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Nos. 744 and 745

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

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Petitioners,

v.

CHARLES SAWYER

CHARLES SAWYER, SECRETARY OF COMMERCE, *Petitioner,*

v.

THE YOUNGSTOWN SHEET AND TUBE CO., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AND ORDER OF RAILWAY CONDUCTORS AS AMICI CURIAE

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CITATIONS.

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These cases raise issues as to the constitutional validity of Executive Order No. 10340, by which the President, acting in reliance upon his alleged inherent powers under the Constitution of the United States, seized the steel mills. The Brotherhood of Locomotive Engineers, the Brother-

hood of Locomotive Firemen and Enginemen and the Order of Railway Conductors have pending in this Court a petition for a writ of certiorari in *Brotherhood of Locomotive Firemen and Enginemen, et al.* v. *United States,* No. 759, this Term, which presents similar issues with respect to Executive Orders Nos. 10141 and 10155, under which the President purported to seize the 197 major railroads of this country. On May 10, 1952, this Court entered an order providing that the Brotherhoods may file briefs *amici* in the instant cases in order to protect any interest which they may have in the issues to be argued herein.

OPINIONS BELOW

The opinion of the District Court in Cases No. 744 and 745, involving the seizure of the steel mills (R. 63-76) is not yet reported. The opinion of the Court of Appeals for the District of Columbia Circuit in these cases (R. 447-449), on consideration of motions for stays, is not yet reported. The opinion of the District Court in Case No. 759, involving the seizure of the railroads is not officially reported but has been unofficially reported in 29 LRRM 2681.

QUESTIONS INVOLVED

The questions considered in this brief are:

1. Whether the President has the power under the Constitution of the United States to seize private property in the absence of a valid congressional enactment authorizing the seizure.

2. Whether the President has the power to seize private property in connection with a labor dispute when Congress has provided in the Labor Management Relations Act and the Railway Labor Act for retention of collective bargaining during national emergencies, subject to a cooling off period, and rejected proposals for seizure—and other bars to economic self-help—as inconsistent with collective bargaining.

CONSTITUTIONAL PROVISIONS, STATUTES AND EXECUTIVE ORDERS INVOLVED

The pertinent provisions of the Constitution of the United States are set forth in Appendix A, *infra,* pp. 61-63. The pertinent provisions of the Labor Management Relations Act, 1947 (29 U. S. C., 141, *et seq.*), are set forth in Appendix B, *infra,* pp. 64-69. The pertinent provisions of the Railway Labor Act (45 U. S. C., 151, *et seq*), are set forth in Appendix C, *infra,* pp. 70-72. Executive Order No. 10340 seizing the steel mills is set forth in full in Appendix D, *infra,* pp. 73-75. Executive Order No. 10141 seizing the Chicago, Rock Island and Pacific Railroad Company is set forth in full in Appendix E, *infra,* pp. 76-78. Executive Order No. 10155 seizing the other 196 major railroads in the United States is set forth in full in Appendix F, *infra,* pp. 79-82.

STATEMENT

In the following statement we do not include a full statement of facts but only those facts in the instant cases and in Case No. 759 which are relevant to the two questions discussed in this brief.

1. The events leading to the seizures.

The seizure of the railroads, which antedated the seizure of the steel mills, grew out of a bona fide labor dispute arising from the demands of the employees for higher wages, shorter hours and improved working conditions and demands of the carriers for the abrogation of numerous previously existing contractual provisions protecting working standards.

The seizure of the Chicago, Rock Island and Pacific Railroad on July 8, 1950 under Executive Order No. 10141, followed the service of notices by the Switchmen's Union of North America, A. F. L., on the Rock Island on September 24, 1949 requesting a 40 hour work week with 48 hours

pay and other improvements in wages, hours and working conditions for the employees of the Rock Island within the crafts for whom the Switchmen's Union was the bargaining representative.[1] These notices were served under the provisions of the Railway Labor Act. The contract then in existence between the Switchmen's Union and the Rock Island was not for any fixed term but could be reopened at any time upon compliance with the provisions of the Railway Labor Act. The Rock Island in turn served notice on the Switchmen's Union of its demands for changes in rules and working conditions which the employees resisted as detrimental to their standards.

After unsuccessful negotiations and unsuccessful mediation efforts, a strike was called for March 21, 1950. The National Mediation Board thereupon advised the President that this labor dispute threatened substantially to interrupt interstate commerce to a degree which would deprive the country of essential transportation service. The President on March 20, 1950, acting pursuant to Section 10 of the Railway Labor Act, appointed an Emergency Board to investigate the dispute. On April 18, 1950, the Emergency Board made public its report. The Switchmen's Union advised the Rock Island that the recommendations of the Emergency Board were unacceptable to them and requested a conference for the purpose of bargaining further with respect to the issues in dispute. These conferences were also unsuccessful and the Switchmen's Union called a strike on the Chicago, Rock Island and Pacific Railroad to begin on June 25, 1950.

The ensuing strike was limited to a stoppage in the movement of only those trains which did not carry troops

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[1] All of the facts herein stated with respect to the Switchmen's Union's dispute with the Chicago Rock Island and Pacific Railroad Company, and the ensuing strike appear either in the opinion in *United States* v. *Switchmen's Union of North America*, 97 F. Supp 97 (D C. W D. N. Y., 1950) or in the official records of the National Mediation Board with respect to its mediation in that dispute.

or war supplies or materials to be used in the manufacture of war supplies.[2] In all instances the Switchmen's Union accepted without question the statement of government officials as to the character of the goods which they requested transported and moved all those designated as for use in the manufacture of goods under defense contracts. The existence of strict government rationing of scarce materials made it possible for any manufacturer of parts, although he was not himself under contract to the government, to know that his parts would ultimately be used in the manufacture of articles for the government at some subsequent point in its processing because otherwise he would not have been allotted his materials. Where neither allocated material nor an identifiable government contract at the end of the chain was present, that meant the materials were in sufficient abundance so that any manufacturer could purchase the material on the open market without difficulty. Even as to such materials or supplies the railway union took or was willing to take the government's designation of any material as needed for defense as final and moved the material (No. 759, Tr. 646-647, 942-944).

On July 8, 1950, efforts to settle the strike having been unsuccessful, the President issued Executive Order No. 10141 (Appendix E, *infra,* p. 76), which recited:

> Whereas I find that as a result of labor disturbance there are interruptions, and threatened interruptions, of the operations of the transportation system owned

[2] While the testimony in Case No. 759 was not directed specifically to the Switchmen's strike on the Rock Island, it was clear from the testimony that all of the strikes conducted by the railroad unions since the outbreak of World War II had been intentionally limited to an attempt to impair the carriers' earnings to the extent that could be accomplished without refusing to move any troops or supplies needed by the government either directly for defense or for the manufacture of defense materials (No. 759, Tr 380-381, 676-677).

> or operated by the Chicago, Rock Island & Pacific Railroad Co.; that it has become necessary to take *possession* and assume *control* of the said transportation system for purposes that are needful or desirable in connection with the present emergency; and that the exercise, as hereinafter specified, of the powers vested in me is necessary to insure in the national interest the operation of the said transportation system. (Italics supplied.)

The Chicago, Rock Island and Pacific Railroad has at all times since July 8, 1950 continued to be subject to Executive Order No. 10141 (No. 759, Tr. 50, 55).

The seizure of the other 196 railroads, including all trunk lines and switching railroads in the United States, on August 25, 1950, under Executive Order No. 10155 followed the service of notices by the Order of Railway Conductors and the Brotherhood of Railroad Trainmen acting under the provisions of the Railway Labor Act upon carriers whose employees are represented by those organizations of their desire to negotiate certain changes in rules and working conditions, requesting, among other things, a 40 hour week with 48 hours pay for employees within the crafts they represent (No. 759, Tr. 21, 761-762).

The carriers met the notices served by the Brotherhoods by serving counter notices stating the desires of the carriers to negotiate widespread changes in previously existing rules and working conditions (No. 759, Tr. 659-661, 765-766, 826-827; Affidavit of Eugene C. Thompson, attached to complaint, par. 2).

Conferences having proved unsuccessful the National Mediation Board on February 24, 1950, advised the President that in its judgment this labor dispute threatened a substantial interruption to interstate commerce to a degree which would deprive the country of essential transportation service (No. 759, Tr. 23). The President on February 24, 1950, pursuant to Section 10 of the Railway Labor Act, appointed an Emergency Board to investigate this labor

dispute (No. 759 Tr. 23). On June 15, 1950, the Emergency Board issued its report (No. 759 Tr. 23). On June 20, 1950, the Order of Railway Conductors and the Brotherhood of Railroad Trainmen advised the carriers that the recommendations of the Emergency Board were not acceptable. Further conferences ensued, at which the National Mediation Board attempted unsuccessfully to help the parties to reach an agreement.

On August 23, 1950, the Brotherhood of Railroad Trainmen and the Order of Railway Conductors set a nation-wide strike for August 28, 1950. In order to avert this strike and before the strike began the President of the United States on August 25, 1950, issued Executive Order No. 10155, in which he found, in language almost identical with that used in seizing the Rock Island (*supra,* pp. 5-6), that "it has become necessary to take possession and assume control" of the 196 railroads named in a list attached to the order (See Appendix F, *infra,* p. 79).

The seizure of the steel mills grew out of an analogous situation. On November 1, 1951, the United Steel Workers of America, C. I. O., which had a collective bargaining agreement with the steel companies due to expire on December 31, 1951, gave notice to the steel companies that they wished in a proposed new collective agreement between the parties to effect increases in wages and improvement in working conditions over those established by the old contract (No. 744, R. 3, 81). No progress was made in the negotiations which followed and, on December 22, 1951, the dispute was referred by the President to the Wage Stabilization Board, in accordance with the provisions of Executive Order 10233, 16 F. R. 3503. The Presidential letter of referral, a copy of which is attached to the affidavit of Mr. Harry Weiss, Executive Director of the Wage Stabilization Board, requested the Board to investigate the dispute and promptly to report with recommendations as

to fair and equitable terms of settlement.[3] The President noted that the union and the steel producers had made no progress in resolving their differences and that it appeared unlikely that further bargaining or mediation and conciliation would suffice to avoid early and serious production losses in the vital steel industry.

The Wage Stabilization Board, on March 20, 1952, issued a "Report and Recommendations". The Board's recommendations, acceptable to the union, were rejected by steel management (No. 744, R. 81). No progress was made in negotiations between the parties pursuant to the union's notice of November 1, 1951, and a strike was called, as contemplated by the notice, for December 31, 1951. After the President's referral of the dispute to theWage Stabilization Board on December 22, 1951, the union voluntarily deferred the strike which had previously been set. After management's refusal to accept the Board's recommendations, the strike was called for 12:01 A. M., April 9, 1952 (No. 744, R. 7). So far as appears from the record the steel companies have no contracts with the government for the production of steel. At the oral argument herein when questioned by the Justices, the Solicitor General disclaimed knowledge of any such contracts.

The strike was averted by the Executive Order No. 10340 issued by the President directing the Secretary of Commerce to take possession of the steel industry on the night of April 8, 1952. The union immediately called off the contemplated strike and full-scale production of steel continued without interruption until April 29, 1952 after the issuance of Judge Pine's decision in the District Court.

As in the railroad seizure, so too in the steel seizure, the

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[3] The Presidential letter of referral, the report of March 13, 1952, by the Steel Panel which heard the presentation of steel wage dispute, and the "Report and Recommendations" of the Wage Stabilization Board of March 20, 1952, all of which are contained in the certified transcript of record in No. 744 as appendices to the affidavit of Mr. Harry Weiss (No. 744, R 59-61), were omitted in printing the record. Copies of these documents have been assembled and deposited with the Clerk for the Court's use.

Executive Order of seizure referred only to the underlying existing labor dispute as the occasion for the seizure. Thus the order of seizure of the steel mills recites (Appendix D, *infra,* pp. 73-74):

> Whereas a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof and certain of their workers represented by the United Steel Workers of America, CIO, regarding terms and conditions of employment; and
>
> Whereas the controversy has not been settled through the processes of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order No. 10233, and a strike has been called for 12:01 a.m., April 9, 1952; and
>
> Whereas a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and
>
> Whereas in order to assure the continued availability of steel and steel products during the existing emergency, is it necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies * * *
>
> * * * * * * * * *
>
> 1. The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation.

