial jurisdiction of the courts in actions which involve defendants residing in different judicial districts. Provision has been made

³⁴⁰ *United States v. Florida East Coast Ry.*, 221 F. Supp. 325 (D.D.C. 1963); *United States v. Florida East Coast Ry.*, Civil No. 63-269-J, M.D. Fla., Dec. 12, 1963.

for valid extra-territorial service of process, as well as for easy consolidation of cases.

Section 209(a) remains essentially the same except for minor changes to make it conform with the new pattern of the dispute procedures, *i.e.*, the authorization of mediation assistance by emergency boards.

Section 209(b), with respect to reconvening the board of inquiry, is unnecessary under the draft procedures, and along with the "last-offer ballot procedures" has been eliminated.

Section 210 authorizes the President to refer to Congress those disputes which do not appear likely of settlement during the 80-day period and in which there is a possibility of the resumption of the strike or lockout.

Section 211 deals with the composition of emergency dispute boards. The new innovations relate to the utilization of persons experienced in the field of labor and industrial relations which may include persons from industry or labor backgrounds. It also makes clear that public officials may be members of such boards. The compensation of board members is increased to \$100 a day and the boards are directed to cooperate fully with the Federal Mediation and Conciliation Service.

The powers of the boards have been clarified and strengthened. While maximum flexibility for the board's procedures in its mediatory capacity is maintained, procedural requirements are set forth in the statute for the conduct of investigatory or factfinding functions. Even these procedures preserve considerable flexibility, since authority is provided for the making of reasonable rules necessary for the orderly conduct of public hearings. The board need not be bound by rules of evidence and hearings may be conducted informally. However, in the performance of these functions hearings are required, unless the parties consent to submit their cases in writing. The procedures include the basics essential to fair play while at the same time permit the flexibility necessary to facilitate the settlement of disputes. They authorize board participation on its own initiative in the calling of witnesses and the introduction of evidence. This will make it possible for the government to insure that a complete record is compiled on the issue of the critical nature of the dispute and its impact on the national health and safety. In addition, opportunity is provided for the parties to the dispute to submit evidence to the contrary.

The procedures provide a degree of certainty for the parties

and the agencies of the government as to what will be expected of them and provide a basis for more orderly coordination of the activities in this area.

There is a "judgment-passing" function specifically granted to the board in the making of its report to the President, which, along with other powers and responsibilities of the board will enable it to fully perform the "classical" factfinding function. In addition, the provisions of the APA are made inapplicable to board proceedings.

Hopefully, the suggested draft has not created more problems than it has resolved. If it serves only to precipitate serious discussions of the defects it seeks to remedy, a more adequate proposal will emerge from the resultant dialogue.

Sections 212 and 213 are unchanged except for renumbering of the old sections, since the draft contains one more provision than Title II of the existing act.

APPENDIX C

A BILL

Amending the Labor Management Relations Act of 1947, as amended, with respect to conciliation of labor disputes in industries affecting commerce, national emergencies, and for other purposes.³⁴¹

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; that Title II of the Labor Management Relations Act, 1947, as amended, is hereby amended to read as follows:

Sec. 201. [That] It is *hereby declared to be* the policy of the United States that—

(a) *Collective bargaining is an essential element of economic democracy, and in order to help achieve our national goals and to ensure that democratic institutions work most effectively, the freedom-of-choice elements in collective bargaining, which derive from the basic principles of free society, must be carefully preserved, while responsibility to the public or common interest, which is a concomitant of freedom, must be encouraged and strengthened;*

(b) [a] sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers

³⁴¹ The draft is presented in ramseyer form for convenience of comparative consideration. For key to ramseyer see pp. 235-36 *supra*.

and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(c) [b] the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration, *and by encouraging the parties to make effective use of various available private techniques for mediation, recommendations on crucial issues, or comparative analyses of particular problems* to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(d) [c] certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees *in developing facts and making pertinent data available which can facilitate sound and equitable collective bargaining decisions, in developing and encouraging techniques of fact-finding by jointly-appointed outside experts or by personnel drawn from the staffs of the parties*, in formulating for inclusion within such agreements provision for adequate notice of proposed changes in the terms of such agreements, for the final adjustment of grievances or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

Sec. 202, (a) To assist in the accomplishment of the purposes of this Act, the Secretary of Labor, in cooperation with other Departments and agencies of the Federal Government having functions related to labor management relations and the advancement of sound and stable industrial peace, shall establish and conduct a program of continuing study and research, and shall coordinate the activities of the Government in making available full and adequate facilities to assist employers and the representatives of their employees in developing facts, techniques and practices which can facilitate sound and equitable collective bargaining decisions and promote industrial peace.

