

THE OPERATION OF THE NATIONAL EMERGENCY PROVISIONS OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947

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WITH the passage of the Labor Management Relations Act of 1947,¹ commonly known as the Taft-Hartley Act, the nation was launched on a vast experiment in governmental regulation of industrial relations. Certainly one of the biggest and most vital experiments in the Act related to the national emergency provisions.² The nation put its reliance on fact-finding boards, the injunction, and "cooling-off" periods as devices for stopping, or at least delaying crippling national strikes.

Briefly, the sequence of events under the national emergency provisions is as follows:

(1) When the President finds that a strike or impending work stoppage threatens the national health and safety, he may appoint a board of inquiry to make a written report to him containing the facts and circumstances of the dispute. The report must not contain any recommendations.

(2) After receiving this report, the President may then direct the Attorney General to petition an appropriate district court to enjoin the actual or impending stoppage. The court may then grant an injunction of 80-days' duration, during which time the parties shall make every effort to adjust and settle their differences with the assistance of the Federal Mediation and Conciliation Service. If settlement is reached at any time within this period, the injunction is discharged.

(3) In the case of unsettled disputes, the President reconvenes the board of inquiry which submits its final report by the sixtieth day of the 80-day period, describing the parties' current positions, their efforts at settlement, and the employer's last offer.

(4) Within the next fifteen days the National Labor Relations Board takes a secret ballot of the employees to determine "whether they wish to accept the final offer of settlement made by their employer." Within the remaining five days of the 80-day period, the NLRB certifies the results of the election to the Attorney General, who then requests and obtains a discharge of the injunction from the court. The parties are then free to take any action they see fit. At the same time the President is required to submit a full

†Commissioner, Federal Mediation and Conciliation Service. All ideas expressed are the author's, and may not necessarily be attributed to the Mediation Service.

1. 61 STAT. 136 (1947), 29 U.S.C. § 141 *et seq.* (Supp. 1952).

2. 61 STAT. 155 (1947), 29 U.S.C. §§ 176-180 (Supp. 1952).

report of the proceedings to Congress together with any recommendations he may choose to make.

This machinery has been invoked on ten occasions since the passage of the Act on June 23, 1947. The first dispute in which the President intervened involved the atomic energy installation at Oak Ridge. Subsequently, the national emergency provisions have been applied to the meat-packing industry, telephone industry, maritime industry (on two occasions), bituminous coal industry (on three occasions), non-ferrous metals industry, and a single pipe-manufacturing plant in the steel fabricating industry.

Each of these cases represents a unique story with its own cast of characters and its own distinctive plot.³ To develop a "complete story" for each of these would require the reconstruction of a total situation. This task would be impossible for anyone except for the "participant-observer," for only he could reconstruct the inner circumstances of each dispute, its real flavor, and the hidden attitudes and personality characteristics of the participants which blocked or aided settlement. The author has had the opportunity of being such a "participant-observer" in the most recent of these disputes—the strike at the Dunkirk, New York, plant of the American Locomotive Company—and, therefore, will make special observations only about this, in some ways unique, application of the national emergency provisions.

At this time, after five and one-half years' experience with these provisions, and with a new Congress considering their modification and amendment, it seems appropriate to analyze their operation. The following analysis is not made in the light of any particular new solution for the problem of critical labor-management disputes. Rather it is an attempt to view critically the experience with these provisions, using as a standard the criteria for success established by Congress when the provisions were enacted.

It is difficult to ascertain any clear standards by which to gauge the success or failure of the national emergency provisions. The congressional standard was never made clear. Representative Hartley saw the emergency provisions as a device for "stopping John L. Lewis";⁴ Senator Taft saw them as a method of enforcing delay and encouraging settlement.⁵ Perhaps the majority of Congress wavered between the conviction and the hope that critical nationwide strikes would be either discouraged, prevented, or stopped. Yet, in evaluating experience under the Act in terms of effectiveness of the provisions, it makes a substantial difference what standard of judgment is used. In so far as it is possible to ascribe a congressional intent, it seems clear that the primary objective was to avoid stoppages. At the same time, Congress could not be

3. The most concise and accurate summary of the chronology of events in these disputes, through the non-ferrous metals dispute of 1951, may be found in DEPT OF LABOR, BUR. LABOR STATISTICS, NATIONAL EMERGENCY DISPUTES UNDER THE LABOR MANAGEMENT RELATIONS (TAFT-HARTLEY) ACT Ser. 5, No. 2 (1952).

4. 93 CONG. REC. 3523 (1947).

5. 1 NLRB, LEGISLATIVE HISTORY OF THE LMRA OF 1947, 421 (1948).

accused of indifference to the terms of settlement or the fate of free collective bargaining. Thus a second objective of these provisions can be determined: a reasonable, viable industrial peace and the kind of federal intervention that would promote mature bargaining or at least maintain existing free collective bargaining.

In light of Congress' own objectives, this article will consider the applications of the national emergency provisions in terms of the following analysis: (1) Have the provisions discouraged, prevented, stopped, or delayed big strikes? (2) Have the provisions aided the collective bargaining process?

