Adams, Childs, McKaig and Lukens, Williams, Myers & Quiggle, of Counsel.

Copy served April 18, 1952. Charles M. Irelan, U. S. Atty.

[fol. 1039] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT—Filed April 18, 1952

COMMONWEALTH OF PENNSYLVANIA,

County of Philadelphia, ss:

Andrew Leith, being duly sworn, deposes and says:

1. I am a Vice President of E. J. Lavino and Company, the plaintiff in this action, and am familiar with the facts involved in this action.

2. This affidavit is made in support of the application of the plaintiff for a preliminary injunction restraining and enjoining the defendant from taking any steps whatsoever to effectuate and carry out the provisions of Executive Order 10340 issued April 8, 1952, in so far as said Executive Order purports to apply to the plaintiff. The statements hereinafter set forth are true to the best of my knowledge, information and belief.

3. The plaintiff is engaged in the business of the manufacture and sale of basic refractories and ferro-manganese. The plants of the plaintiff which have been seized by the de- [fol. 1040] fendant are as follows: a plant at Plymouth Meeting, Pennsylvania, at which the plaintiff manufactures basic refractories; a plant at Sheridan, Pennsylvania, at which the plaintiff manufactures ferro manganese; and a plant at Lynchburg, Virginia, at which the plaintiff manufactures ferro manganese. The products of all of said plants are standard products and are not made to meet the specifications of particular customers. A large part of the products of said plants is sold to customers who are not

steel producers. Said three plants comprise tracts of land on which are located manufacturing works, fixtures, machinery, equipment, incidental facilities and other property.

4. None of the plaintiff's plants produce steel or steel products.

5. Said plants have been seized by the defendant purporting to act under the provisions of the Executive Order aforesaid, and plaintiff thereby has been deprived of the possession, control and use of said plants and properties to the detriment of the plaintiff.

6. I have caused an examination to be made of the relations between the plaintiff and the Government of the United States in respect of the obligation and duties of the plaintiff, whether arising by contract or otherwise, to furnish articles or materials to the Government. As a result of such examination I find that neither the President of the United States, nor any person acting under his authority, has placed under the provisions of Section 18 of the Selective Service Act of 1948, as amended, (62 Stat. 604, 625, 50 U.S.C. App. Sec. 468) any order for any articles or materials for the use of the Armed Forces of the United States or for the use of the Atomic Energy Commission.

[fol. 1041] 7. Said seizure is predicated solely upon the situation arising out of a controversy between certain companies in the United States producing and fabricating steel and certain of their workers represented by the United Steelworkers of America, C. I. O. (hereinafter called the "Steel workers") regarding terms and conditions of employment, and upon the further circumstance that said controversy had 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 by the President of the United States on December 22, 1951, pursuant to Executive Order No. 10233.

8. The plaintiff was not a party to the controversy which was referred by the President of the United States to the Wage Stabilization Board on December 22, 1951.

9. For the purposes of collective bargaining negotiations under the National Labor Relations Act the plaintiff has never in the past participated, and is not now participating,

in bargaining negotiations carried on by the representatives of the steel companies and the Steelworkers. As the plaintiff is not engaged in the production or fabrication of steel it has never had occasion to participate in the nationwide negotiations between the steel industry and the Steelworkers. The practice of the plaintiff and the Steelworkers has been to make separate collective bargaining agreements which expire after the terms of the collective bargaining agreements negotiated between the steel companies and the Steelworkers.

10. The present three collective bargaining agreements between the plaintiff and the Steelworkers,—each of which covers employees in one of the above mentioned plants of plaintiff,—all expire on January 31, 1952, which is thirty days after the expiration of the collective bargaining agree-[fol. 1042] ments between the steel companies and the Steelworkers. No collective bargaining negotiations have taken place between the plaintiff and any representatives of the Steelworkers regarding terms and conditions of employment under a new collective bargaining agreement.

11. It was not until March 21, 1952, that plaintiff was notified by Philip Murray, President of the United Steelworkers of America, C. I. O., by telegram, that the Steelworkers were ready to "resume" negotiations with the plaintiff on the basis of the Wage Stabilization Board's recommendations made on March 20, 1952, and that the Chairman of the Steelworkers' Negotiating Committee would contact plaintiff's representative immediately to begin negotiations March 24, 1952. Neither the Chairman of the Steelworkers' Negotiating Committee, nor any other person acting on the Steelworkers' behalf, contacted any representative of the plaintiff, and no collective bargaining negotiations were pending between the plaintiff and the Steelworkers at the time of the issuance of Executive Order 10340 on April 8, 1952.

12. On April 4, 1952, William G. Mowery, President, Local #3216, posted at the Plymouth Meeting plant of the plaintiff a notice, the text of which follows. "Contract negotiations between E. J. Lavino and Company and Local Union #3216 will commence Tuesday or Wednesday of next week. In the event a strike takes place in the Basic Steel

Industry on April 8th, employees of E. J. Lavino and Company will not be involved."

13. Three days later (on April 7, 1952) plaintiff received from Philip Murray, President of the Steelworkers, three identical letters, dated April 4, 1952, stating that a strike had been called at plaintiff's plants at Plymouth Meeting, Sheridan and Lynchburg, effective 12:01 A. M. April 9, 1952.

[fol. 1043] 14. As hereinbefore set forth neither the Chairman of the Steelworkers' Negotiating Committee, nor anyone acting on behalf of the Steelworkers, had ever contacted plaintiff with respect to the negotiations proposed by Philip Murray on March 21, 1952. Plaintiff has never refused to participate in such collective bargaining negotiations with the Steelworkers.

15. No agreement which may be reached between steel companies and the Steelworkers on the terms of a new collective bargaining agreement can be determinative of many important terms of collective bargaining agreements between the plaintiff and the Steelworkers.

16. The plant at Plymouth Meeting, Pennsylvania, which produces basic refractories, of necessity, has labor classifications and other methods of doing business which follow the practice of the refractories industry. These classifications and methods differ to such an extent from those prevailing in the steel producing industry that few of the wage rates and job classifications of steel producers apply to the plaintiff's refractories plant at Plymouth Meeting.

17. The plants at Sheridan, Pennsylvania and Lynchburg, Virginia, which make ferro manganese, have classifications similar to some of the classifications used by steel producers, but this is true only of blast furnace operations. In so far as concerns the production of ferro manganese, these plants are in no way comparable as to hourly rates and job classifications with those which prevail in the plants which produce or fabricate steel.

18. The methods of doing business in each of the plaintiff's three plants at Sheridan, Plymouth Meeting and [fol. 1044] Lynchburg necessarily conform closely to conditions which prevail in plants of competitors who do not have collective bargaining agreements with the Steelworkers.

19. While the Government has contended that price relief is not immediately involved in the controversy between the steel companies and the Steelworkers, no fair and equitable agreement can be arrived at between the companies, whose plants have been seized by the defendant, and the Steelworkers without the Government affording relief to the companies with respect to prices. With respect to the plaintiff, an additional ground for price relief arises out of the fact that one of the critical elements in the production of ferro manganese is manganese ore which is imported from foreign countries, which is not subject to price controls imposed by the laws of the United States. Likewise, one of the critical elements in the production of basic refractories is chrome ore, which is also imported from foreign countries and which is not subject to price controls imposed by the laws of the United States. Consequently, in the event that the present controversy between the steel companies and the Steelworkers should be settled by a plan which involves price relief, such relief would not be applicable to plaintiff, which would need special price relief adapted to the conditions of its own business.

20. I am advised by counsel for the plaintiff that recommendations which were made by the Wage Stabilization Board on March 20, 1952, are not of any legal effect and cannot in any way be construed as binding upon the plaintiff. Said recommendations include a wage increase of 12½ cents effective for most of the steel companies January 1, 1952; 2½ cents additional effective June 30, 1952; 2½ cents more on January 1, 1953; various so-called "fringe" benefits and a union-shop provision. The defendant threatens to put such recommendations into effect, in whole or in part, and continue them in effect, in whole or in part, and thereby grant to the Steelworkers increases in wage rates and other benefits which the plaintiff and [fol. 1045] the Steelworkers have not agreed to as a result of collective bargaining negotiations. The plaintiff is thereby threatened with irreparable injury.

21. If said recommendations shall be put into or continued in effect, irreparable injury will result and continue to result even after the plaintiff's properties have been returned to it. This is clear, because as a practical matter it would be impossible for the plaintiff, upon the return of

its properties to it, to recede from any increased wage rates and other "fringe" benefits and to cancel any union-shop provisions which may be put into effect by the acceptance of said recommendations, and which may be applicable to the plaintiff. The plaintiff will be saddled with wage rates and employment conditions from which it will be unable to retreat and which it cannot afford to grant. Plaintiff will have imposed upon it the union-shop which is not traditional in the refractories industry or in the ferro manganese industry, which is highly controversial, which many employees resent as a violation of their personal liberty, and which should be established, if at all, only as the result of collective bargaining negotiations between employer and employees acting through their bargaining representative. Moreover, a union-shop is prohibited by a statute of the State of Virginia, where plaintiff's Lynchburg plant is located. (Sections 40-68 through 40-74 of the Code of Virginia of 1950). The irreparable injury referred to in this paragraph of the Affidavit will be directly attributed to the action of the defendant against which the plaintiff will not have any adequate legal recourse.

22. As heretofore stated, many of the job classifications in plaintiff's plants do not exist in the plants of the steel companies involved in the labor controversy, which is the subject of recommendations made by the Wage Stabiliza-[fol. 1046] tion Board on March 20, 1952. Plaintiff fears that wage increases and "fringe" benefits may be put into effect by the defendant without affording plaintiff an opportunity to be heard thereon and without collective bargaining negotiations between the plaintiff and the Steelworkers.

23. The seizure of the properties of the plaintiff will cause the plaintiff irreparable injury in many respects, of which the following are examples:

(a) The basic refractories and ferro manganese industries are highly competitive and the plaintiff has many trade secrets and methods of doing business which are confidential and which the plaintiff would not under any circumstances be willing to have revealed to its competitors. The agents of the defendant in control of the properties of the plaintiff will have access to such secrets and methods and there is grave danger that they may be revealed to the

competitors of the plaintiff and to others who do not have any right to information regarding them.

(b) The plaintiff over the years has built up substantial relationships with its customers and during the current national defense effort has done its best to maintain such relationships in a way consistent with the requirements of the national defense effort. During any period of seizure by the defendant, the business of the plaintiff will be subject to the control of defendant and his agents who do not have any particular reason for protecting such relationships and there is grave danger that such relationships will be impaired to the irreparable detriment of the plaintiff.

(c) The operation of the business of the plaintiff is highly technical and requires the constant attendance of persons who are thoroughly experienced therein. During any [fol. 1047] period of defendant's control, the operation of the business will be subject to the orders of defendant and his agents, many of whom, doubtless will not have any experience whatsoever in the operation of basic refractories and ferro manganese plants and related facilities. There is grave danger that the seized plants and other facilities of the plaintiff will be irreparably harmed by the orders of defendant and his agents.

(d) The defendant has stated publicly that he would proceed promptly to consider making wage increases to the employees of the plants seized by him. Such threatened unilateral wage increases would supersede the plaintiff's control over its labor relations and result in irreparable injury to it.

Andrew Leith.

Subscribed and sworn to before me this 18 day of April, 1952. Edwin S. Freiling, Notary Public. My Commission Expires March 5, 1953. (Seal.)

Copy served April 18, 1952. Charles M. Irelan, U. S. Atty. J. L.

[fol. 1048] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

AFFIDAVIT OF CHARLES SAWYER—Filed April 24, 1952

CITY OF WASHINGTON,
District of Columbia, ss:

I, Charles Sawyer, first being duly sworn, do hereby depose and say:

1. I am Secretary of Commerce and was Secretary of Commerce on April 8, 1952, the date of issuance of Executive Order 10340 (17 F. R. 3139).

2. That a controversy between the United Steel Workers of America, CIO, and E. J. Lavino & Company was referred to the Wage Stabilization Board by the President on December 29, 1951, under the terms of his original referral of December 22, 1951.

3. That E. J. Lavino & Company was included among the companies listed by Executive Order 10340 which authorized taking possession thereof by me.

4. That on April 8, 1952, I issued Order No. 1 (17 F. R. 3242; 17 F. R. 3360) under said Executive Order taking possession of certain properties of E. J. Lavino & Company for the reason that I deemed such taking necessary.

[fols. 1049-1123] 5. That on April 12, 1952, I excluded from the operation of the aforesaid Order No. 1, "All plants, facilities, and properties other than the Plymouth Meeting Plant, and Sheridan Plant in Pennsylvania, and the Lynchburg Plant at Lynchburg, Virginia, of the E. J. Lavino & Co."

6. After consideration of statements received from E. J. Lavino & Company and from United Steel Workers of America, CIO, I have formed the judgment that at the Plymouth Meeting, Sheridan and Lynchburg plants strikes will take place in the event possession is returned to E. J. Lavino & Company. As the purpose of Executive Order 10340 is to protect the interests of national defense by providing uninterrupted flow of steel and steel products, I have,

therefore, refused to return possession of said plants to E. J. Lavino & Company at the present time.

Charles Sawyer.

Subscribed and sworn to before me this 23rd day of April, 1952. Thomas R. Stewart, Notary Public. (Seal.)

[fol. 1050] Defendants Opposition to Plaintiffs' Motion for Preliminary Injunction (omitted in printing).

[fol. 1124] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE B. GOLD—Filed April 25, 1952

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

George B. Gold, being duly sworn, deposes and says:

1. I am a Vice President of E. J. Lavino and Company, the plaintiff in this action, and am familiar with the facts involved in this action. For many years I have had charge of the collective bargaining negotiations on behalf of the plaintiff with labor organizations representing hourly workers in plaintiff's plants.

2. I have read the affidavit of Andrew Leith, a Vice President of the plaintiff, verified the 18th day of April, 1952, and desire to supplement the facts set forth in his affidavit with respect to the differences between the conditions in the industries involved in the plaintiff's plants, of which the defendant has purported possession, and in the plants of steel producers seized by the defendant.

3. As set forth in said affidavit of Andrew Leith, the plaintiff is not engaged in the production or fabrication of steel (Par. 16). The products of all of the plaintiff's plants [fol. 1125] are standard products and are not made to meet

the specifications of certain customers. A large part of the products of said plants is sold to customers who are not steel producers (Par. 3). For example, in the case of basic refractories, the product is sold, not only to steel producers, but to producers of power, cement, paper, nickel and copper.

4. Hereto attached, marked Exhibit A and made a part hereof, is a tabulation showing with respect to each of the plaintiff's plants at Plymouth Meeting, Pennsylvania, Sheridan, Pennsylvania and Lynchburg, Virginia: (a) job titles; (b) the wage rate for each job; and (c) the number of employees in each job.

5. To the best of deponent's knowledge the content of the jobs shown in Exhibit A is not the same as the content of jobs in the steel industry, except as to a limited number of jobs in the blast furnace operations of the plaintiff conducted at plaintiff's plants at Sheridan, Pennsylvania, and Lynchburg, Virginia, and as to the latter jobs, there are variations in job content.

6. Plaintiff's principal competitors in the production of basic refractories are General Refractories Company and Harbison Walker Refractories Company, and the hourly workers of said competitors' plants are not represented by the United Steelworkers of America.

7. Plaintiff's principal competitors in the production of ferro manganese, aside from two steel producers, are not engaged in the production or fabrication of steel and their hourly workers are not represented by the United Steelworkers of America.