2. The powers relied upon by the President as authorizing the seizures

In seizing the railroads the President in his Executive Orders purports to be exercising both the supposed inherent powers conferred upon him by the Constitution and the

powers conferred upon him by the Act of August 29, 1916. Executive Orders Nos. 10141 (Appendix E, *infra,* p. 76), and 10155 (Appendix F, *infra,* p. 79) both state:

> Now, therefore, by virtue of the power and authority vested in me, by the Constitution and the laws of the United States, including the Act of August 29, 1916 (39 Stat. 619, 645), as President of the United States and as Commander in Chief of the Armed Forces of the United States, it is hereby ordered as follows:

At the hearing in the district court in the railroad cases, counsel for the government stated that the government was relying primarily on the Act of August 29, 1916, as justifying the seizure but that the government also reserved the right to rely on the inherent powers of the President (No. 759, Tr. 5, 18).[4]

In seizing the steel mills the President in his Executive Order purports to be exercising only his supposed inherent powers under the Constitution. Thus, Executive Order 10340 (Appendix D, *infra,* p. 74) states:

> Now, therefore, by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander

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[4] In the railroad cases the Brotherhoods have attacked the constitutional validity of the Act of August 29, 1916 on the ground that it constitutes an unlawful delegation of legislative power to the President (Answer, Second Defense, Par. 2). We shall not further mention this statute in this brief except to point out that this Court's classification of the powers involved in the seizure may be of crucial importance to the Brotherhoods' position in Case No 759. If this Court should hold that the Executive Orders here involved constituted an exercise of the power of eminent domain, and that the power of eminent domain is a legislative power, then all the applicable law respecting the inability of Congress to delegate legislative power to the President and respecting the requirements that the legislative exercise of the eminent domain power must include a judgment made by the legislature itself as to the nature of the property to be taken, the procedure to be followed in the taking and the method of compensation, becomes material in judging whether the Act of August 29, 1916 and the executive action pursuant thereto is constitutional.

in Chief of the armed forces of the United States, it is hereby ordered as follows:

3. The nature of the seizures

In each the railroad seizures and the steel seizure the orders of seizure themselves, as well as the conduct of the government in carrying out the seizure, made it clear that the sole purpose of the seizure was to avert a stoppage of production or transportation by a labor dispute. There is no suggestion in the orders themselves or in any acts performed by the government as a result of the seizure that it desired to take either permanently or temporarily any of the property of anyone, except insofar as such a taking might result incidentally from the government's fixing of wages, hours or working conditions for the duration of its seizure.

Executive Orders Nos. 10141 (Appendix E, *infra* p. 76 and 10155 (Appendix F, *infra,* p. 79) seizing the railroads purport to vest possession and control of the railroads in the Secretary of the Army but provide that the Secretary may either operate or arrange for the operation of the railroads (Par. 2) and except as the Secretary may otherwise provide "the boards of directors, trustees, receivers, officers and employees of such carriers shall continue the operation * * * in the usual and ordinary course of business, in the names of the respective companies" (Par. 4). The orders also stated that until the further order of the President or the Secretary the railroads "shall be managed and operated under the terms and conditions of employment in effect" on June 24, 1950 in respect to the Rock Island and on August 20, 1950 in respect to the other roads (Par. 6). The orders indicated an intention that the carriers remain free to make such changes in wages, hours and terms of employment as they and the workers might agree upon (Par. 6).

In accordance with the permissive power vested in the Secretary of the Army either to operate or to arrange for the operation of the railroads, the Secretary of the Army in every instance elected to arrange for the operation of

the roads rather than to operate them himself. Thus on July 10, 1950, two days after the alleged seizure of the Chicago, Rock Island and Pacific Railroad Company, the Army entered into a contract with the Chicago, Rock Island and Pacific Railroad Company entitled "Operating Agreement" (No. 759, Plff's Exh. No. 6), giving the company full operation of the railroad. Within a few days after their respective seizures, the Army entered into a similar "Operating Agreement" (No. 759, Plff's Exh. No. 7) with each of the other 196 carriers here involved, granting each of them the operation of its own road. These agreements specify that the Government is retaining certain limited rights of possession and control, whereas the entire operation is to be in the railroad. As to possession and control, the agreement limits such possession and control in the Army to only that necessary to prevent an interruption of transportation service. Paragraph 2 provides:

> The action of the Government in taking *possession* of said properties is not an assertion by the Government of ownership thereof, or any interest therein, it being understood that title to said properties remains in the owners thereof and that, during the period of their *possession and control,* the Government will assert only such rights as are necessary to accomplish the national purpose of preventing an interruption of transportation service threatened by a labor dispute. (Italics supplied.)

The operating agreements not only divested the Army of any operation which it had assumed by the alleged seizure, but likewise left all possession and control in the railroads subject only to the right of the Government, in the event that a labor dispute thereafter threatened, to assume possession and control to the extent necessary to prevent an interruption of transportation.

The government did not raise any flag over the railroad properties (Tr. 168). It neither stationed government representatives at any of the properties nor did it appoint someone at each of the companies as an agent of the govern-

ment (Tr. 167-168). The government in all respects treated the railroads as operating for their own private accounts and not for the government.

The subsequent orders issued by the Army fully bear out the above analysis. For instance, the second paragraph of General Order No. 1 (No. 759. Plff's Exh. No. 10) begins:

> 2. Operation of Transportation Systems by Existing Management.

From the date of the alleged seizure until the present time all of the instructions issued have proceeded on the premise that during the operation by the railroad management the workers continue to be employees of the carriers rather than of the United States. Illustrative is the letter (No. 759, Defts' Exh. G) sent by the Assistant Secretary of the Army to each of the 196 railroad companies, other than the Chicago, Rock Island and Pacific Railroad Company, a few days after the effective date of the alleged seizure. It reads:

> This will further confirm telegraphic advices * * * that you are to proceed with the operation of such transportation system in the usual manner and *to continue the employment of your employees* under the terms and conditions of employment existing immediately prior to such seizure pursuant to said Executive Order. (Italics supplied.)

The carriers have continued to recognize the workers as their employees. They have continued to hire and fire employees as before (No. 759, Tr. 163). They have continued to assign them jobs and direct their work (No. 759, Tr. 163-164). Since the alleged seizure they have entered into more than a hundred contracts with the Brotherhoods covering every aspect of the employment relationship, including contracts for the union shop and check off. (No. 759, Defts' Exhs. RR, SS, TT, HHH, III, JJJ). These contracts do not contain any language which either directly or indirectly

could be construed as treating the United States as the employer. The United States is not a party to any of these agreements.

The union shop contracts have in many instances contained express reference to the carrier as the employer. See for instance, the contract between the Brotherhood of Locomotive Firemen and Enginemen and the Baltimore and Ohio Railroad Company (No. 759, Defts' Exh. SS). The Army, acting on the basis of a legal opinion of the Judge Advocate General, has ruled that these union shop agreements may be entered into between the carriers and the Brotherhoods, without any need for submission to or approval by the Army (No. 759, Defts' Exh. F).

By General Order No. 2 issued February 8, 1951, the Secretary of the Army directed the carriers to give an increase of 5 cents per hour to road employees and 12½ cents per hour to yard employees. (No. 759 Plff's Exh. No. 11). The Government did not purport itself to give the increase as it would have done had it been the employer. The Army did not bargain with the Brotherhoods about this increase. It did not enter into any contract with the Brotherhoods providing for this increase. The size of the increase was not determined by any process affording due process of law. Apparently, it was decided upon by the Secretary of the Army acting on his own initiative (No. 759, Tr. 904-907, 909).

The Secretary of the Army appears to have regarded his direction to the carriers to give this increase as advisory. The increase of the 5 cents per hour to be given the road service employees and the 12½ cents to be given the yard service employees represented less than half of the amount of increase previously offered to the Brotherhoods by the carriers and then and theretofore rejected by the Brotherhoods as inadequate (No. 759, Tr. 668-669, 903-904). As of the date of the hearing below in No. 759, no steps had been taken to incorporate this increase into any contract between the Brotherhoods and the carriers (No. 759, Tr. 906). In those instances in which the carrier declined to

effectuate the directed increase, the Secretary of the Army did not compel the carrier to put the increase into effect, but suggested further bargaining about the matter between the carrier and the Brotherhoods (No. 759, Tr. 78, 144-146, 907, Defts' Exh. E).

With respect to terms and conditions of employment other than wages, carriers made changes detrimental to the employees and the Secretary of the Army refused to intervene to protect the employees (No. 759, Tr. 823-827, Defts' Exh. CCC).

The facts with respect to seizure of the steel mills show that the President there found it necessary for the "United States" to assume not only possession and control, which was all he found necessary to assume in the case of the railroads (*supra,* pp. 5-7, 11), but also for the "United States" to assume operation of the steel mills, which he did not find it necessary to do in the case of the railroads (*supra,* pp. 5-7, 11). In this regard, Executive Order No. 10340 (Appendix D, *infra,* p. 74), provides:

> * * * in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of *and operate* the plants, facilities, and other property of the said companies * * * (Italics supplied.)

Executive Order No. 10340, applicable to the steel mills, also indicated the President's intention to change wages and other conditions of employment whereas in the case of seizure of the railroads the executive orders had indicated that the President had no intention at the time of the seizure to alter wages, hours and other conditions of employment as they existed prior to the seizure (*supra,* p. 11). Executive Order No. 10340 (Appendix D, *infra,* p. 74), applicable to the steel mills provides:

> 3. The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties possession of which is taken pursuant to this order shall be operated. * * *

The executive orders applicable to steel mills and to the railroads contain substantially similar provisions purporting to delegate legislative power from the President to the respective Secretaries to make rules. Paragraph 3 of Executive Order No. 10155 and Paragraph 3 of Executive Order No. 10141 (*infra,* pp. 77, 80), applicable to the railroads provide:

> The Secretary may issue such general and special orders, rules and regulations as may be necessary or appropriate for carrying out the provisions, and to accomplish the purposes, of this order.

Paragraph 7 of Executive Order No. 10340 (Appendix D, *infra,* p. 75) provides:

> 7. The Secretary of Commerce is authorized to prescribe and issue such regulations and orders not inconsistent herewith as he may deem necessary or desirable for carrying out the purposes of this order; and he may delegate and authorize subdelegation of such of his functions under this order as he may deem desirable.

The steel orders and the railroad orders are alike in that they provide that except as the Secretary of Commerce shall otherwise provide from time to time, the management shall continue in the private owners, who shall operate the mills for their own account, exercising their usual managerial functions and collecting and disbursing dividends from the operations. In this respect Executive Orders Nos. 10141 (Appendix E, *infra,* p. 77) and 10155 (Appendix F, *infra,* p. 80), provide:

> 4. * * * Except so far as the Secretary shall from time to time otherwise provide by appropriate order or regulation, the boards of directors, trustees, receivers, officers, and employees of such carriers shall continue the operation of the said transportation systems, including the collection and disbursement of funds thereof, in the usual and ordinary course of the business of

> the carriers, in the names of their respective companies, and by means of any agencies, associations, or other instrumentalities now utilized by the carriers.
>
> 5. Except so far as the Secretary shall from time to time otherwise determine and provide by appropriate orders or regulations, existing contracts and agreements to which carriers whose transportation systems have been taken under, or which may be taken pursuant to, the provisions of this order are parties, shall remain in full force and effect. Nothing in this order shall have the effect of suspending or releasing any obligation owed to any carrier affected hereby, and all payments shall be made by the persons obligated to the carrier to which they are or may become due. Except as the Secretary may otherwise direct, there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations; and expenditures may be made for other ordinary corporate purposes.

Executive Order No. 10340 (Appendix D, *infra,* p. 75) provides:

> 4. Except so far as the Secretary of Commerce shall otherwise provide from time to time, the managements of the plants, facilities, and other properties possession of which is taken pursuant to this order shall continue their functions, including the collection and disbursement of funds in the usual and ordinary course of business in the names of their respective companies and by means of any instrumentalities used by such companies.
>
> 5. Except so far as the Secretary of Commerce may otherwise direct, existing rights and obligations of such companies shall remain in full force and effect, and there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations, and expenditures may be made for other ordinary corporate or business purposes.

The executive orders applicable to steel and railroads are further alike in that each provides that the seizure shall

terminate when the labor dispute is settled (*infra,* pp. 75, 78, 82).

