Volume 65
Issue 1 *Dickinson Law Review - Volume 65, 1960-1961*

10-1-1960

National Emergency Dispute: A Proposed Solution

I. Herbert Rothenberg

SPECIAL

NATIONAL EMERGENCY DISPUTE: A PROPOSED SOLUTION

The following excerpts were taken from correspondence between the Honorable John L. McClellan, a member of the Judiciary Committee of the United States Senate, and I. Herbert Rothenberg,* Adjunct Professor of Labor Law at Dickinson School of Law.

A record of the correspondence is on file at the office of the Dickinson Law Review.—*Editors*

Dear Mr. Rothenberg:

I am writing to you as a teacher in the field of labor law and labor relations to ask if you will kindly give me the benefit of your experience, your observations, and your thinking on two related questions of vital public concern. I refer to the so-called "national emergency dispute"—the strike which threatens national security or causes widespread public suffering, thus creating what may become an irresistible secondary pressure on government. I refer also to the extraordinary powers now vested in unions which, when exercised, can bring about such situations and do other things that may be considered contrary to the public interest.

Each time a crisis arises the Taft-Hartley Act provisions touching the issue are reviewed critically. Some hold them to be inadequate and others consider them to be oppressive. The question then arises, "What comes after Taft-Hartley?" In other words, what can be done after the eighty days have expired?

The power of unions is a broader matter, although certainly related when it is so used as to produce a "national emergency" or "public safety" situation. It is concededly a very complex and at times a baffling problem. Some believe that unions, organized in their present structures, have entirely too much power; others believe that they should be left as they are; while still others contend that some present restraints should be removed.

If the grave problems inherent in these questions are to be solved with justice to all concerned and without impairment to the system by which we have lived and prospered as a nation, we shall have to look to some of our best academic and legal minds to contribute to the evolution of a national

* Member of the Philadelphia Bar, specializing in Management Labor Relations; Adjunct Professor of Labor Law, Dickinson School of Law; Author of text: "Rothenberg on Labor Relations"; Contributor to many professional and lay periodicals.

labor policy based on principles that are conducive to preserving a free society and providing for procedures that can be subjected to the fewest abuses.

. . . .

Sincerely,

/s/ John L. McClellan
JOHN L. MCCLELLAN
United States Senator from Arkansas

Dear Senator McClellan:

Introductorily, I wish to declare that I am in unqualified accord with the proposition that the problem of the "national emergency dispute" is but a facet of the broader and more complex matter of the "power of unions." For whatever the reason, whether from natural impediment or inspired self-inducement, there exists in many . . . quarters a kind of myopia which blurs the plain truth that strikes which imperil the common welfare and create "national emergencies" could not occur but for the toleration of the power of unions to create such crises.

. . . .

However, since your letter refers first to the "national emergency dispute," and then to the underlying problem of "union power," please permit me to address myself to these matters in the order of their presentation.

National Emergency Disputes

In treating of the national emergency strike, it must be remembered that this species of strike, considerations of geography and impact apart, no less than any other variety of strike—large or small—is a *private* dispute in which the disputants seek to advance or secure their *private* interests. If the paramount interests of the national safety and welfare are to be adequately and effectively safeguarded, sight must never be lost of the *privacy* of the controversy. To disregard the element of the privacy of the dispute is to disregard the national interests. With this element ever in mind, it is appropriate here to consider the three major questions which arise in *every* strike, national emergency strike, or whatever:

(a) How to permit to the disputants, whether large or small, the maximum of independent action in composing their private disputes;

(b) How not only to prevent such private controversies from impinging upon the peace and welfare of *all* the inhabitants of the areas affected by the dispute—including the disputants themselves—but, as well, to prevent the deprivation of the full enjoyment by non-disputants of both *their* private and public rights; and

(c) How to implement such preventive measures without impairing our democratic institutions or the constitutional rights of the disputants, and, equally important, without sacrificing the rights and privileges of non-disputants or of the community as a whole.