EFFECTIVENESS OF THE PROVISIONS IN STOPPING STRIKES

Whether breakdowns in negotiations and consequent work stoppages are avoided by disputants in key industries simply because of dread of the possible appointment of a board of inquiry and subsequent entanglement in the procedures of the Act is a matter for speculation. Such speculation, however entertaining, is futile because it cannot result in a definitive answer. The only evidence on the question of whether the national emergency provisions have prevented strikes lies in the record of the ten cases.

The bare figures show that strikes were involved in seven of the ten cases: the meat-packing dispute, the pension dispute of 1948 and the 1950 contract dispute in the bituminous coal industry, both maritime disputes, the non-ferrous metals and the American Locomotive disputes.

Disputes Without Strikes

Work stoppages were averted in connection with the other three cases: the atomic energy dispute, the telephone dispute, and the 1948 contract dispute in the bituminous coal industry. The record, viewed superficially, would indicate that, in these three instances at least, the national emergency provisions prevented a crippling strike.⁶ Such a judgment would be inadequate because it entirely overlooks the special circumstances under which the settlements occurred.

In the atomic energy dispute, it was not until after the machinery of the Act was exhausted that settlement was achieved and then only by arduous collective bargaining supported by determined mediation. In that dispute the national emergency provisions undoubtedly secured a delay of the strike. It is doubtful, however, that the fact-finding process contributed at all to a settlement. William H. Davis, former Chairman of the Atomic Energy Labor-Management Relations Panel, testified before Congress on this point:

6. This type of thinking was given an unfortunate impetus by the Joint Committee on Labor-Management Relations, set up under § 401 of the Act to make a critical evaluation of its operations. This Committee concluded that the Act might be considered a success since it appeared to have been successful in one or two cases. See REP. JOINT COMM. ON LABOR-MANAGEMENT RELATIONS, 80th Cong., 2d Sess. (1948).

"The controversy was just as acute when the injunction was discharged as it was the day it was issued. Well, what was the result? The men were free to strike. They had almost been authorized by law to strike. But, in that case, the counsel of the American Federation of Labor certainly rose to the occasion. They recognized the tremendous responsibility and importance of the atomic-energy program, and they sent Brownlow down there and settled it without a strike."⁷

If the atomic energy case proved anything, it proved that it is possible to (1) delay a strike, (2) fail utterly in arriving at a settlement during the delay, and, (3) leave the parties eighty days older but no wiser. Mediation and collective bargaining rather than the Taft-Hartley Act seem to have generated the settlement in that case.

In the telephone case the first step in the emergency process—the appointment of a board of inquiry—shocked the parties into a sudden enthusiasm for free collective bargaining. The emergency procedure was abandoned soon after it was initiated, and before the issuance of an injunction. The record of the case clearly shows that as soon as the parties were confronted with the existence of a board, and thereby the prospect of an injunction, they beat a hasty retreat. Perhaps the board of inquiry contributed indirectly to a settlement by providing the parties with what apparently was an unpleasant alternative. But surely the board served no other purpose in its short span of life. Again the settlement was achieved by exclusive reliance on collective bargaining.

Similarly, no injunction was issued in the bituminous coal contract dispute in 1948. The board of inquiry turned its full energies to a kind of cramped but determined mediation.⁸ The major overriding obstacle to settlement in this dispute was uncertainty about a pending court decision. Once that decision was handed down⁹ the board of inquiry virtually abandoned its fact-finding function and encouraged the parties to renew collective bargaining. From then on, the path to settlement was clear and the board's only remaining task was to write its report.

Thus, in none of the three cases in which a strike was averted can one say with any real certainty (or even much plausibility) that the national emergency machinery averted the stoppage.

Strike Cases

In disputes where work stoppages did occur, the record of the national emergency provisions is still unsatisfactory, whether the purpose of the ma-

7. *Hearings before Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess. 891-2 (1949).

8. See p. 1057 *infra*.

9. *Van Horn v. Lewis*, 79 F. Supp. 541 (D.D.C. 1948) (denying injunction against the operation of the United Mine Workers' Welfare and Retirement Fund).

chinery be strike prevention or strike delay. In the two maritime cases, while the machinery delayed the strike for eighty days, serious strikes broke out after the injunction was dissolved. In one of these maritime disputes, the end of the national emergency machinery was followed by a three-month strike involving 28,000 workers. In the other, the Atlantic coast maritime and dockworkers' dispute, the dissolution of the injunction became the signal for a two-week strike involving 45,000 workers. In the 1948 bituminous coal pension dispute a work stoppage was in effect when the board of inquiry was created, and the stoppage continued for a month thereafter. When the 80-day injunction was issued, union cooperation was slow and grudging. Finally the union and its leader were fined for failing to comply with the terms of the initial restraining order.¹⁰ Even at this point full production was not reached for some weeks. In the 1950 bituminous coal contract dispute the lessons the union had learned in the pension dispute were put to good use: the injunction was completely nullified. In this case the union's president, John L. Lewis, ordered the striking miners to return to work following the issuance of the injunction. The miners failed to comply either with the injunction or their president's order. Once again contempt proceedings were initiated, but on this occasion the union and its president were found not guilty on the ground that the Government had failed to produce evidence sufficient to support charges of either criminal or civil contempt.¹¹

Only in the American Locomotive dispute did the machinery delay a strike for the purpose of allowing settlement to be reached. This strike, at the Dunkirk, New York, plant of the American Locomotive Company, had continued for three months until enjoined on December 12, 1952. The strike prevented the manufacture of pipe and other items necessary for the completion and expansion of atomic energy facilities. Production was resumed after the injunction was granted, and a tentative basis for settlement was reached through intense mediation just prior to the holding of the "final offer" ballot. The national emergency machinery, however, did nothing to promote this settlement.