(b) *Such Departments and agencies of the Federal Govern-*

ment shall, to the extent consistent with law, exercise their powers, duties and functions in such manner as will assist in carrying out the objectives of this section. This section shall be supplemental to any existing authority, and nothing herein shall be deemed to be restrictive of any existing powers, duties and functions of any other Department or agency of the Federal Government.

Sec. 203. (a) [202] There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (hereinafter referred to as the 'Service'). [except that for sixty days after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor.] The Service shall be under the direction of the Federal Mediation and Conciliation Director (hereinafter referred to as the 'Director'), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1949, and may, without regard to the provisions of the civil-service laws, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by the employee designated by the Director for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) *The Director shall have the power to act as mediator and to appoint commissioners of conciliation in labor disputes, or to assist parties to collective bargaining relationships, whenever in*

his judgment the interest of industrial peace may require that it be done.

[(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled 'An Act to create a Department of Labor,' approved March 4, 1931 (U.S.C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of labor.]

Functions of the Service

Sec. 204 (a) [203] It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to *collective bargaining relations*, or to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute or *collective bargaining relationship* in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment—

(1) such dispute threatens to cause a substantial interruption of commerce, or

(2) *mediation and conciliation would materially assist the parties to a collective bargaining relationship in avoiding an impasse which might precipitate a dispute which would cause a substantial interruption of commerce.*

Such services may be proffered at such times as may be deemed necessary and appropriate. The Director and the Service are directed to avoid attempting to mediate *in situations* [disputes] which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the

Service does proffer its services [in any disputes], it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out or other coercion, including submission [to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot.] *of the issues in dispute to fact-finding or arbitration.* The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

(Note: Section 204 is primarily surplusage. Section 8(d) of Title I of this Act is amended by adding to subsection (d) thereof the following: "participates fully and promptly in such meetings as may be undertaken by the Federal Mediation and Conciliation Service under this Act for the purpose of aiding in a settlement of the dispute; and")

[Sec. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provisions for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference,

participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute:}

Sec. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate *not in excess* of [~~\$25~~] \$100 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) *The President may, upon the advice of the Director, appoint such Regional Labor-Management Panels as he may deem appropriate, with equal representation from management and labor. The members of such panels shall not exceed twelve in number, and the terms of office insofar as appropriate, and the compensation and allowances shall be in accordance with the provisions of subsection (a) of this section.*

(c) [b] *It shall be the duty of the panels established pursuant to this section, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, [particularly with reference to controversies affecting the general welfare of the country] and to perform such other services as may be appropriate.*

National Emergencies

Sec. 206 (a) *Whenever in the judgment of the Director of the Federal Mediation and Conciliation Service, a collective bargaining situation, or a threatened or actual labor dispute in a major or critical industry or part thereof engaged in trade, commerce,*

transportation, transmission, or communication among the several States or with foreign nations, or engaged in the productions of goods for commerce, could develop into a dispute threatening the national health or safety, he may recommend to the President the appointment of an Emergency Dispute Board and the President may, as he deems appropriate, appoint such a Board to mediate between the parties and to recommend procedures or techniques to assist them in reaching an agreement or which appear conducive to settlement of the issues in dispute.

(b) *Such Board shall attempt to bring about a voluntary settlement through mediation and conciliation and to recommend procedures and techniques to the parties which would assist them in reaching agreement. The President may direct such Board to hold hearings on the question of whether an actual or threatened strike or lock-out, if permitted to occur or continue, would threaten the national health or safety, and he may direct such Board to perform such other functions as may, from time to time, be deemed appropriate. Such Board may, if requested by the parties to a dispute, or directed by the President, or upon its own motion with the permission of the President, make recommendations to the parties as to the terms of settlement of the issues in dispute. Such Board shall, as the President may direct, make written reports to him including a statement of the issues, its findings and recommendations, if any, and such other information as it may deem appropriate.*