8. No agreement which may be reached between the steel producers and the Steelworkers on the terms of a new collective bargaining agreement can be determinative of [fol. 1126] the terms of a new collective bargaining agreement between the plaintiff and the Steelworkers. In order to preserve the right of the plaintiff's and the Steelworkers to engage in collective bargaining, as provided in the National Labor Relations Act and in the Labor Management Relations Act of 1947, representatives of the plaintiff and the Steelworkers will necessarily have to consider proposals which will be advanced by the plaintiff and by the Steelworkers. The representatives of the plaintiff have

always been willing to engage in collective bargaining with the Steelworkers, and are now prepared to do so.

9. If the defendant directs the plaintiff to make any increases in wage rates in any of plaintiff's plants, the plaintiff will be put at a great disadvantage with respect to its competitors who do not have collective bargaining agreements with the Steelworkers and whose contracts with their labor organizations have not expired.

10. In Paragraph 19 of said affidavit of Andrew Leith reference is made to the necessity for price relief to compensate for any wage increases which may be put into effect in the plants of steel producers. Whether wage increases in the plants of the steel producers become effective by direction of the defendant or by a settlement agreement between the steel producers and the Steelworkers, involving an increase in the ceiling price of steel products,—such relief would be inapplicable to the plaintiff either with respect to basic refractories or ferro manganese. The inapplicability of any price relief granted to the steel producers arises out of the facts that (a) the products of that industry are dissimilar from the products of the plaintiff, (b) the increased costs of ingredients imported from foreign countries, not subject to price control, are a large [fol. 1127] factor in the prices of plaintiff's products, and (c) there is a wide difference in wage classifications of the steel producers and of the plaintiff.

George B. Gold.

Subscribed and sworn to before me this 23rd day of April, 1952. John T. Carroll, Notary Public. My Commission Expires March 7, 1953. Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia. (N. S.)

Copy served by me at Mr. Taylor's office on April 23, 1952.
J. C. Peacock, Attorney for Plaintiffs.

[fol. 1128]

EXHIBIT A TO AFFIDAVIT

Sheridan, Pa. Plant—Payroll Ending 4/13/52

(Rates Effective: December 1, 1950)

Job. No.	Job Title	No. of Men on Job	Rate
1	Locomotive Engineer	2	$1.54
2	Locomotive Fireman	1	1.35
3	Brakeman	2	1.41
4	Trestleman	2	1.35
5	Crane Operator (Yard)	3	1.54
6	Crane Fireman	3	1.35
7	Laborer	39	1.27
8	Skipman	4	1.37
9	Scaleman	4	1.37
10	Keeper	4	1.48
11	First Helper	4	1.41
12	Second Helper	4	1.36
13	Third Helper	4	1.34
14	Stove Tender	5	1.44
15	Pumpman	4	1.33
16	Blowing Engineer	5	1.49
17	Cinder Snapper	4	1.37
18	Cinder Engineer	3	1.49
19	Iron Carrier	10	1.35
20	Cast House Laborer (Mud Man)	2	1.31
21	Boiler Fireman	4	1.35
[fol. 1129]			
22	Water Tender	4	1.44
23	Cast House Crane Operator	1	1.41
24	Stock House Laborer (Coke Cleaner)	4	1.27
25	Carpenter	1	1.335
26	Welder's Helper		1.36
27	Welder Leader	1	1.64
28	Traxcavator Operator	1	1.35
29	Blacksmith	1	1.48
30	Blacksmith Helper	1	1.36
31	Store House Man	1	1.30
32	Time Clerk	1	1.33
33	Pipefitter	1	1.48
34	Water Softening Plant Operator	1	1.35
35	Machanic "A" (Electrical)	1	1.48
36	Mechanic "B" (Boiler Cleaner & Washer)	1	1.36
37	Gas Man Leader	1	1.34
38	Track Gang Leader	1	1.37
39	Mechanic Helper	2	1.35
40	General Maintenance Man (Safety and Maintenance)	1	1.43
41	Watchman	4	1.30
42	Laboratory Helper	1	1.34
[fol. 1130]			
43	Boilermaker	1	1.52
44	Janitor	1	1.27
45	Truck Driver	2	1.35
47	Chauffeur	2	1.33
49	General Repairman "B"	1	1.41
50	Mechanic "B" (Diesel Shovel Operator)	1	1.48
51	Machinist "A" (Machinist Leader)	1	1.64
52	Tube Blower	2	1.30
53	Painter	1	1.30
55	Gas Men	3	1.30
	Laboratory Ass't. (Part Time)	1	1.44

[fol. 1131]

Lynchburg, Va. Plant—Payroll Ending 4/13/52

(Rates Effective: December 1, 1950)

Job. No.	Job Title	No. of Men on Job	Rate
1	Locomotive Engineer	1	$1.46
2	Locomotive Fireman	2	1.28
3	Brakeman	1	1.35
4	Trestleman	1	1.28
5	Crane Operator	3	1.46
6	Crane Fireman	4	1.28
7	Laborer	19	1.175
8	Skipman	4	1.35
9	Larry Car Operator	4	1.35
10	Keeper	5	1.42
11	First Helper	4	1.35
12	Second Helper	4	1.29
13	Cast House Laborer	1	1.25
14	Stove Tender	4	1.37
15	Pumpman	4	1.28
16	Blowing Engineer	4	1.43
17	Cinder Snapper	4	1.25
18	Potman	4	1.30
19	Cinder Engineer	5	1.43
20	Iron Carrier	12	1.29
21	Mud Man	1	1.23
[fol. 1132]			
22	Boiler Fireman	4	1.28
23	Boiler Fireman Helper	4	1.225
24	Boiler Cleaner	1	1.29
25	Boiler Cleaner Helper	1	1.225
26	Water Tender	4	1.37
27	Craneman (Cast House)	1	1.46
28	Carpenter	2	1.385
29	Carpenter Helper	0	1.275
30	Gas Man	1	1.29
31	Repairman Helper B	2	1.24
32	Watchman	4	1.22
33	Laboratory Helper	1	1.42
34	Janitor	1	1.175
35	Truck Driver	1	1.28
36	Machinist B	1	1.46
37	Repairman A	2	1.46
38	Shovel Operator	1	1.42
39	Boiler Maker	1	1.45
40	Sample Boy	1	1.25
41	Blacksmith	1	1.42
42	Blacksmith Helper	1	1.29
43	Repairman Helper A	1	1.35
44	Pipefitter	1	1.42
[fol. 1133]			
45	Moulder (Part Time)	1	1.24
46	Bulldozer Operator	1	1.35
47	Oiler	4	1.36
48	Bricklayer (Part Time)	1	1.56
49	Painter	1	1.22
—	Gas Man Helper	1	1.225

[fol. 1134]

Plymouth Meeting, Pa. Plant—Payroll Ending 4/13/52

(Rates Effective: December 1, 1950)

Job. No.	Department	Job Title	No. of Men on Job	Rate Min.	Rate Max.
	Ore Mill	Incentive Men	57	$1.28	$1.67
87	"	Warehouse Clerk	1		1.37
61	"	Maintenance 2nd Class	1		1.46
61	"	Maintenance 3rd Class	1		1.43
	"	Sub-Foreman	1		1.60
122	Technical	Chem. Lab. Helper 1st Cl.	3		1.49
122 A	"	Chem. Lab. Helper 2nd Cl.	1		1.37
118	"	Physical Lab. Sub-Foreman	1		1.63
120	"	Physical Lab. Assistant	8		1.40
121	"	Physical Lab. Helper	5		1.34
113	"	Physical Lab. Sampler	2		1.43
114	"	Screen Test Oper.	3		1.43
117	"	Welder	1		1.56
119	"	Furnace Oper. 1st Cl.	2		1.56
119 A	"	Furnace Oper. 2nd Cl.	1		1.40
124	"	Photographer 1st Cl.	1		1.40
126	"	Instrument Man	1		1.63
	"	Instrument Man 2nd Cl.	1		1.49
	"	Janitress (Part Time)	1		1.03
	"	Petrographic Lab. Tech.	1		1.43
114 A	Ore Mill	Tech. Samplers	8		1.34
			101		

[fol. 1135]

89	Machine Shop	Mach. 1st Cl.	6		1.86
90	"	Mach. 2nd Cl.	2		1.56
91	"	Mach. Helper	1		1.34
92	"	Layer Out	2		1.75
93	"	Welder	2		1.63
94	"	Blacksmith	1		1.67
	"	Asst't. Foreman	1		1.86
127	Storeroom	Stores Ledger Clerk	1		1.46
128	"	Storeroom Clerk	4		1.46
131	"	Station Wagon Opr.	1		1.37
130	"	Office Janitor	1		1.28
	"	Weight Master	1		1.52
98	Construction	Welder	2		1.67
95	"	Millwright 1st Cl.	3		1.83
96	"	Millwright 2nd Cl.	5		1.49
99	"	Bricklayer	1		1.60
100	"	Carpenter 1st Cl.	2		1.71
97	"	Mechanics Hlpr.	7		1.37
104	"	Laborer	8		1.28
96 A	"	Painter 1st Cl.	1		1.52

[fol. 1136]

103	"	Truck Driver	1		1.37
103 A	"	Truck Driver (Shipping)	1		1.46
105	Electrical	Electrician 1st Cl.	8		1.86
106	"	Electrician 2nd Cl.	2		1.52
107	"	Electrician 3rd Cl.	2		1.46
108	"	Electrician Helper	3		1.34
109	"	Elect. Truck Repairman	3		1.63
		Departmental Total	72		

Plymouth Meeting, Pa. Plant—Payroll Ending 4/13/52

(Rates Effective: December 1, 1950)

Job. No.	Department	Job Title	No. of Men on Job	Rate Min.	Rate Max.
	Brick Plant				
10	Grinding Unit	Unit Oper. 1 & 2	4		1.67
9	"	R. R. Mill Oper.	3		1.40
8	"	Screen Oper.	8		1.31
6	"	Crusher Oper.	2		1.31
7	"	Yard Man	2		1.28
5	"	Shovel Oper.	2		1.37
12	"	Unit Runner #3	0		1.46
11	"	Dryer Oper.	4		1.28
30	Brick Plant General	Maint. Gen. 1st Cl.	4		1.86
[fol. 1137]					
31	General	Maint. Gen. 2nd Cl.	3		1.56
32	"	Maint. Gen. 3rd Cl.	3		1.43
35	"	Track Man	6		1.34
23	Press Room	Press Maint. 1st Cl.	3		1.63
25	"	Press Maint. Hlpr.	4		1.34
13	"	Larry Oper.	2		1.52
15	Press Room	Pan Helper	1		1.28
16	"	Hopper Tender	5		1.28
20	"	Press Helper	3		1.31
20 A	"	Car Handler	5		1.31
19	"	Off Bearer 2nd Cl.	6		1.37
17	"	Sub-Foreman or Inspector	7		1.71
27	"	Clean-up Man	6		1.37
21	"	Vibrator Press Oper.	5		1.37
22	"	Vibrator Press Helper	2		1.28
33 A	"	Greaser	3		1.31
29	"	Temper Tester	1		1.28
28	"	Laborer	21		1.28
27 A	"	Relief Man	..		....
[fol. 1138–1142]					
45	Tunnel Kilns	Maintenance 1st Cl.	2		1.86
46	" "	Maintenance 2nd Cl.	2		1.56
47	" "	Maintenance 3rd Cl.	1		1.43
48	" "	Maintenance Helper	3		1.34
41	" "	Fireman 1st Cl.	4		1.90
42	" "	Fireman 2nd Cl.	8		1.63
43	" "	Fireman 3rd Cl.			
44	" "	Fireman Helper	3		1.34
53	" "	Car Repair 1st Cl.	4		1.37
54	" "	Car Repair 2nd Cl.	1		1.31
49	" "	Bricklayer 1st Cl.	1		1.63
50	" "	Bricklayer 2nd Cl.	2		1.49
51	" "	Bricklayer 3rd Cl.			
52	" "	Bricklayer Helper	6		1.34
55	" "	Brick Cutter	4		1.31
36	" "	Clerk	4		1.37
37	" "	Sub-Foreman	1		1.63
55 A	" "	Janitor	4		1.28
	" "	Head Janitor	2		1.31
		Incentive	70	2.32	2.64
		Grand Total	410		

[fol. 419] Civil No. 1550-52

No. 11,410

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a Body Corporate, Youngstown, Ohio; THE YOUNGSTOWN METAL PRODUCTS COMPANY, A Body Corporate, Youngstown, Ohio

v.

CHARLES SAWYER, The Westchester, 4000 Cathedral Avenue, N. W., Washington, D. C.

[fol. 419] Complaint for injunction and for a declaratory judgment (Omitted in printing).

[fol. 425a] Exhibit A. Executive Order (Omitted in printing).

[fol. 426] Summons and service (Omitted in printing).

[fol. 427] Affidavit of Walter E. Watson (Omitted in printing).

[fol. 431] IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed April 9, 1952

Come now the plaintiffs, by their undersigned attorneys and move the Court, upon the basis of the verified complaint and affidavit of Walter E. Watson filed herein, for a temporary restraining order without notice to the defendant, because it clearly appears from specific facts shown by said complaint and affidavit that immediate and irre-

parable injury, loss and damage will result to plaintiffs from the unlawful acts of the defendant before notice can be served and a hearing had thereon.

The acts complained of, against which a restraining order is desired, are set forth in the verified complaint.

John C. Gall, John J. Wilson, J. E. Bennett, Attorneys for Plaintiffs

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[fol. 432] Motion for preliminary injunction (Omitted in printing).

[fol. 433] Memorandum in support of motion (Omitted in printing).

[fol. 434] Statement by Secretary of Commerce, Charles Sawyer following the President's Directive (Omitted in printing).

[fol. 434a] Telegram from Charles Sawyer (Omitted in printing).

[fol. 435] Telegram dated April 8, 1952 Charles Sawyer to Philip Murray (Omitted in printing).

[fol. 435a] Order No. 1 (Omitted in printing).

[fol. 436] Notice of taking of possession by United States of America (Omitted in printing).

[fol. 437] IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

ORDER—Filed April 10, 1952

This cause came on to be heard on April 9, 1952, and the Court after hearing the arguments of counsel for the parties and being of the opinion that plaintiffs' application for a temporary restraining order should be denied, it is hereby

Ordered that plaintiffs' application for a temporary restraining order be, and the same hereby is, denied.

Alexander Holtzoff, United States District Judge.

Dated this, the 10th day of April, 1952.

(N)

[fol. 438] Opposition to motion for a preliminary injunction, attachments and affidavits in support (omitted in printing).

[fol. 263] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1624-52

UNITED STATES STEEL COMPANY, 525 William Penn Place, Pittsburgh, Pennsylvania, Plaintiff,

v.

CHARLES SAWYER, Department of Commerce, Washington, D. C., Defendant

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[fol. 263] Complaint for declaratory judgment and injunctive relief (Omitted in printing).

[fol. 274a] Exhibit A. Telegram from Charles Sawyer (Copy) (Omitted in printing).

[fol. 274b] Exhibit B. Order No. 1 (Copy) (Omitted in printing).

[fol. 274c] Exhibit C. Executive Order (Copy) (Omitted in printing).

[fol. 275] Motion for preliminary injunction (Omitted in printing).

[fol. 277] Points and authorities in support of motion (Omitted in printing).

[fol. 279] Amendment No. 1 to complaint (Omitted in printing).

[fol. 281] [File endorsement omitted]

NOTICE OF SPECIAL APPEARANCE—Filed April 24, 1952

The defendant, appearing specially through his undersigned attorneys, respectfully represents to this Court as follows:

1. The above-entitled case is one of 10 suits involving 17 plaintiffs which have been instituted in this Court against this defendant challenging the Government possession of steel company plants and facilities pursuant to Executive Order 10340, 17 F.R. 3139.

