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In 1947 Congress passed the Taft Hartley Act, which at the time was hailed as the panacea for the country's labor-management difficulties. Sections 206 and 210 established governmental guidelines to be employed where a strike endangered the public health or safety. Since 1947 there have been 29 disputes in which had there been an extensive strike, severe damage would have been inflicted upon the economy and well-being of this nation. Twenty-four of these disputes precipitated invocation of the 80 day injunction period by the President. In seven instances strikes took place after the expiration of the 80 day injunction period.[1] The rationale of the emergency provisions is to provide an 80 day period to allow the parties to resolve their differences without necessitating a strike which would threaten the public welfare. However, the above statistics vividly depict how inadequate the act has been in handling the strike situation.

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Criticism of Taft Hartley Act

Why hasn't the Taft Hartley Act achieved its goals? One of the main weaknesses of the Act is the fact that the Board of Inquiry is specifically prohibited from making recommendations as to the possible terms of settlement. It is limited to advising the President whether a strike is pending, and if so, the positions of each party to the dispute.[2] As a result of this limited authority, the Board of Inquiry usually takes very little time in examining the issues involved and submitting its report to the President.[3] As a result, very little in-depth analysis is made of the reasons for the strike and the justifications for the parties' demands. The Board is also granted the authority to conduct hearings to ascertain facts and positions of each party during the 80 day injunction period; however, neither party involved in the dispute is required to accept any recommendations made by the Board.[4] If there has been no agreement within 60 days after the injunction has issued, the Board's responsibility is to report to the President the positions of the parties and the Employer's final offer.[5] Essentially, for the duration of the injuction period, the Board acts as an experienced reporter having no regulatory (or advisory) power whatsover. Absent any governmental pressure on the parties to resolve their

dispute, it is no great surprise that the disputants often find themselves in the precise position at the termination of the injunction as they were when the injunction was issued. In the act as presently written, at no time is there any governmental inducement to mediate the dispute, and consequently Congress remains the sole source, through legislation, for any positive action to resolve the dispute. While Congress in enacting the Taft-Hartley Act, assumes that reasonable individuals would be able to come to an agreement during the 80 day injunction period; history has shown this premise in several instances, to be an ephemeral hope.[6]

The act also requires the President to make public the report of the Board of Inquiry enumerating the positions of the parties. It appears that the drafters believed that such dissemination of the disputants' positions would enable the public to discern which of the disputants were making unreasonable demands, and thereby bring to bear the weight of public opinion against this party. However, without an impartial recommendation by the board to be used as a guideline, it may be optimistic to expect the public to gauge the relative merits of opposing parties' positions. Regardless of whether the strikers are unconcerned with the public opinion or the public is merely unable to

determine which party is right, public opinion has had little or no effect on the strikes in past disputes.

The Taft Hartley Act also provides for a secret vote to be conducted by the National Labor Relations Board concerning the acceptance or rejection of the Employer's last offer at the end of the injunction period.[7] However, the act does not require the union to accept this offer even if the union members vote to accept this offer. But this observation becomes relatively unimportant when one considers that in twelve instances where such a vote has been conducted; that the Employer's last offer was in each instance rejected by the employees.[8] Thus, the attempt by Congress to have the worker weigh the Employer's offer against a loss in wages while on strike has proven a dismal failure. One might logically think that this failure resulted from union leaders' domination of the rank and file members but in some instances individual employees may be more demanding than their leaders.

> Walter Reuther in September, 1964, wrested from the big three 'the best contract the U.A.W. has ever negotiated', yet his constituents at G.M. called a strike which lasted six weeks. David McDonald went out for total Job Security, Greater Prosperity, and Greater Justice and Dignity on the job; and his Human Relations Commission for Continuous Bargaining was hailed as a real leap forward toward industrial peace. But the giant Steelworkers' Union voted him out. In January, 1965, Longshoremen's President, Thomas Gleason announced, 'the best contract ever'. But the longshoremen struck, nevertheless,

at a cost of $67,000,000 a day in the export and import business alone."[9]