By what means to satisfy these needs yet at the same time protect the national interests is, as you have in your letter observed, a most challenging and complex problem. To secure the national interests at the cost of either the weakening or the destruction of the constitutional fabric of our society would be no less tragic than the sufferance of anarchic private action to despoil the public weal. However, I do believe that a medium can be fashioned which will effectively preserve the national and public interests without impairment of the constitutional rights of private disputants in their private dispute. In submitting this proposal, I am not unaware that it represents an extreme departure from the going approach to the labor problem. I readily acknowledge that when I first thought of this method of treating the problem, traditional orientation and habit almost impelled me, out of hand, to reject the proposition. If, indeed, such is your first impulse, it will be quite understandable. Perhaps because of fascination with its unorthodoxy, I could not get the notion out of my mind, and as it recurred to me again and again, slowly I came to believe that the essential idea embraced greater merit than first impression and the narrowness of my conventional thinking admitted. Accordingly, I respectfully exhort you to reserve judgment of the ensuing proposal which I have herein to make and to give it careful consideration before you make a final evaluation.

Like yourself, I have given this disturbing problem much thought over a period of many years. I have been involved professionally in many labor matters, have taught the subject for a very long time and have written much thereon. From my professional experience, my studies and observations of the times and the mushrooming enormity of the problem, as well as from following closely and sympathetically the ineffectual and often sad efforts by some to treat this now overwhelming problem by half . . . or quarter . . . measures and by the hopeful manipulation of language and punctuation in labor statutes, I have come to the firm conviction that nothing short of important treatment for this important problem will ever result in any substantial relief. I respectfully submit that statutory tinkering is surely not the answer. No less than ten times in somewhat more than a decade since the enactment of the Taft-Hartley Act have the activities of labor unions constrained the President and the Supreme Court of the United States to declare these strikes to be repugnant and inimical to the national safety and welfare . . . almost one such strike for every year since the promulgation of the Act. In each of these perilous episodes the Country tensely waited out the strike

and unloosed a tremendous sigh of relief when the strike was ended. Apart from the issue of the right of private disputants in a private dispute to endanger the public safety and welfare, what right have these private disputants in their private controversies, and whensoever they choose and without restraint of law, to repeatedly excite and unnerve the Nation? Fortunately, in each of these perennial strikes the disputants composed their differences within the Taft-Hartley 80-day time limit. However, in each case the country was agonized and tormented by the question: "What *after* the 80 days"? By the terms of the Act, if the disputants so choose, the strike might be continued or resumed, without right of further intervention by either the President or the courts, regardless of how close to national disaster the disputants might care to drive us. In the recent steel strike when, in the very teeth of an international crisis, the national steel supply was reduced to a critical and very dangerous point, on the tongue of every mature citizen was that haunting question, "What after the 80 days"? This was the same question which plagued the country in the still-remembered coal strike by John L. Lewis' United Mine Workers when, by the testimony of James Boyd, the then Director of the United States Bureau of Mines, and, then too, in a perilous international situation, the Nation's coal reserves had been diminished to a twenty-day stock-pile. This was the same question which alarmed the country during Harry Bridge's maritime strike . . . and, indeed, in each and every one of the 10 national emergency strikes, in slightly more than the same number of years, which have shaken and disquieted the Nation. What, indeed, "comes after the 80 days"? Is it the right of the *private* disputants in a *private* dispute, after the lapse of the short 80-day interval, to completely exhaust the national steel supply, or the coal reserves . . . or to bring to a grinding halt our national nuclear program . . . or to halt all shipping or—as certain individuals even now seek to equip themselves to do—to completely paralyze all national transportation . . . or in any area whatsoever to endanger the safety, lives and welfare of the country or its citizenry? I think not! Each time a new national industrial crisis arises, a great public clamor is heard. From all quarters come nervous demands that something be done to avert resumption of the crisis after the 80-day period. But when, luckily, the dispute is ended within the 80-day hiatus, temperatures and pulse rates subside, everyone returns to their parochial pursuits and politicking, and the entire matter is forgotten until a new and frightening crisis arises. Only the few, like yourself, have a continuing care. And, like yourself, I believe that unless we act now, in a time of comparative industrial calm and quiet and in circumstances admitting of thoughtful consideration, we may some day soon find ourselves wildly thrashing about in a tableau of passion and turbulence in which any decision must be a bad one.

With these considerations in mind, and with a full awareness that it is a gross departure from present-day thinking and that it abounds in all manner of political impedimenta, I respectfully submit as a possible solution the following proposition:

THE ISSUE OF THE CONTINUATION OR TERMINATION OF ANY STRIKE WHICH CREATES A DECLARED NATIONAL EMERGENCY SHOULD, IN A NATIONAL POLL, BE SEASONABLY PUT TO THE PEOPLE, WITH THE EXPENSE OF THE POLL TO BE BORNE IN PART BY THE PUBLIC AND THE REMAINDER IN PRESCRIBED PROPORTIONS ACCORDING TO THE OUTCOME OF THE POLL.