2. Motions for preliminary injunctions have been filed by the plaintiffs in each case.

3. In order to expedite the hearings of these motions and to avoid multiple hearings, the defendant, waiving his rights under Rule 9 of this Court's Rules of Procedure, has consented to a consolidated hearing on April 24, 1952 of all said motions. He has accordingly filed in this Court, or will file prior to the date of hearing, in each case a memorandum of points and authorities in opposition to the motions for preliminary injunctions despite the fact that the five day period

provided for by this Court's rules has not elapsed in every case.

4. The instant plaintiff has instituted 2 suits against this defendant and filed a motion for preliminary injunction in each of these suits. In the above-entitled case, plaintiff has served the defendant with a 20-day summons; in Civil No. 1625-52, the plaintiff has served the defendant with a 60-day summons.

5. The defendant believes that the service upon him of a 20-day summons in the instant case is invalid under Rule [fols. 282-403] 12(a) of the Federal Rules of Civil Procedure. The defendant wishes to make it clear that he, by appearing to oppose the motions for preliminary injunctions at a consolidated hearing, is not thereby waiving his right to file a motion to quash the return of service in the instant suit.

Wherefore the defendant respectfully states that the filing of his memorandum of points and authorities in opposition to the instant motion for preliminary injunction does not constitute a general appearance, and that the defendant will, in due course, promptly move to quash the return of service in the instant case.

Holmes Baldridge, Assistant Attorney General. Marvin C. Taylor, Samuel D. Slade, Benjamin Forman, Herman Marcuse, Attorneys, Department of Justice.

[fol. 283] Opposition to motion for a preliminary injunction, attachments, and affidavits in support (Copies) (Omitted in printing).

[fol. 369] Affidavit of John A. Stephens (Omitted in printing).

[fol. 386] Affidavit of Wilbur L. Lohrentz (Omitted in printing).

[fol. 395] Affidavit of Lewis M. Parsons (Omitted in printing).

[fols. 404-415] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS OR, IN LIEU THEREOF, TO QUASH THE RETURN OF SERVICE OF SUMMONS—Filed April 29, 1952

The defendant, appearing specially through his undersigned attorneys, moves the Court to dismiss the action, or in lieu thereof to quash the return of service of summons on the ground that the defendant is entitled under Rule 12(a) of the Federal Rules of Civil Procedure to a period of sixty days after the service upon him of the complaint in which to answer or otherwise plead.

Holmes Baldridge, Assistant Attorney General, Marvin C. Taylor, Samuel D. Slade, Benjamin Forman, Herman Marcuse, Attorneys, Department of Justice.

[fol. 411] Motion to withdraw verbal amendment and to proceed on the basis of motion for preliminary injunction—granted (Omitted in printing).

[fol. 712] Civil No. 1539-52

No. 11,408

REPUBLIC STEEL CORPORATION, A New Jersey Corporation with Principal Offices in Republic Building, Cleveland, Ohio

v.

CHARLES SAWYER, Weschester Apartments, Washington, D. C.

[fol. 712] Complaint for injunction and for a declaratory judgment and other relief (Omitted in printing).

[fol. 719] Affidavit of John M. Schlendorf (Omitted in printing).

[fol. 723] Summons and service (Omitted in printing).

[fol. 725] Motion for preliminary injunction (Omitted in printing).

[fol. 727] Memorandum of points and authorities (Omitted in printing).

[fol. 728] IN THE UNITED STATES DISTRICT COURT

[File endorsement omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed April 9, 1952

Comes now the plaintiff, Republic Steel Corporation, by its attorneys below named, and moves the Court, upon the basis of the affidavit of John M. Schlendorf, filed herein, for a temporary restraining order without notice to the defendant, because it clearly appears from specific facts shown by said affidavit that immediate and irreparable injury, loss and damage will result to plaintiff from the unlawful acts of the defendant before notice can be served and a hearing had thereon, restraining said defendant

(a) From taking any steps or continuing to take any steps whatsoever to effectuate and carry out the provisions of the Executive Order issued April 8, 1952, by the President of the United States insofar as said Executive Order is intended to apply to the plaintiff herein, its officers, agents, and the control and management of its properties.

(b) From molesting or interfering with plaintiff or doing any act or thing which would prevent or tend to prevent [fol. 729] the plaintiff, its officers, agents and employees from operating the plaintiff's said properties for its own account.

(c) From in any respect changing the wages or other terms or conditions of employment in effect at the properties of the plaintiff at the time of issuance of said Executive Order.

(d) From interfering in any other way with the plaintiff's rights of ownership and control of its business and properties.

Hogan & Hartson, by Edmund L. Jones, Howard Boyd; Gall, Lane and Howe, By John C. Gall; Jones, Day, Cockley and Reavis, By Luther Day.

Thomas F. Patton, General Counsel of Republic Steel Corporation.

Proof of service (Omitted in printing).

[fol. 730] Order denying (Omitted in printing).

[fol. 731] Affidavit of Eugene Magee (Omitted in printing).

[fol. 735] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NOTICE OF SPECIAL APPEARANCE—Filed April 24, 1952

The defendant, appearing specially through his undersigned attorneys, respectfully represents to this Court as follows:

1. The above-entitled case is one of 10 suits involving 17 plaintiffs which have been instituted in this Court against this defendant challenging the Government possession of steel company plants and facilities pursuant to Executive Order 10340, 17 F. R. 3139.

2. Motions for preliminary injunctions have been filed by the plaintiffs in each case.

3. In order to expedite the hearings of these motions and to avoid multiple hearings, the defendant, waiving his rights under Rule 9 of this Court's Rules of Procedure, has consented to a consolidated hearing on April 24, 1952 of all said motions. He has accordingly filed in this Court, or will file prior to the date of hearing, in each case a

memorandum of points and authorities in opposition to the motions for preliminary injunctions despite the fact that the five day period provided for by this Court's rules has not elapsed in every case.

4. The instant plaintiff has instituted 2 suits against this defendant and filed a motion for preliminary injunction in each of these suits. In the above-entitled case, plaintiff has served the defendant with a 20-day summons; in Civil No. 1647-52, the plaintiff has served the defendant with a 60-day summons.

5. The defendant believes that the service upon him of a 20-day summons in the instant case is invalid under Rule [fol. 736] 12(a) of the Federal Rules of Civil Procedure. The defendant wishes to make it clear that he, by appearing to oppose the motions for preliminary injunctions at a consolidated hearing, is not thereby waiving his right to file a motion to quash the return of service in the instant suit.

Wherefore the defendant respectfully states that the filing of his memorandum of points and authorities in opposition to the instant motion for preliminary injunction does not constitute a general appearance, and that the defendant will, in due course, promptly move to quash the return of service in the instant case.

Holmes Baldridge, Assistant Attorney General; Marvin C. Taylor, Samuel D. Slade, Benjamin Forman, Hermon Marcuse, Attorneys, Department of Justice.

Receipt of copy acknowledged this 23rd day of April, 1952. ————, Attorney for Plaintiff.

[fol. 737] Stipulation (Omitted in printing).

[fol. 739] Opposition to motion for a preliminary injunction, attachments and affidavits in support (Copies) (Omitted in printing).

[fol. 813] IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS OR, IN LIEU THEREOF, TO QUASH THE RETURN OF SERVICE OF SUMMONS—Filed April 29, 1952

The defendant, appearing specially through his undersigned attorneys, moves the Court to dismiss the action, or in lieu thereof, to quash the return of service of summons on the ground that the defendant is entitled under Rule 12(a) of the Federal Rules of Civil Procedure to a period of sixty days after the service upon him of the complaint in which to answer or otherwise plead.

Holmes Baldridge, Assistant Attorney General.
Marvin C. Taylor, Samuel D. Slade, Benjamin Forman, Herman Marcuse, Attorneys, Department of Justice.

[fol. 820] Application for stay of the order granting preliminary injunction (Omitted in printing).

[fol. 822] Designation of record (Omitted in printing).

[fol. 823] Order to transmit original record (Omitted in printing).

[fol. 660] Affidavit of Herman J. Spoerer (Omitted in printing).

[fol. 663] Notice of special appearance (Omitted in printing).

[fol. 667] Motion to dismiss or, in lieu thereof, to quash the return of service of summons (Omitted in printing).

[fol. 1506] [Stamp:] Filed May 6, 1952. Harry M. Hull, Clerk.

In the United States District Court for the District of Columbia

Civil Action No. 1550-52

The Youngstown Sheet and Tube Company, The Youngstown Metal Products Company, Plaintiffs,

v.

Charles Sawyer, individually and as Secretary of Commerce, Defendant.

Civil Action No. 1539-52

Republic Steel Corporation, Plaintiff,

v.

Charles Sawyer, individually and as Secretary of Commerce, Defendant.

Civil Action No. 1549-52

Bethlehem Steel Company, et al., Plaintiffs,

v.

Charles Sawyer, individually and as Secretary of Commerce, Defendant.

Washington, D. C.
Wednesday, April 9, 1952.

The above entitled actios came on for hearing on motions for temporary injunction, before the Honorable Alexander Holtzoff, United States District Judge, at 11:30 o'clock a.m.

[fol. 1507] Appearances:

On behalf of The Youngstown Sheet and Tube Co: John C. Gall, Esq., and John J. Wilson, Esq.

On behalf of Republic Steel Corporation: John C. Gall, Esq., Edmund L. Jones, Esq., Howard Boyd, Esq., and Thomas F. Patton, Esq.

On behalf of Bethlehem Steel Company: Cravath, Swaine & Moore, by: Bruce Bromley, Esq. Wilmer & Broun, by: E. Fontaine Broun.

On behalf of the Defendant: Holmes Baldridge, Esq., Assistant Attorney General.

[fol. 1508] Proceedings

Argument on behalf of The Youngstown Sheet and Tube Company, and The Youngstown Metal Products Co.

Mr. Wilson: If Your Honor please, several of us, on behalf of the steel companies, would like to present certain matters to Your Honor this morning.

At nine o'clock I, at the direction of Judge Bastian, extended an invitation to the gentlemen from the Department of Justice to be present, and I understand they are here now.

If Your Honor please, I am speaking on behalf of The Youngstown Sheet and Tube Company. I am associated with Mr. John C. Gall in that appearance.

Also, there will be presented to Your Honor this morning certain matters on behalf of the Republic Steel Company. The Republic Steel Company is, as well, represented by Mr. Gall, Mr. Edmund L. Jones, Mr. Howard Boyd, and Mr. Thomas Patton.

I think, on behalf of Bethlehem Steel Company, Mr. Bruce Bromley and Mr. E. Fontaine Broun will speak at the appropriate time.

If Your Honor please, these matters come on before Your Honor this morning on applications for temporary restraining orders.

[fol. 1509] At ten-thirty or a quarter-to-eleven last evening, the President made a radio address coincident with which he issued an Executive Order, which does not have a number at the moment; at least, my copy does not have a number.

The Executive Order, a copy of which is attached to, I think, all of the complaints, directed Charles Sawyer, who is the respondent in all of the actions, to seize the steel mills and plants of this country, the names of which are listed on a list which accompanies the Executive Order.

The Court: Is a copy of the Executive Order attached to your complaint?

Mr. Wilson: Yes, Your Honor.

The Court: I don't see it there.

Mr. Wilson: I am sure it was, when it left my hands.

The Court: Have you a copy of it?

Mr. Wilson: Yes, indeed, sir.

As I said to Your Honor, the President issued his Executive Order at about half-past-ten or a quarter-of-eleven. In his radio speech, he stated that at midnight Mr. Charles Sawyer, the Secretary of Commerce, would seize the mills.

At approximately 11:30 p.m. last evening, Mr. Gall and I appeared at the home of Judge Bastian and presented to him the papers in The Youngstown Sheet and Tube case. [fol. 1510] We asked him at that time for a temporary restraining order, pursuant to a motion which we had with us to that effect.

He determined that he would set the hearing upon this matter, and the others which are here today, at eleven-thirty this morning, and directed us to notify the Acting Attorney General promptly at nine o'clock to this effect.

At the same time, he kindly agreed that any of the other steel companies which were ready with their pleadings might appear before the Court this morning; and I hope Your Honor will have the same feeling about it.

I should say that at midnight the Secretary of Commerce, Charles Sawyer, acted and seized the steel mills. Of course, our injunctions were designed and are designed to prevent such seizure.

Mr. Sawyer sent out a telegram to the presidents of a number of the steel companies, whose names are listed in a paper which I shall hand Your Honor in a moment, and in this telegram he stated that he was mailing, immediately, copies of the Executive Order of the President, his own Order No. 1, and the notice of the taking of possession.

We have procured from the office of Charles Sawyer copies of these documents. There can be no doubt about their authenticity. They were not available earlier than within the last half-hour. I hope Your Honor will accept them for filing.

[fol. 1511] Gentlemen, do you have copies of those?

Mr. Baldridge: Yes; we do.

Mr. Wilson: Now, if Your Honor please, the Executive Order of the President states that by virtue of the authority vested in him by the Constitution and laws of The United States, and as President of The United States and Commander-in-Chief of the Armed Forces, he made and promulgated the order which I have just stated.

The Order does not refer to any constitutional provisions, nor does it cite any statute or regulation that could possibly or remotely be considered as applicable to this situation. I mean by that, that there is a total omission of specification of the bases for this Order.

The Order No. 1 of the defendant does not depart materially from the language of the Executive Order, itself. I would call attention to the fact, however, that in the first four or five or six lines of Mr. Sawyer's Order No. 1, he says, by virtue of the authority vested in him by the President, "I deem it necessary in the interests of national defense that possession be taken of the plants, facilities, and other properties of the companies named in the list specified in Appendix A. I, therefore, take possession effectively at twelve o'clock midnight,"—and then the remainder of the Order contains many of the statements which appear in the Presidential Order.

[fol. 1512] Now, I should dispose of a technical matter with respect to The Youngstown case.

In certain labor discussions which are the genesis of this matter, one of The Youngstown affiliates, The Youngstown Metal Products Company, was a participant. The result was that in the drafting of the complaint in The Youngstown case, we have two plaintiffs, The Youngstown Sheet and Tube Company and The Youngstown Metal Products Company. It appears that The Youngstown Metal Products Company's name does not appear either upon the President's list or, I think, upon Mr. Sawyer's list. Therefore, it may become necessary, subject to our checking it further, because we haven't had much time, to regard the second plaintiff in The Youngstown suit as, shall I say, surplusage for the purpose of the moment, and somehow dispose of it in due course.

If Your Honor please, the papers which are before Your Honor in The Youngstown case are a complaint which, by the way, we have had verified by the vice-president of the

company; an affidavit in support of this application, likewise executed by the same affiant; and a motion for a temporary restraining order.

I doubt that there is any material difference between the affidavit and the complaint in The Youngstown case. There may be additional matters in the complaint, but the reason [fol. 1513] for two papers is that, at first, we had not considered verifying the complaint and using simply the affidavit, but for precaution's sake we had both of them sworn to.

Now, if Your Honor please, the brief history of this situation is that the union contract of the steel companies with United States Steel Workers, CIO, was expiring on December 31, 1951. In November of 1951, negotiations began, looking towards the ultimate execution of a new contract.

I shall not take the time, because I believe, for my purposes, it is not material, to delineate too minutely the matters in negotiation, in the labor negotiations. I should say to you, very briefly, however, that they involved wages; they involved additional pay for Sunday; they involved the very important question of whether the employees of the steel companies should be regarded and required to be members of the union; that is to say, a union shop arrangement.

The negotiations continued for some time, and the matter was submitted to the Wage Stabilization Board. Eventually, the Wage Stabilization Board came out with a recommendation in favor of certain increases and certain fringe provisions, and for a union shop. These matters were not acceptable to the steel companies in that form, [fol. 1514] but, despite statements to the contrary, the steel companies continued to discuss with representatives of the union and with the members of the Wage Stabilization Board these problems.

