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PROFESSOR ROTHENBERG'S PROPOSED SOLUTION FOR NATIONAL EMERGENCY DISPUTES: A REPLY

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In the October 1960 issue of the *Dickinson Law Review,* Professor I. Herbert Rothenberg proposed a solution to the problem of national emergency disputes. He suggested that, when an emergency dispute arose, a national poll should be conducted, at least in part at the expense of the parties, to determine whether or not the public wishes the strike to continue.[1] This proposal would seem to have no practical chance of adoption. But it is interesting and merits discussion because it draws upon the basic deterrent to irresponsible acts by either party in a national emergency dispute, namely the potentiality of restrictions upon the parties being imposed by demands from the public. However, the proposal makes no provision for the means by which the dispute would be settled or for the terms on which it would be settled. This constitutes a fatal defect which makes the proposal itself at best unworkable, and at worst harmful because it conceals the true nature of the problem. At the same time, however, its presentation serves the important purpose of focusing attention upon one of the realities facing the parties in emergency disputes, namely that unless they act responsibly, public opinion will ultimately impose severe restrictions to protect itself from the effects of such disputes.

A national emergency dispute is not merely a *strike,* but also a *dispute* between two parties seeking to impose their respective demands as to the conditions of employment in the industry. Professor Rothenberg's suggestion for a referendum presenting the question of "whether the public wishes or does not wish the strike to continue . . ."[2] ignores the fact that a dispute is involved and treats the problem as being merely the strike itself. This fundamental error is not a new one. On the contrary, it was made in our early treatment of national emergency disputes in the past. The first great national emergency dispute arose on the railroads in 1877 when strikes spread spontaneously without union direction in protest against wage cuts, and led to rioting which was put down with the assistance of federal forces.[3] The second nationwide emergency dispute was the Pullman railway strike

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1. *National Emergency Dispute: A Proposed Solution, Excerpts From Correspondence Between Senator John L. McClellan and I. Herbert Rothenberg,* 65 DICK. L. REV. 1 (1960), also reprinted in 12 LAB. L.J. 108 (1961).

2. *Id.* at 12.

3. See DULLES, LABOR IN AMERICA 118-122 (1949); BRUCE, 1877: YEAR OF VIOLENCE (1959); Goldman, Book Review, N.Y. Times, Dec. 13, 1959, § 7 (Book Review), 6, 24.

of 1894, which led to an injunction not merely against violence but against any effort to persuade the employees not to work.[4] The injunction was upheld by the Supreme Court on the ground that the strike unreasonably interfered with interstate commerce, and that under the circumstances this justified injunctive relief action even without express statutory authority.[5]

This approach of dealing with emergency disputes as *strikes alone* with no effort to deal with the underlying *dispute,* however, led to great bitterness and was one of the sources of a determined campaign against "government by injunction" which led to the enactment of the Norris-LaGuardia Act in 1932.[6] Even before 1932, however, our approach to national emergency disputes was drastically revised. A third national railway dispute arose in 1916 over the issue of the eight-hour day. The unions demanded an eight-hour day with no reduction in wages and the employers declined to agree. Congress responded by enacting the Adamson Act[7] which made the eight-hour day mandatory. It further provided that no reduction in wages should occur during a temporary period while the operation of the plan was studied by a commission.[8] This constituted a striking departure from the approach in the 1894 railway dispute because the legislation dealt with the *substantive issues involved in the dispute* rather than merely seeking to deal with the strike which was the *symptom* of the dispute. It was thus recognized that a national emergency dispute *was a dispute* between two parties rather than merely a strike by the employees, and accordingly, that both elements of the problem had to be dealt with for an effective solution.

This recognition was applied in the Railway Labor Act passed by Congress in 1926 to deal with future disputes on the railroads.[9] That statute provided machinery for seeking to settle disputes before a strike became necessary.

When in 1946 a railway strike occurred despite the procedures set up by the Railway Act, President Truman responded by seeking drastic legislation which would among other things have permitted him to draft railway strikers into the Army.[10] This bill was rapidly passed by the House, but

4. United States v. Debs, 64 Fed. 724, 727, item 7 (C.C.N.D. Ill. 1894).

5. In re Debs, 158 U.S. 564 (1895).

6. Labor Disputes Act (Norris-LaGuardia), 47 Stat. 70 (1932), 29 U.S.C. §§ 161-10, 113-15 (1958); see United States v. Hutcheson, 312 U.S. 219 (1941); FRANKFURTER & GREENE, THE LABOR INJUNCTION (1930).

7. Hours of Service Act (Adamson), 39 Stat. 721 (1916), 45 U.S.C. § 65 (1958).

8. The Adamson Act was upheld in Wilson v. New, 243 U.S. 332 (1917).

9. Railroad Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151-188 (1958); see Murphy, *Agreement on the Railroads, The Joint Railway Conference of 1926,* 11 LAB. L.J. 823 (1960).