Similarly, the remaining cases neither prove nor disprove the adequacy of the machinery in stopping or delaying strikes. In the meat-packing case, the President was poorly advised as to the criticalness of the controversy as evidenced by the fact that he made no attempt to obtain an injunction after receiving the report of the board of inquiry. In the non-ferrous metals dispute, while the injunction did appear to prevent the continuance of the work stoppage, the actual circumstances of the dispute reveal that an agreement between the most important parties was reached the day before the board of inquiry

10. *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).

11. *United States v. United Mine Workers*, 89 F. Supp. 179 (D.D.C. 1950), *dismissed as moot*, 190 F.2d 865 (D.C. Cir. 1951).

met for the first time. Apparently, the work stoppage would have ended at approximately the same time, with or without an injunction.

The lesson of the strike cases, particularly the two maritime and two coal disputes, is quite evident. Most unions, unlike the United Mine Workers, are not sufficiently cohesive and strong of purpose to be able to frustrate and ignore an injunction.¹² However, it is plain that nothing in the provisions can "stop" a union or its leaders who are determined to strike after the injunction's dissolution. At best the injunction can only delay the strike. It is doubtful whether there is much virtue in delay *per se*, as evidenced by the fact that there has been only one settlement during the injunction's cooling-off period.¹³ As Cyrus Ching, former Director of the Federal Mediation and Conciliation Service, stated:

"[I]n . . . those cases . . . the injunction stopped the strike at the time, or when it was threatened. However, . . . after the injunction had expired we still had the same problems."¹⁴

This lack of success—unless a "national emergency" strike loses its emergency nature simply by being delayed—is both disappointing and surprising. It is disappointing in view of the high hopes and large promises made for the national emergency provisions by its original advocates; surprising in view of the high regard for the provisions still held by many of these same proponents.

This almost complete failure of the provisions to stop critical strikes can be attributed to the provisions' effect on the collective bargaining process.

IMPACT OF THE PROVISIONS ON THE COLLECTIVE BARGAINING PROCESS

The national policy of favoring and promoting collective bargaining was not altered by the Taft-Hartley Act. The stated intent of the Act indicates that its sponsors sought to reinforce the collective bargaining process. Even in regard to the national emergency provisions Congress had this as one of its two objectives. The failure of the provisions to attain the first objective—stopping critical strikes—can be attributed to a failure by the legislative drafters to understand the nature of the collective bargaining process. The following criticisms of the national emergency provisions, based upon experience with them, point inescapably to the general conclusion that they neither aid collective bargaining nor create the conditions necessary for amicable agreement between labor and management.

12. While it is true that John L. Lewis has been somewhat less than cooperative with the national emergency machinery, it remains Lewis' contention that the nation has never suffered from a shortage of soft coal during his tenure as President of the UMW. To the surprise of many, this statement is difficult to disprove. See Bernstein & Lovell, *Are Coal Strikes National Emergencies?*, 6 IND. & LAB. REL. REV. 352 (1953).

13. The American Locomotive dispute. See p. 1051 *supra*.

14. *Hearings*, *supra* note 7, at 63.

Excessive Reliance on Government Intervention

The very existence of the national emergency provisions necessarily alters the framework in which bargaining is conducted and results in excessive reliance on government intervention. The possibility that the emergency machinery may be put in motion has figured inevitably in the calculations, tactics, and expectations of the parties. The board of inquiry in the West Coast maritime dispute reported:

“The possibility [of resort to the national emergency provisions] has influenced negotiations. The appointment of the board of inquiry has, of course, increased the possibility of an application for the issuance of an injunction. And that has alleviated for the time being the pressure for settlement which a threatened strike would otherwise impose.”¹⁵

Bargaining in key industries has very frequently been done with an eye peeled for the possibility of federal intervention. In concrete terms this means that a party that feels that it has something to gain from an injunction or a board of inquiry may devise its strategy in order to put pressure on the President for resort to the national emergency provisions of the Act. Management, of course, gains continued production and profits. But even unions, professing to despise the labor injunction, will adopt this strategy in circumstances where they are secretly relieved to be ordered to refrain from what they were, in fact, reluctant to do—take or continue strike action. This may occur in two situations: either where the union leaders' public militancy is not supported by an enthusiastic membership, as was suspected to be the case in the telephone dispute; or where the union is anxious to avoid or stop a strike in situations in which the charge of harming the national defense and safety is difficult to ignore. This was particularly true in the atomic energy dispute.