One basic realization about the failure of the Taft Hartley Act emerges; namely that the act lacks any provision which might pressure or induce the parties to settle their differences. Rather, the act was drafted so that if the parties were unable to agree and the injunction period expired, any further action would have to be accomplished legislatively by the President and Congress. Our system of government is built upon the rationale that the individual should be able to determine his own fate with as little government intervention as possible. The following excerpt from an article by Professor Leland Hazard most convincingly deliniates the basis for this rationale:

> "Government hesitates to interfere with collective bargaining and strikes for good reasons. It is held to be essential to the private enterprise system that wages be determined by private contract. George U. Taylor, advisor to Franklin Roosevelt and every President of the U. S. since, and Dean of Philosophy of labor management relations, says that there are four ways in which wages may be fixed: by management, by labor, by government, or by collective bargaining. The strike in our system of industrial democracy is a right. It is the worker's way of asserting that he is not a slave. It is significant that when American labor sought to prevent, and later to repeal or amend, the Taft Hartley Act, which in some respects curtailed Union power the verbal weapon it most frequently used was the phrase 'Slave Labor Law'; poignant proof of labor's recent emancipation, for indeed, most of the world's work in historical time has been done by slaves. The fact that the average American

> worker has more conveniences, comfort, health, and amenities than any other man in all past history is not the point. The worker must be independent, free to provide his services on terms and conditions to which he agrees and free not to work under compulsion - that is, free to strike."[10]

Many people have realized that the Taft Hartley Act has not been capable of minimizing the danger of public strikes and consequently there has been much literature suggesting a variety of solutions.* The proposed solutions run from compulsory arbitration to a national poll of the public. A critical review of some of these proposals will demonstrate the complexity of the problem and the difficulties encountered in attempting to develop a workable solution.

Labor Courts

Strikes such as the 1964-65 Longshoremen's Union which lasted 90 days after the expiration of the 80 day injunction period, have caused many labor commentators to propose compulsory arbitration as the means to avert emergency strike situations. This arbitration process may be disguised in many forms, but basically it contemplates the imposition of a settlement upon disputants by an impartial individual or group based on the facts of each case. This result could be achieved by the creation of a labor court which would consider both

* These solutions and their relative merits will be examined below.

parties positions, any possible inflationary results, and impose a judicial solution upon the parties.[11] Proponents of this view-point out the efficiency with which the courts adjudicate disputes between individuals by application of the law, both statutory and common law, to the facts in each case. But in a labor dispute there may not really be any legal question to be resolved.[12] The question of whether an employee should receive a wage increase is not one susceptible to the application of legal rules. Rather the court in effect becomes an arbitrator and imposes its view as to the most equitable settlement to both parties.

Compulsory arbitration as a general rule has been considered unacceptable as an efficacious means to resolve emergency disputes. Such a solution is destructive of the very foundation of the basic premise of a democratic form of government, that an individual has the right to strike and determine upon what terms he shall be employed. It also has the effect of taking the initiative from both parties to determine their own future and subjugates the individual's right to self-determination to the good of the country. In this author's opinion such a proposal is categorically unacceptable. To effectuate such a system seems to be an application of the Machiavellian principle 'The end justifies the means'.

Ad Hoc Legislation

Another proposal which has received considerable support as a possible solution to the present morass created by the Taft Hartley Act is that of Congress passing ad hoc legislation as each dispute arises.[13] Even a cursory glance at the present Taft Hartley Act shows that the basic premise of the Act was that in the event of the parties' inability to agree, Congress would take the initiative to solve the problem by legislation. However, the act itself fails to give positive direction as to how this legislation should be adopted or what basis Congress should use to draft proposals which would be equitable to both parties. These objections have been largely obviated by an innovative proposal recommended by Mr. Richard Givens.[14] Mr. Givens suggests that ad hoc legislation used within the framework of the present Taft Hartley Act would be sufficient to solve the present emergency strike problems. By amending the present Taft Hartley Act to allow the Board of Inquiry to make recommendations, Congress would have an adequate measure as to what might be a workable solution. He further argues that with such a recommendation Congress could, by amending the Taft-Hartley Act, provide that at the end of the injunction period, a temporary mandatory recommendation period be invoked. During this period the

recommendations of the Board of Inquiry would be in effect, and the parties would continue to bargain for a permanent settlement. If the parties fail to agree within the time specified, then Congress could legislate a permanent settlement for the parties which in effect would probably adopt the recommendations of the Board.[15]

As was said earlier, this proposal does provide the machinery to better effectuate the purposes of the Taft Hartley provisions; but given the changes will this proposal be effective? As a practical matter, where two parties are unable to agree and a recommendation is made by the Board of Inquiry, if one of the parties finds the recommendation more favorable to its position; will this party be amenable to further bargaining? Will not this recommendation in effect deadlock the parties and require Congress to legislate a settlement. Congress, in most instances, will adopt the proposed recommendations of the Board; thereby, imposing the solution of an impartial Board much like a form of Compulsory Arbitration.