The union had given notice that unless a contract was agreed to by midnight last night, there would be a strike. A contract was not agreed to. And so, we say, in order to coerce the steel companies, the President issued this seizure order, and as a result of the issuance of the seizure order, and of its execution by the separate order of the defendant, the strike which was scheduled for one-minute-after-midnight was called off.

Our position is that there is no power in the President,

and no power in Mr. Sawyer, to make the seizure which was made last evening. I shall come a little more in detail about that, because I realize, of course, that it is an important consideration at this time. I do not understand we must resolve to a moral certainty that legal question at this time. I understand the law to be that if we can convince Your Honor that there is reasonable question about the situation, then you will go to the next question, perhaps, of whether there is irreparable injury; and, if so, we hope we can convince you on that.

The Court: Well, there are other factors than irreparable injury; there is a question of balancing equities, when you [fol. 1515] apply for a temporary restraining order of a preliminary injunction.

Mr. Wilson: All right, sir; I will not dispute that with Your Honor at this time. I think, frankly, it is not a question of balancing the equities. I think the equities are 100 percent on our side.

The Court: I am not prejudging that, but I am only suggesting that irreparable damage, or the possibility of it, is not the only matter for the Court to consider.

Mr. Wilson: I meant to say that I am satisfied to meet that situation, too, as we meet the others.

If Your Honor please, we are willing to assert that there is no provision of the Constitution and no statutory provision that would support this seizure. With Your Honor's permission, I would like to say it just that way and, in a sense, ask Your Honor to call upon the Department of Justice to give what might be called a bill of particulars in that field. I mean, I am perfectly willing to prove a negative here, if Your Honor would care to hear from me in greater detail on that point.

The Court: You proceed in your own way. I will let each counsel proceed in his own way. You will have to make your own decision as to how you argue the matter.

Mr. Wilson: Yes, Your Honor; I am perfectly willing [fol. 1516] to do that.

I say to Your Honor that you may begin with the preamble to the Constitution, and you may conclude with the last Amendment to the Constitution, and there is no jot or tittle in the Constitution that will support this seizure.

Certainly, the Supreme Court has had occasion in more

than one case to point out that there are no inherent powers in the situation in the President; that his powers are the powers which are expressly provided and those which are reasonably to be derived therefrom; but I mean, there is no reservoir of intangible powers in the President as Commander-in-Chief or as President of the United States or, let's see what other bases he states—I think those are the two bases under which he purports to act.

We say as well, if the Court please, that there is no statutory provision which even remotely supports this situation. We say, the history of the various Acts is entirely to the contrary.

We say the War Labor Disputes Act, which was involved, for example, in the Montgomery Ward case, has gone out of existence. We say that the legislation which followed, for example, the Labor-Management Act, the so-called Taft-Hartley Act, supports the very opposite of the situation, and that there is no provision whatsoever in there to justify [fol. 1517] or authorize this seizure.

We say, as well, that the legislative history of the Taft-Hartley Act demonstrates the contrary, since efforts were made to put seizure provisions in the Act, and they were not adopted.

So, here, again, in our effort in the opening to prove a negative, I would say to Your Honor that our examination of the authorities, our examination of the statutes—those which formerly existed and those which presently exist—lead us to the clear and inevitable conclusion that there is no statutory authority for the action of the President in this case.

Coming to the question of irreparable injury, I certainly do not have to repeat the chief thing which has happened here. The property of citizens of The United States has been seized by this respondent. It happens, perhaps, that it is not my property at the moment, nor your property at the moment, but it is property of fellow-citizens of ours, which the respondent in this case has reached out and taken away from us.

We are not in a state of war, legally speaking. We are not in a situation where a requisition has occurred. We are not in any other situation where a seizure of any sort can be justified, except by the arbitrary use of power, as

it exists at the moment, illegally, I say, but as it is exercised [fol. 1518] at the moment by the respondent in this case.

The result is, to repeat and to emphasize, because it is the crux of our problem here, that our property has, as of midnight, been summarily and illegally taken away from us. We are no longer in control of the management or operation of our own plants, our own facilities. They are clearly taken away by Mr. Sawyer, in his order. The fact that in his order, which is somewhat a copy of the Presidential Order, he has selected the presidents of the companies to be the operating agents of the companies, is no excuse for this act. They are the agents of the companies, so I am sure it will be contended, and the result is, that the Government—I shouldn't say "the Government"; I should say the respondent in this case—is in full control of all the physical properties and the real estate, for that matter, if there is a distinction, of the plaintiffs in this action.

The moving papers and the complaint in this case make this point as one of the principal points, after setting forth what we regard as the primary proposition here, namely, that our property is taken away from us.

Our second point is, why it is taken away from us; and while motives, as such, may not be important to Your Honor, the consequences of the move, I say, will become [fol. 1519] important to Your Honor.

What happens here, what can happen here, and what we say is happening here, is that the seizure is a coercive effort by this respondent to compel us to enter into a union contract according to the recommendations of the Wage Stabilization Board, which recommendations have no legal effect whatsoever in this situation.

We point out in the moving papers that not only from the dollar side of things, the conditions which are sought to be imposed upon the steel industry in these cases, and, more particularly, because I am speaking for Youngstown, imposed upon the plaintiff in this case, are so burdensome financially that we will not be able to sustain them without a corresponding increase in price.

The Court: I don't think I can go into that.

Mr. Wilson: I am well aware of that, and I am moving from the motives and the details to a result, which is very crucial.

Another feature is this union shop situation. That can't be measured in dollars-and-cents. That is trying to cram down the throats of the steel industry a method of employer-labor relations, policy-management control contrary to and against the will of the steel companies.

I wanted to reemphasize those things to make this point: We say, that based upon prior experiences in similar situa-
[fol. 1520] tions, more specifically in the coal industry, that when the Government makes a seizure such as this, it then steps in and makes a contract with the union, and it makes a contract with the union which burdens the business of the plaintiff; and it turns out, aside from the question of whether the contract is one which might legally survive the return of the property to the steel company, it turns out that it is made a condition of return to the steel company. That is to say, we fear it will be made a condition of return, as it was a condition of return in the coal industry.

The Court: Of course, I can't consider that. You are trying to prognosticate the future, what the Government might do at some future time. The mere fact that the Government might do something, which you say would be illegal if it did it, is no reason, in itself, for granting an injunction at this time.

Mr. Wilson: Yes, sir, I think it is, sir, if you will permit me to differ with you, because here, we are here on an application for a temporary restraining order, and we are saying to Your Honor that, "Stay the hand of this defendant from doing that very thing for ten days or twenty days, until you can investigate more thoroughly this problem—perhaps receive an answer from the respondent, and consider the thing materially."

[fol. 1521] The Court: I would be very glad if you would address yourself to the question as to why the drastic remedy of a temporary restraining order, or a preliminary injunction, is necessary at this particular time. You have just suggested that there should be 20 or 30 days to investigate those matters. Well, why do you need an injunction in the meantime?

Mr. Wilson: I am addressing myself to those matters, in my judgment, at this moment, if Your Honor please.

I am saying that, contrary to the simplest principles of

the American way of life, our property was taken away from us last night, illegally.

The Court: By an action in this Court, of course. But you are asking for the extraordinary remedy of a temporary restraining order, or a preliminary injunction, and you have to make a showing why you are entitled to that drastic remedy; because, after all, courts are loath to grant preliminary injunctions except on a very strong showing.

Mr. Wilson: I go back to the matter that I was discussing when this immediate colloquy came up. I say it is not speculation; it is not the expression of a possible fear that this respondent may enter into a labor contract and saddle this industry with this unwanted and unacceptable contract; I say, in the Executive Order of the President, himself, he said, in paragraph 3:

> [fol. 1522] "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."

I say to Your Honor that the record before Your Honor shows a policy of the Government in previous cases to do the very thing about which I am now complaining, and to saddle the industry with a Government-made contract, and not return the property to industry without the willingness of the industry to accept the Government-made contract.

I say, that if I came before Your Honor today with a motion for a temporary restraining order to enjoin my neighbor from cutting down my tree, if the tree isn't cut down before I come into the courtroom, all I can come in and say is that he has got an ax or a saw, and he is out there hacking away on the trunk of the tree, and that is some kind of reasonable fear; and I say to the Court, in this case, that I do not have to come in with a written letter from Mr. Sawyer in which he says, "The day after tomorrow, I intend to make a contract with the union." I say, the facts speak for themselves. I say, the history of the conduct of the Government in similar matters can be drawn upon by us in this situation to explain the reasonableness of our position.

[fol. 1523] I point out to Your Honor that Mr. Sawyer is empowered by the President of the United States to make arrangements and agreements covering the wages and conditions of employment, and terms, of the employees. And I say, that may be done before the ten days are up. I say, that may be done before we have an opportunity to argue a motion for a preliminary injunction. I say, that may be done before the respondent in this case has filed his answer; and I say, that once that is done, that is an irreparable injury for which we may not be compensated in any Court in damages or in any other manner. So, I say, it is a situation which can arise, and which could have arisen before we even got before Your Honor at eleven-thirty today; and it can arise, if Your Honor should deny this application for a temporary restraining order, before the day is over, or could happen tomorrow, or within ten days, or before Your Honor hears the preliminary injunction.

That is an irreparable situation. That is a situation from which we can never recover, and it is a situation which can arise, and is not whimsical; it is not imaginary; it is not, certainly, fearful; it is based upon a practice and policy of the Government in every other kind of situation as this is.

Now, I should like to add some other reasons which I think are evidence of irreparable injury.

[fol. 1524] In paragraph 14 of the complaint, we have stated them in one fashion, and in several of the paragraphs of the affidavit we have stated them in a similar fashion. The paragraphs are very brief. I am always reluctant to read matters to the Court. I see Your Honor is examining them; but while Your Honor is examining them, I will go over them briefly, to lay some emphasis upon it.

We say, again, as I have endeavored to emphasize several times this morning, that this is a seizure of our property which would deprive the plaintiffs, without due process of law, of our own property.

We say, secondly, that:

> "Said seizure will result in the disruption of normal customers between the plaintiff and their customers,

the great majority of whom have pending orders with the plaintiffs for steel and steel products usable and to be used in the civilian economy of the United States having no relation to any war effort of the United States."

The Court: I have read these paragraphs.

Mr. Wilson: All right, sir.

More specifically, we go to the affidavit, since it comes more directly to the point about which I am talking.

We point out, in the three paragraphs of paragraph 8 [fol. 1525] of the affidavit, that the defendant and his agents now are in our businesses. That the defendant and his agents have control of our trade secrets and methods of doing business, which are confidential with us.

The Court: May I inquire this: The order appoints the president of your company as the operating manager on behalf of The United States; how does the Government get control of the confidential matters and secrets, so long as the president of the company is the operating manager?

Mr. Wilson: I think there are two answers to that, Your Honor. I know, when I make you one answer, that Your Honor will give me an answer. If I say this to Your Honor, "How do we know tomorrow that Mr. Sawyer will not send Mr. X, his own agent, into the plant?" I know what Your Honor will say in answer to that: "Wait until Mr. Sawyer sends Mr. X into the plant."

The Court: I think you have anticipated correctly.

Mr. Wilson: On the other hand, Your Honor will agree with me that Mr. Sawyer, himself, can go into anybody's plant today; that he could ask to see confidential information and trade secrets. I mean no reflection on the integrity of Mr. Sawyer, as an individual, because he is a highly honorable individual; but I do mean, and I say on this point, I don't have to wait until Mr. Sawyer calls me up and says, "I am going in your plant tonight,"—I don't [fol. 1526] have to wait for that, to run down here to Your Honor and say, "Our trade secrets will be invaded, our confidential business data will be scrutinized, maybe dissipated, maybe passed to competitors, because this is a highly competitive business. I say that the reasonable likelihood of those things occurring, on the face of this record, are

with Your Honor this morning. Those are irreparable situations.

Here we have a highly competitive business, with our own trade secrets; with our own methods of doing business; with our own lists of customers. And, some common denominator in the form of this respondent, who has access, let us say, to the files of Youngstown at ten o'clock, and to the files of Republic at eleven o'clock, and to the files of Bethlehem at twelve o'clock, who may, if he chooses, pass the information from one on to another—and that is not an absurd suggestion; in the very nature of this thing, that may occur.

Now, once that has occurred, that can never be recovered. Those are irreparable consequences of this move.

We speak, in paragraph (a) of paragraph 8, about the trade secrets. We speak, in paragraph (b) about the relationship with our customers; and we speak, in paragraph (c), about the technical nature of the operation of our business. And there, if you please, we are faced with [fol. 1527] the grave danger of inexperienced instructions and directives actually wrecking our plant, and the huge investment which we have in our properties.

The Court: You don't have that danger, so long as the president of your company is the operating manager.

Mr. Wilson: Your Honor, I say—and may I repeat it for emphasis' sake——

The Court: Yes, indeed.

Mr. Wilson: I say to Your Honor that it is inherent in this situation that Mr. Sawyer, the appointive power, may choose to call upon a plant today, and call for records. Now, do I have to wait until that occurs, before I must run down here and ask Your Honor for temporary relief? I say to the Court that those are things that may reasonably be expected to occur and, sitting, as Your Honor does, as a Chancellor in this situation, in view of those probabilities, that Your Honor should stay the hand of Mr. Sawyer in this situation until you have had an opportunity to consider this thing very thoroughly.

Your Honor is patient with me—and you must be longer patient, because others want to talk, and I don't want to usurp all of the time here this morning—I come back to the legal proposition, about which there is no doubt, I come

back to the proposition that there is no legal basis for this act. I come back to the proposition that in that situa-[fol. 1528] tion Your Honor should stay the hand of the respondent in this case until you can investigate that situation thoroughly.

Coming to the question of the equities, which I don't wish to avoid in my discussion here: This matter of the way the President discusses it, that the safety of the Government is involved, I say to the Court that the real reason here—and it is not one that must be inferred from the situation—is a coercive effort by governmental authority to cram a labor contract down the throats of industry.

The Court: You have covered that point.

Mr. Wilson: All right, sir. Now I want to conclude, if I may, with one little reference to a quotation from one of our forebears, Henry Clay, in which he was thinking about this kind of a situation when he said this:

> ". . . Inherent power: Whence is it derived? The Constitution created the office of President, and made it just what it is. It has no powers prior to its existence. It can have none but those which are conferred upon it by the instrument which created it, or laws passed in pursuance of that instrument. Do gentlemen mean by inherent power such power as is exercised by the monarchs or chief magistrates of other countries? If that be their meaning they should avow it."

And I am waiting interestedly and intensely to see if that is the theory upon which the Department of Justice will undertake to defend this unlawful seizure in this situation.

Thank you.

ARGUMENT ON BEHALF OF REPUBLIC STEEL CORPORATION

Mr. Gall: May it please the Court——

The Court: Whom do you represent?

Mr. Gall: Your Honor will note I am on the pleadings for both Youngstown and Republic. I am speaking now for Republic Steel Corporation. And, as I am associated with Mr. Wilson in connection with the pleadings, I should like to associate myself with him in connection with the views

and arguments to which Your Honor has listened so patiently.

I do not intend to cover the ground covered by Mr. Wilson in any detail. The most that I can do, I think, Your Honor, is to try to reinforce one or two points to which he has already adverted.

Republic Steel has filed with the Court substantially the same kind of complaints, affidavits and motions as have been filed on behalf of Youngstown Sheet and Tube Company.

The remedy we have asked the Court for is the same as that asked for by The Youngstown Sheet and Tube Company.

[fol. 1530] Your Honor has referred to this, very properly, as a request for an extraordinary remedy. And we want to say to you, with all the feeling that we can, that we think an extraordinary remedy is necessary because of the extraordinary action which the President took last night in conferring upon Mr. Sawyer complete dominion over the plants and properties and facilities of Republic Steel Corporation.