Whereas the Secretary of the Army acting with respect to the railroads, which it is recalled, the President in his Executive Order did not find it was necessary for the government to operate (*supra,* pp. 5-7, 11, 15), made operating agreements with the railroad companies whereby the railroads were operated by the companies for their own account (*supra,* pp. 11-12), there being a finding in the executive orders applicable to steel that it was necessary for the United States to operate the steel mills, the Secretary of Commerce took steps to appoint an agent of the United States in each plant to act on behalf of the United States in operating the mills. Over their protest, the Secretary of Commerce named the president of each seized company as "Operating Manager for the United States" and directed them to operate their companies subject to his supervision and in accordance with his regulations and orders (No. 744, R. 22). In respect to the railroads, it will be recalled that the Secretary of the Army neither appointed anyone at the respective railroads as an agent of the government nor did he station any representative of the government at each railroad (*supra,* pp. 12-13). He did not so much as assign any specific representative of the government to carry out functions with respect to any specific railroad (No. 759, Tr. 167-168). The steel companies were directed to open new books of account beginning with the date of seizure. There was no such requirement in the case of the railroads. Indeed, the government did not even make any inventory of the property of the railroads of which it claimed to have taken "possession and control" (No. 759, Tr. 178). The steel companies were directed to fly the United States flag over their plants as a sign that the plants were in government possession. The flags were raised and flown. No flags were flown over the railroads (No. 759, Tr. 168).

Whereas the President and the Secretary of the Army, with respect to the railroads, refused to bargain collectively,

and repeatedly told the Brotherhoods that they must look to the carriers for any changes in wages, hours and working conditions (No. 759, Tr. 144-146, 705-706, 794-817, 823-827, 906-907, Defts' Exhs. E, OO, PP, VV, WW, XX, YY, ZZ, AAA, BBB, CCC), the President and the Secretary of Commerce with respect to the steel companies immediately after the seizure announced an intention to impose upon the steel companies without their consent whatever changes in terms and conditions of employment they saw fit and to pay increased wages and other fringe benefits with the companies' funds (No. 744, R. 103).

4. The effect of the seizure upon collective bargaining.

From the outset of the negotiations between the carriers and the Brotherhoods upon the notices initiated in 1949 and 1950, and even prior to the seizures, the carriers showed an adamancy which reflected the carriers' belief that the President by the exercise of his assumed seizure powers would protect the carriers in their operation of the roads for their own profits on such labor conditions as they deemed fit by preventing any strike. Such had been the carriers' experience in the seven prior seizures of the railroads by the President between 1943 and 1950.[5] Bargaining

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[5] These were the seizure of the Toledo, Peoria & Western Railway Company in 1943 (see *Toledo, Peoria & Western R. R. Co.* v. *Stover,* 60 F. Supp. 587 (D. C. S. D. Ill); the seizures in 1943, 1946, and 1948 growing out of national strikes (see *United States* v *Brotherhood of Locomotive Engineers,* 79 F. Supp. 485 (D.C.), dismissed as moot, 174 F 2d 160 (C. A. D. C.), certiorari denied, 335 U S 867, 338 U. S. 872), arising out of the 1948 strike; the seizure of the Bingham & Garfield Railroad Co., in 1945; of the Monon Connecting Railway Co. in 1946; and of the Illinois Central Company, also in 1946 In addition to the suit involved in Case No 759, there were at least three reported opinions with respect to injunctions issued during the present seizures. *United States* v *Brotherhood of Railroad Trainmen,* 95 F. Supp 1019 (D. C D. C); *United States* v. *Brotherhood of Railroad Trainmen,* 96 F Supp 428 (D. C. N. D. Ill. E. D.); *United States* v *Switchmen's Union of North America,* 97 F. Supp. 97 (D. C. W. D. N. Y). See also the order enjoining a strike in *United States* v. *Brotherhood of Railroad Trainmen,* 27 L. R. R. M. 2151 (D. C. N. D. Ill. E. D).

between the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Locomotive Engineers, respectively, and the carriers on their notices initiated on November 1, 1949 and January 6, 1950, did not begin until subsequent to the seizure (No. 759, Tr. 658, 861). After the seizure the negotiations reflected the carrier's attitude that they had no reason to make such concessions as the employees requested because the carriers were operating their roads to their profit while their workers had lost their right to strike for the duration of the seizure (No. 759, Tr. 919-920). During the period subsequent to Presidential seizure the carriers had net operating profits of one billion six hundred and sixty million dollars ($1,660,000,000) after taxes (Counterclaim and Cross-Claim, Par. 8, calculated upon official reports of the Interstate Commerce Commission). The employees represented by the Brotherhood of Locomotive Engineers, the Order of Railway Conductors and the Brotherhood of Locomotive Firemen and Enginemen, numbering approximately 150,000 operating employees, have continued to work at 1948 wages and working conditions, supplemented in most cases by the almost insultingly low increase advised by the Secretary of the Army in February 1951, of 5 cents an hour for roadmen and 12½ cents per hour for yardmen, an amount about half of the carriers' then outstanding offer (No. 759, Tr. 669, 903).

The only indication which the Brotherhoods had of any willingness on the part of the carriers to engage in bona fide collective bargaining occurred after the Brotherhoods went on strike on March 9, 1952 on the New York Central Lines West of Buffalo and the Terminal Railroad Association of St. Louis (No. 759, Tr. 916). At that time L. W. Horning, vice president of the New York Central, and chairman of the Eastern Carriers Conference Committee, phoned the executive heads of the Brotherhoods, offered to fly to Cleveland, Ohio, to meet with them and indicated that he was prepared to consider a proposition for settlement much more favorable to the Brotherhoods in its terms than

any which the carriers had theretofore considered (No. 759, Tr. 917). As soon as the district court sitting below in No. 759, on March 11, 1952, issued its restraining order directing the Brotherhoods to call off the strike and directing their members to return to work. Vice President Horning cancelled his proposed conference with the Brotherhoods (No. 759, Tr. 917, 918).

The record in the steel cases, so far as we have been able to ascertain, contains no material directly relevant to the issue of whether the steel negotiations were likewise conducted on a sham basis because of some feeling on the part of either the steel companies or the unions that the President would intervene by seizure to prevent one or the other of the parties from backing up its bargaining position with a show of economic strength. The United Steelworkers of America, C.I.O., in their Brief as Amicus Curiae, filed herein, do assert that the negotiations carried on with respect to their notices served on November 1, 1951, were at all times a sham and a fiction except after the strike which they began on April 29, 1952, immediately following the decision of Judge Pine in the court below, issued earlier that same day, holding the seizure unconstitutional and returning the mills to the owners. However, the Steelworkers attribute the mill owners' failure to negotiate in good faith to the carriers' insistence upon the government's allowing them a price increase, before they would settle with the union (*ibid.*, p. 17). The Steelworkers do assert that only the possibility of a strike would give meaning to the process of collective bargaining (*ibid.*, p. 19). Just as in the case of the strike on the railroads, the strike caused the carriers to approach the bargaining table with an indication of a desire to bargain collectively, so too the strike at the steel mills moved the steel employers to giving indications that a negotiated settlement might be reached (*ibid.*, p. 20). And again, as in the railroad case, just as the restraining order terminating the strike ended a willingness on the part of the carriers to engage in bona fide bargaining

so the stay order issued by the Court of Appeals for the District of Columbia Circuit below in Case No. 744, by returning the steel mills to their former status under seizure, put an end to all bona fide bargaining by the steel companies. The Steelworkers attribute the willingness of the steel companies to try to reach a genuine settlement between the date of Judge Pine's decision and the stay order of this Honorable Court as due to the fear of the steel companies that the President would impose higher wages than the steel companies would agree to unless they first made a bargain with the union (*ibid.*, p. 20).

5. The extent to which the emergency procedures of the Labor Management Relations Act and the Railway Labor Act were exhausted before or after seizure.

The emergency provisions set out in Section 10 of the Railway Labor Act had been exhausted with respect to the Switchmen's Union of North America prior to the seizure of the Rock Island on July 8, 1950, by Executive Order No. 10141 (No. 759, Tr. 43, 44). Both at the time of the seizure of the Rock Island on July 8, 1950, and at the time of the seizure of the other 196 major railroads on August 29, 1950, by Executive Order No. 10155, the emergency procedures of Section 10 of the Railway Labor Act had been complied with and exhausted by the Switchmen, the Trainmen, and the Conductors, the labor organizations there involved (No. 759, Tr. 23, 43). The procedures of Section 10 were exhausted as to the Brotherhood of Locomotive Firemen and Enginemen on February 25, 1952, the expiration date of the thirty-day cooling off period subsequent to the issuance of a report by the President's Emergency Board (No. 759, Tr. 44).

The procedures of Section 10 of the Railway Labor Act have never been applied to the Brotherhood of Locomotive Engineers. The President has never appointed an emergency board to consider the labor dispute occasioned by the inability of the Brotherhood of Locomotive Engineers

and the carriers to reach an agreement (No. 759, Tr. 878, 789, Defts. Exhs. A, B, and GGG).

In respect to the steel dispute, the emergency provisions of the Labor Management Relations Act were never resorted to. The President did refer the dispute to the Wage Stabilization Board and the government contends the procedures before the Wage Stabilization Board afforded an adequate substitute for the emergency provisions of the Labor Management Relations Act (Gov't. Brief No. 745, pp. 153-163).

SUMMARY OF ARGUMENT

I.

The President has no power under the Constitution of the United States to seize private property in the absence of a valid congressional enactment authorizing the seizure.

The Executive Orders seizing the steel companies and the railroads purport to be a taking of private property for public use. In this brief the President's power to issue these executive orders will be discussed on the assumption that they are essentially a taking of private property. It should be observed, however, that when the orders are analyzed, they constitute primarily orders dealing with labor relations rather than a taking of property except to the extent that a suspension of either the employers' or the employees' power to refrain from entering into a labor contract or to make it on such terms as they see fit may constitute a taking of property. There can be no doubt that the President has no power under the Constitution by executive fiat to fix wages, hours and working conditions nor to prescribe whether they shall be fixed by compulsory arbitration, limited forms of bargaining or by some other method. We do not believe the President claims that his executive orders can be justified except as a taking of property and we will here test them as such.

All taking of property by the government is an exercise

of eminent domain. By the time of Blackstone's Commentaries it was established in England that the monarch could not take property except for the purposes, upon the occasions, to the extent, and in the manner that he was authorized to do so by an act of parliament. The Constitution of the United States makes no mention of the power of eminent domain. The Fifth Amendment by implication assumes that there is a power in the federal government to take property for it provides, however, without any express reference to the federal government as distinguished from the state, "nor shall private property be taken for public use without just compensation."

Because of the failure to include the power of eminent domain in the enumerated powers given to the federal government by the Constitution, and despite the Fifth Amendment, for almost a century after the adoption of the Constitution it was seriously doubted that the federal government had any power of eminent domain, except in the District of Columbia, as to which the federal government exercised the powers which in the rest of the country had been reserved to the states. During the pre-Civil War period, whenever the federal government desired to take property it applied to the state governments for a delegation from the state to the federal government of the power of eminent domain which it was assumed had been reserved exclusively to the states.

The state supreme courts uniformly followed the English practice and held that the power of eminent domain is a legislative power and can be exercised by the executive only for the purposes, to the extent, and by the procedures established by an act of the legislature.

In 1875 this Court held that the federal government had the power of eminent domain as an inherent part of its sovereign powers. *Kohl* v. *United States,* 91 U. S. 367. Since that date this Court has never been called upon to determine the precise issue of whether that power is vested in the executive to any extent. It has stated that it is a

legislative function, not to be exercised by the executive. *Hooe* v. *United States,* 218 U. S. 322, 336 (1910). The lower federal courts have uniformly followed the numerous and consistent state decisions that eminent domain is exclusively a legislative power. And it is today hornbook law that all eminent domain powers, both federal and state are exclusively legislative.

The only power which the Executive has to take property without the proper prior authorization is limited to a taking in a theater of war. A taking of property in the theater of war is regarded as an executive act, a part of the waging of war and therefore within the President's executive powers as Commander in Chief of the armed forces. A few of the cases decided prior to 1875 seem to extend beyond the theater of war the President's power to take when the emergency is too great to first permit of resort to legislative procedures. It is to be recalled that at the time these cases were decided it was believed that the federal government had no power of eminent domain and could only act when it secured a delegation from a state. This cumbersome procedure undoubtedly led to some bad law, which now that it is recognized Congress has the power of eminent domain, should be overruled rather than extended. There is no reason why as to the legislative power of eminent domain, the rule applicable to all other legislative powers should not be applied, that even in emergencies, all legislation must be enacted by Congress, not by the President.

