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Thoughts about the Steel Seizure Case

David E. Feller

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In view of the large number of speakers that are apparently scheduled to participate in the program about the steel seizure case, I think I should give you an idea of what I can contribute to it so that you can advise me as to what would be relevant and what I should not talk about. It very well may be that what I have to contribute is so small that you will want to reconsider my participation at all. So, with this preliminary comment, let me tell you what I know and what I don't know about the Steelworkers and the steel seizure case. I have no records and what follows is in the nature of an oral history which I will correct when I can get a chance to look over what others have written.

My role in the negotiations and the litigation was a subordinate one. Arthur Goldberg had been hired in 1949 by Philip Murray, president of the CIO and the Steelworkers, as his General Counsel and I had been hired by Goldberg to serve as his assistant and then associate General Counsel for both. My relationship with Goldberg and Goldberg's relationship to Phil Murray and the bargaining in basic steel is outlined in the enclosed copy of my reminiscences before the National Academy of Arbitrators. As detailed in that piece, Arthur was an important player in steel negotiations, but the ultimate decisions were made by Murray. What I know is derived from what Arthur told me about what had happened in the negotiations. I was also Arthur's brief writer and I did write, under his supervision, the briefs which the union filed in the steel seizure case.

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* This letter was written to Professor Ken Gormley of the Duquesne University School of Law in response to an offer to have Professor Feller participate in the Truman Program. David E. Feller was the John H. Boalt Professor of Law at the University of California at Berkeley School of Law. In his extensive legal career, he helped assist Thurgood Marshall prepare legal action against school racial segregation in the 1950s. Feller also assisted Arthur Golberg in drafting an *amicus curiae* brief on behalf of the steelworkers' union in Youngstown Sheet & Tube Co. v. Sawyer. He later became a prominent labor lawyer who served as general counsel for the United States Steel Workers of America. Mr. Feller passed away on February 10, 2003.

Background: The story begins with the negotiations which took place in 1951. At that time there was no formal bargaining on an industry-wide basis. The unions' committees met separately with the various employers in the basic steel industry. The fact, however, was that the companies conferred with each other and presented a united front. The lead company was United States Steel. The practice was that United States Steel would settle and then the other companies would settle on the same basic economic formula that was negotiated with U.S. Steel. (In 1949 there was a departure from the formula in that the original settlement was made with Bethlehem Steel, but, as we later found out, this was because Bethlehem had first secured agreement form the other steel companies that they could go first.)

The 1951 negotiations were significant because more was at stake than wages. The basic steel agreements had not been renegotiated since 1946. The agreements in the years subsequent to 1946 were always on "re-openers" limited to certain subjects accompanied by an extension of the basic framework of the agreements. There were a number of problems with this basic framework, one of which was the absence of the union ship. In the negotiations in the fall of 1951, however, no progress was made on anything. The industry was profitable, but the companies refused to make any economic concession whatsoever. The reason was that there existed at that time price controls, and the companies were unwilling to agree to any increase in wages or benefits until they had assurance that they could, as they had in the past, pass along double the cost of any increase by raising their prices. At that time, and until the 1959 strike proved otherwise, the companies assumed that the demand for steel was fixed and not responsive to any changes in price. Foreign competition and a possible substitution of other metals simply did not figure in their calculations. Indeed, it was reported that the head of Republic Steel had said that strikes every there years or so were necessary for the industry in order to tighten the market. There was competition among the companies to be sure, but there was no understanding that a strike would cause any permanent loss of market. It followed that the only real question was whether the government would allow the companies to follow their usual practice of raising prices following a wage increase, even though such a raise wasn't justified under the then existing price controls.

In 1952, as you well know from your work on the Archibald Cox Book, the Wage Stabilization Board ("WSB") had the authority to