It is true, Your Honor, that Mr. Sawyer has not in his first order undertaken to exercise that complete dominion. However, he does assert it, in that the present officers of the corporation are in fact permitted by his order to continue to exercise certain of their functions for the moment. It is perfectly reasonable, however, for us to have a fear of imminent and irrevocable damage to the properties and business of Republic Steel Corporation.

Your Honor has said that we cannot foresee what the Government is going to do, or anticipate that it is going to do things which will put burdens upon this company for the future. We feel, however, that we are entitled to guide our own policies and our own views, as expressed to this Court, by the experience that we have had in the past under seizure of certain of our properties. I know of no better way of considering what may happen than what has happened in the past.

The coal mines of Republic were seized on several [fol. 1531] occasions by the Government of The United States, and were operated by the Government of The United States; and on two occasions, while the mines were in possession of the Government, contracts were made between

the Government agent and the United Mine Workers of America, one in connection with the portal-to-portal matter in 1943; the other, in connection with the so-called Welfare Fund, I believe, in 1945. We were unable to get our properties back, except by taking over and operating under the contract which had been made by the Government with the union.

On those occasions, Your Honor, the management of Republic's mines was not ousted. The mines were still nominally in possession of and under the dominion of Republic Steel for that purpose. As a matter of fact, however, everything that was done by the management in the control and operation of those mines was determined by an agent of the Government, just as Mr. Sawyer is an agent here for that purpose. And elaborate regulations and manuals of operations, and so on, were promulgated by the Government agent in that case.

We have reason to fear that, based on that experience, we may expect, no matter how reasonable Mr. Sawyer is, if it becomes necessary or desirable from his standpoint to exercise the more complete and intimate control over the affairs of Republic Steel Corporation, he will do so. We [fol. 1532] think we are entitled to some protection against that, until the entire merits of this matter can be examined.

May I refer to the matter of the power to seize and operate these properties? Mr. Wilson has covered that at some length.

We can find no warrant, and we find no claim to warrant, except in the most general terms in the Executive Order itself; we can find no warrant in anything specific or fairly implied from any provision of the Constitution, or, certainly, from any statute.

Your Honor, on that point, that there is no authority in the President to do what he has done, or in Secretary Sawyer to exercise these powers, may I refer to a contemporary matter which has a very direct bearing on it?

Day before yesterday, April seventh, the President of the United States sent to the Congress, addressed to the Vice-President, a communication which appears in the Congressional Record of April 7, 1952, in which he asked the Congress to extend by statute certain emergency powers which he said would expire when the treaty of peace with

Japan is consummated; and among the powers that he listed as expiring when a state of war should expire, was the power to continue the seizure of the railroads.

Now, the President has statutory power, today, for the railroad seizure, which is in progress. He does it under [fol. 1533] an express power given him by Congress during a state of war.

The Court: Technically, we are in a state of war today, are we not?

Mr. Gall: The President does not think so, and he does not claim—in fact, he expressly says, in this communication, that if the treaty of peace with Japan shall be concluded, his power to hold the railroads will no longer exist.

The Court: Yes, but until the treaty is signed, we are in a state of war, are we not, technically?

Mr. Gall: As far as Japan is concerned.

The Court: But still we are in a state of war.

Mr. Gall: But he is not purporting to act as in a state of war; his Executive Order does not claim so.

The Court: Do you contend that the President must cite the authority for his act——

Mr. Gall: (Interposing) I do not so claim, Your Honor.

The Court: Or that any Government official must cite?

Mr. Gall: I do not so claim, Your Honor. I do claim that we should be able to discover it somewhere when it is challenged, however, and we have been unable to discover any such power.

I think, Your Honor, it is quite relevant to consider that [fol. 1534] the President, himself, in an address to the Congress only day before yesterday, considered that his power to keep control of the railroads under an express statute will no longer exist, unless he has further statutory authority.

Also, in this morning's Daily Labor Report—I realize, Your Honor, that is not an official report; that is a service which many of us get here in Washington, with which Your Honor may be familiar—but the measure which the President sent to the Congress on the seventh of April, this month, with respect to the continuation of his emergency power, was referred to the Senate Judiciary Committee; and, yesterday, the Senate Judiciary Committee reported that measure favorably to the Senate. But, in doing so, it inserted an ex-

press proviso that limited the President's power of seizure of property to public utilities.

Now, it may be said that the President has some power independent of legislation. His own conduct in recommending to Congress an extension of his emergency power, so that he could continue the seizure of the railroads, negatives, in our view, even a claim on his part that he has such power, except in pursuance of statute.

I also say, Your Honor, that when it comes to balancing the equities in this matter, the position for which we contend, and the action which we are asking the Court to take, [fol. 1535] does not leave the Government remedyless. We are left remedyless, in a practical sense, if some of the things which we have reason to fear the Govrnmnt may do in connection with our property should take place. The Government has other remedies than the seizure of our properties.

The Congress specifically has provided a remedy to be used by the Government, as appropriate in any national emergency growing out of a labor dispute. No one can contend that this emergency, so far as there is one with respect to steel, does not grow out of a labor dispute.

The Labor-Management Relations Act of 1947, as Your Honor so well knows, has in it a provision for the granting of injunctive relief at the request of the Government of the United States to stay a stoppage in a situation such as this, in the steel industry, as of 12:01 last night. The Executive has not seen fit to use the machinery and the remedy provided by Congress.

Furthermore, the Executive Branch of the Government is not the only one that has some responsibility for protecting the Government's interests in a situation of this kind. The Congress is in session, and if the President feels that he does not have such power to deal with this situation otherwise than by seizure, Congress is in session and could act, and undoubtedly, if the President requested emergency [1536] powers of some kind, the Congress would review and determine to what extent it was willing to give him those powers.

In conclusion, Your Honor, we think that we have stated in our petition, in our complaint and in our affidavit, facts which indicate a very real probability, particularly based on our past experience, that action may be taken

which will work irreparable harm to the properties of Republic Steel Corporation; and we believe, sir, that we are entitled to some relief, which relief, in our judgement, would not in any way harm the interests of the Government of the United States, which has other remedies available to it under the law.

Thank you.

Your Honor, I would like to introduce to the Court Mr. Thomas F. Patton, General Counsel of Republic Steel Corporation, and a member of the Ohio Bar, if Your Honor would be willing to hear him.

The Court: Do you move his admission for the purpose of this case?

Mr. Gall: I move his admission for the purpose of this case.

The Court: Mr. Patton may be admitted for the purpose of this case.

Mr. Patton: Thank you.

[fol. 1537] If Your Honor permits, I would like to make just a few brief, practical observations with respect to the question you raised as to the balancing of equities.

In the first place, I think it is quite apparent that if the purpose of the President in issuing his Order was to assure the continued production of steel, there was available to him, under the Labor Relations Act, a plain, lawful method set forth by the Congress for accomplishing that result. All he had to do was to appoint a board, a few days ago; have that board say that there was a strike about to happen which would threaten the national security. And he could have come into this court, or any similar court, and have had an injunction enjoining the strike for at least 60 or 80 days.

The Court: Mr. Patton, may I ask you this question: Of course, a Court can't take cognizance of anything except the record before it. There were, however, some radio reports that I happened to hear this morning, before I knew that this case would come before me, to the effect that some of the companies have suspended operations and have refused to permit their employees to return to work this morning. Are those reports correct, if you care to answer the question?

Mr. Patton: Well, I will explain that situation, Your

Honor. You have to understand the steel industry. As [fol. 1538] the union recognized, in connection with the strike, it said it would give 96 hours' notice in order to permit the industry to close down, because in the steel industry you have great furnaces that must be cooled and emptied of their material; you have coke ovens that must likewise be handled in the same way. So, when you talk about resuming operations—and I might say, that pursuant to that notice the entire industry, I know our own company was, was down completely at midnight last night—so, it is quite a job to resume operations.

And, in Republic's case, no telegram was received in Cleveland until about nine o'clock this morning, and Mr. White, who is the president of the company, to whom the telegram was addressed, had been in New York on these very union negotiations.

As rapidly as it is possible, in an orderly fashion, unless this Court decrees otherwise this morning, operations will, of course, be resumed on the next shift, or whatever shift is necessary. But that is one of the points I would like to make to Your Honor.

The Court: I wanted to know about that, because it seemed to me that if the companies weren't willing to resume operations, why, they don't come to the Court—if I may use the term in the technical sense—with clean hands.

[fol. 1539] Mr. Patton: Well, you must realize, as I said, that this industry is a peculiar industry. It is now down, completely. If Your Honor doesn't grant the restraining order requested this morning, the industry must go to the expense of spending thousands and thousands of dollars to get its operations back to normal. If Your Honor does grant the restraining order, it will only be a very short time before you can hear this case in a more thorough sense, and nobody will be hurt in the interim. And why won't they be hurt? Because, I think, you can take it as a judicial fact that every company has at least 30 days' inventory of steel for its operations, and you can take judicial notice of the fact that for the short time necessary for you to dispose of this case, there will be steel available to the customers.

On the other hand, if Your Honor should refuse it, and the company has to resume operations, and then after you

hear the case the employees say, "We won't work any longer, because we are now not working for The United States Government"—and I am sure they will—then we must shut down again, and spend thousands and thousands of dollars, again, in a few days, shutting down our operations.

So that, it seems to me, the equities are all with the companies in this situation, and that you can preserve the status quo for the short time necessary for you to reach [fol. 1540] a conclusion on the legal points in these matters, and that the companies should be given the benefit of that short stay, rather than the Government.

Nobody is being hurt, because everybody has steel for at least 30 days, and that is the minimum; so, I say, the equities are with us in this situation this morning.

I would like also to point out one other thing: If, after a more thorough consideration, Your Honor decides that this seizure is illegal, then the action of the Secretary of Commerce will not have been an action in his capacity as a Government official.

Now, we have a remedy, but it is against Mr. Sawyer, as an individual. Maybe the Government will accept claims for damages—maybe we have some rights against it; at the moment, I am not sure—but I am sure you will realize that there will be millions and millions and millions of dollars in damages involved, and I don't know whether Mr. Sawyer will be willing or ready or able to respond.

The Court: Wouldn't you have a claim under the Federal Tort Claims Act against The United States, if this is an unlawful seizure?

Mr. Patton: If it is, then that is the individual action of the officer, and we may have some trouble on that.

The Court: Well, yes; but under the Federal Tort Claims [fol. 1541] Act, the Government waives its immunity to suits for damages for torts committed by its officers and agents, with certain exceptions; and now, with certain exceptions, actions for damages in tort run against the Government quite as much as they do against a private corporation or a private individual.

Mr. Patton: I hope you are right, because I am sure Your Honor is going to hold that Mr. Sawyer's seizure under

the President's Order was illegal, and he will have some damage suits.

The Court: I am not going to try any damage suit now under the Federal Tort Claims Act, before such a suit is filed, anyway; I am inquiring, if you don't have a remedy under this Act?

We will continue this after the recess.

(Thereupon, at 12:30 o'clock p.m., the hearing was adjourned until 1:45 o'clock p.m.)

[fol. 1542] AFTER RECESS

(The proceedings were resumed at 1:45 o'clock p.m., at the expiration of the recess.)

Mr. Broun: Your Honor, I am E. Fontaine Broun of the Washington firm of Wilmer & Broun. We are local counsel for the plaintiffs Bethlehem Steel Company, et al., in No. 1549-52.

I would like to move the admission for the purpose of this proceeding of Mr. Bruce Bromley of the New York firm of Cravath, Swaine & Moore, who is a member of the bar of the highest court of New York and the Supreme Court of the United States.

The Court: It is a pleasure to have Mr. Bromley.

Mr. Bromley: May it please Your Honor, I thank you for receiving me.

ARGUMENT OF BEHALF OF BETHLEHEM STEEL COMPANY

Mr. Bromley: With characteristic keenness and clarity Your Honor has put two questions to the plaintiffs' side of the table, satisfactory answers to which I think must be furnished you in order for us to prevail.

I refer to your suggestion that possibly in a consideration of the relative equities here, that the damage to the plaintiffs, although it may be irreparable or at least severe, your question suggests might be balanced or at least, or even outweighed by damage to our nation as a whole. [fol. 1543] Now, I assert that that is not so, and I say that for this reason: There is no emergency facing this country which has not been created by the action of our President himself.

Now, that is his own choice. He said last night:

> "I can't go under the Taft-Hartley Act because it might take me a week or two."

Now, let's examine that. The Taft-Hartley Act requires that a board of inquiry be convened and that it report the facts to the President and thereafter the Government should — move against the union for at least eighty days under the injunctive provision.

Isn't it perfectly plain to any observer that the President could a week ago, ten days ago—this afternoon, if you please—constitute the present Wage Stabilization Board, that board of inquiry who could within sixty minutes re- [fol. 1544] port to the President what the situation was, and the machinery of that Act be launched on its intended course.

So I say to you that the situation is of his own creating which does not lessen, perhaps, the danger to the nation if it be too late to correct it, but it is not too late to correct it, and he should take that course of action now which is perfectly possible of immediate accomplishment instead of subjecting the plaintiffs to unlawful seizure of their property to untold damages, and to great injury to our democratic system of government. Because this scheme of governing by Executive edict in the absense of Congressional authority, I say poses grave questions of grave danger to this country.

Now, why do we need a temporary restraining order, says Your Honor, and that is the second question, I think closely allied to the first. Well, I had assumed we needed it badly because, as counsel this morning said, if the seizure is unlawful we must content ourselves with a suit against Mr. Sawyer who may not—I hope he has, but who may not have quite enough money to pay our damages.

And Your Honor I thought very properly said, "What about the Tort Claims Act?"

Now, I say to Your Honor that the Tort Claims Act gives us no remedy whatsoever, and I hope I can demonstrate [fol. 1545] it in this fashion:

First, what is the affirmative grant of jurisdiction against our Government under the Tort Claims Act? Well, that is to be found in the jurisdictional section.

The Court: I am familiar with the Tort Claims Act, quite familiar with it. I participated in drafting it.

Mr. Bromley: Yes, sir, I know you did, but I want to make sure that Your Honor agrees with me that there is no grant under that section of any right to sue Mr. Sawyer.

The Court: No, but isn't there a grant to sue the United States for damages?

Mr. Bromley: I didn't mean what I said. There is no grant under that section to sue the United States for any act which Mr. Sawyer takes while acting within the scope of his office or employment.

I am talking about the jurisdictional section, sir; Section 1346 of Title 28 of the U. S. Code.

Let me read it to you so that I may get it a little more clearly in my mind than I seem to have:

> "(b) Subject to the provisions of Chapter 171 of this Title. . . ."

That is the Tort Claims Act.

> "The District Courts shall have exclusive jurisdiction of civil actions on claims against the United States [fol. 1546] for money damages . . . for injury or loss of property, or personal injury, or death caused by the legligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, . . ."

Now, if Mr. Sawyer is not lawfully authorized to seize our plants, I submit to Your Honor that he is not acting within the scope of his office and that we have no remedy against the United States Government. And if that is not clear enough, sir, I beg to call your attention to the exception contained in Section 2680 of Title 28 of the Tort Claims Act, which I think makes assurance doubly sure that we have no right against the Government, for it says:

> "The provisions of this Chapter. . . ."

That is Chapter 171.

> ". . . shall not apply to—
>
> "(a) any claim based upon an act or omission of an employee of the Government exercising due care in

> the execution of a statute or regulation, whether or not . . . valid, . . .''

Now, that is an exclusion, sir, and this executive order under which Mr. Sawyer purports to act, is a regulation. And all liability against the Government for any act taken by Mr. Sawyer, whether that regulation be valid or invalid, [fol. 1547] is, I think, excluded from the scope and coverage of the Tort Claims Act.