The concept of the right of the community to advise in disputes which concern the communal welfare may indeed be novel, but I believe it to be morally and socially sound and, I expect, will some day—sooner or later—become the governing rule.

. . . .

Based on my own professional experience, studies and observations, I am completely convinced that the one single factor which obtains as a license, if not, indeed, as an inducement, to strikes, "national emergency strikes" and otherwise, is the fact that the those in labor unions who . . . encourage, incite or provoke strikes are able to do so without any real and substantial financial detriment to themselves or their organizations. In making this assertion, I draw a clear line between the striking workman and the leaders of labor unions and their factoti. Sadly, it is true that the striking workman himself does sustain great, and often irrecoverable loss, but it is seldom that *they call* a strike. Almost invariably it is the union leaders or their cohorts who do so. Not always are wages, hours or working conditions the actual gravamen of a strike. In too many instances such employment considerations are only the ostensible or proclaimed burden of the stoppage. . . . . If the newspaper accounts are to be believed, in the recent steel strike, at least at its outset, there obtained a huge and dissuasive sentiment among the workingmen against the calling of a strike.

. . . .

It is the pitiful fact that the workingmen lost heavily of wages in that strike. So did the companies who were embroiled.

. . . .

During the course of that strike, I often pondered whether or not the strike would have been sustained as long as it was or, indeed, called at all if the union or its functionaries would *NECESSARILY* have sustained a loss commensurate with the collective loss sustained by the strikers or by the employers. I most seriously doubt it. It is significant that when, in the

coal strike, Judge Goldsborough imposed upon John L. Lewis a $20,000.00 fine and levied upon the union [a] . . . $1,400,000.00 fine, both John L. Lewis and his union suffered a sudden loss of enthusiasm for the strike. A short time ago, in negotiating an initial contract in a small, newly-unionized plant, the company was called upon, under threat of strike, to accord wage increases and fringes which, for the contract year, would exceed the company's total profit yield for the previous year. Under the shadow of a strike, the company granted the demands. Near the close of the negotiations, the union, despite the . . . gains made by the workingmen under the contract, was prepared and offered to throw up the entire contract and call a strike because one of the requests of the employer involved bookkeeping which the union protested would cost it approximately $100.00 a year. I am convinced that one of the greatest deterrents to the provocation of industrial strife would be to cancel out the impunity with which labor leaders and their yeomen may at will or whimsy call or incite strikes. Parenthetically, it may be noted that much of the litigation before the National Labor Relations Board is purely tactical and is often instituted on the theory that it costs nothing to initiate such actions and that with the Board's attorney prosecuting the action *for free* and the employer being put to onerous expense of defending the action, the institution of such Board's actions represents fine strategy and, who knows, but what the Trial Examiner might believe the union's tale.

It is interesting to note that in each and every one of the "national emergency disputes" which have occurred to date, the work-stoppage which occurred was in each such instance produced by a strike by the union involved. In not a single instance was there a curtailment of production which was chargeable to a lockout or to other direct action by the employer. The crisis and damage to the country and the public which resulted from the union's strike and stoppage of production was in no way attributable to the employer, unless one chooses to . . . interpret as the inducing "cause" the employer's refusal to submit . . . to the union's demands rather than the union's strike action which actually produced the work-stoppage and the ensuing national crisis.

The law and national policy of the land requires that "employers, employees and labor organizations . . . *above all recognize under the law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public, safety, or interest,*" and, further, to "proscribe practices on the part of labor and management which . . . *are inimical to the general welfare, and to protect the right of the public in connection with labor disputes affecting commerce.*"[1] In their concurring opinion

1. Labor Management Relations Act (Taft-Hartley Act) § 1(b), 61 STAT. 136 (1947), 29 U.S.C. 141 (1958).

in the steel strike,[2] Justices Frankfurter and Harlan held that the "interests of both parties (labor and management) must be subordinated to the overriding interests of the Nation."