Another disturbing aspect of this solution is that it virtually takes away the right to strike. Although this achieves the ultimate goal of protection of the public interests, to deprive the employee of his ultimate collective bargaining weapon, the strike,

is unconscionable. Ultimately, then, this proposal either imposes compulsory arbitration on the parties and denies the employee the right to strike; or in a situation where Congress decides not to act after the temporary mandatory recommendation period, then the same inadequacy of the Taft Hartley; that is the lack of any positive pressure to settle the dispute comes to the fore.

The Given proposal also attempts to utilize public opinion by publication of the parties' positions and the recommendation of the Board of Inquiry. Supra we faulted the act itself for failing to publicize a recommendation which the people could use to gauge the two positions. But even with the recommendation, assuming that the people come out strongly against the employees in a strike; although this will have some affect on the leaders; is this going to cause them to abandon their hard fought bargaining position? To be most effective, the injection of public opinion must act in concert with other pressures to entice the parties to settle their differences. Such a solution would be ineffective if Congress failed to act or, if Congress exercised the ultimate power these proposals vest in it, it would destroy the individual's right to bargain for his own terms of agreement by taking away the initiative from him.

Administrative Agency

In some areas such as regulation of interstate commerce, administrative agencies have been very effective in handling difficulties which arise. Some writers have expressed the view that such success could also be attained in the emergency strike area if an administrative agency was established to deal with the various disputes as they arose.[16] They recommend that this agency be imbued with regulatory powers, such as the ability to declare contract benefits as non-retroactive. The agency would also be empowered with the authority to notify the public of the facts in each dispute as they arise. It has also been suggested that this agency determine the size of the bargaining unit and possibly that unions may only represent union members and not speak for those who are non-union members employed at the plant.

This proposal is the first which tries to apply positive pressure to induce the adverse parties to bargain. However, the proposal also engenders problems which come with any such agency. Such a permanent agency may become pro-labor or pro-management depending on which party happens to be the dominant political party at the time of the dispute. Thus, a political aspect is injected into the proceedings which, prior to this time, was of little, if any, concern. Such a

change would also have an adverse effect on the collective bargaining climate, inasmuch as each party would most likely attempt to influence the agency as to the merits of its position and consequently, place less emphasis on reaching agreement with his opponents. Although the positive pressures which could be exerted by such an agency would be very helpful to induce the parties to bargain, the political element which would be presented by the appointments to this agency and the parties' attempts to influence the agency would be most detrimental to the collective bargaining process.

It is also apparent that such a solution would, depending on the power awarded the agency, possibly limit the powers of the employees. For example, would the agency be able to prevent a strike in a particular industry? Again, would the agency be able to dictate terms of an agreement to each of the parties? Although such an agency would be most effective in defining the issues and keeping the public informed, the problems which it brings with it (political and possibly suppression of the rights of the parties) would far outweigh any positive effect such a proposal might have on the present ilemma.

National Election

In an open letter to Senator McClellan published in the Dickenson Law Review,[17] Professor I. Rothenberg proposed that where a strike is threatened which imperils the national health or safety that a National Poll of the citizens of the country be taken to determine their views on such a strike. If the vote favors the union position, then the employees would be allowed to strike, however, if the country votes against the strike would union continue to bargain with management but without the benefit of a strike to enhance its bargaining position. Although this solution has the advantage of appraising the public of the issues in the dispute and possibly arousing public sentiment to induce a settlement, it may be questionable whether the average citizen has the qualifications to render an unbiased and intelligent decision concerning the dispute. It is also possible that the public, realizing that such a strike could be contrary to the best interest of the country, would more readily sacrifice the freedom of self-determination of the individual workers rather than injure the country on the whole? Such a solution, although democratic, rebels against the very basic freedom of collective bargaining and for that reason is completely unacceptable.