The Court: I don't understand that an executive order directing the doing of some specific act is a regulation.

Mr. Bromley: That is a question which must be resolved, and I have found no decision on it. Because, of course, this Act was passed to protect people from being run down by mail trucks, not to be applied in this situation. So it is not surprising that we have no decision, and I respectfully submit to Your Honor that the broad language ''statute or regulation'' should include an executive order such as this, and I certainly think that it does as a matter of construction, and I certainly think that we would get cold comfort out of the attempt to assert any right against the Government if it turned out that Mr. Sawyer's seizure was unlawful.

Now, may I call Your Honor's attention in connection with my assertion that the President has deliberately taken the wrong route when the right route was open to him, that is, the Taft-Hartley Act. I wish Your Honor would look again at the President's order, because in paragraph 3—numbered 3—your attention has been called to the fact that it provides:

> ''The Secretary of Commerce shall prescribe the [fol. 1548] terms and conditions of employment under which the plants shall be operated.''

Now, that is the only affirmative direction in the whole order, because if you look at the succeeding paragraphs you see:

> ''Except so far as the Secretary shall otherwise order, the management shall continue''—

the plant operations shall continue, the money shall continue, the dividends shall continue. The sole purpose of this order on its face, I say to Your Honor, was to empower the Secretary to impose upon these plants recommendations of the Wage Stabilization Board which were not binding upon them. And I think the Government owes it to Your Honor to tell us now, before Your Honor makes up your mind whether you will sign our restraining order or not, to tell us now whether Mr. Sawyer is going to put these onerous terms and conditions in effect today or tomorrow, or not. And I think we should at least have a stipulation out of them that the status quo in that regard will be maintained until this important question, important to our very national existence, I submit, be determined as a matter of law. And I hope my friend Mr. Baldridge will respond to that prayerful inquiry.

And now may I impose upon Your Honor to say a word [fol. 1549] about the fundamental question of power? And I do that hoping I can make a little progress, because I think the Government ought to tell Your Honor today that there is no statutory provision upon which they can place any reliance. It is perfectly plain that there is in existence today no statute from Congress which authorizes seizure of our plants for the purpose of settling a labor dispute—like the War Labor Disputes Act was, now no longer in existence.

Therefore, they have to go to some other kind of an Act, and I think they can only go to two such Acts, and I think they should disavow that either covers, but I must mention, I think in the interest of expedition, the Selective Service Act of 1948 and the Defense Production Act of 1950.

Now, let's take the easiest one first. The War Production Act of 1950 merely authorizes the requisition of supplies or equipment when all other means of obtaining those parts or supplies upon fair and reasonable terms have been exhausted.

It is a sort of a condemnation statute. It applies first to personal property, supplies and articles, and then it applies to real estate. But, as to real estate, the only power is to bring a court proceeding of condemnation.
[fol. 1550] So I think you have got to admit at once—

and I think Mr. Baldridge should admit at once that he does not place any reliance upon that Act at all.

Now, lets go to the Selective Service Act. Section 18 of that Act, as I read it, provides that if a company gets an order under that Act and each one of these complaints, may it please Your Honor, before you alleges that no one of these companies has any such order as is provided for by Section 18, and the provision there is that if the President gives an emergency order under this statute for the benefit of the Armed Services or the Atomic Energy Commission, and the contractor fails or refuses—and I submit that means being able to do so—fails or refuses to fill the order, then seizure may take place.

Now, the fundamental keystone, if anyone seeks to erect an arch or tower on that statute, is missing. We have never got any such order, and if we were struck and our plants were closed, then I think under the statute we could not be guilty of failing or refusing to fill such order.

The Court: But there is no strike.

Mr. Bromley: There is no strike now, no, sir, and nobody has invoked the provisions of this statute yet, and that is the reason I am trying to throw it to one side and come [fol. 1551] to what I think Mr. Baldridge ought to argue, and that is what about the Constitution.

Now, the Constitution, I suppose we have to start off with Article 2, and there are three sections there that might possibly give some grant of power relevant to this situation.

The first one is that the executive power shall be vested in the President. And the second one is that the President shall be Commander-in-Chief of the Army and Navy. And the third one is that he shall take care that the laws be faithfully executed.

I do not believe there is any other section of the Constitution to which my friends can point, and I take it that the one to which they are most apt to point is the one that makes our Chief Executive Commander-in-Chief of the Armed Forces.

Well, what's his power as such? I think first it should be said that it is undoubtedly true that there is no undefined residual of power in the Executive, unspecified power which comes to him in the public interest. He has got to look

to something in the Constitution and it would not do him any good to declare the kind of emergency that is now in existence, I submit a somewhat strange document that he declared in 1950, because I don't think he no more than any- [fol. 1552] one else could pull himself up his boot straps, and unless the declaration of emergency brings into being some power which is expressed to be given him in the Constitution or in a statute, the mere declaration of the emergency accomplishes nothing.

What can he do as Commander-in-Chief? Well, first we are not at war with Korea, I assume as lawyers, although to everybody else in this court room we certainly would be.

What about Japan? Your Honor was quite right. We are this very minute in a technical state of war with Japan.

Why? Well, simply because everything having been done by all the ratifying powers in the world, everything having been done by our Senate which has consented and approved ratification, the document which the President must sign is on his desk. He has not signed it.

When he does sign and deposit it, war is over.

Now, that is the reason he went to Congress the other day, because it was upon the existence of that technical state of war that others of his powers depended, and he knew he would have to sign this ratification promptly, I assume, so he went to Congress and he asked them to extend the war powers for another sixty days, and they did, [fol. 1553] and on the floor of the House it was made abundantly clear that Congress did not intend thereby to give the President any power to seize the steel plants.

So I must frankly say to Your Honor that there is a technical state of war. I think it is about the thinnest and the most technical state of war in which we have ever been, but there it is.

Now, I say to Your Honor that even in time of war the Commander-in-Chief, the President, has no power to seize private property in these circumstances. I think he can only do so, that is, his authority can only be exercised to do so in the area of conflict, or, if outside that area, at a time when the clear and present danger of national disaster is so overwhelming that, as a practical matter, nothing else will satisfy the demands of the safety of our people. And I think a consideration of our brief on that point and

the cases in support of it will demonstrate the soundness——

The Court: Is there a brief? It has not been handed to me.

Mr. Bromley: Yes, sir, with our papers we have a statement of points and authorities which is somewhat longer, I understand, than may be the practice.

The Court: Oh, yes.

[fol. 1554] Mr. Bromley: It is a brief on the law, and it is a brief on the law as to the President's power under the Constitution.

And my friends on the other side have it.

Mr. Baldridge: We do not have it.

Mr. Bromley: Well, I understand you did not get it, but I started two copies to you at nine o'clock this morning.

The Court: I have it here now.

Mr. Bromley: Excuse me, Your Honor. I started two copies to them at nine o'clock this morning.

The Court: Well, I have it here now.

Of course, as you read the life of Lincoln, he certainly took the position that there is a reservoir of inherent powers in the Presidency because he drew upon that reservoir time and time again.

Mr. Bromley: He did. He stretched its very sides. There is no doubt about it, and I think it is very interesting now to look back on that, but he did. There can be no doubt about it.

The Court: And Theodore Roosevelt threatened to seize the coal mines, I recall reading, at one time when there was a threatened coal strike.

Mr. Bromley: Yes.

The Court: Apparently he felt that there was such [fol. 1555] power.

Mr. Bromley: Yes, my criticism of too much executive power is not confined to the present incumbent alone. I think the fact that Presidents feel sometimes the necessity of this, points to the danger. It is very easy to solve problems in a dictatorial fashion. It is very easy to forget about Congress; it is very easy to say "I alone will do this," but we cannot maintain our existence in safety that

way. Some day we will get a fellow who will go far too far and we will end up with a Hitler.

Well, I have taken too much of Your Honor's time. I thank you.

The Court: Well, I would like to ask you a question before you resume your seat.

These actions are nominally directed against the Secretary of Commerce.

Mr. Bromley: Yes, Your Honor.

The Court: But the Secretary of Commerce is acting pursuant to a directive of the President, a specific directive, or a specific order of the President.

Aren't you indirectly seeking a restraining order against the President though not nominally so? And, if so, does the Court have the power to issue an injunction against the President of the United States?

[fol. 1556] I do not know of any case on record in which a Federal Court, or any other court, has issued an injunction against the President of the United States.

And you recall in the Aaron Burr case, John Marshall indicated a doubt as to whether he could enforce a process against Thomas Jefferson. He indicated that he could issue a subpoena duces tecum against the President, but if the President declined to obey, there was nothing that he, John Marshall, could do about it.

He did not quite use those words, but that was the indication.

Mr. Bromley: Yes, sir, that is so.

The Court: Suppose I issue this restraining order and Mr. Sawyer comes in and says, "I am acting pursuant to the direct orders of the President"?

Mr. Bromley: Well, first, if this were a suit against the United States, then I might be in some difficulty, but the law is perfectly clear, Your Honor, and there is a point in our brief which covers that, that a suit in this precise situation against a Cabinet Officer—and mind you, it is not only against him as Secretary; it is against him as an individual. My caption is "Individually, and as"——

The Court: I would not ask the question that I addressed to you if Mr. Sawyer of his own volition, in the exercise [fol. 1557] of his own discretion, took this action and if you demonstrated that the action was illegal, but he is act-

ing pursuant to a directive of the President, and therefore wouldn't an injunction against him be in effect an injunction against the President?

Mr. Bromley: I think not, sir. I think not. I don't think the President is an indispensable party to this action.

The Court: I don't say that he is, as a matter of form, but I mean in essence and in spirit wouldn't an injunction against him be an injunction against the President?

Mr. Bromley: I do not think it would, sir, under the law.

I approach the problem this way: It certainly is not a suit against the United States.

The Court: No, it is not. I don't think you have to labor that point.

Mr. Bromley: And I do not think it is a suit against the President, although, if it were, I think it would lie. I think a suit against the President under this kind of a situation would lie.

The Court: Do you think that the Court has authority to issue an injunction against the President?

Mr. Bromley: No, I have not at the moment.

[fol. 1558] The Court: I say, is it your view that the Court has that authority?

Mr. Bromley: Yes, sir.

The Court: I don't know of any case in which that has been done.

Mr. Bromley: I do not at the moment either. But we considered that before we drew our pleadings and came to the conclusion that Your Honor, as a District Judge, possessed that authority. But I do not think it, sir, any more necessary that the action be thought of as an action against the President than an action against a local postmaster to enjoin him from carrying out an order of the Postmaster General can be said to be an action against the Postmaster General.

This Court can give effective relief, if Your Honor pleases, not only against Mr. Sawyer, but against the man Mr. Sawyer sends out to our plant. You don't need Mr. Sawyer to give us protection as to a specific plant. And I submit that this Court does not need to resolve the question whether it could issue a direct order against the President, since it is clear that it can issue such an order against the President's designee.

But I should be glad to go back to the office and see what I can find.

Mr. Wilson: If Your Honor please, may I make an an-[fol. 1559] swer to Your Honor's inquiry?

The Court: Yes, indeed.

Mr. Wilson: Supplementing Mr. Bromley's response.

I think when you go back to Mississippi against Johnson at the time of the attempted enforcement of the Reconstruction Acts, in which the Supreme Court had occasion to consider that doctrine, and when you try to analogize the situation which Your Honor has posed, with the one which arises when the Court has the problem of whether a suit against a Cabinet Officer is a suit against the United States, you find an entirely different situation.

We know that frequently when Cabinet Officers have been sued and the United States has not been sued, as such, that this Court and other courts including the Supreme Court has determined that the action was an action against the United States.

That is based upon certain considerations that I need not take the time to outline here.

Certainly they are not the same considerations which are indulged in on the proposition which Your Honor has now posed, because the question of the power to sue the President of the United States flows from the doctrine of the separation of powers, as Your Honor knows, and the courts over the years have seized every possible kind of excuse [fol. 1560] to avoid the difficulty of that problem when the President was not named as a defendant.

Now, that is the test of the situation. In other words, I don't believe there is a case—there certainly is no case which I have ever been able to read or have ever seen, where the court would indulge in the same kind of reasoning that you do when you are considering this problem of a suit against the United States.

In other words, in this situation the question is who is being sued; who is to be enjoined. It is a matter of sheer personality.

The Court: Well, there is no doubt about the technical situation, but, actually, if an injunction is granted its effect would be to nullify a personal act of the President of the United States; would it not?

Mr. Wilson: Yes, but that is not the test of the problem. The test is the question of the exercise of the judicial power against the executive.

Now, it does not go any further than the office of the Chief Executive. Your Honor knows that the Cabinet Officers are agents of the Executive.

The Court: I would be very glad to have an answer to this question, Mr. Wilson:

Suppose the President personally was exceeding his authority, could this Court issue an injunction against the [fol. 1561] President personally?

Mr. Wilson: I would have considerable doubt about it, sir.

The Court: That is my feeling also.

Mr. Wilson: But if I answered any differently from Mr. Bromley, we are in accord on the result because we don't——

The Court: Your point is that you can sue a subordinate?

Mr. Wilson: Certainly.

The Court: Even though you may not sue the chief?

Mr. Wilson: I read again last night somewheres between midnight and breakfast this morning, Mississippi against Johnson, because I anticipated, with Your Honor's keenness of mind, that this problem would arise. And I say you can read Mississippi against Johnson from the first word to the last and you come out with only one impression, and that is that it is a problem of the personal action against the person of the Chief Executive himself, and that is the only way in which this question of the separation of powers arises in this picture.

As I started to say to Your Honor a few moments ago, every Cabinet Officer is a member of the Executive Branch of the Government, and every Cabinet Officer is an agent of the President, and yet no one would think for one moment [fol. 1562] that in an ordinary situation a suit against a Cabinet Officer was a suit against the President of the United States.

Now, the only other thing I wanted to add is this: The President in this case allowed for a margin of discretion on the part of Secretary Sawyer. In other words, Mr. Sawyer did not stop by saying, in his order No. 1, "By virtue of

the authority vested in me by the President of the United States, I seize so and so."

As I said to Your Honor in my argument, he added additional words of high significance in this situation—"I deem it necessary"; not the President of the United States speaking, Your Honor. This is the respondent Charles Sawyer.

Charles Sawyer says:

> "I, Charles Sawyer, deem it necessary in the interest of national defense that possession be taken of the plants. I, therefore, take possession."

He has gone on record here as having made the final and fatal decision. He is, therefore, amenable to the processes of this Court under these circumstances.

The Court: I will hear from the Government.

ARGUMENT ON BEHALF OF THE DEFENDANT

Mr. Baldridge: May it please the Court, the complainants are here seeking the extraordinary remedy of a re- [fol. 1563] straining order on the following grounds:

One, that there is no power in the President to seize the steel plants.

Two, on the ground of irreparable injury.

Three, that the Government has an adequate remedy by existing statute.

And, four, that no one would be injured by a few days' delay anyhow.

Since, in order to secure this extraordinary remedy it is necessary for the complainants to show irreparable injury, we submit in the absence of irreparable injury and in the absence of an adequate remedy at law, they are not entitled to the order, and I should like to address myself first, briefly, to the question as to whether they have made out a case for irreparable injury.

They have argued largely that the seizure deprives them of their property and their possession and right to control in the ordinary course of business;

That they are deprived of the right to negotiate and to bargain collectively;

That it exposes the steel companies to the possibility

that they will have forced upon them a labor contract embodying the recommendation of the Wage Stabilization Board;

That it will destroy their relations with customers and [fol. 1564] interfere with existing contracts and injure their good will;

That it will endanger their trademarks and that it amounts to a usurpation as well as an impairment of the rights of the stockholders.