Thus, there can be no doubt either in law or in morality that the national and public safety and welfare transcends the rights of private disputants in a private labor dispute. No individual or group of individuals has the right to endanger the country or the common good to advance their personal and private interests. How, then, can anyone arrogate to himself or themselves the right, whether by lockout or strike, be it for wage increases, working rules or whatever, to unsettle or imperil the Nation or its people. Obviously there is no such right, and howevermuch one may desire to improve his economic situation and no matter how great the membership of an organization seeking to do so, no one and no group, for their personal advantage, ought be suffered to threaten or sacrifice the interests of the entire Nation. None but those covetously concerned with only their own selfish interests, can doubt or cavil with this proposition. Unfortunately, there have been and are such self-seeking persons and groups. Even more unfortunate is the fact that, under the law, there is no provision for restraining the . . . activities of such individuals, except for the brief 80-day period. Whatever lawful restraints may be imposed upon . . . groups during this interval such restraints are too ephemeral to be meaningful for under the existing law, *on the government's own motion,* the restraints must be mandatorily removed at the end of the 80-days.[3] Thereafter these individuals are free, without obstacle of any existing law, to resume their activities, no matter what the cost or peril to the Nation or the well-being of its people.

How, then, to constitutionally control these persons when the 80-day period has expired? Are we to trust innocently that those individuals whose . . . activities had, in the first instance, compelled the country to invoke the 80-day restraints, when the restraints are removed and the country is helpless to defend itself further, will suddenly experience a miraculous redemption. . . . .

In the past and in a time of war, the government sought to dull the impact of emergency strikes by seizing the employer's property.[4] There have

2. United Steelworkers of America v. United States, 361 U.S. 39 (1959).

3. Labor Management Relations Act (Taft-Hartley Act) § 210, 61 STAT. 156 (1947), 29 U.S.C. 180 (1958). In the Steelworkers' case, *supra* note 2, the Supreme Court acknowledged that while, in an emergency strike, the Government was the "guardian of the national health and safety," its right to safeguard and protect these vital interests exists only "for a time"—viz: eighty days.

Thus, at the end of the eighty-day period and short of some new Congressional action, the Nation's "health and safety" are delivered to the hands of those who initially placed it in peril.

4. During the coal and railroad strikes of some years ago property was seized.

been those who have advocated as an answer to the emergency-strike problem that, *even in peace-time,* the employer's property should be seized and administered by the government until the employer yields to the union's demands or, in some other undescribed phenomenon, the union should call off its strike, and that then, and then only, should his property be returned by the government to the employer.[5] Needless to say . . . there are but few who will subscribe to this bizarre proposal of peace-time expropriation. It is a curious kind of impartiality and fairness that would invest in one side of a private industrial dispute the prerogative, by merely calling a strike and precipitating a national crisis, of dragging the government and its mighty strength and tremendous resources on its side by expropriating the adversary. . . . .

No less inexorable than the myopic zealots and champions of confiscation and expropriation and comparable constitutional excesses are those extremists who would deny all right of collective action on the part of persons engaged in industries wherein work-stoppages might produce national emergencies. As often as not these proponents of *selective* recognition of workingmen's right of collective action are found in those quarters in which the total elimination of this right is fervently espoused. These dogmatists analogize a critical industry to the armed forces of the United States and proclaim that no individual servitor or any groups thereof have the right, or should be suffered, to disorganize the whole to advance his or their personal advantage. There can be no quarrel with the proposition that it would be grotesque and inadmissible, not only in these terrible days but at any time, to permit individuals in our military organizations to strike and disorganize the defense establishment whenever they chose or whenever they deemed their private interests occasioned such action. The very thought of such license is as ludicrous as it is fearsome. However, the analogy ends here, for private industry, albeit a critical industry, is neither the Army, Navy or the Air Force. It is and remains a private industry and to deny to workingmen in these industries the collective rights which are enjoyed by those engaged in other industries is equally as inadmissible as to grant these rights to the personnel of the military organizations which are charged with the protection and defense of the Nation. Those who urge otherwise are as extremist as those who would confiscate and expropriate the employer's property or would otherwise tear up the Constitution for private advantage. There is no room in the American society for either of these or kindred species of extremism. At the same time, while moderation is surely preferable to excess, moderation in itself is not a legitimate goal. Until such time as the

5. See: TELLER, *What Should Be Done About Emergency Strikes,* LAB. L.J. (Jan. 1950).

whole of our people choose by orderly process to change their Constitution, it is the protection and preservation of the constitutional rights and privileges of our composite society which is the supreme concern. It ought not be permitted to either management or organized labor . . . which are in reality each but small segments of the whole society . . . to do damage to or endanger the larger part of our society merely because the damage or danger is worked through *moderate* means. While the whole of our society is no more important than any of its constituent segments, no segment is more important than the whole.