Any approach to the problem of critical strikes must consider this strategy. What the government is or is not expected to do has become one of the fundamental factors conditioning the conduct of negotiators in the major industries. In some, federal intervention has been virtually assured if either of the parties adopts the strategy of inducing the application of the emergency provisions. The frequent adoption of this strategy will increase the number of instances in which government intervention is necessary. And, perforce, the goal of eliminating the need for government intervention is defeated.

The Dilemma of Timing

If strikes are to be averted or delayed by the national emergency provisions it has become necessary for the President to initiate action some time in advance of the strike date. The practical effect of this has been to reduce the

15. BOARD OF INQUIRY CREATED BY EXEC. ORDER No. 9964, REPORT TO THE PRESIDENT ON LABOR DISPUTES IN THE MARITIME INDUSTRY 13 (1948).

pressure for settlement just at the stage when such pressures are mounting. These circumstances place the mediation authorities at a significant disadvantage. Mr. Ching, former Director of the Federal Mediation and Conciliation Service, testified:

"We have found this: that in some of these large cases we had to stop negotiations at a fairly critical period, an important period, possibly two weeks before the deadline, in order that a board of inquiry could be set up under the law and report to the President. Such a report had to be filed before the President could ask for an injunction."¹⁶

Negotiations ordinarily stop when the Act is invoked because the parties must shift their energy from the search for agreement to the more immediate task of making a good presentation before the board of inquiry. Since the impending injunction frees both parties from the threat of an immediate work stoppage, there is no economic pressure to reach a settlement. Moreover, early intervention is particularly unfortunate where, as in many industries, it is traditional not to reach settlement until the eleventh hour. On the other hand, if the Government encourages collective bargaining and assists the parties until the last minute, the national emergency provisions cannot then be brought into play in time to prevent a stoppage.

The problem of timing has been a serious one on several occasions when the Act was used.¹⁷ In the maritime dispute the President felt impelled to prevent a strike rather than to end a strike at some unspecified date after it had occurred. Accordingly, a board of inquiry was appointed twelve days prior to the contract termination date. Normally, settlement could have been expected to be reached during this period. However, in the non-ferrous metals dispute, the President selected the other alternative and delayed initiation of the Act's machinery. Consequently, two weeks' valuable production was lost while the government went through the ritual preparatory to an injunction.

Thus, in industries where continuous service or maximum production is essential, the machinery of the Act poses a serious dilemma for the Government. Although the initiation of federal intervention may occasionally frighten a few parties into a renewal of fruitful collective bargaining, the usual pattern is a shift from negotiations looking to possible agreement to a renewal of contention at the most crucial and inopportune time. On the other hand, if the Government does not resort to the national emergency provisions until the stoppage is actually under way, it guarantees a senseless work stoppage for at least a matter of days.

16. *Hearings, supra* note 7, at 62.

17. The problem, of course, does not exist in most production and manufacturing industries because the existing stockpile of the product ensures a sufficient supply while the machinery of the Act eventuates in the injunction. However, when the problem does occur, as for example in communication, transportation, or in defense production industries, the dilemma is very real.

Restrictions on Boards of Inquiry

The Labor Management Relations Act of 1947¹⁸ crippled the boards of inquiry with many restrictions. Among these are a necessity for haste and procedures which neglect the influence of public opinion. In addition, the Act prohibits recommendations by the board of inquiry, in circumstances where the best fruit of fact-finding would be a set of recommendations on which the parties could agree. These restrictions have largely eliminated possible opportunities for the boards to aid and assist the collective bargaining process. As a result, these boards have gradually taken on several new and interesting functions.

The necessity for haste. One of the primary restrictions upon fact-finding is the time factor. As someone remarked, "A board of inquiry is nothing but a whistle-stop on the road to an injunction." On this road, speed is a necessity, reflection a luxury. The executive orders creating boards of inquiry have always specified the date on which the board's report was due.¹⁹ The time is invariably too brief for competent research, conscientious analysis, and sometimes even clear writing of the report. Time is limited because the report of the board of inquiry is a necessary preliminary to the injunction. The President, confronted with the alternative of interrupting the bargaining process or allowing a strike to begin, has almost always appointed boards of inquiry at the last possible date and has at the same time asked that their reports be given him in a very few days. The board in the East Coast maritime dispute was asked to report in three days; the non-ferrous metals board in five. Both the non-ferrous metals and the American Locomotive boards of inquiry found it necessary to ask for an extension of time in order to complete their findings.

An atmosphere of tension and haste pervades the boards' inquiries.²⁰ The entire proceeding has ordinarily been conducted in a mad rush to get in under the deadline. A series of twelve-hour days is hardly conducive to exhaustive analysis or mature reflection.

Neglect of public opinion. The most fundamental assumption behind the use of fact-finding procedures is that if the public knows the facts, then public pressure will force a settlement. Yet public opinion can hardly become in-

18. 61 STAT. 136 (1947), 29 U.S.C. § 141 *et seq.* (Supp. 1952).