10. See 92 CONG. REC. 5754-62 (1946). Serious questions under the thirteenth amendment might have been raised. *Cf.* Bailey v. Alabama, 219 U.S. 219 (1911); Taylor v. Georgia, 315 U.S. 25 (1941).

was blocked in the Senate largely through the restraining influence of Senator Robert Taft.[11] It is clear that the possibility of legislation of some sort, should the strike have continued, was of great importance in its settlement.

The post-war coal strike of 1946 was terminated by an injunction during a government seizure under a World War II seizure statute, but authorization for seizure was not continued.[12] When the President sought to seize the steel mill on his own authority in 1952, the Supreme Court held the action beyond his powers where Congress had provided for emergency dispute procedures in the Taft-Hartley Act but omitted any seizure authority.[13] The strike resumed after the seizure ended, and was settled only after its effect upon our defense effort made it clear that it could not continue.[14]

The steel dispute of 1959 was settled before the expiration of an eighty-day injunction under the national emergency provisions of the Taft-Hartley Act, after the strike had continued for a considerable time before the Act was invoked. It is plain that in this case the possibility of further legislation should the strike continue was also of great importance in the settlement.[15]

The basic philosophy of the Taft-Hartley Act emergency provisions, as well as the Railway Act, ultimately rely upon voluntary settlement supported by the possibility of further Congressional action should no dispute be achieved after the specified procedures have been exhausted. The Taft-Hartley Act specifically provides for a report to Congress at the expiration of an eighty-day injunction which could deal with recommendations for further action affecting the parties to the dispute.[16]

The approach of utilizing the *possibility* of further governmental action, *not specified in advance,* as a means of seeking to induce the parties to act responsibly is a utilization of what Professor Adolf Berle has called our "inchoate law."[17] Even where no explicit limitations on private action have been enacted by the legislature or laid down by judicial

11. See 92 CONG. REC. 5780-81, 5843-58; 5968-75, 5988 (1946); Student Analysis, *The Legal Framework for Public Intervention in Industrial Disputes,* 35 NOTRE DAME LAW. 654, 686-87 (1960).

12. See United States v. United Mine Workers, 330 U.S. 258 (1947).

13. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

14. See Enarson, *The Politics of an Emergency Dispute: Steel, 1952,* in BERNSTEIN, ENARSON & FLEMING, EMERGENCY DISPUTES AND NATIONAL POLICY (1958) at 46, 71.

15. See Seidman, *National Emergency Strike Legislation,* in SLOVENKO, A SYMPOSIUM ON LABOR RELATIONS LAW (1961).

16. Labor Management Relations Act (Taft-Hartley), 61 Stat. 156 (1947), 29 U.S.C. § 180 (1958).

17. See BERLE, POWER WITHOUT PROPERTY 91-93 (1959); Berle, *Legal Problems of Economic Power,* 60 COLUM. L. REV. 4, 7-8 (1960); *cf.* Givens, *Parallel Business Conduct Under the Sherman Act,* 5 ANTITRUST BULL. 273, 284-85, 291 (1960).

decisions, it may be quite clear that should private conduct of a certain type occur, a reaction on the part of the public would follow and legal restrictions would be imposed in some manner. This is itself a form of regulation. This approach also has the important advantage of preserving flexibility, leaving open a wide choice of possible procedures at the time of a future emergency.[18]

For these reasons, the author has argued that the ultimate sanctions to be applied in a future national emergency dispute settlement should not be spelled out in advance; rather the possibility of further Congressional action should be left open after the exhaustion of preliminary procedures.[19] The undesirability of spelling out precise detailed alternatives in advance is heightened by the fact that none of the existing alternatives for compulsory settlement is free from severe drawbacks.[20]

Professor Rothenberg's proposal draws upon the deterrence of the impact upon the public opinion of a continued emergency dispute, but it falls into the error which we made in 1894 of dealing with an emergency dispute merely as a strike and not as a dispute with the strike being a symptom.