approve or disapprove any increase in wages or other compensation that was negotiated by the parties. It also had the power, if the President requested it, to make recommendations as to the settlement of any dispute in which the parties were unable to agree. Unlike the War Labor Board which had the authority to decide such disputes, it could only recommend. At that time, Arthur was working with the Truman administration and was committed to the idea of sending the unresolved steel dispute to the Wage Stabilization Board. But Murray, the president of the union, was opposed. It was his view that submitting a dispute to a board always resulted in the board recommending some compromise which the union then had to strike to obtain and which the union then had to compromise again from. That was what had happened in 1949 and Murray was opposed to it. Better, in his view, was to strike and then compromise on the union's demands in settlement of the strike rather than compromise on a compromise. Accordingly, Murray called a meeting of the union's Executive Board in Washington. After telling the board that he was adamantly opposed to submitting the dispute to the WSB, he got the board to pass a resolution calling for a special convention of the union in Atlantic City in January to consider any request by the President to submit the dispute to the WSB. The purpose of this resolution was to permit Murray to respond to any request by the President for a delay of the strike by saying that he had no power to do so because the question would have to be submitted to the union's convention in January. Goldberg, who had committed himself to the opposite course, almost resigned. After the meeting Murray got on a train to travel back to Pittsburgh and something happened. I have no direct or even indirect knowledge of what happened, but it is probable that President Truman called Murray and persuaded him to change his mind. In any even, on arriving in Pittsburgh, Murray decided to accede to the President's request to submit the dispute to the Wage Stabilization Board and to postpone any strike. The convention in Atlantic City turned out to be simply a meeting to ratify the decision which Murray had make. There was no strike.

All of the above is hearsay, related to me by Goldberg. I was personally involved in what followed.

In preparation for the hearing before the WSB, the union conducted an extensive review of all the arbitration decision that had been rendered under the 1946 agreement and its amendments and presented a large comprehensive list of proposed changes, in addi-

tion to the economic case for a wage increase. Among other things, the union propose a union shop and, for the first time in the steel industry, pay for holidays not worked and premium pay for weekend work. Such provisions were common in all of American industry, but absent, surprisingly, from the steel contracts. There then ensued a titanic struggle among the members of the WSB. It was a tripartite body. The public members, however, did not have the power to make a decision by themselves. They had to have a majority, which meant that they had to obtain the acquiescence of either the industry or the union representatives on the board. Given the complexity and the multi-issue nature of the dispute this meant that there had to be a package, and the public members had to bargain with either the union or the employer representatives on the board for the least undesirable package rather than deciding for themselves what the appropriate recommendation should be. In the bourgeoning, it was reported to us, the employer representatives took a hard-nosed stance, and in the end, the public members had to bargain with the union members of the board to reach a majority recommendation. That recommendation, in the end, included the union shop, time and one-quarter for Sunday work and holiday pay, as well as a substantial wage increase, an increase in shift differentials, and other increases in wages. The recommendation was immediately accepted by the union and rejected by the steel companies. The union promptly announced it would strike.

Seizure: On the day called for a strike, the President issued an Executive Order directing the Secretary of Commerce to take possession of the steel plants and operate them. The union immediately called off the threatened strike and the workers continued to operate the steel mills. It is important to note that this "seizure" change absolutely nothing. The mills continued to operate in the same manner as they had under the same managers and under the same terms and condition. The only thing that really happened was that the flag was hoisted over the steel mills. That was enough for Murray. He was not inclined to do a John L. Lewis. Lewis had struck the coalmines when they were under government control following seizure of the mines under the War Labor Disputes Act and the Mine Workers paid a heavy price for contempt of court when Lewis violated an injunction requiring him to terminate the strike.

Next came the litigation in which the major steel producers contested the legality of the seizures. When Judge Pine sustained the

company's position and issued an order directing that the mills be returned to their owners, the union promptly struck. The next critical pint was the government's application in the Court of Appeals for the District of Columbia for a stay of Judge Pine's order. I was in the court when the Solicitor General argued for the stay. Noticing the presence of Howard Holtzman in the courtroom, I sat down next to him. Holtzman was counsel for and negotiator for a basic steel company, the Colorado Fuel and Iron Company. I had negotiated the agreement ending the 1949 strike with Howard and knew his mother, who served with me on the Board of the NAACP Legal Defense and Education Fund. We were friends. I asked Howard why C.F.& I. was not among the companies that had joined in the lawsuit. He said that they had considered joining the lawsuit but then visualized their potential report to the Board of Directors. We would report, he said, that we had won a grate victory in overturning the seizure, but, by the way, the men are out on strike. They decided, he said, that this was not a desirable outcome.

The argument for a stay in the Court of Appeals involved essentially two issues. One was whether a stay would be granted pending a petition of certiorari. The second question was whether the government should be enjoined from making any changes in wages or conditions of employment during pendency of the litigation. The government won on both issues by a 5 to 4 vote. A stay was issued conditioned on the government filing a petition for certiorari in a few days. The company's request for an injunction against changes in wages or benefits during the pendency of the litigation was denied. The union terminated the strike after three days.