The assumption that the executive has some power to take property outside of the theater of war, in emergencies, without legislation so authorizing, is based upon a misreading of the cases as to the power of a public officer to destroy property to prevent the spread of fire or flood. The uniform law is that such destruction of property to prevent imminent disaster is not a governmental function. Every private individual has the same power, as part of his right to self protection or to save the life or property of

another. The cases holding that a public officer is not liable for such destruction of property are based on the law that he acts as a private individual and as such is not liable.

II.

The President has no power to seize private property in connection with a labor dispute when Congress has provided in the Labor Management Relations Act and the Railway Labor Act for retention of collective bargaining during national emergencies, subject to a cooling off period, and rejected proposals for seizure—and other bars to economic self-help—as inconsistent with collective bargaining.

We believe that in Point I we have so conclusively demonstrated that the President has no inherent power to seize private property, as to make this point entirely unnecessary. However, the Government is so insistent that the President must have some power to deal with emergencies, at least until Congress can act, that we believe we would be remiss in our duties, were we to fail to point out that here Congress has acted. It has not merely "occupied the field," so to speak, and thereby excluded presidential action, assuming he had any residual power to act, but it has acted in such a manner that the President's action is inconsistent and in conflict with the congressional enactment. The President has not acted to fill a vacuum. Instead he has displaced congressional occupation of the field by an inconsistent enactment of his own. This, of course, is absolutely unconstitutional on the part of the President.

The national emergency provisions of the Labor Management Relations Act are modeled upon the emergency board provisions of the Railway Labor Act. Both statutes provide that the President may, in the event of a national emergency, appoint a board of inquiry. If such a board is appointed, there may follow a period during which the parties will be required to refrain from a strike or a lockout.

At the expiration of the cooling off period the parties are free to resort to a show of economic strength.

In enacting the Labor Management Relations Act, Congress rejected seizure provisions on the ground that a seizure would, by its nature, preclude either party from backing up its bargaining demands with a threat of exercise of economic power. The Congress which enacted the Railway Labor Act similarly refrained from including therein any bar upon strikes subsequent to the expiration of the cooling off period, likewise upon the express ground that no genuine collective bargaining was possible unless each of the parties had the right to resort to economic self-help to compel the other to come to terms.

This Court has recently held that Congress, by guaranteeing to workers the right to collective bargaining, had thereby necessarily guaranteed the right to strike as an inherent feature of collective bargaining.

The facts with respect to the course of bargaining negotiations in both the instant case and in the railway seizure case, demonstrate that Congress was correct in its assumption that bargaining negotiations are a sham and a fiction when one of the parties at the bargaining table has no power to inflict any economic loss on the other because it must continue to operate without the right to close down operations either by a strike or a lockout.

ARGUMENT

Relationship of Issues in Cases Nos. 744 and 745 to Issues in Case No. 759

The Brotherhoods in their motion to expedite the consideration of their petition for a writ of certiorari in *Brotherhood of Locomotive Firemen and Enginemen* v. *United States*, No. 759, this Term, requested that the petition be granted and that case set down for oral argument immediately following oral argument in these cases, in order that the decision in the instant cases, which might

constitute a precedent applicable to certain of the issues in case No. 759, be not issued without the petitioners in case No. 759 having an opportunity to present to this Court their position in respect to these issues. This Court instead of granting that request, entered an order permitting the petitioners in case No. 759 to present oral argument and file briefs *amici* with respect to such issues in the instant cases as might be applicable to case No. 759.

We have accordingly carefully limited ourselves to the argument of the two questions presented, which are common to the two cases. However, before turning to those questions we desire at the outset to call attention to various aspects of the issues in case No. 759, which we fear might inadvertently be affected by the decision issued herein should this Court not limit itself strictly to the decision of the two questions presented.

The instant cases, which for convenience herein we shall designate the steel cases, present the issue of the power of the President to seize steel mills over the objection of the owner. Case No. 759, which for convenience we shall designate as the railroad case, presents the issue of the power of the President to seize railroads over the objection of the employees (for purposes of this brief we shall assume, without conceding, that the President has in fact seized railroads, although in Case No. 759, we challenged the seizure as a sham and a fiction).

We believe that from several points of view the employees have rights which the Constitution of the United States guarantees and protects against unconstitutional seizure to the same full extent as the rights asserted by the steel companies.

The steel companies, it is true, own vast plants, real and personal property, which are the traditional private property protected by the Constitution. But the steel companies do not regard the seizure as having the effect of taking this property from them permanently. They do rely on loss of control over the terms and conditions of employment in

the mills for the period of seizure and threatened permanent loss of the millions of dollars which the Government would pay over to employees out of company funds were it to put into effect the wage increases recommended by the Wage Stabilization Board.

We do not make the above distinction between a permanent taking of the steel mills which is not here involved, and a temporary taking away from the owners of control over the labor relations in those mills and the payment to workers out of funds of the companies of amounts which the steel mills have never agreed to pay, as lessening the very serious and fundamental violation of the constitutional rights of the steel mills. We point to the distinction rather as pointing up the closely analogous position of the railroad workers and the steel employers.

The railroad workers have an interest in not working for wages, terms and conditions of employment to which they have not agreed, equal in character and rank, so far as protection by the Constitution is concerned, with the interest of the steel employers in not having their mills operated on labor terms to which they have never agreed. The employers' interest in not having wages, hours, terms and conditions of employment imposed on their operations by unconstitutional methods is certainly of no higher rank than the employees' interest in not being forced by unconstitutional methods to work for wages, hours and working conditions to which they have not agreed. If anything, in view of the fact that the workers' interest involves not only property rights but also human rights, the taking of their labor, "the sweat of his brow, the intelligence of his brain," which admittedly outrank property rights, the employees' constitutional standing is higher than the employers. We mention this merely to avoid any leveling comparisons from the emphasis we herein place on the common interests of employer and employee alike in the constitutional issues now before this Court in the steel cases.

Looking at the employee's interest from a property point of view, we find that his interest in his liberty of contract, his freedom to work only under such terms of employment as he agrees to voluntarily is a property right in every respect the same as the employer's interest in his freedom to contract for terms of employment from the employer's side of the bargaining table.

Mr. Justice Brandeis in *Dorchy* v. *Kansas,* 272 U. S. 306 (1926) at p. 311, said:

> The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful.

An employee's right to sell his services and hold a job is the way he carries on business. In *Ex Parte Wall,* 107 U. S. 265 (1882), the Supreme Court conceded (at p. 289):

> ". . . that an attorney's calling or profession is his property, within the true sense and meaning of the [Fifth Amendment of the] Constitution . . ."

Taking an employee's labor and paying the laborer less than he consents to work for is the same as taking the employer's funds to pay an employee more than the employer agrees to pay. Upon economic analysis labor, though not as tangible as the physical property of the employer, is intangible property. It is labor that makes funds. The seizure of labor as it is being put into productive effort is a seizure of the same sort as a seizure of the finished products of labor, or their converted form, the employer's fund, which come both from the employee's labor and from the employer's managerial genius and his devotion of plant and equipment to the enterprise.

The laborer is robbed by an unconstitutional giving of more of his labor to the employer than the amount of labor he would agree to give for the price paid, equally as much as the employer is robbed by an unconstitutional

paying of more to labor than the employer has agreed to pay.

The issue in the steel cases does not involve any attack upon the admitted right of the state by constitutional methods to fix wages which may result in labor receiving less than it would have agreed to work for or employers paying more than they would otherwise have agreed to pay. That is, the steel case involves no attack upon the regulatory power of the government over labor relations, but rather is concerned solely with the constitutional question of which branch of government has that regulatory power, whether the executive or the legislative. In the railroad case we are concerned with additional constitutional questions:

One of these is whether Congress can delegate the seizure power to the executive without fixing the method, purpose and standards for compensation for the taking, both as it applies to the employer and to the employee. In the instant cases the Brotherhoods have given some consideration to standards for determining compensation due employees for the unjust taking of their labor and paying wages less than the employees would have agreed to work for. The difficulties of determining a standard for compensating the steel companies for their losses due to seizure are equalled, if not exceeded by the parallel problem as to the employees. This issue was injected into the railroad case by the filing by the Brotherhoods of a counterclaim and cross-claim as part of their answer in the district court. In this counterclaim and cross-claim the Brotherhoods pray for a declaration that the seizure orders were invalid and that the employees they represent are not employees of the United States but employees solely of the carriers. In the alternative they prayed that if the Court found these persons were employees of the United States, the court should declare that the United States should not permit the carriers to receive and retain the profits and should enjoin and restrain the carriers from receiving, retaining, and

disbursing any profits from any past, present or future operations during the period of seizure while the employees from whose services the profits were in part derived were employees of the United States. Appropriate motions were made to add the 197 carriers as additional parties, to be named as cross-defendants. The prayer also requested that an accounting should be had of the net profits, in said accounting setting aside and allocating for ordered payment to employees of all such moneys as shall, additional to sums already paid to such employees, fairly and justly compensate each of said employees for the service and labor performed as employees of the United States. The government filed a motion to strike the counter-claim and cross-claim. The district court has not ruled on either the Brotherhoods' motion to add parties or the government's motion to strike. The government's motion to strike the counterclaim and cross-claim was based on the ground it was an unconsented suit against the United States. The arguments presented in the government's brief in support of the motion to strike are strikingly in contrast with the arguments made by the government in Nos. 744 and 745 as to the ease and certainty of an adequate remedy at law for an illegal taking by presidential seizure.

Another issue in the railroad cases is whether either the legislature or the executive may in effect draft labor to be used not for the public purposes but for the private profit of the employer—that is, if there is going to be a seizure in a labor dispute, must not the employer's profits as well as the employees' labor be seized. Several careful studies of the problem of seizure in labor disputes have been made. In listing the requirement for a valid statute, all the studies point to two fundamental requirements: *first,* there must be provided some appropriate method of fixing wages, hours and working conditions during the period of government seizure; and *second,* such a seizure must necessarily be conditioned upon the profits going into the United States Treasury. These two provisions are deemed

essential in order that the seizure shall not plainly collide with the restrictions of the Fifth and Thirteenth Amendments. Eugene C. Gerhart, *Strikes and Eminent Domain,* 30 J. Am. Jud. Soc. 116 (December 1946); Twentieth Century Fund, Labor Committee, *Strikes and Democratic Government* (1947), pp. 27, 30-31; New York University, Fourth Annual Conference on Labor, *Government Seizure in Labor Disputes* (1951), pp. 283, 285-289.

Eugene C. Gerhart in the article just cited states (at pp. 118, 120-121, 122):

> 'Involuntary servitude', prohibited by the Thirteenth Amendment, it is well settled, refers to *personal* servitude, one *private* party to another * * *
> The employees should not be compelled to work for a *private* company's profits while it is under *public* control by the Government. Limiting the company's net profits during Government operation to the fair rental value of its property, the balance to be paid to the Federal Treasury, would accomplish this:
>
> a. It would provide the company with just compensation *for the* deprivation of its beneficial enjoyment of its property.
> b. It would assure the employees that they in reality were working for the *Government* and not for the private company.
>
> * * *
>
> 7. Labor is given an alternative weapon as a substitute for taking away its right to strike; namely, limiting the company's *net* profits. This will put pressure on the company similar to that applied by a strike, to reach an agreement with the employees, * * * (Italics in original.)

The Twentieth Century Labor Committee in the study cited, refers to the article by Mr. Gerhart and states (p. 27):

> The author thinks, and so do we, that to require anyone to work for a *private* employer on the basis of compulsion, either as to hours, wages or working con-

ditions, is an invasion of the right of private contract; (Italics in original.)

The Twentieth Century Labor Committee was composed of the following prominent industrialists, labor leaders and public representatives: William H. Davis, Chairman, William L. Chenery, Howard Coonley, Clinton S. Golden, Sumner H. Slichter, Robert J. Watt, and Edwin E. Witte.

In this connection see *Anderson* v. *Chesapeake Ferry Co.*, 186 Va. 481, 45 S. E. 2d 10, holding that profits belong to the state when it seizes a transportation system shut down by a strike and uses the power of the state to supply a labor force which the transportation system could not itself obtain because of its unwillingness to come to terms with its employees respecting their wages, hours and working conditions. The court held further that just compensation to the employer for the taking should not be based on a supposition that the property taken was a going concern when in fact a strike would have kept the business inoperative had not the state intervened by seizure to provide the only basis upon which labor could be compelled to stay at work.