National Finance Trustee Commission

Of all the plans critiques, the proposal for a National Finance Trustee Commission[18] is by far, the most forward looking and innovative yet suggested. Under this plan the National Finance Trustee Commission would be established. This commission would be authorized to seek a strike injunction against the union, where the President deemed an industry-wide strike to be a danger to the well-being of the country. The commission would then create two trusts: one to pay retroactive benefits to employees on settlement of the dispute; and the other trust would be composed of the adjusted profits of the industry and would be held in trust until a settlement was reached. In this way there would be pressure from the stockholders of the companies involved to settle since no investment or expansion could take place while the money was held in trust. After a settlement was reached, the trust would be dissolved and the money returned to the industry.

This proposal is innovative in that it applies pressure on industry to bargain while not infringing upon its rights of self-determination and the right of the employees to strike. Unfortunately, the solution does not go far enough. It places all of the pressure on industry with no accompanying pressure on labor to

bargain. It also fails to provide any sanctions against a party who prolongs a dispute by making unreasonable contract demands. But the basic premise of applying pressure to the parties to reach agreement on their own is the way most likely to insure protection of the public interest while maintaining the employee's basic rights of self-determination and the right to strike.

Emergency Protection Act of 1970

On February 27, 1970 President Nixon submitted a message to the Congress concerning a proposal for dealing with emergency disputes.[19] Although this proposal, if adopted, will apply only to the transportation industries, an analysis here will be most helpful as indicative of the present trend of thought concerning the solution of the problem.[20] President Nixon expressed the view that our highly interdependent economy is especially vulnerable to a cessation in the flow of goods, and therefore, that special measures were necessary to protect the economy in this area. The following excerpt from the President's message is a succinct synthesis of the conflicting interest involved in any national emergency disputes.

> "Our past approaches to emergency labor disputes have been shaped by two major objectives. The first is that health and safety of the nation should be protected against work stoppages. The second is that collective bargaining should

> be as free as possible from government interference. As we deal with the particularly difficult problems of Transportation strikes and lockouts, we should continue to work towards these objectives. But we must also recognize that, in their present form, these two principles are mutually inconsistent. For if bargaining is to be perfectly free, then the government will have no recourse in time of emergency; and almost any government effort to prevent emergency strikes will inevitably have some impact on collective bargaining.
>
> Our task, then, is to balance partial achievement of both objectives. We must work to maximize both values. Ideally, we would provice maximum public protection with minimum Federal interference. As we examine the laws which presently cover the transportation industry, however, we find that interference has often been excessive and protection has often been inadequate."21

Basically the President's proposal would amend the Taft Hartley Act to give the President three additional options if at the end of the 80 day injunction period, the labor dispute in question has not been settled and the national health or safety is again endangered. The first option would be to allow the President to extend the cooling off period for as long as thirty days, or in the alternative to require partial operation of the troubled industry or finally to offer the procedure of final offer selection. The final offer procedure, when invoked, gives the parties the opportunity to submit their last offer for settlement to the Secretary of Labor. The parties would then have five additional days to bargain over these proposals and if still unable to agree, the disputants

would appoint a three-member board if they could agree on the appointees. If not, the President would appoint three impartial members, who would choose one of the final offers exactly as presented.

This proposal, in theory, is a very sincere attempt to preserve the best interest of both labor and the public interest. It provides for a possible-partial operation of the troubled industry which would allow the required services and goods to continue the flow, while providing sufficient pressure on both industry and labor to settle the dispute. By requiring the final offer selection group to choose one of the final offers as submitted, the parties attempting to insure adoption of their settlement proposal will be required to submit the most reasonable offer they consider acceptable. Such a provision could result in the final offers being very close to that sought by the two parties so that whichever offer is chosen, both parties would come away from the negotiations content with the settlement.

Although, in theory, this proposal would appear to protect the interest of all concerned, I do not think that the actual results will have that effect. If the Nixon proposal were adopted, any President in such a situation would ordinarily extend the cooling off period for 30 days. However, if the strike

occurred during a period where the economy was in even a slight recessionary phase; it would not be feasible for the President to allow a major industry to operate at less than full capacity? In such a situation it is suggested that to choose partial operation over full production would be unthinkable.