I submit, Your Honor, that the clear language of the executive order issued by the President, the operating order No. 1 issued by the Secretary of Commerce, who is the delegate, the direct delegatee of the President, as well as the telegraphic notice issued by the Secretary of Commerce to each of the steel plants, indicate that none of these alleged injuries are possible.

And I call your attention to the executive order, paragraph 3, which provides that the Secretary of Commerce shall recognize the rights of the 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.

Now, there is nothing in that paragraph, Your Honor, that deprives these concerns, or the unions, of an opportunity to bargain collectively.

The Court: What do you say about the point made by counsel for the plaintiffs that what they really fear is the possibility—or they call it the probability—that the Gov- [fol. 1565] ernment, during the period of Government operation, may enter into labor contracts with which the companies will be saddled after they resume possession, and which they will consider highly unfavorable to them?

What do you say about that point?

Mr. Baldridge: Well, first I think, Your Honor, they have had adequate——

The Court: As I see it, that is the only real so-called irreparable damage that they claim.

Anyway, it is the only one they have emphasized.

Mr. Baldridge: Based on past histories of seizures of this type, research discloses that in only one instance has

the Government ever negotiated a wage contract with the union in a seized plant.

That was the Krug-Lewis agreement, I believe, in 1946.

In all other seizures—and there was one seizure in Lincoln's time of this type, under the general plenary powers of the President, and there was one in Woodrow Wilson's time, and there were twelve in Franklin Roosevelt's time—and in none except the 1946 Krug-Lewis agreement was there any effort nor any agreement consummated in respect to terms and conditions of employment as between the Government, who was operating the plants technically, [fol. 1566] and the unions.

I submit, Your Honor, that paragraph 3 of the executive order not only permits, but it was deliberately designed to permit, as well as encourage, continued collective bargaining as between the steel plants on the one hand and the unions on the other.

The President, in his remarks last night outlining the reasons for the seizure of the plants, indicated that both sides had been called to Washington today for the purposes of bargaining as between themselves in an attempt to settle this very serious wage dispute.

Now, as to their argument that the management would be interfered with and ousted, and dispossessed of the possession of their plants, I call your attention to paragraph 4 of the executive order, which reads:

> ". . . 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."

Likewise, in paragraph 5 of the executive order it provides that existing rights and obligations of such com- [fol. 1567] panies shall remain in full force and effect, and there may be made, in due course, payments of dividends of stock and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations, and expenditures, shall continue to be made in the ordinary corporate fashion.

Then in the delegatee's order No. 1, which is the order of the Secretary of Commerce, there is provided that the executive officers of the company shall be designated as the operating managers for the United States, and that they are to continue the normal operations of the plant the same as though there was no Government seizure of any kind.

That is, as to the day-to-day operations of the plants, keeping of accounts, disbursements, and so forth.

I submit, Your Honor, that based upon the specific provisions of the executive order, the operating order No. 1 of the Secretary of Commerce, the President's delegatee, as well as the telegraphic notice, there is no showing of irreparable injury based upon the grounds advanced by complainants.

The management is to continue to perform the usual functions of management.

We submit, second, that the request for a temporary re- [fol. 1568] straining order is untimely, not only because there has been no irreparable injury shown, or threatened, but because these complainants have an adequate remedy at law.

This, I submit—and it is our position—is a legal taking under the inherent executive powers of the President and subject to just compensation under the Fifth Amendment to the Constitution in the event damage is suffered and proved by them.

The Court: Well, are you going to institute eminent domain proceedings?

Mr. Baldridge: We had not contemplated that, Your Honor.

The Court: Well, where there is a taking by eminent domain, isn't there an obligation on the part of the Government to institute eminent domain proceedings?

Mr. Baldridge: That is correct. We do not anticipate going that route.

The Court: Beg pardon?

Mr. Baldridge: We do not anticipate going that route.

The Court: In other words, you would remit these plaintiffs to the Court of Claims for action for damages?

Mr. Baldridge: That is correct.

The Court: Of course, the Court of Claims does have [fol. 1569] jurisdiction to reward damages for taking by eminent domain.

Mr. Baldridge: That is correct.

The Court: Where the Government fails to institute eminent domain proceedings.

Well, do you concede, then, that this is a taking by eminent domain?

Mr. Baldridge: Well, we say that this is a legal seizure. That is subject to just compensation under the Fifth Amendment in the event the parties can make a case.

The Court: I know, but I think I would like to get it reasonably precise so there will be no ambiguity.

Do you concede that an action for just compensation lies in the Court of Claims for any effects of this seizure?

Mr. Baldridge: That is correct. We do concede, and we would like to make that clear.

The Court: Now, if the seizure is illegal, would you concede or deny that there is a remedy for damages against the United States under the Federal Tort Claims Act?

Mr. Baldridge: We think there would be.

The Court: Do you concede that too?

Mr. Baldridge: Yes.

[fol. 1570] Now, a word, Your Honor, as to the power of the President to seize under the inherent executive powers. It is our position that this is not the proper time to present that problem. That is a legal problem on the merits and it is going to require more time.

The Court: No, I think it is a proper time. I think that is one of the matters that the Court weighs in determining whether or not to grant a restraining order.

Mr. Baldridge: Well, if there is no irreparable——

The Court: I do not think you should just decline to argue that matter.

Mr. Baldridge: Well, I would like to submit a brief on it, Your Honor.

The Court: No, I am going to decide the matter at the end of this argument. This is an application for a restraining order. I think the application would be defeated if I reserved decision and decided the matter ten days hence.

I think I have to decide the matter today.

If this was a final hearing, that would be different proposition.

Mr. Baldridge: I call Your Honor's attention to Article 2 of the Constitution which provides that the executive power shall be vested in the President of the United States; [fol. 1571] that the President shall affirm that he will faithfully execute the office and will attest to the best of his ability, preserve, protect and defend the Constitution of the United States; that he shall be Commander-in-Chief of the Army and Navy of the United States; that he shall be the sole organ of the nation in its external relations, and that he shall take care that the laws be faithfully executed.

We submit that these provisions of the Constitution are sufficiently broad that the executive powers vested in the President of the United States is, in itself, a grant to the President of all executive power, not specifically divested by other provisions of the Constitution.

The Court: What is meant by "executive powers," Mr. Baldridge? Isn't it the power to execute statutes?

Mr. Baldridge: Well, among other things it is the power to protect the country in times of national emergency by whatever means seem appropriate to achieve the end.

The Court: Well, how far would you carry that?

Mr. Baldridge: Well, we don't think we have carried it too far in this particular instance, Your Honor. I don't know as I can discuss it—

The Court: Now, you say that this is really a taking by eminent domain. Of course, the Government has the power [fol. 1572] of eminent domain; the Supreme Court has held that time and time again, but what perturbs me a little bit when you assert this to be a seizure by eminent domain, it was my understanding that eminent domain was a power that has to be exercised pursuant to an Act of Congress.

Mr. Baldridge: We say it is a legal taking, Your Honor, subject to just compensation under the Fifth Amendment. We don't go so far as to take the position that it is a taking under the eminent domain powers.

The Court: Well, what kind of a legal taking if not a taking by eminent domain?

Mr. Baldridge: I am not prepared to answer that.

The Court: Very well.

Mr. Baldridge: Now, the complainants have argued, Your Honor, that the Government had an adequate remedy by statute; that they did not have to move under the plenary powers which reside in the executive.

We submit that that is a matter that cannot be inquired into.

The Court: I don't think you need to argue that. It is not for this Court to say which of several courses the President should have pursued. That is for the President. If he has legal power to pursue the course that the President has pursued, the mere fact that he had the choice of [fol. 1573] some other course is nothing for the Court to pass on.

Mr. Baldridge: We think that is correct, too, Your Honor.

I should like to say a word about the unclean hands point that Your Honor brought up this morning.

We understand—we have not had a full report, but a number of plants——

The Court: Beg pardon?

Mr. Baldridge: A number of the plants have shut down in spite of the executive order.

What that amounts to is that the complainants are in here on an application for a temporary restraining order, seeking this Court's assistance in keeping the plants closed in order to assist them in the labor dispute.

The Court: What do you say about Mr. Patton's statement that the reason they did not reopen the plants this morning was because they had to shut down the furnaces in preparation for the strike, and that it takes time to start the furnaces going again?

In other words, I gathered that Mr. Patton's point was that there was no contemplation of defiance of the President in failing to reopen the plants this morning, but it was merely due to the physical conditions.

[fol. 1574] What do you say about that?

Mr. Baldridge: If that be true, Your Honor, of course that is a practical consideration that management has to meet.

I understand that when a plant is shut down and the fires are banked, that it takes quite some time to get the plant into operating condition, that is, its normal operating

condition. I don't know just the time. I have heard it variously estimated from up to two to three weeks. Just how far the fires are banked in furnaces of the various companies, we do not have that information.

Mr. Bromley: I want to say for Bethlehem that we are not closing any plants.

Mr. Gall: The same is true for Republic and Youngstown.

Mr. Patton: I found out just over the noon hour that our company has called its employees back in the normal course.

As I said, first we have to get some pig iron before the employees in the open hearths could come in. Then the employees in the open hearths come in, and before we can start these mills, they have to have steel to roll in the mills. We have been shut down now, and we cannot do it all in a minute, to reopen.

[fol. 1575] The Court: Well, under those circumstances I don't think failure to reopen the mill this morning should be considered as any circumstance adverse to the plaintiffs on this application.

Mr. Baldridge: I should like to address myself briefly to a statement of one of counsel this morning, that this seizure is a coercive effort to force the companies to negotiate on the basis of the recommendations of the Wage Stabilization Board.

I think I need to go no further than to point out the reasons stated by the President last night in his radio address to the nation pointing out the reasons for the seizure.

We are in a period of national emergency, in a defense production situation, and it is necessary that production be constant and continuous as well as high in volume and quality, and that any interruption of that production effort would cause serious interference with our preparations for national defense.

And just one more word, Your Honor, as to the President's power to seize: I think in the last analysis it is fair to say that magnitude of the emergency itself is sufficient to create the power to seize under these circumstances.

The Court: I think Chief Justice Hughes said in one of [fol. 1576] his opinions that emergencies do not create power. They may give an occasion for the exercise of power that has been dormant, but they do not create power.

Mr. Baldridge: Well, under our Constitutional system, Your Honor, it seems to me that there is enough residual power in the executive to meet an emergency situation of this type when it comes up.

The Court: I think that whatever decision I reach, Mr. Baldridge, I shall not adopt the view that there is anyone in this Government whose power is unlimited, as you seem to indicate.

Mr. Baldridge: I was not indicating that, Your Honor. I just said I thought that the present emergency presented a sufficiently serious situation that it could be met by the residual powers that reside in the executive.

The Court: Do you rely on the President's powers as Commander-in-Chief? You have not mentioned them at all, except in reading Article 2.

You seem to place more virtue in the first sentence of Article 2 than in the laws constituting him Commander-in-Chief.

Mr. Baldridge: Based upon all the powers that he has as an executive, including the powers that he has by virtue of his position as Commander-in-Chief.

[fol. 1577] Mr. Bromley: I have not heard, Your Honor, any answer to my inquiry as to whether Mr. Baldridge could tell us what Mr. Sawyer was going to do about increasing wages.

The Court: Perhaps he doesn't know.

Mr. Baldridge: I think I mentioned, Your Honor, that the President mentioned over the radio last night that he had asked both sides to come down and resume negotiations. Further than that, I do not know what the situation is as of now.

Mr. Bromley: Well, I really press for some statement that our reopening of the plant——

The Court: Perhaps Mr. Baldridge is not in a position to make any statement as to what his client proposes to do.

After all, Mr. Baldridge only represents him as his legal adviser and as his counsel, of course.

Mr. Bromley: Yes, but he has been operating here with a pretty free hand about modifying and amending the Tort Claims Act. I am not sure what good that concession will do me, by the way, when I get in the Court of Claims. I hope it will be effective. I really don't think it will be.

The Court: I must say, Mr. Bromley, I don't agree with the construction you place on the jurisdictional cause of [fol. 1578] the Act. I think that jurisdictional cause is intended to create a right of action against the United States for the damages for a tort committed by any officer or employee of the Government within the scope of his Government activities, irrespective of whether the act is illegal or not. Even if it was not illegal, then of course there would not be a cause of action. Cause of action arises only for an illegal act.

It is just like if a driver of a department store truck is guilty of negligence, he is not authorized to be negligent, but nevertheless if he is acting within the scope of his employment, his employer is liable.

Mr. Bromley: Yes, but it is the exception, I submit to Your Honor. A man acting with due care, but under some governmental direction, whether valid or invalid——

The Court: It does not say "direction." It says under a statute or regulation.

Mr. Bromley: Regulation, yes.

The Court: I don't say a directive to do a particular thing is a regulation. A regulation is one of general character.

Mr. Bromley: And also I don't think Mr. Baldridge's concession about condemnation is binding on the Government, or means anything to us plaintiffs.

[fol. 1579] The Court: Well, there is a principle of law that the Government cannot be estopped by concessions made by its agents, but, however, Mr. Baldridge is a sufficiently high officer of the Department of Justice that I am sure the Department of Justice will not repudiate his concessions.

Mr. Baldridge: I think I indicated, Your Honor, that just compensation would be paid if they can make a case.

The Court: Well, of course, but the plaintiff would have to prove damages.

Anyone who seeks compensation for a legal taking of property must prove damages; otherwise he recovers a nominal damage of one dollar.

But you admit there is a cause of action in the Court of Claims for damages, if damages can be shown?

Mr. Baldridge: That is correct.

Mr. Bromley: I do call to Your Honor's attention again that I think Your Honor should have, before Your Honor decides this motion, some indication from the Government as to whether they will maintain the status quo if Your Honor should deny our motion.

The Court: Status quo as to what?

Mr. Bromley: As to wages.

If Your Honor fails to give us this restraining order and [fol. 1580] they walk out of here and sign a contract with the union, irreparable damage is irreparable, and is done, and I think they ought to give us an assurance here that they will not do that until we could decide this very important fundamental question of law to which you have adverted and which we have been discussing here.

The Court: Would you like to answer that?

Mr. Baldridge: I cannot give assurance as to that, Your Honor. As of this moment I do not know, but I do want to point out that if this temporary restraining order is granted, it will be an order, in effect, to strike, because as of the moment there is no strike. When the seizure order went into effect at midnight last night, the president of the CIO announced that the strike was off and the union would go back to work.

Now, if a temporary restraining order is entered now, that order will have the effect of causing a strike and, as a matter of fact, it would be legalizing a strike by court order.

The Court: No, now, just a moment. You are not suggesting that if this Court issues a restraining order, there will be a strike?

Mr. Baldridge: If a restraining order is issued, then the situation remains, I suppose, in status quo prior to seizure [fol. 1581] action, and what the means is that you have notice that the union is going out on a strike as of a certain time.

The Court: You mean, in other words, that if I issued a restraining order, the status will revert to what it was before the President's seizure order took effect?

Mr. Baldridge: Yes.

The Court: When was that, 12 o'clock midnight?

Mr. Baldridge: 12:01, I believe.

The Court: I see your point.

Reply Argument on Behalf of Youngstown Sheet and Tube

Mr. Wilson: If Your Honor please, Your Honor has been so very kind and I have talked so much, as my voice indicates, that I don't want to try your patience even as large as I know that it is, but I cannot refrain, in closing in a couple of minutes from referring to Mr. Baldridge's comment in dealing with this question of irreparable damage, that the President in his remarks last night in effect called the parties together to try to straighten this out.

Now, I am not concerned about Mr. Baldridge's arguments. I don't think——

The Court: You have taken a good deal of time, Mr. Wilson. What is your point?