In correlating these observations to the national emergency provisions of the Taft-Hartley Act one cannot escape the depressing conviction that by abdicating after the 80-day interval Congress has fled its bounden duty rather than to face up to the problem as the lapse of the 80-day period magnifies and intensifies it. In the years which have ensued since the enactment of the Taft-Hartley Act, we have muddled through . . . dangerously, but nevertheless, muddled through . . . ten national emergency strikes. In a number of these, in the turmoiled state of the world and with powerful potential enemies awaiting and rejoicing at impending catastrophe, the danger to the Nation has been awesome. Neither the national peril nor the Country's alarm seemed to deter those who had precipitated these crises. "What after the 80-days"? Congress and each and every one of its members surely had a full awareness of each recurring crisis and its portents. However, in none of these crises did Congress act. There were those like yourself who were and still are most deeply moved by this tremendous problem. Unfortunately, however, there were too many who for obvious reasons preferred to remain unobtrusive and sit the crisis out.

. . . .

When shall we act? Shall we provide now, in an atmosphere calm of relative industrial quiet and when detachment and circumspection are possible, or shall we act when peril is already upon us and in an arena of hysterical fault-finding and name-calling under the dark pall of impending national calamity? It is better to act now! It is time to set aside personal considerations, tawdry politics and to do what may best and only be done now.

Underlying my proposal for a national poll as a vehicle for treating emergency strikes are two propositions; the first, a moral and firmly established legal proposition, the second being of a pragmatic nature. These supporting premises are (1) that the "overriding" concern is that of the "public interest." This principle and policy, as previously noted, has already and firmly been established as the law of the land by both Congress[6] and the

6. Labor Management Relations Act, *supra* note 1.

Supreme Court of the United States.[7] The second premise is that deterrence prior to the precipitation of a crisis is preferable to forceful relief of the crisis once it has occurred.

In considering the "public interest" aspect of national emergency strikes, it is important not only to recognize that, as it has already been legislatively and judicially declared, the public interest is not only paramount to the private interests of the private disputants, but, as well, to realize that the public—that is the American society as a whole—is *a party in interest,* albeit not a party in controversy, in any strike which creates a national emergency and hence involves and endangers the welfare of this society. It is this proposition which lies at the heart of every congressional and judicial pronouncement of the paramountcy of the public interest and welfare in strikes creating national emergencies. Thus, to make provision for the protection and preservation of the rights and privileges of the disputants without making comparable and equal provision for the security of the *paramount* interests of the country and the public as a whole, is to fail the situation and to sacrifice the prime interests to the lesser interests. At the same time, however, it must be remembered that being a party in interest, the public not only enjoys the right to have its interests secured but, along with the disputants themselves, it must assume its proportionate share of the obligations involved in such media as are utilized to protect its rights as well as the rights of the disputants. Even as the public and the society which it comprises does not exist for the exclusive benefit of the disputants in a national emergency strike, the disputants do not exist for the exclusive benefit of the public. Although the public rights are supreme, they are not exclusive. National industrial peace is a common objective and a common enterprise from which all segments of society benefit. And just as the disputants must be required by law to "pull their oar" towards national industrial peace and safety, the residual public must assume its share of the obligations undertaken in the direction of such national industrial harmony and welfare.

The spine of my proposal is the national poll, its vertebrae that it be held seasonably, in appropriate circumstances and under proper conditions in which *ALL* segments of the public in *ALL* parts of the country may indicate their disposition in the strike which has produced the national emergency.

The principal of an election in national emergency disputes *per se,* is by no means novel since the Taft-Hartley Act itself already provides for a "final-offer" election.[8] The instant proposal is, of course, a major extension,

7. United Steelworkers of America v. United States, 361 U.S. 39 (1959); Local Lodge 1424, International Ass'n. of Machinists v. N.L.R.B., 362 U.S. 411 (1960); N.L.R.B. v. Fant Milling Co., 360 U.S. 301 (1959).

8. Labor Management Relations Act (Taft-Hartley Act) §§ 206-10, 61 STAT. 155-56 (1947), 29 U.S.C. 176-80 (1958).

but nonetheless merely an extension of the election principle already recognized by law in the Taft-Hartley Act.