Sec. 207 (a) *After receiving a report of an emergency dispute board on the question of whether a threatened or actual labor dispute threatens the national health or safety, and when [whenever] in the opinion of the President of the United States such threatened or actual strike or lock-out [affecting an entire industry or a substantial part thereof] in a major or critical industry, or part thereof, engaged in trade, commerce, transportation, transmission or communication among the several States, or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, [imperil] threaten the national health or safety, he may [appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report*

with the Service and shall make its contents available to the public.] declare the existence of a national emergency dispute. Upon the declaration of such emergency, the President is authorized to direct the parties to such a dispute to continue or resume operations in whole or, to the extent practicable, in part, until agreement regarding the dispute is reached, for a period not to exceed 80 days. No change, except by agreement of the parties, or pursuant to an order of the President pursuant to this section, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

(b) Upon such declaration of emergency, the Emergency Dispute Board shall be authorized to continue mediation and conciliation, to make findings of facts regarding the issues in dispute and related matters, and to make recommendations to the parties and the public at the discretion of the President regarding settlement of such issues, including any recommendation which might appear appropriate regarding the effective date of any adjustment in previous terms and conditions of employment. Recommendations to the parties may be made any time regarding changes in terms or conditions of employment which in the Board's judgment should be put into effect during the 80-day period or on a concurrent or retroactive basis. Such Board shall, at such times as the President may direct, make written reports to him regarding the disposition or progress of such dispute. Upon the expiration of the 80-day period, or earlier, if the parties have reached agreement on the issues in dispute, or, if in the judgment of the Board, further efforts to effectuate a settlement would be to no avail, the Board shall file with the President a comprehensive report, including the status of the dispute, its findings and recommendations, and such other matters as may be appropriate.

Sec. 208 (a) Any interested person aggrieved by an order of the President issued pursuant to section 207, or by the failure or refusal of any person to comply therewith, may petition any District Court of the United States having jurisdiction of the parties for review or enforcement of such order.

[Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof

engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.]

(b) *Any suit, action, or proceeding under this title against an employer, or a labor organization, or other persons subject thereto involving two or more defendants residing in different districts may be brought in the judicial district whereof any such defendant is an inhabitant; and all process in such cases may be served in the district in which any of them are inhabitants or wherever they may transact business or be found.*

(c) *The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this title. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.*

(d) [b] *Upon a petition for review or enforcement of any such order, the Court shall have jurisdiction to issue such other orders as may be necessary and appropriate for the effectuation of the provisions of this title. In any case, the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", (47 Stat. 70, 29 U.S.C. 101-115) shall not be applicable.*

(e) [c] *The order or orders of the court shall be subject to review by the appropriate circuit court of appeals as provided in Title 28 U.S.C., sections 1291, 1292 and by the Supreme Court upon writ of certiorari or certification as provided in [sections 239 and 240 of the Judicial Code, as amended (U.S.C., Title 29, secs. 346 and 347)] Title 28 U.S.C., section 1254.*

Sec. 209. [(a)] *Whenever [a district court has issued] an order under section [208 enjoining acts or practices which imperil or threaten to imperil the national health or safety] 207 has been issued, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their dif-*

ferences, with the assistance of the Service created by this Act *and any Emergency Dispute Boards established thereunder*. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement [made by the Service].

[(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.]

Sec. 210. *In any threatened or actual strike or lock-out declared to be a national emergency dispute under the provisions of this title in which, despite the efforts of an Emergency Dispute Board, it appears likely that a strike or lock-out will occur or resume after the expiration of the 80-day period, the President is authorized to refer the matter to the Congress with such recommendations for appropriate action as he may deem appropriate.*

[Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.]

Sec. 211(a) [207(a)] *An Emergency Dispute Board [a board of inquiry] shall be composed of the Chairman and such other members as the President shall determine, who shall be appointed from among persons experienced in the field of labor and industrial relations. Such Boards may include members with labor or industry backgrounds, provided, however, in their capacity as Board members such persons shall represent the public. An Emer-*

gency Dispute Board [and] shall have power to sit and act in any place within the United States and shall [to] conduct such hearings, either in public or in private, as [it] may be [deem] necessary or proper to ascertain the facts with respect to causes or circumstances of the dispute, and to perform such other functions as may be necessary and appropriate to effectuate the purposes of this title. Such Board, in the performance of its functions under this title, shall cooperate fully with the Federal Mediation and Conciliation Service and the Secretary of Labor, to assure continuity of operations and efficient utilization of resources and facilities.

(b) The following rules of procedure shall be applicable to the performance of its investigatory or fact-finding functions under sections 206 or 207 of this Act:

(i) Notice of Hearing. Upon the appointment of an Emergency Disputes Board, the parties shall be promptly notified thereof and informed of the time, place, and nature of the hearings, the legal authority and jurisdiction under which they are to be held, and the matters to be covered therein.

