IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 745

CHARLES SAWYER, SECRETARY OF COMMERCE, *Petitioner*

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

and

Application for Stay

MEMORANDUM ON BEHALF OF RESPONDENTS

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The respondents have no objection to the granting of the present petition.

We have here a situation which, as Mr. Sawyer asserts, is "of the gravest national peril" requiring "an immediate resolution in the public interest of the substantive

issues which were sweepingly decided below." (Petition, page 17.)

* * *

Mr. Sawyer's petition for a writ and application for a stay argues these propositions:

1. There should be immediate review of the District Court's injunction because of the tremendous public importance of the questions involved and the pressing need that those questions be answered authoritatively.

2. A stay should be issued which will lift the force of the injunction and permit Mr. Sawyer to direct the operation of the steel industry and to prescribe its labor relations.

3. The District Court's order granting an injunction should be reversed on the ground that (a) it was based upon a decision that the Executive Order, under which Mr. Sawyer purports to act, is invalid and (b) that question should not be reached until a final hearing.

In this argument counsel for Mr. Sawyer moves in two directions at once. On the one hand he asserts that there is a paramount public interest in freeing Mr. Sawyer of any legal restraint and in permitting him to act as he sees fit for the months which could elapse before a hearing and final decision on a permanent injunction. On the other hand it is recognized (Petition, page 30):

> "But a stay can of necessity be only a stop-gap. As long as the ultimate disposition of these cases is in doubt, the respective rights and obligations of all parties affected will be uncertain and the ability of the United States to take steps necessary to protect the nation against any further cessation or impairment of steel production will be a matter of potential controversy."

This inconsistency points up the imperative need for final disposition by this Court now, and for the preservation of the *status quo* pending that disposition so that the

rights of these respondents will not be irretrievably impaired in the meantime. The interests of the respondents, whose rights have been upheld by the District Court, should not be sacrificed while the case is being decided.

As we have said, the respondents here do not oppose the writ prayed by Mr. Sawyer.* But the respondents do object most vigorously to the course of action proposed on behalf of Mr. Sawyer. From every point of view, it is submitted, what is most required by the public interest and by the spirit of our tripartite Constitutional system is that this Court, the ultimate and final judicial authority, should settle the rights and obligations of the parties to this great controversy at the earliest time consistent with the deliberation necessary for wise determination of an issue fundamental to the structure of our government. Otherwise the most serious injury will be suffered not only by the respondents but by all parties concerned in this controversy.

The first and longest step in the contrary course of procedure proposed on behalf of Mr. Sawyer is the issuance of an unconditioned stay. That is the step which would free Mr. Sawyer from all legal restraint for months to come. If that stay is issued, as prayed, Mr. Sawyer will then seek to appropriate the respondents' private funds to grant the Union whatever wage and other concessions he sees fit and to impose on the respondents a new pattern of employment conditions which cannot be undone. This record shows clearly that he threatens to take precisely that course, and that that is the reason that he prays for the stay.

If that long step is taken by this Court, then even if this Court proceeds promptly to a decision of this legal and

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* In the event the writ shall be granted, respondent E. J. Lavino & Company reserves its rights to develop, in connection with any stay or in argument on the merits, the further grounds for relief which are referred to in the footnote on page 5 of the petition in No. 744.

Constitutional controversy, it will be unable effectively to dispose of this case as law and justice may require. Inevitably the respondents would suffer grievous and irreparable injury.

Mr. Sawyer's petition wholly abandons the groundless claim of his counsel in the District Court that if his acts are invalid the steel companies have a remedy under the Federal Tort Claims Act.

And the concession of Mr. Sawyer's counsel in the District Court that the steel companies would have no right to sue for damages in the Court of Claims for the damaging consequences of his acts (if they are not the acts of the United States because invalid) is not modified in Mr. Sawyer's petition. On the contrary Mr. Sawyer's counsel carefully—indeed adroitly—refrains from questioning the authority of *Hooe* v. *United States,* 218 U. S. 322, 335-336 (1910); *United States* v. *North American Transportation & Trading Company,* 253 U. S. 330 (1920); and *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 695 (1949). Those three cases stand squarely for the principle that no suit will lie in the Court of Claims for compensation for an *illegal* taking.*

Finally there is not a word in the Solicitor General's argument in the petition that weakens by one jot the force of this Court's opinion in *American Federation of Labor* v. *Watson,* 327 U. S. 582, 593-595 (1946), to the effect that impairment of the collective bargaining position of a party to a labor dispute is an utterly irreparable and immeas-

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* The petition of Mr. Sawyer does not even refer to those controlling cases which are referred to at pages 10 and 11 of the petition in No. 744. Instead, in footnote 8 on page 21 of Mr. Sawyer's petition, it is simply asserted "Whether or not the Fifth Amendment provides a complete answer to respondents' challenge to the President's action, we think it clearly gives them an adequate legal remedy." Nothing is cited to support that assertion, and no effort is made to deal with the bar to suit in the Court of Claims arising from the fact that an unlawful taking of property by Mr. Sawyer is *not* a taking by the United States.

urable injury; nor is there—nor could there be—any denial that Mr. Sawyer's threatened change in employment conditions, if consummated, would destroy the collective bargaining position of the steel companies in relation to the Union. His acts would raise for all time the level on which the Union would be able to stand in its present and future bargaining with the companies.*

We submit that there is one, and only one, course of action which can be taken if a stay is granted—and that is the attachment to the stay of a condition which would prevent Mr. Sawyer from changing the *status quo* with respect to terms and conditions of employment. This would mean that those conditions could be changed by collective bargaining between the companies and the Union under the Labor Management Relations Act while this Court is considering the case—but could not be changed by fiat of Mr. Sawyer.