The "final-offer" election contemplates an election in which the voting is confined to the employees involved. Moreover, the only issue to be voted upon is whether or not the employees wish to accept the last offer made by the employer. It is to be observed that the "final-offer" election under the Taft-Hartley Act is not only a narrowly limited election, but that the provisions relating thereto are woefully bleak and seem to evidence a legislative determination to flee the responsibilities which such an election might create rather than to confront, recognize and resolve the complex problems which ensue from such an election. First, it is to be observed that in this election only the employees vote. No provision is made for a choice in the premises by any other persons or entities directly interested in the controversy. To be sure, no voice is given therein to the public. Moreover, the only issue to be submitted in the election is whether or not the employees wish to accept the employer's final offer of settlement. Nowhere does the Act provide for an expression by the individual of their approval of the strike action by the union officialdom, whether they wish to discontinue the strike, or, in fact, whether they wish to persist in the strike. As previously indicated, in the recent steel strike there were widely circulated reports that, at least at the outset of the strike, a great proportion of the employees did not wish to strike. Whether that be the case or not, it was important for Congress in drafting the emergency strike provisions to have so provided that the employees could state whether they did or did not wish to go on strike and thus to prevent any union leader or clique of leaders from hurling workers unwillingly into a huge strike and from precipitating a national crisis. Further, the Act does not provide how the election should be determined. It does not state whether the acceptance should be unanimous, by majority vote or howsoever. It merely prescribes that the vote should be taken. The Act is totally silent on the legislative effect of the outcome of the balloting, regardless of its nature. It does not prescribe whether or not an affirmative vote should mandatorily conclude the strike or whether it could continue notwithstanding, nor does it provide that the rejection of the offer, by whatever number of employees, should have the effect of validating the strike. Finally, regardless of the outcome of the election, the Attorney General is mandated to go into court immediately upon the certification of the results of the election and to move for the discharge of the injunction.

Although the vacancies, inadequacies and frustrations of the national emergency strike provisions of the Taft-Hartley Act are much more numerous and intricate than may be gleaned from the foregoing brief recitation, it is pointless to pursue the matter since the only significance of this pertinent

part of the Taft-Hartley Act to the present discussion is that the principle of election has already been established by Congress and that these provisions have been sustained by the Supreme Court.

In the national election contemplated by this proposal, the election which is intended is a public election. Since it is the public which has the greatest stake and indeed the paramount interests (and which will sustain the greatest and, in truth, the irretrievable loss) in a national emergency strike, it is the public least of all which should be excluded from expressing its choice in the matter of the continuation or discontinuance of the strike. It is not intended that in such an election the disputants should be excluded. Indeed, the disputants are part of the public and as such are entitled to express their choice. The larger interest in such national emergency strikes is in the public and in the American society as a whole. There is no persuasive or moral reason why there should be held an election in which not even both disputants, but only one of the disputants (the striking union) should be permitted by their ballot to determine the issue of the continuation of the strike. Reason and indeed national self-preservation requires that in any such election all parties directly affected thereby, and particularly the public—which is most affected—should be privileged with the same right to express its views as is conferred by the Taft-Hartley Act unilaterally upon the strikers alone.

The issue in such an election would be simply whether the public wishes or does not wish the strike to continue. If the public—that is the American society—as a whole expresses its will that the strike be ended and the danger to its existence be thereby removed, no moral or persuasive reason appears to this writer for permitting a small minority of the public to perversely and obstinately persist in conduct which will jeopardize the whole society and the American nation.

It may be asked: what is meant by a national election? The answer is brief: a national election in which a *popular* vote would be cast. This terse reply must undoubtedly invite the following questions: (1) how and when will and can such an election be held; (2) who will pay the tremendous cost of such an election; (3) how can such an undertaking and expense be justified?

Taking these questions in inverse order, a national emergency or crisis which is produced internally and by a small segment of the whole society is as real and no less important than a comparable crisis created by external enemies. If enemies from without, either by show of force or by embargo or otherwise created for the United States of America a national paralysis which, for instance, might be produced by a new, but this time endlessly continued, steel strike (. . . or a West or East coast—or combined—shipping strike . . . or one which would suddenly choke off our nuclear production

or research . . .) who in the Nation would question the warrant for appropriate action. No right-thinking or self-respecting citizen in the land would shirk from the strongest measures. In a national emergency strike, the danger to the country is produced from within rather than from without. The danger, however, may be just as great or, in truth, even greater because of the tendency towards apathy. [T]he most ardent champions and spokesmen of organized labor could not permit such a situation to continue unabated or unredressed. Between the various alternatives which exist for the forceful solution of such grievous situations, the national election is surely the least odious and productive of the minimum damage, if any damage whatsoever, to our Constitution. If warrant or justification be required, this is sufficient unto itself.