19. *E.g.*, on December 3, 1952, Executive Order 10417 established the American Locomotive board and stipulated that "The Board shall report . . . on or before December 10, 1952." EXEC. ORDER NO. 10417, 17 FED. REG. 10981 (1952).

20. The American Locomotive board worked an average of slightly over 11 hours a day for a seven-day period in preparing its initial report. This is not unusual under these circumstances.

The one exception with which the author is familiar occurred in the meat-packing dispute, where the board was informally requested by the White House to delay as long as possible in submitting its initial report in hope that the dispute would be settled before resort to injunction. This board took 24 days to submit its report.

formed, let alone effective, in the twenty-four or forty-eight hour period that occurs between the issuance of the report and resort to the injunction.²¹ Resort to injunction has not only effectively paralyzed the normal pressure for settlement but has lessened public interest and reduced public pressure at the same time. With a promise of eighty days of "peace," public interest has quickly waned.

This lack of public interest has been equally obvious in the case of the boards' final reports which are made at the end of the first sixty days of the injunction period. During the life of the injunction, public interest in a dispute fades. It is revived only with the prospect of some "break," either settlement or stoppage. Therefore, in the flood of news stories accompanying major national disputes, relatively little attention has been directed to the final reports. In large part this is due to a paralyzing restriction on the creation of public interest in these reports—the prohibition against the making of recommendations.

Ban on recommendations. A statement of the *facts* of a national dispute by a board of inquiry generally adds nothing new to public understanding. The national wire services give rather extensive coverage to most critical disputes. Hence the board reports, while they contain exhaustive statements of the "position of the parties," have provided nothing new for the public beyond a recapitulation of the basic essentials of the dispute—in short, no *news* at all. If Congress sought to use the board reports to mobilize public opinion behind the settlement of a controversy it failed in that attempt. What is newsworthy is precisely what the Labor Management Relations Act forbids, *i.e.*, a judgment of a board of inquiry respecting the merits of the case. Who is wrong? How should the dispute be settled? These are the questions to which the public might ordinarily look to an expert board for an answer.

Why did the Congress forbid the making of recommendations? The drafters of the Act were quite clear in their conviction that boards of inquiry ought not to make recommendations lest such recommendations take on the role of arbitration awards.²² They were properly concerned with the danger of unintentionally slipping into a system of compulsory arbitration. However, if a dispute is in fact of "emergency" proportions then Government intervention might be expected to do something more than recite the facts.²³ In practice, the general ban on the making of recommendations at any time and in any

21. Due to the extreme time pressure existent in the East Coast maritime, non-ferrous metals and American Locomotive disputes, the President requested the Attorney General to obtain an injunction before copies of the report were available for the press and public.

22. 1 NLRB, LEGISLATIVE HISTORY OF THE LMRA OF 1947, 407 (1948).

23. In his suggested amendments to the Act made in 1949, Senator Taft attempted to give the boards power to make recommendations for a fair settlement. 95 CONG. REC. 7796 (1949). His bill—S. 249, 81st Cong., 1st Sess. (1949)—passed the Senate but was rejected by the House. *Id.* at 8717.

situation has proved too inflexible if the work of the boards is to have meaning and significance.

New functions of the boards of inquiry. Since it is not in the nature of men to "put in their time," particularly in critical situations, boards of inquiry have tended to adopt several new functions—functions for which they were not intended but which they have occasionally performed rather well.

The first of these has been to operate as *ad hoc* boards of mediation. If boards could not recommend a fair settlement they could at least try to settle the dispute during or immediately following their hearings. The board of inquiry in the 1948 bituminous coal contract dispute attempted exactly this with a substantial degree of success. This example was followed in the non-ferrous metals dispute, with less but still worthwhile success, and by the board of inquiry in the American Locomotive case, totally without success.²⁴ Nevertheless, the experience of these cases would seem to indicate a need for granting the board greater flexibility in accomplishing what is, after all, the central purpose of the whole procedure, a peaceful settlement.

Another interesting function that has been undertaken by boards of inquiry is the determination of the seriousness or criticalness of the disputes. In most of these disputes the seriousness of the situation is evident and is a problem of national concern. However, in the meat-packing dispute both parties came before the board of inquiry contending that their labor dispute created no crisis of national proportions. After considering this problem at substantial length privately, and to a lesser extent in its report, that board of inquiry concluded that the language of the statute prevented it from making any finding as to the emergency nature of the situation.²⁵ This precedent began to weaken in the non-ferrous metals dispute where the board of inquiry spent as much time in its initial report discussing the emergency nature of the strike in that industry as it did on the positions of the parties.

24. From the point of view of a participant in the American Locomotive dispute, the pervading feeling throughout this time was one of futility. Mediation was attempted in an effort to do something—anything—constructive toward settling the dispute. It was obvious to all concerned that the dispute would eventually be settled on approximately the terms at which it was finally settled. However, problems of face-saving after a year-long negotiation and the technical position of the union in relation to the "national emergency" provisions made it seem impossible to find a lever to move the parties from their crystallized positions. A solution, with neither side gaining a total victory, was eventually found only when the pressures of an impending work stoppage again faced the parties.