What happened next was interesting. Negotiation between the unions and companies following the Wage Stabilization Board's recommendation had produced nothing but a complete stalemate. The executive order directing the seizure had also authorized the Secretary of Commerce to make changes in the terms and conditions of employment. Negotiation, therefore, were between the Secretary of Commerce and the union. But Sawyer, Goldberg reported to us, was reluctant to implement any of the WSB's recommendations. But when the Court of Appeals granted the stay and refused to enjoin the Secretary from making changes the dam broke. President Truman called the representative of the companies and the union together at the White House, urged them to negotiate a settlement, and announced that Sawyer was prepared

to make some, unspecified, changes in wages. That did it. The first real negotiations in the entire dispute took place in the White House and miraculously, a settlement appeared imminent. I was in the CIO office on Jackson Place. Goldberg, who was at the negotiations, called and instructed me and my associates to start drafting provisions for a memorandum of settlement.

While this was going on, the companies, led by Youngstown Sheet & Tube, filed a petition for certiorari, as did the government. The government requested a continuation of the stay that the Court of Appeals had issued. The companies opposed the stay, but asked that the court, if it issued one, to condition it on a freeze on any changes in the terms and conditions of employment. Up to this point, the union had taken no part in the litigation. But we did prepare and file, in great haste, a brief amicus opposing the condition that the companies had requested. A copy of that brief is enclosed. I wrote it, and I think it is persuasive, but it failed. The court granted cert and continue the stay, but also granted the company's request. When news of its order was received the negotiations abruptly ceased.

The union also filed a brief amicus after certiorari had been granted. That brief did not support either the government or the companies. It made three points. First, that whatever the court might decide as to the President's power, it should not hold that he lacked power to seize the mills because he did not invoke the procedures of the Taft-Hartley Act. All of the objectives of a Taft-Hartley injunction had already been realized. The strike had been postponed for more than 90 days, a longer period than would have resulted from a Taft-Hartley injunction. The dispute had been submitted to a board, not the board provided under the Taft-Hartley Act, but a board which, unlike that board, had the power to make recommendations. All of the objectives of the Taft-Hartley Act having been achieved, it would be nonsense, we argued, to hold that the President was deprived of his power to seize the steel mills by his failure to invoke Taft-Hartley. The second point was that there was not really a labor dispute. The real dispute was a dispute about prices. The companies had made it clear that they would make no offer until they had received assurances that they would be permitted to increase the price of steel, even though such an increase would not be permissible under the then existing price control regulation. The companies, we argued, were really using the union as a weapon to coerce the government on prices. Finally, the brief urged that a decision be made promptly.

Because of the condition which the court had imposed in granting a stay, the union was deprived of any opportunity to bargain with either the companies or with the government, and a prompt decision whichever way it went, would restore the union's bargaining power.

In a sense, we won. Although the court decided that the President had exceeded his powers, it did not premise that conclusion on his failure to use the Taft-Hartley Act. And it certainly decided quickly. Certiorari had been granted on May 3. The case was argued on May 12 and decided on June 2. I was in the courtroom with Goldberg on the day the decision came down. As soon as the result was announced, and before the various justice had delivered their opinions supporting the result, Goldberg whispered to me, "Call Phil Murray." I left the courtroom and went to a public phone in the building. When I reached Murray, which I did immediately, he was at first disinclined to believe that the court had set aside the seizure, but when I assured him that that was the case he hung up and immediately called a strike. It may not literally be true but it could be said that the steel mills shut down before all of the justices had delivered their opinions. The companies had indeed won a great victory, but the mills were shut down.

Within a few days, bargaining at the White House resumed. But without success. The companies waged a massive publicity campaign, arguing that the only real issue was whether the companies would agree to what they called a "compulsory union shop." (The terminology would, in the end, provide one key to the eventual settlement.) Finally, the government agreed to a price increase for steel almost twice the amount permissible under the then prevailing formula and a settlement was reached with the union after a three-week strike.

As usual, the basic terms were negotiated between Benjamin Fairless, representing United States Steel, and Philip Murray in a private conversation very much like the ones that I described in my reminiscences. The union got most of the economic terms recommended by the WSB. One of the major disappointments was with respect to pay for weekend work. The union had originally demanded time and a half for work on Saturday and double time for Sunday. Recognizing that this was impossible of achievements, it reduced that demand to just time and a half for Sunday. The WSB compromised and recommended time and one-quarter. The settlement provided time and one-eighth for Sunday work.