This solution also suffers from the one basic fault which it is trying to prevent; namely, the ultimate settlement is imposed upon the disputants by an impartial arbitrator who must choose one of the final offers. Where two final offers are fairly close, the mandatory selective provision will have accomplished its objective. But where both parties feel their proposal is fair, and they turn out to be very far apart; the goal of compulsory arbitration - namely, the best solution possible for each party - will be incapable of achievement since one or the other must be selected. So, in effect, the ultimate solution becomes compulsory arbitration sans the advantage of the impartial arbiter striving to impose the best settlement on both parties. It is suggested that such a solution in some cases might result in such grave injustice that it would be better to have the Taft Hartley Act as ineffective as it has been shown to be than to adopt such a proposal.

Conclusions and a New Proposal

Our system is dedicated to the maintenance of the collective bargaining process in the resolution of labor disputes. Sections 206-210 of the Taft Hartley Act are a result of the desire to allow the individual to determine the wages and conditions of his employment. However, in attempting to insure the preservation of this system, the drafters failed to provide for any positive pressure which would be an incentive to good faith bargaining. Such external pressures, if reasonable, would provide an atmosphere which would allow the collective bargaining process to coexist with the principle of protection of the public interest.

AN ACT TO AMEND THE TAFT-HARTLEY ACT

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, that the Taft-Hartley Act is hereby amended as follows, by adding the following sections thereto:

Section 1. Where the president deems a pending strike in a proposed industry to be detrimental to the public welfare:

a. Within 60 days of the contract deadline the President shall appoint an Industrial Fact-Finding Commission to investigate the problem

and report on the likelihood of a strike, and the issues being disputed by the parties.

b. Upon the receipt of the Commission's report, the President may obtain a 90 day injunction against any strike occurring after the contract deadline.

c. The commission shall consist of three economists, one of whom shall be the President of the Commission and two lawyers from the Labor Law Field, one from Industry and one from Labor. All appointments shall be made by the President after conferring with representatives of both parties to the dispute.

Section 2. After the injunction issues, the I.F.F.C. shall participate in all future negotiations. At these negotiations, the commission shall attempt to assist the parties in any way; publish a bi-weekly status report as to the position of each party.

Section 3. After the expiriation of the 60 day injunction period, the Commission shall establish two trusts. Into one trust the unions involved in the dispute, shall be required to deposit from their treasury, an amount equal to one-half of the aggregate of the monthly dues paid by its members. The other trust shall be made up of the estimated

monthly adjusted profits of the previous month of the industry involved in the negotiation. At the end of 90 days of the injunction period, both parties shall deposit an amount computed in the same manner as the previous month's deposit. Any further monthly deposits shall be within the discretion of the Commission. Upon settlement of the dispute, these funds shall be returned to the respective depositors with the exception of the situations noted below.

Section 4. At the end of 75 days the Commission shall publish a report establishing the level of productionthe industry would have to maintain to prevent any serious damage to the public welfare.

Section 5. Upon expiration of the 90 day injunction period, and upon a failure to achieve agreement, if the union desires to strike, the industries will be operated at the levels as set by the Commission.

Section 6. If, at any time, after the partial operation period begins, the Commission determines that one of the party's position is so unreasonable as to evince bad faith in the negotiations; the commission in a confidential written report to the disputant concerned shall indicate why they find such action to be of such a nature. This party

shall have five working days within which to reply to the Commission's allegations and shall submit reasons why their position is not unreasonable. If after consideration of the disputant's reply, the Commission still considers the party's position as exhibiting bad faith, then the Commission shall inform the disputant of the fact. If the party fails to alter its position to a more reasonable demand within seven days after the Commission's final determination, then, upon settlement of the dispute, the Commission may at its discretion request the Attorney General's Office to bring an action in the U.S. District Court against that party. If the court should after a trial on the merits find bad faith in the negotiations, then it may award damages to the opposing party in the dispute from the trust fund which was previously created. After the payment of damages the residue, if any, of the trust shall be returned to the contributor.