No possible injustice would be done by such a condition. The Union, which presumably will not strike while Mr. Sawyer's seizure continues, loses no right. It is true that in the collective bargaining that will continue pending this

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* The Union has made it quite clear that it will treat Sawyer-imposed terms and conditions as a new floor from which to bargain in the future. In the brief *amicus* filed in Nos. 744 and 745 by the United Steelworkers of America, at p. 7, the Union argues that the bargaining position of the respondents will not be impaired because "when the mills are restored to their possession they will have the right and it will again be their duty to bargain with the Union concerning *the then current* wages and working conditions." (Emphasis added.) It is obvious that the Union's view of the matter would be that, having pocketed the gains from the Sawyer-imposed terms, they will trade *from that point* in the future. The abiding effect of labor conditions prevailing during government seizure was recognized by the War Labor Board under the War Labor Disputes Act. That Board customarily consulted with the owners of the plant because of "the likelihood that the period of governmental operation may be short and the effect of the changes may last beyond this period." Opinion of the General Counsel of the War Labor Board, 15 L.R.R.Man. 2578 (1944).

Court's decision the strike threat will not be available. But this Court's decision will come soon. When it comes, if the seizure is invalidated, the Union will have its strike weapon in support of such demands for retroactive wage increases as it may wish to assert. If the seizure is validated, it will be validated *ab initio* and Mr. Sawyer's power to grant the Union's demands with respect to the period during which the case is pending will be all that it could possibly be if an unconditioned stay were issued now.

The only possible argument against attaching the condition—demanded by every consideration of equity toward the steel companies for whose funds Mr. Sawyer is even now reaching to placate the Union—is that the Union will strike against a stay so conditioned. In his memorandum in response to the petition in No. 744 counsel for Mr. Sawyer lays it down bluntly that "Any change in the nature of the stay now in effect would probably result in a new crisis, with danger of still another interruption." (Memorandum on behalf of Respondent in No. 744, page 2). A suggestion that this Court should not do equity because a powerful Union might strike against this Court's action has implications hardly less grave than the basic Constitutional issue in Mr. Sawyer's seizure.

But we need not be concerned about Mr. Sawyer's counsel's suggestion of a threatened strike. The Union itself has filed a brief *amicus* and does not even intimate that it would call a strike if a stay were conditioned as respondents request. Its *only* objection is its assertion that the condition would prevent it from bargaining as to terms and conditions of employment since it would "have no employer with which it can bargain." (Brief *amicus*, page 3.)

This extraordinary statement is altogether without foundation. The Executive Order does not affect the right of the employees to bargain with the steel companies.* In

* We submit that sections 3 and 4 of the Order plainly recognize such right.

fact, immediately after the seizure collective bargaining between the companies and the Union was resumed. The companies are ready and willing to bargain with the Union now. Mr. Sawyer has never suggested that there is any bar to or qualification on the Union's right to bargain with the companies. In the application for a stay filed on Mr. Sawyer's behalf in the Court of Appeals it was stated specifically that one of the consequences of seizure was to accomplish resumption of collective bargaining between the Union and the respondents.* And if there were any shadow of doubt as to the Union's right under the Executive Order to bargain with the companies and, through an agreement thus reached, to determine the terms and conditions of employment, that shadow of a doubt could be laid at rest by a simple change in the terms of that Order or by an express provision in the stay itself.** It is absurd to suggest that the Order or Mr. Sawyer intends to prevent such bargaining. If anything has characterized the arguments in support of the legality of the seizure it is the proposition that the *only* thing that Mr. Sawyer is interested in is the continued operation of the steel plants; his whole case here presupposes that he is *not* interested

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* In paragraph 3 in "Application for Stay Pending Appeal From Order Granting Preliminary Injunction" filed on behalf of Mr. Sawyer in the Court of Appeals in each one of the cases it was stated: "The Government possession under Executive Order No. 10340 had the effect of keeping the steel plants and facilities in operation *while collective bargaining between the plaintiff and the United Steel Workers of America, CIO, looking toward possible agreement and return of the plants and facilities continued . . .* " (Emphasis added.) (R. 443)

** Executive Order No. 10340 does not state specifically as does sec. 6 of Executive Order No. 10155 under which certain railroads have been seized, that the employees have the right to bargain collectively *with the companies.* If that omission is deemed of any significance—and it obviously is not—the stay sought on behalf of Mr. Sawyer could be conditioned on a requirement that Mr. Sawyer recognize the Union's right of collective bargaining with the companies.

in determining the terms and conditions of employment except as that may be necessary to secure such operation; obviously if the Union and the companies reached an agreement between themselves over the terms of employment Mr. Sawyer would be the first to applaud.

CONCLUSION

It must be concluded, therefore, that if a stay is issued a condition therein, as prayed by the respondents, will preserve the bargaining position of the parties, will prevent irreparable injury, and will adversely affect no one. It will maintain the case in a posture permitting equitable disposition by this Court as the law requires.

Respectfully submitted,

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