25. The language of the statute states that when, "in the opinion of the President of the United States" a threatened or actual strike or lockout imperils the national health or safety, "he may appoint a board of inquiry to investigate the issues involved in the dispute." 61 STAT. 155 (1947), 29 U.S.C. § 176 (Supp. 1952). This language would seem to indicate that the conclusion of the board of inquiry in the meat-packing dispute was accurate within the meaning of the Act. However, the board's reservations as to the emergency nature of the dispute were borne out by the fact that the President made no attempt to obtain an injunction.

The tendency to determine the "emergency nature" was even more evident in the dispute at the American Locomotive Company's Dunkirk plant. In this case the board of inquiry held its first hearing with the representatives of the Atomic Energy Commission on the subject of the seriousness of the strike's effect on the completion and expansion of facilities for the production of nuclear fission products. Following this, the board included within both its initial and final reports statements from the Atomic Energy Commission on the criticalness of the situation. A substantial portion of both of its reports was devoted to this point. Thus, without seriously considering whether it was a part of its function, the board assumed the task of supporting the President's decision to intervene in the dispute. The board's findings on this point were accepted as evidence by the federal courts when the Steelworkers' Union subsequently litigated the constitutionality of the national emergency provisions and their application to this dispute.²⁶

These new activities of the boards of inquiry—the first to operate as an adjunct to the mediation process, and the second to attempt a determination of the criticalness of the dispute—indicate that boards can make a substantial contribution to the settlement of emergency disputes and, moreover, that their functions should not be explicitly limited in the statute.

26. The union unsuccessfully resisted the temporary injunction in the district court. *United States v. American Locomotive Co.*, 109 F. Supp. 78 (W.D.N.Y. 1952). The Supreme Court refused to grant certiorari, 344 U.S. 915 (1953), and the union then pursued its appeal in the Second Circuit. The union claimed that the Act was unconstitutional since it required a district court to grant an injunction solely to help the executive branch of the Government to settle a labor dispute. It contended that this provision placed a non-judicial function upon the court because the injunction did not relate to a justiciable case or controversy within the meaning of Article III of the Constitution. The union further argued that even if the national emergency provisions were constitutional the Act had been improperly applied because the Dunkirk strike, involving one small plant in the large steel fabricating industry, did not meet the requirements of the Act that the strike or lockout "affect an entire industry or substantial part thereof. . . ." It was argued that the legislative history of the Act showed clearly that Congress meant it to apply only to strikes which were substantially industry-wide in scope and not to those of a local character such as the Dunkirk dispute.

The day before the injunction expired the Second Circuit held the national emergency provisions constitutional. *United States v. United Steel Workers of America*, 202 F.2d 132 (1953). The court ruled that the issuance of the injunction was a judicial function comparable to an appellate court's review and enforcement of an order of the National Labor Relations Board. *Id.* at 138. It felt that the prohibition of strikes and lockouts under specific circumstances implied that such strikes and lockouts were an invasion of public rights. *Id.* at 139.

The court of appeals found no merit in the union's claim that the Act was misapplied in this dispute. The strike affected a substantial part of the atomic energy industry. The court decided that the words of the Act ("affects an entire industry") were sufficient basis from which to infer a congressional intent broad enough to include a minor strike in one industry substantially affecting another. *Id.* at 137.

The union was unable to obtain further review of this decision as the case became moot the following day.

The Fallacy of "Cooling-Off"

"It is absurd at the outset to characterize a waiting period for strikes as a cooling-off period. Employees whose demands are subject to enforced delay are most likely to become warmer over the controversy. . . . The unfair feature of cooling-off legislation lies in the fact that the government thereby compels persons to work upon terms and conditions of employment which not it, but a private employer has fixed and which the government has no legal right to alter."²⁷

Compulsory "cooling-off," imposed by injunctions, has been at best meaningless and at worst harmful in relation to the collective bargaining process. The futility of the cooling-off philosophy ought to be apparent. Labor disputes are seldom matters of frayed tempers that cool off with time. Nor are the experienced negotiators who usually bargain for key industries normally given to sudden and uncontrollable bursts of anger. The disputes involve basic conflicts in which the positions of the parties are the product of calculated strategy. A burst of anger would more often be a part of this strategy than a reflection of a real animosity.

Not only has the cooling-off period failed to serve its avowed purpose, but in at least one instance the union exploited this period to stimulate animosity toward the employer and to cement strike plans. Harry Bridges, leader of the West Coast longshoremen, proclaimed to the board of inquiry that he would turn the cooling-off period into a "warming-up period," a period of preparation of strike psychology and strike plans.²⁸ In that dispute both parties reported to the board that the injunction and the cooling-off period had largely failed of their purpose.

The reaction of Mr. Bridges to the injunction-imposed cooling-off period simply underscores the general reaction. Where an injunction has been obtained, there has been little evidence of noticeable progress toward settlement. The reason for this ought not to be obscure. The dread of a stoppage, with the cost it implies for both parties, is the dominant factor in the pressure for settlement of labor disputes. The effect of a "cooling-off" period is to *suspend* pressure for settlement for that period, making collective bargaining sessions largely hollow gestures.²⁹ Government intervention ought to enhance

27. Testimony of Ludwig Teller, *Hearings before the Senate Committee on Education and Labor on S. 55*, 80th Cong., 1st Sess. 273 (1947).