Foreseeable Difficulties with this Solution

One of the major problems with this solution is the difficulty which will undoubtedly be encountered in attempting to determine the level at which the industry should operate. Although the question will be a difficult one with many inherent problems, the

economists on the Commission should be able to develop a reasonable criteria for solution of this problem.

However, the thorniest problem with this solution is the question of what standard shall be utilized by the court to determine the question of bad faith bargaining in the negotiations. Courts are constantly called upon to decide upon the reasonableness of various aspects of human behavior, for example, was an employer negligent in failing to provide an injured employee a reasonably safe place to work? In considering the reasonableness of the disputant's position, the court will have the industry's profit, the nature of the demands made, or the contract settlement offered by management and the efficacy of the profitable operation of the industry or the resultant margin of profit if the parties' position was adopted. Although this problem is difficult and complex, it is my opinion that an adjudication of whether a party bargained in bad faith is within the present capabilities of the judicial system.[22]

Favorable Aspect of the Proposal

In this solution I have attempted to balance the public interest and collective bargaining concepts. By adopting a solution which makes allowance for a partial operation of industry, protection is provided for the

public welfare while still according to the individual the right to assert pressure on the employer through the machinery of a strike. I have also attempted to draft a solution which imposes pressure on both parties to reach agreement by providing for periodic publication of the progress of the negotiations. In this way public opinion is brought to bear in attempt to pressure the parties to reach agreement. With the establishment of the trusts and the possibility of the forfeiture of a part or all of these funds after 60 days of the injunction period, it is obviously to the party's benefit to settle the dispute at the earliest possible time.

Ultimately this solution places the responsibility on the parties themselves to reach an agreement, and thereby, preserves the individual's right to determine his own fate as long as he does so in a reasonable manner. In today's complex society it is not too much to ask that the individuals's demands be reasonable and consistent with the best interests of the country. It is suggested that to allow a party to maintain an unreasonable bargaining position to the detriment of the remainder of the country is a situation which cannot be tolerated in this day of advance reason.

FOOTNOTES

1. National Emergency Disputes, Bulletin nr. 1633, US Dept. of Labor Bureau of Labor Statistics.

2. See §206, Labor Management Relations Act, 1947, as amended by Public Law 86-257, 1959.

3. The Board returned a written report one day after its creation in the 1959 Atlantic Coast Longshoremen's strike.

4. op cit supra footnote 2, §209(a).

5. Ibid. §209 (b).

6. See Appendix A., in seven instances the injunction period was followed by prolonged strikes.

7. op. cit. supra footnote 2, §209(b).

8. See Appendix A.

9. Leland Hazard, Strikes and People, Atlantic Monthly Dec. 1966, p. 116.

10. Ibid.

11. Smathers, 61 Lab. Rel. Rep. 42, (1966).

12. Cooper, Protecting Public Interest in Labor Disputes, 58 Mich. L. Rev. 873, (1960).

13. Note, Ad Hoc Compulsory Arbitration Statutes: The New Device For Settling Nat. Emer. Disputes, Duke L. J. 1968, p. 905.

14. Givens, Dealing With National Emergency Labor Disputes, 34 Temp. L. Q. 17, (1960).

15. Givens proposal also included a recommendation that for any substantive questions, Congress could legislate a solution as was done by the Adamson Act which established an eight hour work day and ended the railway strike of 1916.

16. op. cit. supra footnote 12.

17. Rothenberg, National Emergency Disputes: A Proposed Solution, 65 Dick. L. Rev. 1, (1960).

18. Note, 45 Chi-Kent L. Rev. 191, (1969).

19. Cong. Rec. 52544 (Feb. 27, 1970).

20. By transportation industries here the President is referring to the Airlines, Railroad, Trucking, Longshore, and Maritime Industries, and thus his proposal includes industries presently covered by both the Railway Labor Act and the Taft Hartley Act.

21. Cong. Rec. 52544 (Feb. 27, 1970).

22. N.L.R.B. v. Katz et al, 369 US 736, 8 L. Ed. 2d. 230 (1962), and Insurance Agents International Union, AFL-CIO v. N.L.R. B., 361 US 477, 4 L. Ed. 2d 454 (1959) are two instances where the Supreme Court rendered adjudications concerning the question of what constituted bad faith negotiation.