Still other questions presented in the railroad case are whether the executive, if there has been a valid delegation to it by Congress, may exercise that delegated power in arbitrary and capricious fashion; and whether a judicial decree, based upon arbitrary and capricious executive action, which coerces labor under terms not agreed to and not fixed by due process, violates the Fifth and Thirteenth Amendments to the Constitution of the United States. We shall not discuss those issues here but merely wish to call their existence to this Court's attention.

I.

The President Has No Power Under the Constitution of the United States to Seize Private Property in the Absence of a Valid Congressional Enactment Authorizing the Seizure.

The Executive Orders seizing the steel companies and the railroads, are worded in the phraseology applicable to a taking of property. However, in view of the fact that the orders themselves disclose that the taking is limited to a control of labor relations, including of course the right to use the steel companies' funds to pay increases in wages, the orders would probably have been more realistic, but more obviously unconstitutional, had they instead of purporting to take property, purported to legislate concerning terms and conditions of employment. Thus in the steel cases the president, if he had not wanted to try to support his action by some supposed greater right in the executive to take property than to impose a labor code, could have ordered whatever increase in wages, improved terms of employment, increased fringe benefits he desired and done nothing about seizing the property. In railroads he could have phrased the order as a direction to employees to work for previous wages until he should by order direct new wages.

We shall here confine our discussion of the validity of the President's executive orders to the assumption they constitute a taking of property as they purport to. Their invalidity upon any other basis is so obvious that the government has not attempted to defend them on any other basis.

The term "eminent domain" covers all taking of property by the government whether real, personal, or personal services (*Sackman and Van Brunt,* Nichols on Eminent Domain, 3d ed., Vol. 1, (1950), p. 2, § 1.11):

> Eminent domain is the power of the sovereign to take property for public use without the owner's consent.[8]

[8] *United States-Scott* v. *Toledo,* 36 F. 385. CAA 688.

By the time of Blackstone's Commentaries it was well established in England that the monarch could not take property against an owner's will except when authorized so to do by Act of Parliament. Thus see I Commentaries, (Lewis, 1900) 139-140:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform.

The Constitution of the United States makes no mention of the power of eminent domain. The Fifth Amendment presupposes some power in the federal government to take property for it imposes a limitation upon the taking of property. It reads:

> nor shall private property be taken for public use without just compensation.

The history of the pre-Civil war takings of property is reviewed in *Sackman and Van Brunt*: Nichols on Eminent Domain (3rd ed.), Sec. 1.24, pp. 48-49:

> Originally there was some doubt with respect to the power of eminent domain in the federal government since, it was argued, the United States is a government of delegated powers and the powers of eminent domain had not been specifically granted in the federal constitution. In the early days the federal government's power was exercised without question in the federal courts only insofar as acquisitions within the District of Columbia were concerned. * * *
>
> Because of its reluctance to arouse the animosity of those who favored the theory of state's rights the federal government initiated proceedings in the state courts to ascertain the compensation to be paid upon a federal taking by eminent domain. The judicial reasoning in support of such proceedings by the United States was based upon the theory that such action by the federal government was, in effect, an exercise of the state's power of eminent domain which had been delegated to the federal government.
>
> In 1872 the power was exercised by the United States with the consent of the state wherein the property was located by the bringing of a proceeding in the federal court. (Footnote references omitted.)

In *Burt* v. *Merchants Ins. Co.*, 106 Mass. 356 (1871), the court approved a state statute delegating eminent domain powers to the federal government. The court observed that from a very early period the state legislature had followed the practice of making such delegations to the federal government. For other cases upholding state statutes delegating eminent domain power to the federal government see *Matter of Petition of United States,* 96 N. Y. 227 (1884); *Reddall* v. *Bryan,* 14 Md. 444 (1859); *Gilmer* v. *Lime Point,* 18 Cal. 229 (1861).

With respect to the question of whether the sovereign power of the state to exercise eminent domain powers was vested in legislative branch of the state government as distinguished from the executive branch of the state govern-

ment, the state supreme courts have uniformly applied the rule stated in Blackstone's Commentaries. They hold that the power of eminent domain is "a strictly legislative function". *Sholl* v. *German Coal Co.,* 118 Ill. 427 (1887); *San Joaquin Irrigation Co.* v. *Stevenson,* 164 Cal. 221 (1912); *Londoner* v. *Denver,* 52 Colo. 15 (1912); *Parham* v. *Justices, etc., Decatur County,* 9 Ga. 341 (1851); *Brookville* v. *Metamora Hydraulic Co.,* 91 Ind. 134 (1883); *Sesson* v. *Supervisors,* 128 Ia. 442 (1905); *Aldridge* v. *Tusumbia, ets R. R. Co.,* 2 Stew. & Port. 199 (Alabama, 1832).

In 1875 this Court held that the federal government had the power of eminent domain as an inherent part of its sovereignty. *Kohl* v. *United States,* 91 U. S. 367. Since that date this Court has never had the occasion to determine the precise issue of whether that eminent domain power is vested in the executive to any extent. On two occasions it has stated that a federal taking is valid only where it is pursuant to an act of Congress. In *Hooe* v. *United States,* 218 U. S. 322, 336 (1910), this Court stated:

> The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some Act of Congress, is not the Act of the Government.

In *United States* v. *North American Co.,* 253 U. S. 330, 333, Mr. Justice Brandeis speaking for the Court said:

> In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do either directly by Congress or by the official upon whom Congress conferred the power.

The lower federal courts have on at least three occasions been squarely called upon to rule upon the issue of whether the federal power of eminent domain was solely a legislative power. They have uniformly so held. *United States* v. *Certain Tract of Land,* 79 Fed. 940 (E. D. Pa., 1894); *United States* v. *Rauers,* 70 Fed. 748 (S. D., Ga., 1895); *United States* v. *Montgomery Ward & Co.,* 58 F. Supp. 408

(D. C., N. D., Ill., E. D.) certiorari denied, 324 U. S. 858, reversed on other grounds, 150 F. 2d 369 (CA 7), vacated as moot, 326 U. S. 690. *Cf. Toledo, Peoria & Western* v. *Stover,* 60 F. Supp. 587 (D. C., S. D., Ill.).

In *United States* v. *Certain Tract of Land,* 70 Fed. 940, the United States brought proceedings to condemn certain parts of the battlefield of Gettysburg as a national memorial park. Congress had passed the Gettysburg appropriations Act, providing funds for markers, tablets and paths but had given the executive no express authority to acquire real estate. The petition for condemnation was quashed. The court said (at p. 942):

> The power referred to (taking of property for public use) is, not exercisable at all in the absence of legislative authorization.

In that case the Court mentioned the existence of a federal statute providing the procedure to be used in condemning and stated that in addition to providing the procedure for the taking, Congress must also empower the executive to acquire the property in question. Promptly after the above decision Congress passed a Joint Resolution (June 5, 1894) granting the Secretary of War authority to acquire real estate by purchase or condemnation for the purposes set out in the Gettysburg Appropriation Act. This Court thereafter sustained condemnation under the latter joint resolution. *United States* v. *Gettysburg Electric Railway Co.,* 160 U. S. 668.

It is today hornbook law that eminent domain is exclusively a legislative function. 18 American Jurisprudence, p. 637, Eminent Domain, Sec. 9, states:

> Under the customary division of government power into three branches, executive, legislative and judicial, the right to authorize the exercise of the power is wholly legislative and there can be no taking of private property for public use against the will of the owner without direct authority from legislature.

See also Ann. Cas. 1918 E. 41.

The only power which the President has to take property without prior authorization is limited to seizures made within the theater of war. Such a taking is not legislative in character. Rather it is executive, the act of the Commander-in-Chief of the Armed Forces, in waging war. While a few of the early cases contain language which would seem to indicate that the President's taking may be justified in grave emergencies (see *United States* v. *Russell,* 13 Wall 623, 627 and other cases cited, Gov't. Brief, No. 745, pp. 132-140) these cases were decided at a time when this Court had never sustained in the federal government any power of eminent domain. The government followed the practice, when it needed property, of applying to the states for a delegation to the United States of the states' admitted powers of eminent domain. When it desired to acquire property even for such defense construction as arsenals, munitions dumps and forts the federal government followed the practice of applying to the states for a grant of power to condemn. It is therefore not surprising to find a few early cases seeming to approve a seizure in a very grave emergency, even if beyond the theater of war operations. Now that it is established the federal government itself has the power of eminent domain, there is no longer the need to stretch the war cases beyond their legitimate applicability to the theater of war. Instead of the cumbersome procedure of securing a delegation of power from a state, the federal government can act promptly by appropriate congressional enactment. If, as we believe, the power of domain is strictly legislative, it may be exercised solely by the legislature. In no other field of legislation does the existence of any emergency transfer legislative power to the executive.

The plea that emergencies may be so grave as to require executive action before the Congress has time to act, is a plea of lack of confidence in our constitutional form of government. Even in such matters as labor issues, Congress can and has operated with great speed when it was faced with an emergency.

That the Congress of the United States is able in emergency situations to provide specific standards which meet the constitutional tests while assuring that the transportation requirements of the emergency will not be endangered by strike situations has been demonstrated by the World War I experience.

In 1916 a nationwide rail strike was threatened for September 2nd. President Wilson met with the parties. He became convinced the Brotherhoods' demand for an 8-hour day without reduction of the 10 hours take home pay was sound and that they properly refused to submit the demand to arbitration. Accordingly, on August 29, 1916, President Wilson addressed a joint session of Congress requesting that Congress avert the strike by passing an 8-hour law applicable to railroad workers, which would prohibit any reduction in take home pay. 53 Cong. Rec. 13355-13337. Congress passed the 8-hour law immediately. It was signed by the President on September 3, 1916 (39 Stat. 721, at 436). The strike was thus averted. See *Wilson* v. *New,* 243 U. S. 332, in which the Court in upholding the constitutionality of this 8-hour law recited its history. This history was also repeatedly mentioned on the floor of Congress during the debates leading to the enactment of the Railway Labor Act of 1926 when proponents of the bill defended its failure to provide for compulsory arbitration or to ban strikes. See for instance Representative Barkley's statement at 67 Cong. Rec. 4511-4512. See also 67 Cong. Rec. 4521.

The government in arguing that the executive has some power to take property outside of the theater of war, in emergencies, without the prior authorization of Congress, relies in part on cases as to the power of a public officer to destroy property "in times of great public danger and when the public safety demands it". *United States* v. *Pacific Railroad Co.,* 120 U. S. 227, 238. Gov't. Brief, No. 745 pp. 132-133. The uniform law is that a destruction of property to prevent the spread of fire or flood or other imminent disaster is not a governmental function. Every

private individual has the same power, as part of his right to self protection or to save life or property. The cases holding that a public officer is not liable for destruction of property proceed upon the theory that he acts as a private individual and as such is not liable; *Sackman and Van Brunt:* Nichols on Eminent Domain (3rd ed.) Sec. 1.43.

II.

The President Has No Power to Seize Private Property in Connection with a Labor Dispute When Congress Has Provided in the Labor Management Relations Act and the Railway Labor Act for Retention of Collective Bargaining During National Emergencies, Subject to a Cooling-Off Period, and Rejected Proposals for Seizure —and Other Bars to Econmic Self-Help—as Inconsistent With Collective Bargaining.

If, as we have argued in Point I, the power of eminent domain is a legislative function, then the President has no power to take property except as authorized by Congress. The government argues that although the power to take property is primarily a legislative function, this does not preclude the President from acting in an emergency until Congress has time to act. That argument, which we believe is entirely unsound, would nevertheless give the government no support in the present case, because Congress has already acted. Congress has not only acted, but its action is of such a character as entirely to preclude presidential seizure.