The settlement of the union shops issue was interesting. The companies had announced in newspaper advertisements that they would never agree to a "compulsory union shop." That was, in fact, a redundancy. A union shop, under which all new employees are required to join the union, or pay fees, after 30 days of employment is compulsory; the addition of the pejorative word was purely for public relations purposes. But it provided the key to the settlement. The agreement provided what could be called the voluntary union shop: all new employees were required, as a condition of being employed, to join the union, but had the right, between the 15th and 30th day of employment, to withdraw. This was, of course, a charade designed to enable the companies to say that they had not agreed to a "compulsory" union shop. As a matter of fact, the right to withdraw was buried in the fine print and in fact rarely exercised, and in the succeeding negotiations in 1956, the pretense of voluntariness was simply dropped.

Thus ended the steel dispute of 1952. The Supreme Court, by the issuance of its freeze on changes in terms and conditions of employment, had created, unnecessarily, the occasion for a decision of lasting constitutional importance. The companies had used the union to breach the limitations on its ability to raise price. The same pattern of increased wages and benefits and increased prices would continue in subsequent negotiations until, as a result of the 1959 strike, both discovered that the premise of a virtually closed market was false. The 1952 dispute, which involved both the mills and the ore mines, involved more than a half a million workers. Today, the employment in both is only a tenth of that.

The foregoing is all that I know about the background and result of the 1952 steel seizure case. Most of it, I am sure, is irrelevant to our discussion in November. Indeed, it may be that what I have to add that is directly pertinent is so small that you may decide to omit me entirely from the program. If not, I would appreciate your indicating to me what of the foregoing I should include in my discussion.

Yours truly,
David E. Feller
Professor of Law, Emeritus

The following is the beginning of an article that Professor Feller started writing for this issue prior to passing away. The Law Review Editorial Board felt it appropriate to publish this excerpt as a reminder of Professor Feller's dedication to this symposium, who was writing this piece shortly before his death.

Second Thoughts

David E. Feller

The courtroom was crowded with lawyers and reporters. It was April 30, 1952. The full bench of the United States Court of Appeals for the District of Columbia was to hear arguments by the government for a stay of the injunction which Judge David Pine had issued granting a petition for a preliminary injunction ordering the government to return to the major steel companies the basic steel mills which had been seized by the order of President Truman on April 8. I was there as a lawyer for the United Steelworkers. We were not party to the lawsuit but we were very much interested.

I found a seat next to Howard Holtzman. He was counsel to and negotiator for the Colorado Fuel and Iron Company, a small basic steel producer. I had negotiated the agreement ending the 1949 strike at CF&I with Howard and had come to know and like him. I asked Howard why CF&I had not joined all the other basic steel producers in the suit seeking to set aside President Truman's seizure of the industry. He said that they had considered the law suit but then visualized reporting to the Board of Directors if the suit succeeded. We would report, he said, that we had won a great victory in overturning the seizure but, by the way, the men are out on strike and the mills are closed. They decided, he said, that this was not a desirable outcome.

Howard's remark sums up one of the mysteries of the great steel seizure case. Everyone knew that what he predicted happened if the lawsuit was successful was so. The collective bargaining agreements with the company had expired months ago, on December 31, 1951. The union had withheld strike action in response to President Truman's request that it dispute its disagreement with the companies through the Wage Stabilization Board. When the companies refused to accept the Board's recommendation for settlement the union again threatened to strike but withheld its actions because Truman had seized the mills and the union would

not strike against the government. The minute Judge Pine sustained the companies contention that the seizure was illegal the union went out on strike, not even waiting for the issuance of his injunctive order. And the strike continued as we spoke. The only hope for a return to work was a stay by the Court of Appeals of Judge Pine's decision. That is why we were there in court that day.

The question then is: Why did the companies pursue a litigation the certain result of which was that, if successful, it would cause a closure of the mills? The union, at that time, knew the answer to that question. The root cause of the crisis which had led to a seizure of the steel mills was not a dispute between the steel companies and the union but a dispute between the steel companies and the government about steel prices. During the negotiations with the companies prior to December 31, the companies had offered not a penny in wages or benefits even though everyone knew, including the companies, that some increase was due. There might be a dispute as to how much but there had been no wage increase in the industry since 1946. The companies were highly profitable and the cost of living had risen sharply. Everyone knew that some increase had to be given, although they might be a dispute as to how large and in what form. Nevertheless, nothing was offered. The reason was that the companies wanted assurances from the government about prices. This was a period of price control. Under the regulations in effect the companies would be entitled to only a small increase in prices if they increased wages and benefits and they wanted more. There weapon against the government in order to get more was to cut off production and they could rely on the union to accomplish that by refusing to make any proposal for increases or benefits. A union strike was the industry's weapon against the government and so, or so we believed at the time, they needed to win the law suit so they could have that strike. They had won before Judge Pine and they had the strike.