28. BOARD OF INQUIRY CREATED BY EXEC. ORDER NO. 9964, *op. cit. supra* note 15, at 10.

29. This point is affirmed by experienced mediators.

"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 the discharge of an injunction) to spur them to renewed efforts. In most instances the efforts of the Service to encourage the parties to bargain during the injunction period . . . fall on deaf ears." 1 *FED. MEDIATION & CONCILIATION SERV. ANN. REP.* 56 (1948).

or supplement the pressures making for settlement. But the cooling-off periods have simply served to produce a waiting period, a dead space in which pressures for settlement are slight.

Whatever the dubious advantages of the cooling-off period, they have surely been lost by using the injunction to enforce a cooling-off. Regardless of the logic or the legal even-handedness with which an injunction is applied to the parties, the injunction seems, in the eyes of labor, to be a device for strait-jacketing labor. The memory of the labor movement is long; in the legend and folklore of unions, "government by injunction" is a symbol of oppression. "Injunction" is a word and an event which creates a deep emotional reaction on the part of labor groups and hardly improves the atmosphere for negotiations.

The presumed purpose of an injunction is to secure an additional period of time for renewed efforts at settlement. Yet in most instances it is possible to achieve the same objective simply by requesting a postponement of the strike. Experience under the Railway Labor Act supports the view that a delay in a work stoppage will almost always be agreed to by the parties without the compulsion of an injunction. A Presidential request for extension of the status quo for a fixed period would seem to be a more appropriate method of gaining time. If this objective can be achieved without coercion, and without increasing the hostility of one of the parties, surely this is desirable.³⁰

The "Final Offer" Election

The secret ballot on the "final offer" of the employer contributes nothing to the settlement of a dispute and is a positive irritant. Yet the Act requires that in every unsettled dispute the NLRB, between the sixtieth and seventy-fifth day of the 80-day injunction period, shall poll the employees to ascertain whether or not they wish to accept the employer's "final offer" for settlement. This is patently absurd. Up to the point of the actual signing of the agreement, no offer can be called final. It may be part of a larger package. It may be a conditional or partial offer made in the expectation that many other details can be jointly agreed upon. It may be a genuine attempt at settlement or simply a bargaining gesture.

Experience with these elections has clearly demonstrated their waste and futility. The employees have overwhelmingly rejected the offer in the four cases where it has been presented to them under the Act.³¹ In one case, the union leaders asked the membership to boycott the election,³² and not one

30. The ultimate irony in the use of the injunction lies in the fact that it cannot be completely depended upon to stop a determined union or angry men from striking. This is an unmistakable lesson of the coal strike of 1949-1950.

31. Elections were held in the atomic energy, both maritime, and the non-ferrous metals disputes. The voting ranged from 2-1 to 10-1 for rejection of the employer's final offer. Some idea of the expense involved may be gained from the fact that the NLRB spent slightly over \$8,000 to hold the non-ferrous metals election.

32. This case involved the West Coast ILWU. See 1 FED. MEDIATION & CONCILIATION SERV. ANN. REP. 48 (1948).

ballot was cast either for or against the employer's last offer. In the maritime dispute on the West Coast the employer's last offer constituted a wholly new offer which had never been the subject of collective bargaining. In this same dispute an election had to be held on ships at sea, which proved impossible within the fifteen-day period, and where the secrecy and fairness of the balloting was open to substantial doubt. Moreover, the complexity of the issues and the lack of explanation frequently makes it doubtful that the workers truly understand the nature of the offer.

In the American Locomotive dispute the ineffectuality of the "final offer" election can be seen clearly. On approximately the fifty-fifth day of the injunction, the employer refused to state a "final offer of settlement" at the board's hearings on the ground that he had already reached a settlement with the union. The union denied that an agreement had been reached, stating that the employer had made an offer to settle the dispute at all three plants of the company (only one of which was under the jurisdiction of the board), but which offer the union had rejected.

Two members of the board of inquiry, interpreting the words of the statute—"as stated by him"³³—to mean that the employer must state his last offer to be such, felt unable in these circumstances to report any "final offer." The Chairman of the board, in a separate statement, felt that despite the fact that the employer refused to characterize it as such, a final offer was in fact made. The Chairman reported this last offer as the willingness to put into effect the terms of the so-called settlement. The Chairman did not feel compelled to analyze the utility of a last offer requiring acceptance at three plants, the employees of only one of which were going to be allowed to ballot.

When this report of the board of inquiry was duly submitted to the President of the United States, the Company was apparently unwilling to be taken at its word. On the sixtieth day, the Company reported that it was now willing to make a "last offer," a wage increase substantially below that which it had already stated it was willing to put into effect. Although the board reported this offer to the President, it was of course unable to do so within the statutory sixty-day period. This confusion of conflicting statements and offers was finally "resolved" when the NLRB, at the suggestion of the Federal Conciliation and Mediation Service, postponed the ballot "indefinitely," *i.e.*, permanently.³⁴

The American Locomotive experience illustrates the extent to which the "final offer" provision is conceptually elusive. In the course of negotiations

33. 61 STAT. 156 (1947), 29 U.S.C. § 179 (Supp. 1952).