Concerning the matter of cost of such an election, this writer has no means of ascertaining what the cost might be. It is clear that it must be enormous. However, measured against the irreparable damage which would have been done to the nation had any of the national emergency strikes occurring in the last thirteen years been permitted to continue unabated, the cost of an election would surely be trivial. Moreover, it is respectfully submitted that no matter how great the cost of such an election, if it provided a means for escaping or preventing national disaster yet at the same time preserves and secures to all parts of our society, including the disputants, the integrity and protection of the Constitution, the price is cheap, particularly where the alternatives may some day conceivably be either national disaster or the re-writing of the Constitution by militia and field piece.

There remain the questions of how and when the election would or could be held and, next, who would pay for the election. At an earlier point, it was said that the underlying thesis of this proposal of a national election in national emergency strikes consisted of (1) the supremacy of the public interests in such strikes and (2) the desirability of *deterrence* rather than relief of a crisis already produced by national emergency strikes. It is in relation to the matter of deterrence that the timing and mechanics of the proposed election and the imposition of the costs thereof have special pertinence.

This writer is firmly and unshakeably convinced that an enormous part of our national labor strife is produced by the foreknowledge on the part of labor leaders that neither they nor their organizations will sustain any direct financial responsibility in the industrial turmoil which they have the right to . . . produce. That is not to say that the right to engage in strikes or kindred activity which are permitted by law should generally be curtailed or that penalty should be imposed upon labor leaders or their organizations for the lawful exercise of their rights. Nevertheless, the fact remains that caprice is encouraged by this total immunity from financial responsibility.

As these observations apply to the matter at hand, it has, it is hoped, been adequately demonstrated that the people of the United States . . . the whole people and in all quarters and areas of our Country . . . have a deep and real interest in any labor dispute which produces a national crisis or emergency and which endangers the safety and welfare of the country and its citizenry. It is trusted that it has been made equally clear and manifest that the disputants—who represent only a small minority of society—should not alone be invested with the final and exclusive decision as to whether to continue or terminate the dispute which creates the peril to the nation, but that the nation itself and all of its people, including the disputants, should have a voice in this decision. If this be the case, then, as a party in interest, the public should sustain its fair share of the costs of the election. Its stake in the election is demonstrably no less than that of the disputants themselves. However, this does not mean that the public should sustain the total cost. While it should undertake its fair share of the expense, the remainder of the costs should be borne by the disputants who have provoked and produced the national crisis which renders the election necessary. In the apportionment of costs, it is imperative that the share of the cost to be borne by the disputants must neither be ruinous nor established as a substitute for a penalty for exercising lawful right. However, it must also not be so minimal or inconsequential that it should lose its deterrent potential or become farcical. It should be sufficiently substantial to give either disputant heavy and considered pause. It is conceded that while this view is empiricial, it is the opinion of this writer that had the South and the North and the Plain States as well as the East and the West been able to express themselves in a universal poll in any of the national emergency strikes which, in the past thirteen years, have visited such anxiety and havoc upon the nation, none of these strikes would have occurred, or if undertaken would never have been pursued to the points of outrage to which they were selfishly pushed.

. . . .

In discussions with my colleagues, it has been asked whether or not the mandatory holding of a public election with the compulsory assumption of a part of the cost thereof by the disputants was not in effect a penalty for a lawful act and, to this extent, an infringement of the constitutional rights of the disputants. It is conceded that a statute which was drafted recklessly and with abandon or with malign purpose, could easily word itself into unconstitutionality. However, if the statute were drafted with a true care for the constitutional rights of all the parties in interest, the mere requirement of the holding of an election in which all parties in interest could participate and in which the costs would be apportioned in an equitable manner, it could be achieved without any violence to the Constitution. It is in this regard that the "how" and "when" become vital and significant.