(ii) Opening Statement. The Chairman or one designated by him to act as Chairman at a hearing of the Board shall announce in an opening statement the scope and purpose of the hearings and the subjects to be covered therein.

(iii) Hearing to be Public. The Board shall hold public hearings, unless private hearings are necessary in the interest of national security, or the parties agree to present their cases in writing. The record made at such hearing shall include all documents, statements, exhibits and briefs, which may be submitted, together with the stenographic record. The parties shall have the right to attend the hearing with such persons as they desire, and the hearing shall be open to any other person who wishes to attend, including representatives of the press and other news media.

The board shall have authority to make whatever reasonable rules are necessary for the conduct of an orderly public hearing. The board may exclude persons other than the parties at any time when in its judgment the expeditious inquiry into the dispute so requires.

(iv) Participation by Board in the Hearing. The board may, on its own initiative, at such hearing, call witnesses and introduce documentary or other evidence, and may participate in

the examination of witnesses for the purpose of expediting the hearing or eliciting material facts.

(v) *Participation by Parties in Hearing.* *The interested parties or their representatives shall be given reasonable opportunity: (a) to be present in person at every stage of the hearing; (b) to be represented adequately; (c) to present orally or otherwise any material evidence relevant to the issues; (d) to ask questions of the opposing party or a witness relating to evidence offered or statements made by the party or witness at the hearing, unless it is clear that such questions have no material bearing on the credibility of that party or witness or on the issues in the case; (e) to present to the board oral or written argument on the issues.*

(vi) *Stenographic Records.* *An official stenographic record of the proceedings shall be made. A copy of such record shall be available for inspection by the parties, and copies may be purchased by the parties from the court reporter.*

(vii) *Rules of Evidence.* *The hearing may be conducted informally. The receipt of evidence at the hearing need not be governed by the common law rules of evidence.*

(viii) *Facilities Available to Board.* *The Board may during the proceedings consult with the Office of the Secretary of Labor or his designated agents for the purpose of obtaining information pertaining to any issue concerning wages, hours, or other conditions of employment. (Such information may include information in the possession of other governmental agencies.)*

Emergency boards shall be serviced, including making available personnel and facilities of the several Departments and agencies, through the offices of the Secretary of Labor and the Director of the Federal Mediation and Conciliation Service.

(ix) *Requests for the Production of Evidence.* *The Board does have the power of subpoena. It shall request the parties to produce any evidence it deems relevant to the issues. Such evidence should be obtained through the voluntary compliance of the parties, if possible.*

(x) *Adjournment of Hearing to Permit Direct Negotiation.* *Where in the opinion of the board, the parties should make further efforts to settle an issue by collective bargaining or where the parties agree to do so, the board may recess the*

hearing to allow the parties to resume direct negotiations for a period as they may mutually agree upon, or until a date specified by the board for reconvening of the hearing.

(xi) *Question as to Extent of Board's Authority.* If during the proceedings a question arises as to the extent of the authority of the board to inquire into the facts, or as to the interpretation of the order setting up the board, or matters referred to it, the board may recess the hearing and consult with the Secretary or his designated agent for the purpose of obtaining clarification.

(xii) *Findings of the Board.* After the conclusion of the hearing the board shall submit to the President an original and copies of its report which shall state its findings of fact, including the issues in dispute, the facts and circumstances surrounding the issues, the possibility of settlement and assessing the responsibility for the impasse which threatens the national interest, and such other issues as may be referred to it under this Act. The provisions of the Administrative Procedures Act shall not be applicable to the proceedings of emergency disputes boards under this title.

(c) [(b)] Members of [a board of inquiry] *an Emergency Dispute Board* shall receive compensation at the rate of [\\$50] \$100 for each day actually spent by them in the work of the Board, together with necessary travel and subsistence expenses. *Provided, that any person who is otherwise an officer or employee of the United States shall not be entitled to any additional compensation, other than necessary travel and subsistence expenses, for duties performed as members of any such Board.*

(d) [(c)] For the purpose of any hearing or inquiry conducted by any Board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (title 15 U.S.C., secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such Board.

Compilation of Collective Bargaining Agreements, Etc.

Sec. 212 [211] (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining

agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute except that no specific information submitted in confidence shall be disclosed.

Exemption of Railway Labor Act

Sec. 213 [212] The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.