In both the Railway Labor Act (45 U. S. C., 151, *et seq.*), and the Labor Management Relations Act (29 U. S. C., 141, *et seq.*), Congress made specific provision for the manner in which it desired labor disputes to be handled in the event of an emergency. The provisions of the Labor Management Relations Act for the handling of national emergencies was described by its sponsors in Congress as patterned after the provisions of the Railway Labor Act (93 Cong. Rec. 6386). The common features of these two statutes are readily ap-

parent. The Railway Labor Act, as enacted in 1926, provides in Section 10 thereof, that if any dispute between a carrier and its employees could not be adjusted by negotiations, mediation, or proffers of arbitration and threatened "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the President may appoint a board to investigate and report respecting the dispute. It provides further that such a board shall make a report to the President within thirty days from the date of its creation. Section 10 prohibits the parties to the controversy from making any change in the conditions out of which the dispute arose from the date of the creation of the board until the expiration of thirty days after the board has made its report. During the hearings leading to the enactment of the Railway Labor Act, this section was repeatedly described as providing for a sixty-day cooling off period.[6] The Railway Labor Act makes no express provision as to what, if any, course is to be followed at the expiration of the sixty-day cooling off period. The legislative history shows that Congress intended that the employees should be free to strike in support of their collective bargaining demands at the expiration of the period of thirty days following the rendition by the board of its report. Congress rejected amendments which would have extended beyond thirty days the time within which the emergency board would have been required to report (67 Cong. Rec. 4727). The opposition to these amendments was based on the unwillingness of Congress to extend further the time during which employees would be prohibited by law from striking in support of their bargaining demands (67 Cong. Rec. 4662-4664). See also a similar explanation by Mr. Donald Richberg, during the hearings, of the necessity for limiting the emergency board to thirty days within which to report. (Hearings before the Commit-

[6] Hearings before Committee on Interstate Commerce, U S Senate, 69th Cong , 1st Sess , in S 2306, p 14; Hearings before Committee in Interstate and Foreign Commerce, U. S House of Representatives, 69th Cong , 1st Sess. on H. R. 4729, p. 270.

tee on Interstate and Foreign Commerce, House, 69th Cong., 1st Sess., on H. R. 7180, p. 100.)

Indeed, so strong was the feeling against any interference with the right to strike that Congress deliberately refrained from any express limitation on the right to strike even during the thirty days the emergency board was to have to consider a case and the thirty days thereafter. Twice during the debates on the floor of Congress in 1926 the proponents of the bill explained their refusal to write into the law any limitation on the right to strike, by referring to statements made by Mr. Robertson, who then as now was President of the Brotherhood of Locomotive Firemen and Enginemen. Congressman Mapes stated (67 Cong. Rec. 4524):

> Mr. Robertson, in a statement on page 270 of the House hearings, states very clearly what the parties who negotiated this agreement [referring to the agreement reached by the carriers and the labor organizations to support the Howell-Barkley bill] meant by the language employed. I will not take the time to read his statement now, but will include it in my remarks:
> ' * * * In order that the committee might know what motivated or prompted the parties in negotiating this Article 10 * * *
> 'We felt the word "conditions" very clearly described the situation which would be confronting us when a threatened interruption to interstate commerce occurred. The railroads agreed with us that the word "conditions" meant if they threatened, or rather, served notice on us of a desire to reduce wages, they would not be permitted to reduce wages during this 60 days mentioned in Article 10; if we sought an increase in wages or a change in conditions, that is, a change in working rules—we agreed as practical men that we would not, nor would we have any reason, for authorizing a strike unless it were to change those conditions; therefore, we would not authorize a strike, because no strike was ever authorized, except to change conditions. The only exception that there could be would be that if the railroad disobeyed the law, or, rather, disrespected that particular provision and forced arbitrarily a reduction of wages upon the employees, we felt we would then be justified; perhaps, in authorizing a strike if it was necessary to preserve the conditions, but we would not be changing the conditions.'

The second instance in which Mr. Robertson was quoted on the floor of Congress to the same effect appears at 67 Cong. Rec. 4588.

On numerous occasions during the debates on the 1926 Act, its proponents explained on the floor of Congress how inconsistent with the bill it would be to prohibit strikes. Congressman Barkley, the sponsor of the bill in the House, in his opening statement gave a history of the successful efforts of railroad labor over the years to defeat repeated attempts in Congress to write anti-strike provisions into railway legislation (67 Cong. Rec. 4513, 4517).[7] Several

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[7] In 1919, Congress in adopting the Esch-Cummins Act rejected amendments which would have imposed compulsory arbitration and anti-strike provisions. The bill (H. R. 10453, 66th Cong , 1st Sess.,) as it was reported out by committee did not contain any anti-strike provisions (58 Cong Rec 8315) Congressman Webster, in the course of debates, proposed a substitute for the labor provisions of the committee bill (Section 300) Congressman Webster's substitute required compulsory arbitration and contained criminal penalties for strikes during the pendency of the matter in dispute (58 Cong Rec 8480) Anderson proposed a substitute to Webster's substitute Anderson's bill provided no penalties either civil or criminal (58 Cong Rec 8483) Anderson's amendment was adopted (58 Cong Rec 8519) by a voice vote and at 58 Cong Rec 8690, by a record vote By its adoption as a substitute for the Webster amendment, the Webster amendment was rejected The Senate version of the bill contained anti-strike provisions (59 Cong Rec 146). In Conference the House version prevailed in this respect (59 Cong Rec. 3260, 3262) In Conference, the bill was explained as follows (59 Cong Rec. 3262):

> "The House bill contained no enforcement provisions but relied on the voluntary observances by the parties of all decisions made by them The Senate amendment made extensive use of criminal penalties * * * for any person who entered into a conspiracy to restrain the operation of trains in interstate commerce The Conference bill contained no penalty provisions for violation of decisions of the Railway Labor Board * * * ".

Congressman Esch in explaining the bill stated (59 Cong. Rec. 3270):

> "There is nothing in the conference bill of an anti-strike character."

Congressmen asserted that Congress had no power to pass any anti-strike legislation because such legislation would in actual effect deprive workingmen of any real voice in determining their wages, hours or working conditions, and thereby impose involuntary servitude (67 Cong. Rec. 4702-4703, 4705-4723).

The proponents of the Railway Labor Act stated that it preserved the right to strike and would therefore supersede any state law abolishing the right to strike. Thus, during the debates on the floor of Congress in 1926, preceding the adoption of the Railway Labor Act, Congressman Mead stated (67 Cong. Rec. 4721):

> It in no way interferes with the right of any individual state, because it deals with the great interstate commerce function, thus in no way interfering with the sovereign rights of the several states, but if any state is so far backward as to pass anti-strike legislation and force men to work in interstate commerce, it should interfere with such a law. There should be no such state law in free America.

Congressman Shafer, speaking a few minutes later, stated (67 Cong. Rec. 4723):

> Any legislation having for its object the prevention of individual or collective refusal to work is unjust and unconstitutional. * * * As a workman has no defense against an oppressive employer except the threat to leave or the actual leaving of his employment, it would be manifestly unfair and extremely unjust to deprive him of that right. In short, when a worker leaves his employment, individually, or collectively, he exercises only his right to elect upon what terms he may give his labor. To interfere with his right would take away his liberty and freedom and make him a slave.

The Labor Management Relations Act by Sections 206-210 prescribes a course of action which may be followed by the

President of the United States whenever he is of the opinion that (Section 206):

> "a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, * * *

In the contingency of a national emergency such as is described in the above language quoted from Section 206, the President is authorized to appoint a board of inquiry "to ascertain the facts with respect to the causes and circumstances of the dispute" (Section 207 (a)). After the President receives a report from the board of inquiry he may direct the Attorney General to secure an injunction restraining a strike or lockout, where the court finds that such threatened or actual strike or lockout (Section 208 (a)):

> (i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and
>
> (ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

After the issuance of the injunctive order the President is required to reconvene the board of inquiry and secure another report from it, at the end of a sixty-day period, respecting the current position of the parties and the efforts

which have been made for settlement, including a statement of the employer's last offer of settlement (Section 209 (b)).

The National Labor Relations Board is required within the succeeding fifteen days to take a secret ballot of employees on the question of whether they wish to accept the final offer of settlement made by their employer. The National Labor Relations Board is required to certify the results of this secret ballot to the Attorney General within five days thereafter The Attorney General is then required to secure a discharge of the injunction and thereupon the President is required to submit to Congress "a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action" (Section 210). These national emergency provisions of the Labor Management Relations Act were recognized by Congress as establishing a cooling off period with a retention by the employees of the right to strike after the exhaustion of the procedure provided in Sections 206-210.

During the disputes leading to the adoption of the Labor Management Relations Act, Congress considered (93 Cong. Rec. A1007, 3512, 3637-3638, 6295) and rejected seizure as a procedure to be utilized in national emergencies (93 Cong. Rec. 3637-3645). In explaining the rejection of seizure Senator Taft stated (93 Cong. Rec. 3835):

> Basically, I feel that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on *free collective bargaining* * * * that *means that we recognize a freedom to strike* when the question is the improvement of wages, hours and working conditions, when a contract has expired and neither side is bound by a contract. * * * We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, hours and working conditions. But if we impose com-

> pulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy * * *
>
> * * * *
>
> If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, *we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining.* We have done nothing to outlaw strikes for basic wages, hours and working conditions after proper opportunity for mediation.
>
> * * * *
>
> We did not feel that we should put into the law, as a part of the collective bargaining machinery, an ultimate resort to compulsory arbitration, or to *seizure,* or to any other action. We feel that it *would interfere with the whole process of collective bargaining.* If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. (Iatlics supplied.)

This Court has relied upon the above quotation from Senator Taft as showing that the collective bargaining guarantee of the Labor Management Relations Act includes the right to strike and thereby precludes states from enacting anti-strike legislation. In *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, the Supreme Court held the Wisconsin Public Utilities anti-strike act unconstitutional and in conflict with the national policy. The Wisconsin Public Utilities Anti-Strike Act was limited in its application to emergencies and had been utilized by the state in national emergencies such as a national telephone strike which included a stoppage of all telephone service within the

State of Wisconsin. This Court there interpreted the Labor Management Relations Act as preserving collective bargaining as the ultimate method of settling labor disputes even though they reached the magnitude of national emergencies. This Court there stated (at page 394):

> And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law.
>
> Like the majority strike-vote provision considered in *O'Brien,* a proposal that the right to strike be denied, together with the substitution of compulsory arbitration in cases of 'public emergencies,' local or national, was before Congress in 1947. This proposal, closely resembling the pattern of the Wisconsin Act, was rejected by Congress as being inconsistent with its policy in respect to enterprises covered by the Federal Act, and not because of any desire to leave the states free to adopt it.

In *Automobile Workers* v. *O'Brien,* 339 U. S. 454, this Court had similarly invalidated the Michigan Labor Mediation Law.

The collective bargaining guarantees of the Railway Labor Act are the same as those of the Labor Management Relations Act. Section 2, paragraph 4, of the Railway Labor Act was inserted by the 1934 amendments to that Act. This paragraph begins (45 U. S. C. A. 152(4)):

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing.

In *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, this Court speaking of the above sentence said (at p. 346):

> Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the

philosophy of bargaining as worked out in the labor movement in the United States.[6]

[6] Cf. *H. J. Heinz Co.* v. *NLRB,* 311 U. S 514, 523-526.

This Court in the *Order of Railroad Telegraphers* case, then proceeded to cite numerous economic texts to show the characteristics of collective bargaining as worked out in the labor movement in the United States (see footnote 7, page 346).

An examination of "the philosophy of bargaining as worked out in the labor movement in the United States" shows that an indispensable ingredient of collective bargaining is the right to strike for better wages, hours and working conditions. And this Court has so held in a case involving the construction of the collective bargaining provisions of the National Labor Relations Act (29 U. S. C. A. 158 (5)). *Automobile Workers* v. *O'Brien,* 339 U. S. 454, 457.

This Court has often commented on the fact that the collective bargaining provisions of the Railway Labor Act and the National Labor Relations Act are identical in all the respects here relevant and that the cases under one act are authoritative for the construction of the other. As set forth in the above quotation, this Court in the *Telegraphers* case cited and followed the case of *H. J. Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514, 523, 526, in which this Court upheld resort to economic authorities in order to determine the incidents of collective bargaining for the purposes of the National Labor Relations Act, and also *J. I. Case* v. *N. L. R. B.,* 321 U. S. 332, applying that method of construction. For other instances in which the Court has relied on cases under one Act for the construction of the other, see *N. L. R. B.* v. *Jones & Laughlin Co.,* 301 U. S. 1, 33-34, citing *Virginian Ry Co.* v. *System Federation,* 300 U. S. 515, 548-549; *Medo Photo Supply Corp.* v. *N. L. R. B.,* 321 U. S. 678, 683-684, citing and relying on the *Telegraphers* case.

For many years prior to the adoption of the Railway

Labor Act it had been clearly understood as part of "the philosophy of bargaining as worked out in the labor movement in the United States" (321 U. S., at p. 346), that the right to strike was an indispensable element of collective bargaining. Thus, as early as April 1909, in an article by John B. Clark, in the American Economic Association Quarterly, entitled "The Theory of Collective Bargaining" it is stated (pp. 26, 28):

> The strike, sometimes resorted to and at other times held as a possibility, is an indispensable part of collective bargaining * * *

The same author further states (at p. 32):

> Where labor unions are strong and widely extended, and where they are judicious in their demands, an anticipation of a strike usually brings the concession without the use of the last resort, the actual strike itself. The more effective strikes become potential rather than actual.