It goes without saying that the public would prefer an emergency strike not to continue. The suggested referendum would merely demonstrate that truism. The real question would remain—*on what terms* should the dispute be settled? It is also clear that the public would prefer that the parties work out their own settlement. The necessity of holding a referendum, on the other hand, would suggest that some form of compulsory settlement would be contemplated. But by what means and on what basis? If no answer is provided, the entire procedure has brought us no nearer to a solution of our difficulties. Professor Rothenberg may contemplate that the strike itself should be terminated as a result of the wishes of the public as expressed in the proposed referendum, *without any further concern for settlement.* This would amount to saying that the dispute should be resolved by the employees simply abandoning whatever demands had originally led them to strike, regardless of their merits. Such an attempt to impose a settlement on the terms sought by one party to a dispute with no determination of the merits would not be durable or workable. And it is to be noted that Professor

18. See Wirtz, *The "Choice of Procedures" Approach to National Emergency Disputes,* BERNSTEIN, ENARSON & FLEMING, EMERGENCY DISPUTES AND NATIONAL POLICY 149-65 (1955); Kramer, *Emergency Strikes,* 11 LAB. L.J. 232-34 (1960); Report of Special Committee, Department of the Church and Economic Life, National Council of Churches of Christ in the U.S.A., In Search of Maturity in Industrial Relations: Some Long-Range Ethical Implications of the 1959-60 Dispute in the Steel Industry 10-15 (1960); *cf.* N.Y. Times, October 14, 1960, p. 20, col. 8 (Remarks of Senator Kennedy).

19. Givens, *Dealing with National Emergency Labor Disputes,* 34 TEMP. L.Q. 17 (1960).

20. Compare Cole, *The Role of the Government in Emergency Disputes,* 26 TEMP. L.Q. 375 (1953).

Rothenberg did not spell out whether this is what he has in mind. Rather the question which he would put to a vote in a national referendum would merely be whether the public wishes the strike to continue, with Delphic silence as to what means should be used to end the strike and whether or not they would involve any settlement of the underlying dispute.

Professor Rothenberg's suggestion, despite its unworkability, does seek to draw upon the basic factor of the demand of the public for some form of settlement, and the potentialities for more drastic public intervention which this implies as an independent means of dealing with the emergency. And it might be desirable to make this factor clear to the parties in concrete form at the time of the emergency dispute through some form of procedure. A referendum could not feasibly satisfy the purpose of such a form of procedure because it does not permit the formulation of alternatives in the light of the specific facts of the dispute. Rather, it would result in merely a "yes-or-no" answer to a predetermined question drawn up without contemplation of the particular facts involved, and hence would not be an effective means of dealing with a particular dispute.[21] Any more appropriate means would necessarily involve an examination of the particular facts in the dispute itself.

One way in which this might be accomplished would be to permit Presidential emergency boards under the Taft-Hartley Act to make recommendations of possible settlement terms. This would generate pressure for the parties to reach some solution, and would place at least some onus on the party rejecting the recommended settlement terms.[22] Should this prove insufficient, a second step might be for the emergency board to be authorized to make recommendations to the President of possible legislation which he might propose to the Congress should no settlement be reached. The Taft-Hartley Act might well be amended to empower a fact-finding board to make recommendations of either or both types.

However, even in the absence of express statutory authority, the President would be empowered to appoint an outside board of experts to advise him concerning possible settlement terms or concerning legislation which he might recommend to Congress.

Should these measures prove insufficient, a further *ad hoc* measure short of ultimate permanent compulsory settlement might be the imposition of a *temporary* period during which the recommendations of an emergency board would be mandatory on both parties.[23] Such a drastic measure would be

21. *Cf.* LIPPMANN, PUBLIC OPINION, ch. XIV (1922).

22. See Report of Special Committee, Department of the Church and Economic Life, National Council Churches of Christ in the U.S.A., In Search of Maturity in Industrial Relations: Some Long Range Ethical Implications of the 1959-60 Dispute in the Steel Industry 14-15 (1960).

23. Givens, *Dealing with National Emergency Labor Disputes,* 34 TEMP. L.Q. 17, 33-41 (1960).

undesirable unless it proved absolutely necessary, and therefore, it should not be authorized in advance by any statute enacted before an actual emergency necessitated such action. However, should an emergency reach the point where further compulsory legislation of some sort was an absolute necessity, then authorization of a temporary mandatory period might be preferable to the other compulsory settlement devices which have been discussed.[24]

Professor Rothenberg's suggestion of a referendum should serve as a valuable stimulant to discussion of these difficult issues by focusing attention on the importance of the eventual demands of the public as the ultimate sanction for settlement of emergency disputes. The reality of the matter is that the parties must settle such disputes between themselves before the impact on the nation becomes too severe, or else more drastic intervention will result. The parties already know this in each case. Further means of making it clear in the context of the specific emergency dispute might nevertheless be valuable. Professor Rothenberg's suggestion is interesting because it points this out in a way which is spectacular because of the novelty of his idea. His actual proposal, however, ignores the lesson which should be drawn from our experience with national emergency disputes in the past—namely that they are *disputes* as well as merely *strikes*. His referendum proposal should therefore not be adopted because it provides no machinery for dealing with the ways in which the dispute itself, which is the source of the national emergency strike, may be resolved.

24. *Id.* at 22-23.