In the present national emergency provisions of the Taft-Hartley Act the injunctive provisions do not become operative unless and until the President of the United States, following a written report to him by a Board of Inquiry specially appointed for that purpose, concludes that the particular labor dispute "imperils the national health or safety." Until such time, disputants are free to exercise their respective rights without governmental restraint. In the instant proposal it is contemplated that a similar determination should first be made by the President of the United States before the provisions prescribing a national election should become operative. However, immediately upon the rendition by the President of his opinion that the national safety and health are being imperiled, and coincident with the issuance of an injunction pending the outcome of the public election, the election process should begin forthwith. It is recognized that the very undertaking of the election process would begin the accumulation of expense. The cost would rise and mount each day and would continue to do so until the completion of the election and the ultimate tally and certification of results. It would be the right of the disputants to terminate the dispute at any time between the commencement and the conclusion of the election process. However, to avert trifling with the election process and the Country's welfare, the costs of the preparations to the date of the termination of the dispute—if it should precede the conclusion of the election—would be apportioned in the same ratio that the costs of a completed election would be imposed. In weighing the merits of this proposal, my colleagues have suggested to me that the imposition upon the disputants of the costs of the incomplete election is tantamount to penalizing the disputants for composing their differences and bringing the strike to an early end. I submit that this is an unrealistic view inasmuch as the disputants themselves, by persisting in their private controversy to a point where a Presidential proclamation of public jeopardy is necessitated, have themselves produced the initiation of the election process and the fact that they may have precluded the necessity for pursuing the election process further by privately composing their differences is no occasion for rewarding them with exemption from sustaining their fair share of the accumulated costs of the election process which they themselves produced. A more sound view would be that by rendering it unnecessary to carry the election process to a conclusion they have merely spared themselves the continuing and increased expense which would have ensued upon the completion of the election process. Equally persuasive is the fact that if the disputants themselves were not obliged to bear their fair share of the cost of an unfinished election, the money expended thereon to the date of the settlement would have to be borne by someone, and this someone would necessarily have to be the public—the innocent party in interest. Such magnamity would

certainly not be endorsed by the public even though it might conceivably be espoused by certain public representatives . . . .

If it be objected that it is impossible within proper constitutional ambits to delegate to the public, by election or otherwise, the right to bind the disputants in their private dispute, it must first be remembered that the public is not alien to the dispute, but is a party having an interest in the dispute at least equal to if not superior to that of the private interests of the disputants. But more important, it is not proposed that the election should bind the disputants at all—no more than the already judicially approved Taft-Hartley Act which itself provides for an election procedure of its own. On the contrary, it is submitted that the disputants shall be free to pursue whatever course they may choose following the completion of the election and the official certification of the results, and, indeed, that any injunction theretofore issued should be contemporaneously dissolved. Since no delegation of the disputants' right of self-determination is either impaired or unconstitutionally delegated to the public, no valid objection based thereon could be made. However, if the entire nation should vote against the continuation of the strike and thereby universally confirm the Presidential proclamation of national peril, it is neither likely that any strike would be continued in the face of such a universal condemnation or that, if continued, it would not long sustain itself. It seems clear to this writer that no union, whatever its membership, would dare . . . nor could it, without destroying organized labor itself . . . persist defiantly in a strike against the national safety and welfare where the Nation as a whole has openly denounced it.

In presenting the foregoing proposal, I am fully cognizant of the monolithic dead weight of political reality. Nor am I afflicted with any Arcadian disability to distinguish between academic euphoria and political pragmatism. However, I feel deeply honored that you should have solicited my opinion. As you have surmised in your letter, I have indeed given the vexatious problem of the national emergency strike long and sustained thought.

. . . .

In your letter you have asked for suggestions as to how best to treat with the national emergency strike consistent with the constitutional tenets of our free society. I sincerely believe that the proposed public poll in national emergency strikes may be one of the media for conjuring with this problem, and, accordingly I respectfully commend it to your attention, leaving the appraisal of its political seaworthiness in your capable hands. I have, of course, given fitting heed to the halting mechanical complexities which would attend the election process, and I believe that I might be of some help in that regard. If you should deem this proposal to warrant any further consideration, I would be most pleased to meet with you and to impart what

appears to me to be adequate solutions to such of the mechanical difficulties which have presented themselves to me.

. . . .[9]

Sincerely,

[s] I. Herbert Rothenberg

I. HERBERT ROTHENBERG

9. The remainder of Professor Rothenberg's letter deals with the broader problem of union power and is comprised mainly of excerpts taken from an article written earlier by him: ROTHENBERG, *What Should Be Done About Emergency Strikes? . . . A Reply,* LAB. L.J. (April 1950).