Consistently in the years since 1909 authors describing collective bargaining have commented on the indispensability to the collective bargaining process of the right to strike. See for instance John R. Commons, *Trade Unionism and Labor problems,* 1921, p. 1; E. T. Hiller, *The Strike,* 1928, p. 206; John R. Commons, *The American Federation of Labor,* Encyclopedia of the Social Sciences, 1930, Vol. II, pp. 28-29; John A. Fitch, *Strikes and Lockouts,* Encyclopedia of Social Sciences, 1934, Vol. XIV, pp. 420 ff.; E. E. Cummins, *The Labor Problem in the United States,* 1935 (2d ed.), pp. 251, 339; Malcolm Keir, *Labor's Search for More,* p. 18; National Labor Relations Board Bull. No. 4, No. 4, *Written Trade Agreements in Collective Bargaining* (Gov't. Print. Off., 1940), pp. 8, 10-11.

David A. McCabe and Richard A. Lester, *Labor and Social Organization,* 1938, pp. 107-108 state:

> Few systems of collective bargaining have been established before the workers proved their ability to

> conduct a formidable strike, or have been maintained without the occasional use of the strike.

John R. Commons, *Institutional Economics,* 1934, p. 854, states:

> * * * Social responsibility is never accepted *effectively* by employers or any other class of individuals, until they are faced by an alternative which seems worse to them than the one they 'willingly' accept. (Italics in original.)

E. E. Cummins, *The Labor Problem in the United States,* 1935 (2d ed.), p. 251, states:

> * * * Without the strike it [the union] feels itself defenseless. Some unions, notably the railroad brotherhoods in their infancy, have thought they could get along without strikes but were soon brought to a realization of their folly; and the railroad brotherhoods though they have not actually engaged in many strikes, have on a number of occasions made forcible use of the threat * * *

In National Labor Relations Board, Bull. No. 4, *Written Trade Agreements in Collective Bargaining* (Gov't. Print. Off., 1940), p. 12, n. 39, it is stated:

> The importance of the strike as a potential device is very well illustrated by the case of the railroads. Although there have been no significant strikes upon the railroads since 1926 (the year in which the Railway Labor Act was adopted), the strike vote and authorization continue to be a part of the collective bargaining procedure.
> Peaceful relations under these conditions are not to be confused with another type of situation in which strikes are absent. 'Smoldering discontent may exist for a long time without coming to a head. Such discontent is reflected in decreased efficiency and an increased cost of production. Even strikes may be preferable, clearing a surcharged atmosphere and affording a basis for a fresh start. Many an industry which has

> had no strikes for years nevertheless has anything but satisfactory industrial relations.' Edwin E. Witte. The Government in Labor Disputes, 1932, pp. 3-4.

So well accepted is it today that there can be no real collective bargaining without the right to strike that we find representatives of employers such as Ira Mosher, Chairman of the Executive Committee of the National Association of Manufacturers, testifying to the same effect in 1947 during the hearings before the Senate Committee on Labor and Public Welfare on the Taft-Hartley bill, S. 1126, 80th Cong., 1st Sess., pp. 940, 950. He said:

> We have to preserve the right to strike if we are going to have good faith collective bargaining over wages, hours, and working conditions * * *.

A committee of prominent industrialists, labor leaders and government officials recently stated (*Twentieth Century Fund, Labor Committee, Strikes and Democratic Government* (1947), pp. 13-14):

> Those processes [the processes of collective bargaining] lose all color of reality if the workers have not the right to reject management's offer and quit, or if management has not the right to refuse the workers' terms and close the plant. It is the overhanging pressure of this right to strike or lockout that keeps the parties at the bargaining table and fixes the boundaries of stubbornness in the bargaining conferences. It sets the limit upon the aggressive and emotional conduct of the negotiations and dominates the situation in the final moments of responsible decision. Unless the negotiating parties are faced with this possibility of a strike or a lockout, and are forced to examine and accept the consequences of their own decision, they are free from the responsibility that makes genuine collective bargaining possible and produces through it creative results.

The Railway Labor Act of 1926, the 1934 amendments thereto, the 1935 National Labor Relations Act and the

1947 Labor Management Relations Act were all based on the premise that the way to protect commerce from obstruction by strikes was not to illegalize strikes for wage, hour and working condition issues but rather to foster collective bargaining backed up by the power of labor to withdraw its services. The legislative background of these statutes reveals that Congress believed that the history of strikes in this country proves that they had occurred repeatedly and would occur repeatedly, irrespective of their legality, unless both employers and employees could go on strike and no court or other governmental agency would interfere. When the latter type of genuine collective bargaining prevailed strikes rarely took place because both parties realized the tremendous gamble they were taking if they did not reach an agreement. See *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, 553-557.

Hearings before Congressional committees upon the 1934 Railway Labor Act amendments and the first Wagner bill introduced before Congress in 1934 were held concurrently. Debates upon the 1934 Railway Labor Act often contained references to the pending "Labor Disputes" bill, the Wagner bill, which with a few amendments was adopted in 1935 as the National Labor Relations Act (*e.g.,* 78 Cong. Rec. 11717, 11720). The evidence produced before the committees of Congress conclusively established that unless the workingman had the legal right to back up his collective bargaining position with a strike, he was subject to whatever dictatorial terms the employer imposed. No law, nothing restrained the employer. And employers unless restrained by the knowledge that the employees could strike without being restrained by injunctions or criminal penalties became dictatorial. Repeated and almost continual sporadic strikes occurred, always punished by law, but never quenching the universal insistence of the American to have some effective voice in the government of his economic life. Courts in upholding the constitutionality of the National Labor Relations Act and the Railway Labor Act

have adverted to this legislative history and summarized it. See *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 33-34, 41-43 and companion cases; *Virginia Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, 553-557.

The premise underlying these Congressional enactments is fully supported by the facts in the railroad industry. From 1926 until the outbreak of World War II there was genuine collective bargaining. There was no doubt but that strikes were legal and could not be enjoined. But after World War II broke out the employers became convinced that they could secure governmental aid in preventing any strike on any carrier of any importance or size. The larger carriers ceased good faith bargaining. They went to the bargaining conferences confident they need make no substantial concessions because labor had no imminently effective power to bring economic pressure to bear to secure the desired concessions. Indeed, the carriers have not only adamantly resisted reasonable demands of the type employees in other industries had already asked and secured, but the carriers have begun to make counter demands which would deprive the workers of provisions in their agreements which were won years ago and preserved over the years by genuine collective bargaining. This was illustrated in Mr. Shield's testimony by his reference to the carriers' demands for the right to eliminate from their agreements the provisions now protecting employees from the carriers' arbitrary establishment of interdivisional runs with the attendant harsh effects on employees who would have to move from their homes and have their seniority rights revised adversely (No. 759, Tr. 888-891). The result has been that since the end of the actual hostilities in World War II, we have had an unprecedented number of railroad strikes, actual and threatened.

The foregoing is fully supported by the reports of the National Mediation Board. The number of strikes from 1934 to 1949 appear in the Sixteenth Annual Report of the National Mediation Board, page 6, as follows:

TABLE A. WORK STOPPAGES IN THE RAILROAD INDUSTRY 1934-49

Year	Number of Stoppages	Number of Workers Involved	Man days idle	
			Number	Percent of estimated working time
1934	0	0	0	0
1935	1	30	60	(1)
1936	2	590	22,900	(1)
1937	6	1,100	26,400	(1)
1938	1	30	130	(1)
1939	0	0	0	0
1940	1	70	570	(1)
1941	5	1,160	22,200	(1)
1942	9	1,340	17,500	(1)
1943	8	3,270	9,230	(1)
1944	12	3,240	25,600	(1)
1945	13	5,790	56,900	0 01
1946	15	356,000	912,000	.20
1947	7	13,900	288,000	.06
1948	12	3,670	108,000	.02
1949	10	49,700	1,180,000	.31

[1] Less than 1/100 of 1 percent

For the two years subsequent to 1949, strikes have continued to increase. In the Sixteenth Annual Report the strikes for the year ending June 30, 1950, are described as follows (p. 3):

> During the year, the number of threatened strikes in the transportation industry was greater than in any previous year in the life of the Act.

There were 16 actual stoppages during that year (*ibid.*, p. 4).

Respecting the next year, the Seventeenth Annual Report of the National Mediation Board states (p. 2):

> Fiscal year 1951 saw the largest number of actual work stoppages by rail and air carrier employees of any year since the Railway Labor Act was passed in 1926, there being 24 such stoppages of record during this period.

The Mediation Board has also given recognition to the interference by the government with the exercise of economic power as a cause of the breakdown of collective bargaining. In its Sixteenth Annual Report the National Mediation Board states (p. 7):

> There are situations from time to time where the employees express a deep concern that the employer has operated under a feeling of assurance that they would be protected by the Government against any use of their economic power, and that such feeling has operated to make negotiations an empty gesture.

The facts with respect to the course of bargaining negotiations under the threat of seizure and under actual seizure as evidenced by the record in the railroad case, No. 759 (see pp. , *supra*) give full support to the Congressional assumption that in the long run free and genuine collective bargaining affords the only sound method of settling basic wages, hours and working conditions. There can be no doubt but what seizure prevents genuine collective bargaining. As Mr. Justive Frankfurter so aptly suggested during the course of the oral argument in these cases, the dissatisfaction which workers express after a settlement reached under seizure consists not merely of the usual complaint that they did not get enough but rather expresses their conviction the settlement is not a collectively bargained one.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should decide that the President has no power to seize private property or personal services without a valid Congressional enactment prescribing the purposes, occasions, methods, extent of taking and mode of compensation. We also urge that this Court should decide that Presidential seizures conflict with the expressed will of

Congress that even in grave national emergencies the right to collective bargaining shall be preserved.

Respectfully submitted,

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May 14, 1952.

APPENDIX A

Pertinent Provisions of the Constitution of the United States

ARTICLE I.

Section 1. *All legislative Powers* herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;

* * *

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles Square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Maga-

zines, Arsenals, dock-Yards, and other needful Buildings—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. * * * *

ARTICLE II.

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

* * *

ARTICLE IV.

Section 2. * * * The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

* * *

ARTICLE VI.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * *

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

* * *

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * *

Amendment XIII.

Section 1. * * * Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.

APPENDIX B

Pertinent Provisions of the Labor Management Relations Act, 1947, 29 U. S. C., 141 et seq.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

"Findings and Policies

"Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly ad-

justment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"Definitions

"Sec. 2. When used in this Act—

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include * * * any person subject to the Railway Labor Act, as amended from time to time.

* * *

"Rights of Employees

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain

from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a) of this title.

(b) It shall be an unfair labor practice for labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) of this title;

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * *

"Limitations

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

* * *

Sec. 206. Whenever in the opinion of the President of the United States a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign

nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1941, as amended (U. S. C. 19, title 15, secs. 49 and 50, as amended), are made applicable to the powers and duties of such board.

Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to

enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 29, secs. 346 and 347).

Sec. 209. (a) Whenever a district court has issued an order under section 208 of this title enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this chapter. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

Sec. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including

the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

* * *

Exemption of Railway Labor Act

Sec. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.''

APPENDIX C

Pertinent Provisions of the Railway Labor Act (45 U. S. C. 151 et seq.):

* * *

Sec. 2 * * * *

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * *

Fourth. Employees shall have the right to originate and bargain collectively through representatives of their own choosing.

* * *

Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both

parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * *

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

* * *

Sec. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: Provided, however, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and

make a report thereon to the President within thirty days from the date of its creation. . . .

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

APPENDIX D

Executive Order No. 10340

DIRECTING THE SECRETARY OF COMMERCE TO TAKE POSSESSION OF AND OPERATE THE PLANTS AND FACILITIES OF CERTAIN STEEL COMPANIES.

Whereas on December 16, 1950, I proclaimed the existence of a national emergency which requires that the military, naval, air and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made throughout the United Nations and otherwise to bring about a lasting peace; and

Whereas American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; and

Whereas the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and

INDISPENSABLE TO PROGRAMS

Whereas steel is likewise indispensable to the carrying out of programs of the Atomic Energy Commission of vital importance to our defense efforts; and

Whereas a continuing and uninterrupted supply of steel is also indispensable to the maintenance of the economy of the United States, upon which our military strength depends; and

Whereas a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof and certain of their workers represented by the United Steel Workers of America, CIO, regarding terms and conditions of employment; and

Whereas the controversy has not been settled through the processes of collective bargaining or through the efforts

of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order No. 10233, and a strike has been called for 12:01 a.m., April 9, 1952; and

Whereas a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and

Whereas in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies as hereinafter provided:

ORDERED AS FOLLOWS

Now, therefore, by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

1. The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation.

2. In carrying out this order the Secretary of Commerce may act through or with the aid of such public or private instrumentalities or persons as he may designate; and all Federal agencies shall co-operate with the Secretary of Commerce to the fullest extent possible in carrying out the purposes of this order.