34. This "solution" casts light upon the problem which a ballot presents mediators. The Mediation Service did not want the ballot taken, because collective bargaining was once again becoming fruitful in the dispute. The Service felt, from bitter experience, that if a date for a ballot were announced, the union leaders would immediately direct their energy away from negotiations and toward the political struggle of amassing a heavy negative vote in the election in order to justify their previous conduct of negotiations.

many offers, firm or conditional, are made. What then should be the "final offer" to be placed on the ballot? How long should the NLRB wait before printing a ballot on which a realistic "final offer" may be placed? Should the Board submit to the workers the final offer made by the employer, or the last offer that was subjected to collective bargaining between the parties, or any final offer at all if the employer refuses to admit that he has made one?

If the offer which is made at least twenty-one days in advance of termination of the injunction does, in fact, represent the statement of a fixed and unchanging position on the part of the employer, then a real barrier has been placed in the way of mediation efforts that are supposed to continue during the remaining twenty days. On the other hand, a vote turning down the employer's last offer places new obstacles and difficulties in the way of settlement. The essence of mediation, and of collective bargaining as well, is that all conceivable paths to settlement must be explored. This process involves continuous altering and restating of position, to which the very concept of "final offer" is repugnant.

The "final offer" provision contains a profound misunderstanding of the relationship of unions to their membership and to the employer. The plain implication of the provision is that unions do not represent the true wishes of their membership, hence the employees are casting a secret ballot with which to undermine the position of their leaders. The provision for the ballot was placed in the Act despite the fact that almost all of the authorities on labor relations agree that in a test of loyalty the worker will almost invariably support his union rather than his employer.³⁵ The "final offer" provision could have significance only in the exceptional instances where the union suffers severe internal dissension, and blocs within the union are able to produce a vote that aims at undermining the union leadership. In such instances the leadership is as likely to be rejected for being too soft in its dealings with the employer as it is for being too hard.³⁶ Thus, the retention of a "final offer" ballot in procedures designed to settle, or allow the settlement of, critical strikes can only negate the purpose of the procedures.

CONCLUSION

The problem of securing uninterrupted production and economic stability in basic industries is very real and cannot be diminished simply by criticism of the existing machinery for meeting the problem. Some procedure whereby a work stoppage can be halted or delayed is occasionally essential. A provision

35. "[A strike vote is] a ritual affirmation of solidarity, a symbolic gesture to impress the employer. To vote 'no' would be equivalent to a complete nullification of the union's bargaining power, an act of total disarmament during a crisis in foreign relations. . . . [A] strike vote is merely a vote of confidence in the leadership, taken at a time when it can hardly be denied." ROSS, *TRADE UNION WAGE POLICY* 41 (1948).

36. This was the experience in the "wildcat" longshoremen's strike, November-December 1951.

for a board of inquiry can be useful in situations where the parties have not genuinely bargained or have refused to make clear their demands or proposals. However, since the primary purpose of any machinery is to assist disputants in reaching a settlement, this procedure should be optionally available. Labor disputes are infinitely varied in nature. For this reason the procedures adopted to assist in the resolution of such disputes should be equally flexible. The inflexibility of the existing national emergency procedures has made enforced delay—the injunction—the core of the machinery.

The apparent theory of the Act is two-fold: (1) the injunction effectively blocks a threatened strike or terminates an existing one; and (2) a compulsory cooling-off period encourages settlement. Where a union has resolved to continue a stoppage, the injunction has been disregarded. Where one or the other of the parties has decided not to bargain or reach a settlement, the 80-day cooling-off period has been without effect. After all the elaborate requirements of the Act have been met, it is still possible to be face-to-face with the initial problem of reaching a settlement and assuring uninterrupted production.

As initially indicated, there is no attempt here to describe or evaluate the immense number of suggested approaches to solving this problem. These range from "doing nothing" because we had little trouble before we attempted to legislate against trouble, to the extreme alternatives of compulsory arbitration or stringent limitations upon the size of bargaining units. In between are numerous suggestions—various forms of arbitration, voluntary "cooling-off," intra-industry agreements, more mediation, seizure, show-cause hearings, and combinations of these—each of which is deserving of consideration and study. The current debate is encouraging, and should result, if the lesson of experience is appreciated, in improvements in the existing national emergency provisions.

The purpose of this article has been to evaluate the working of our present legislation and, indirectly, to re-emphasize one basic point. Our national labor policy is one of favoring and encouraging the resolution of labor-management disputes through free collective bargaining. Therefore, in handling disputes in basic industries the Government must ensure that the collective bargaining pressures that make for settlement are strengthened, not dissipated. To the extent that the existing machinery has not done this, it has failed. Modifications and amendments in the Act that aid collective bargaining and the agreement-making process will doubly succeed. They will protect the community from harm resulting from labor-management strife. Simultaneously, they will strengthen our democratic industrial society.

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