3. The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties possession of which is taken pursuant to this order shall be operated. The Secretary of Commerce shall recognize the rights of workers to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining, adjustment of grievances, or other mutual aid or protection, provided that such activities do not interfere with the operation of such plants, facilities, and other properties.

ORDINARY COURSE OF BUSINESS

4. Except so far as the Secretary of Commerce shall otherwise provide from time to time, the managements of the plants, facilities, and other properties possession of which is taken pursuant to this order shall continue their functions, including the collection and disbursement of funds in the usual and ordinary course of business in the names of their respective companies and by means of any instrumentalities used by such companies.

5. Except so far as the Secretary of Commerce may otherwise direct, existing rights and obligations of such companies shall remain in full force, and effect, and there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations, and expenditures may be made for other ordinary corporate or business purposes.

6. Whenever in the judgment of the Secretary of Commerce further possession and operation by him of any plant, facility, or other property is no longer necessary or expedient in the interest of national defense, and the Secretary has reason to believe that effective future operation is assured, he shall return the possession to the company in possession and control thereof at the time possession was taken under this order.

7. The Secretary of Commerce is authorized to prescribe and issue such regulations and orders not inconsistent herewith as he may deem necessary or desirable for carrying out the purposes of this order; and he may delegate and authorize subdelegation of such of his functions under this order as he may deem desirable.

HARRY S. TRUMAN.

THE WHITE HOUSE
April 8, 1952.

APPENDIX E

Executive Order No. 10141

POSSESSION, CONTROL AND OPERATION OF THE TRANSPORTATION SYSTEM OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY.

WHEREAS I find that as a result of labor disturbance there are interruptions, and threatened interruptions, of the operations of the transportation system owned or operated by the Chicago, Rock Island & Pacific Railroad Company; that it has become necessary to take possession and assume control of the said transportation system for purposes that are needful or desirable in connection with the present emergency; and that the exercise, as hereinafter specified, of the powers vested in me is necessary to insure in the national interest the operation of the said transportation system.

NOW, THEREFORE, by virtue of the power and authority vested in me by the Constitution and the laws of the United States, including the act of August 29, 1916, 39 Stat. 619, 645, as President of the United States and Commander in Chief of the Armed forces of the United States, it is hereby ordered as follows:

1. Possession control, and operation of the transportation system owned or operated by the Chicago, Rock Island & Pacific Railroad Company (hereinafter referred to as the company) are hereby taken and assumed, through the Secretary of the Army (hereinafter referred to as the Secretary) as of four o'clock, Eastern Standard Time, July 8, 1950; but such possession and control shall be limited to real and personal property and other assets used or useful in connection with the operation of the said transportation system.

2. The Secretary is directed to operate or to arrange for the operation of, the transportation system taken pursuant to this order in such manner as he deems necessary to assure to the fullest possible extent continuous and uninterrupted transportation service.

3. In carrying out the provisions of this order the Secretary may act through or with the aid of such public or private instrumentalities or persons as he may designate,

and may delegate such of his authority as he may deem necessary or desirable. The Secretary may issue such general and special orders, rules, and regulations as may be necessary or appropriate for carrying out the provisions, and to accomplish the purposes, of this order. All Federal agencies shall comply with the orders of the Secretary issued pursuant to this order and shall cooperate to the fullest extent of their authority with the Secretary in carrying out the provisions of this order.

4. The Secretary shall permit the management of the company to continue its managerial functions to the maximum degree possible consistent with the purposes of this order. Except so far as the Secretary shall from time to time otherwise provide by appropriate order or regulation, the board of directors, officers, and employees of the company shall continue the operation of the said transportation system, including the collection and disbursement of funds thereof, in the usual and ordinary course of the business of the company, in the name of the company, and by means of any agencies, associations, or other instrumentalities now utilized by the company.

5. Except so far as the Secretary shall from time to time otherwise determine and provide by appropriate order or regulation, existing contracts and agreements to which the company is a party shall remain in full force and effect. Nothing in this order shall have the effect of suspending or releasing any obligation owed to the company, and all payments of such obligations shall be made to the company by the persons obligated to the company. Except as the Secretary may otherwise direct, there may be made, in due course, payments of dividends on stock and of principal, interest, sinking funds, and all other obligations; and expenditures may be made for other ordinary corporate purposes.

6. Until further order of the President or the Secretary, the said transportation system shall be managed and operated under the terms and conditions of employment in effect on June 24, 1950, without prejudice to existing equities or to the effectiveness of such retroactive provisions as may be included in the final settlement of the dispute between the company and the workers. The Secretary shall recognize the right of the workers to continue their membership in labor organizations, to bargain collectively through

representatives of their own choosing with the representatives of the company, subject to the provisions of applicable law, as to disputes between the company and the workers; and to engage in concerted activities for the purpose of such collective bargaining or for other mutual aid or protection, provided that in his opinion such concerted activities do not interfere with the operation of the transportation system taken hereunder.

7. Except as this order otherwise provides and except as the Secretary may otherwise direct, the operation of the transportation system taken hereunder shall be in conformity with the Interstate Commerce Acts, as amended, the Railway Labor Act, as amended, the Safety Appliance Act, the Employers' Liability Acts, and other applicable Federal and State Laws, Executive orders, local ordinances, and rules and regulations issued pursuant to such laws, Executive orders, and ordinances.

8. Except with the prior written consent of the Secretary, no receivership, reorganization, or similar proceeding affecting the company shall be instituted; and no attachment by mesne process, garnishment, execution, or otherwise shall be levied on or against any of the real or personal property or other assets of the company.

9. The Secretary is authorized to furnish protection for persons employed or seeking employment in or with the transportation system of which possession is taken hereunder; to furnish protection for such transportation system; and to furnish equipment, manpower, and other facilities or services deemed necessary to carry out the provisions, and to accomplish the purposes, of this order.

10. From and after four o'clock, Eastern Standard Time, on the eighth day of July, 1950, all properties taken under this order shall be conclusively deemed to be within the possession and control of the United States without further act or notice.

11. Possession, control, and operation of the transportation system, or any part thereof, or of any real or personal property taken under this order shall be terminated by the Secretary when he determines that such possession, control, and operation are no longer necessary to carry out the provisions, and to accomplish the purpose, of this order.

HARRY S. TRUMAN.

THE WHITE HOUSE
April 8, 1950

APPENDIX F

Executive Order No. 10155

POSSESSION, CONTROL, AND OPERATION OF CERTAIN RAILROADS.

WHEREAS, I find that as a result of labor disturbances there are interruptions, and threatened interruptions, of the operations of the transportation systems owned or operated by the carriers by railroad named in the list attached hereto and made a part hereof; that it has become necessary to take possession and assume control of the said transportation systems for purposes that are needful or desirable in connection with the present emergency; and that the exercise, as hereinafter specified, of the powers vested in me is necessary to insure in the national interest the operation of the said transportation systems:

NOW, THEREFORE, by virtue of the power and authority vested in me by the Constitution and the laws of the United States, including the acts of August 29, 1916, 39 Stat. 619, 645, as President of the United States and as Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

1. Possession, control, and operation of the transportation systems owned or operated by the carriers by railroad named in the list attached hereto and hereby made a part hereof are hereby taken and assumed, through the Secretary of the Army (hereinafter referred to as the Secretary), as of 4 o'clock PM Eastern Standard Time, August 27, 1950; but such possession and control shall be limited to real and personal property and other assets used or useful in connection with the operation of the transportation systems of the said carriers. If and when the Secretary finds it necessary or appropriate for carrying out the purposes of this order, he may, by appropriate order, take possession and assume control of all or any part of any transportation system of any other carrier by railroad located in the continental United States.

2. The Secretary is directed to operate, or to arrange for the operation of, the transportation systems taken under, or which may be taken pursuant to, this order in such manner as he deems necessary to assure to the fullest possible extent continuous and uninterrupted transportation service.

3. In carrying out the provisions of this order the Secretary may act through or with the aid of such public or private instrumentalities or persons as he may designate, and may delegate such of his authority as he may deem necessary or desirable. The Secretary may issue such general and special orders, rules, and regulations as may be necessary or appropriate for carrying out the provisions, and to accomplish the purposes, of this order. All Federal agencies shall comply with the orders of the Secretary issued pursuant to this order and shall cooperate to the fullest extent of their authority with the Secretary in carrying out the provisions of this order.

4. The Secretary shall permit the management of carriers whose transportation systems have been taken under, or which may be taken pursuant to, the provisions of this order to continue their respective managerial functions to the maximum degree possible consistent with the purposes of this order. Except so far as the Secretary shall from time to time otherwise provide by appropriate order or regulation, the boards of directors, trustees, receivers, officers, and employees of such carriers shall continue the operation of the said transportation systems, including the collection and disbursement of funds thereof, in the usual and ordinary course of the business of the carriers, in the names of their respective companies, and by means of any agencies, associations, or other instrumentalities now utilized by the carriers.

5. Except so far as the Secretary shall from time to time otherwise determine and provide by appropriate orders or regulations, existing contracts and agreements to which carriers whose transportation systems have been taken under, or which may be taken pursuant to, the provisions of this order are parties, shall remain in full force and effect. Nothing in this order shall have the effect of suspending or releasing any obligation owed to any carrier affected hereby, and all payments shall be made by the persons obligated to the carrier to which they are or may become due. Except as the Secretary may otherwise direct, there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations; and expenditures may be made for other ordinary corporate purposes.

6. Until further order of the President or the Secretary, the said transportation systems shall be managed and oper-

ated upon the terms and conditions of employment in effect on August 20, 1950, without prejudice to existing equities or to the effectiveness of such retroactive provisions as may be included in the final settlement of the disputes between the carriers and the workers. The Secretary shall recognize the right of the workers to continue their membership in labor organizations, to bargain collectively through representatives of their own choosing with the representatives of the owners of the carriers, subject to the provisions of applicable law, as to disputes between the carirers and the workers; and to engage in concerted activities for the purpose of such collective bargaining or for other mutual aid or protection, provided that in his opinion such concerted activities do not interfere with the operation of the transportation systems taken hereunder, or which may be taken pursuant hereto.

7. Except as this order otherwise provides and except as the Secretary may otherwise direct, the operation of the transportation systems taken hereunder, or which may be taken pursuant hereto, shall be in conformity with the Interstate Commerce Act, as amended, the Railway Labor Act, as amended, the Safety Appliance Acts, the Employers' Liability Acts, and other applicable Federal and State laws, Executive orders, local ordinances, and rules and regulations issued pursuant to such laws, Executive orders, and ordinances.

8. Except with the prior written consent of the Secretary, no receivership, reorganization, or similar proceeding affecting any carrier whose transportation system is taken hereunder, or which may be taken pursuant hereto, shall be instituted; and no attachment by mesne process, garnishment, execution, or otherwise shall be levied on or against any of the real or personal property or other assets of any such carrier; provided that nothing herein shall prevent or require approval by the Secretary of any action authorized or required by any interlocutory or final decree of any United States court in reorganization proceedings now pending under the Bankruptcy Act or in any equity receivership cases now pending.

9. The Secretary is authorized to furnish protection for persons employed or seeking employment in or with the transportation systems of which possession is taken hereunder, or which may be taken pursuant hereto; to furnish protection for such transportation systems; and to furnish

equipment, manpower, and other facilities or services deemed necessary to carry out the provisions and to accomplish the purposes of this order.

10. From and after 4 o'clock PM Eastern Standard Time on the said 27th day of August 1950, all properties taken under, or which may be taken pursuant to, this order shall be conclusively deemed to be within the possession and control of the United States without further act or notice.

11. Possession, control, and operation of any transportation system, or any part thereof, or of any real or personal property taken under, or which may be taken pursuant to, this order shall be terminated by the Secretary when he determines that such possession, control, and operation are no longer necessary to carry out the provisions and to accomplish the purposes of this order.

(s) HARRY S. TRUMAN.

THE WHITE HOUSE
August 25, 1950.