Mr. Wilson: I am coming right to the point. I am [fol. 1582] concerned with what Your Honor said and I want to answer it, and that question is "We seem to have emphasized mostly the matter of the probability of this labor contract."

I told Your Honor this morning, and of course you remember it, that the problem is not only a problem of wages and the fringe benefits, but it is the imposition of a union shop upon the steel industry, a transformation not only treasury-wise but policy-wise and operational-wise of the whole relationship.

The Court: Oh, well, it is not for me as a Judge to decide whether a union shop is wise or unwise.

Mr. Wilson: Of course it is not.

The Court: And I shall not do so.

Mr. Wilson: And that is the reason that it is evidence of irreparable injury in this situation.

Now, let me close with this thought, because we are men and not boys; we are realistic; we find out that two

and two make four, and here is how they make four in this situation:

The President, in paragraph 3 of his executive order, said that the Secretary of Commerce shall determine and prescribe terms and conditions of employment. "Shall determine." Now, last night this is what the President [fol. 1583] said, and I have the press release from the White House which cannot be disputed:

> "There has been a lot of propaganda to the effect that the recommendations of the Wage Board were too high; that they would touch off a new round of wage increases——"

The Court: Now, gentlemen, it so happens that I did not hear the President's speech on the air last night. I did not know this matter was coming before me, and I did not know it until a few minutes before ten o'clock this morning, but I think it just as well that I did not hear the President because, if I heard it, you might feel that hearing that speech might have influenced me one way or the other.

Now, then, I don't think you should read it to me either.

Mr. Wilson: I want to say this, if the Court please: I want to smile, too, but I am tired, and so is Your Honor, but let me make this observation in closing:

In the first place, if there is any question about the speech being in the record, I would like to be sworn and identify the speech in my hand as the one that I heard the President render over the radio.

The Court: I don't think that it is relevant to this proceeding before me.

Mr. Wilson: It is relevant, if the Court please, if I [fol. 1584] may try your patience one last second.

The Court: You are not trying my patience. The Court always enjoys hearing you, Mr. Wilson.

Mr. Wilson: Thank you, Your Honor. Thank you very much.

I want to refute the statement of Mr. Baldridge that the President has some kind of an open mind about this situation. The President says:

> "There has been a lot of propaganda. The facts are to the contrary. When you look into the matter,

> you find that the Wage Board's recommendations were fair and reasonable; they were entirely consistent with what has been allowed in other industries over the past 18 months; they are in accord with sound stabilization policies."

And so on down there, and the effect of it is, when you put the two and two together, the President's declaration that the Wage Board's findings are fair and his directive to Mr. Sawyer straightened out this question of labor relations, the two add up to an inevitable result of a labor contract which will impose irreparable damages upon us.

The failure of Mr. Baldridge to be able to say that that [fol. 1585] will not occur is in and of itself all that Your Honor needs to grant the temporary injunction in this case.

The Court: We will take a short recess at this time.

(There was a brief informal recess, at the conclusion of which the proceedings were resumed as follows:)

OPINION

The Court (Holtzoff, J.): On April 8, 1952, the President of the United States issued an Executive Order entitled "Directing the Secretary of Commerce to take possession and operate the plants and facilities of certain steel companies."

The principal position of this Executive Order reads as follows:

> "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 interest 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."

Acting pursuant to this Executive Order, the Secretary of Commerce took possession of the plants, facilities, and [fol. 1586] other properties of certain companies engaged in the manufacture of steel. Among them are the three

companies who are plaintiffs in the three actions now before the Court.

The order of seizure was accompanied by a lengthy telegram addressed to the president of each company, whereby the president was being called upon, as a loyal and patriotic citizen, to serve as and was appointed operating manager for the United States of the properties of the company.

The president of the company, as such operating manager, was authorized and directed to continue operations for the United States. In other words, the management of the company was in each instance left in charge of the operation of the plant, subject to Government control.

Three of the companies whose plants were so seized—Bethlehem Steel Company, Republic Steel Corporation, and Youngstown Sheet and Tube Company—have brought actions for an injunction and declaratory judgment against Charles Sawyer, individually, and as Secretary of Commerce. In each instance, an application for a temporary restraining order has been made to restrain the defendant from continuing possession of the plant, and in any other way from acting under the order of seizure.

[fol. 1587] An application for a temporary restraining order involves the invocation of a drastic remedy which a court of equity ordinarily does not grant, unless a very strong showing is made for the necessity and the desirability of such action. The application is, of necessity, addressed to the discretion of the Court. It is not sufficient to show that the action sought to be enjoined is illegal. It is, in addition, essential to make a showing that the drastic remedy of an injunction is needed in order to protect the plaintiff's rights.

In arriving at its decision, the Court must arrive at a balance of equities, and consider not only the alleged legality or illegality of the action taken, but also other circumstances that will appeal to the discretion of the Court.

There are several matters that the Court must weigh in this instance. Although, nominally, and technically, the injunction, if granted, would run solely against the defendant, Sawyer, actually and in essence it would be an injunction against the President of the United States, be-

cause it would have the effect of nullifying and stopping the carrying out of the President's Executive Order for the seizure of the plants. It is very doubtful, to say the least, [fol. 1588] whether a Federal Court has authority to issue an injunction against the President of the United States, in person. (The State of Mississippi v. Johnson, 41 Wall. 475.) In that case, Chief Justice Chase made the following statement, at page 500:

> "The Congress is the legislative department of the Government. The President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both when performed are in proper cases subject to its cognizance."

The Court, it seems to me, should not do by indirection what it could not do directly, irrespective of whether the Court has the power so to do. It would seem to me that this is a consideration that should affect the exercise of the Court's discretion.

Another circumstance that must be considered is whether the plaintiffs will sustain irreparable damage if a temporary restraining order were denied. The Court heard counsel at length on this point, because that is a matter that seemed to the Court to be of vital importance. The situation, as it presents itself at this stage, is that the president of each company, and his managerial staff, remain in control and are named as operating agents for the United [fol. 1589] States. They have not been dispossesed or displaced. They are still in possession and will continue to conduct the company's operations.

True, plaintiff's fear that other drastic steps may be taken which would displace the management or which would supersede its control over labor relations. It seems to the Court that these possibilities are not sufficient to constitute a showing of irreparable damage. If these possibilities arise, applications for restraining orders, if they are proper and well-founded, may be renewed and considered.

On the other hand, to issue a restraining order against Mr. Sawyer, and in effect nullify an order of the President of the United States, promulgated by him to meet a nation-

wide emergency problem is something that the Court should not do, unless there is some very vital reason for the Court stepping in.

The Court feels that the balance of the equities is in favor of the defendant, so far as the present application is concerned. This conclusion is fortified by the concessions of Government counsel, to the effect that, in any event, the plaintiffs have an adequate remedy in suits for damages. Government counsel concedes that if, as they say it is, the seizure is lawful and a legal taking of property, a suit for [fols. 1590-1591] just compensation will lie in the Court of Claims against the United States.

On the other hand, Government counsel further concedes that if the seizure is illegal, an action for damages lies against the United States under the Federal Tort Claims Act. The Court is of the opinion that such actions would lie.

The fact that the plaintiffs have adequate remedies by way of actions for damages, and the considerations already stated, lead to the conclusion that the balance of equities requires a denial of a temporary restraining order. The motion for a temporary restraining order is denied.

(The instant matter was concluded.)

[fol. 1592] [Stamp:] Filed May 5, 1952. Harry M. Hull, Clerk

In the United States District Court for the District of Columbia

Civil Action No. 1550-52

The Youngstown Sheet and Tube Company, and The Youngstown Metal Products Company, Plaintiffs,

v.

Charles Sawyer, Defendant

Civil Action No. 1539-52

Republic Steel Corporation, Plaintiff,

v.

Charles Sawyer, Defendant

Civil Action No. 1549-52

Bethlehem Steel Company, et al., Plaintiffs,

v.

Charles Sawyer, Individually and as Secretary of Commerce, Defendant

Washington, D. C.,
Thursday, April 10, 1952.

[fol. 1593] The above-entitled actions came on for hearing on an oral motion to advance for trial before the Hon. Walter M. Bastian, United States District Judge, at 12:00 noon.

Appearances

On behalf of Plaintiffs The Youngstown Sheet and Tube Company and The Youngstown Metal Products Company: John C. Gall, Esq., and John J. Wilson, Esq.

On behalf of Plaintiff Republic Steel Corporation: John C. Gall, Esq., Edmund L. Jones, Esq., Howard Boyd, Esq., and Thomas F. Patton, Esq.

On behalf of Plaintiff Bethlehem Steel Company, et al.: E. Fontaine Broun, Esq., and Bruce Bromley, Esq.

On behalf of Defendant: Homes Baldridge, Assistant Attorney General, and Marvin Taylor, Esq.

[fol. 1594] PROCEEDINGS

Mr. Jones: Your Honor please, we are here this morning in the case of Republic Steel v. Charles Sawyer, which was filed yesterday for an injunction against Mr. Sawyer in connection with the seizure of the steel plants. I speak as one of the counsel for Republic Steel Company, and there are two cases that are on here this morning, the Sheet and Tube case and the Bethlehem case.

Your Honor probably knows yesterday there was argued before Judge Holtzoff a motion for a temporary restraining order, which the Judge denied. In view of the great seriousness of this case and the necessity of a very prompt determination as to the alleged right of the Government or of Mr. Sawyer to seize and take over the steel plants, we feel that it is imperative that this emergency, which I believe is recognized by all, should be promptly decided. We, therefore, are here this morning to ask Your Honor to advance this case for trial and set it down for a very prompt trial on its merits.

The Court: Is there opposition to that?

Mr. Baldridge: Yes, Your Honor.

The Court: Let me say this Court is going to disqualify itself. I have in a very modest portfolio acquired, I might say prior to going on the bench, I don't have much chance to acquire them afterwards, a very small block of stock, [fol. 1595] namely, 30 shares in the Sharon Steel Corporation. While the Sharon Steel Corporation is not a party to either of these suits, its position is similar to those of the other companies which have filed suits and the Court therefore feels it should disqualify himself.

I therefore refer this case to Judge Pine, if he could take it, or otherwise to the Assignment Commissioner for reassignment.

Mr. Jones: Would Your Honor consent to hear this motion if the Government would raise no question about it?

The Court: I think I would be a little embarrassed, I mean the amount of my stock interest is about $1,000, I think; I assure you it isn't all I have——

Mr. Jones: It seems that is the minimus, Your Honor please.

The Court: But on the other hand there may be criticism, particularly in a case where there is as much public interest as this one.

Mr. Baldridge: I just want to say, Your Honor, the Government would have no objection whatever to your sitting on it.

The Court: Well, very frankly, maybe I am overcautious, I am not trying to get out of hearing the case, I assure you gentlemen, it is one that interests me a great deal, but it may be embarrassing.

[fol. 1596] Mr. Wilson: Would Your Honor—excuse my voice.

The Court: I understood you were arguing yesterday, is that it?

Mr. Wilson: The night air is bad for me and I caught cold the night before last.

The Court: Mr. Wilson called me at my house at 11:30 and I saw him at that time; afterwards one of the news services called me up at 2:00 o'clock in the morning and I haven't caught up with my sleep yet.

Mr. Wilson: Would Your Honor ask your clerk, or would Your Honor yourself ask Judge Pine if he could see us if we came there now?

The Court: I will be glad to do it now if you gentlemen will come in my chambers with me. Is there any way you gentlemen could agree on some date to hear it?

Mr. Baldridge: I don't think so, Your Honor, we'd like to go the usual route on the matter with respect to the hearing on the temporary injunction and the final injunction.

The Court: Well, if you gentlemen will—I want to say, first, I appreciate the Government's attitude and my unwillingness to go ahead, it does seem silly, probably will to outsiders, because of an interest such as that, that I should disqualify myself but, like Caesar's wife, I guess we have got to be above suspicion.

[fol. 1597] If you gentlemen will come in my chambers,

I will call Judge Pine and see if he will hear it. If not, I will see that you do get a hearing before some other Judge.

(Whereupon, the foregoing proceedings were concluded.)

[fols. 1202-1203] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1539-52

REPUBLIC STEEL CORPORATION, a New Jersey Corporation, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

Civil Action No. 1549-52

BETHLEHEM STEEL COMPANY, et al., Plaintiffs,

vs.

CHARLES SAWYER, Individually and as Secretary of Commerce of the United States of America, Washington, D. C., Defendant

Civil Action No. 1550-52

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a Body Corporate, Youngstown, Ohio; The Youngstown Metal Products Company, a Body Corporate, Youngstown, Ohio, Plaintiffs,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

Civil Action No. 1581-52

JONES & LAUGHLIN STEEL CORPORATION, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

[fol. 1204] **Transcript of Proceedings**—Filed April 14, 1952

MOTION TO ADVANCE THE ABOVE-ENTITLED CAUSES OF ACTION FOR HEARING AND TO SET THEM DOWN FOR TRIAL ON THE MERITS AT THE EARLIEST POSSIBLE DATE

Washington, D. C.,
Thursday, April 10, 1952.

Counsel for the parties in the above-entitled causes of action having, at 12:20 o'clock p. m., on Thursday, April 10, 1952, in the court house in Washington, D. C., appeared in open court

Before Honorable David A. Pine, Judge of the United States District Court for the District of Columbia, there being

PRESENT:

On behalf of Republic Steel Corporation:

Messrs. Hogan and Hartson, by Edmund L. Jones, Esquire, and Howard Boyd, Esquire;
Messrs. Gall, Lane and Howe, by John C. Gall, Esquire;
Messrs. Jones, Day, Cockley and Reavis, by Luther Day, Esquire, and T. F. Patton, Esquire;

On behalf of Bethlehem Steel Company:

Messrs. Cravath, Swaine & Moore, by Bruce Bromley, Esquire, and
Messrs. Wilmer & Broun, by E. Fontaine Broun, Esquire;

[fol. 1205] *On behalf of The Youngstown Sheet and Tube Company and The Youngstown Metal Products Company:*

Messrs. Gall, Lane and Howe, by John C. Gall, Esquire;
John J. Wilson, Esquire; and
J. E. Bennett, Esquire;

On behalf of Jones & Laughlin Steel Corporation:

John C. Bane, Jr., Esquire;
Walter I. McGough, Esquire;
Sturgis Warner;
H. Parker Sharpe, Esquire;

On behalf of the Defendant herein:

Holmes Baldridge, Esquire, Assistant Attorney General of the United States, and Marvin Taylor, Esquire, Assistant Attorney General of the United States.

Thereupon the following procceedings were had:

Proceedings

Mr. Jones: If your Honor please, we appreciate very much your agreeing to hear us on this very short notice.

I appear this morning for the Republic Steel Corporation in the case of Republic Steel vs. Charles Sawyer, which was filed yesterday. There are three other companion cases; the case by the Bethlehem Steel Company, the case by the Youngstown Sheet and Tube Company, and I believe Jones & Laughlin have also filed.

The Court: You say Bethlehem Steel Company?

[fol. 1206] Well, I should make this disclosure to you. My wife is the owner of twenty or twenty-five shares of Bethlehem Steel Company. I don't know what the market is today, but I suppose that is valued at about a thousand dollars.

Now, if you wish to make any point of that, or if any of the other counsel wish to make any point of that, why this is the time to do it.

Mr. Jones: We certainly wish to make no point. Knowing your Honor, I know that wouldn't have the slightest influence on your decision today.

Mr. Baldridge: The Government will be happy to have your Honor sit.

The Court: Very well, if you have no objection after the full disclosure, I will consider whatever this motion is.

Mr. Jones: As your Honor probably knows, yesterday in three of these cases involving the seizure of steel plants, a motion for a preliminary restraining order was argued before Judge Holtzoff and he denied the application.

In view of the great seriousness and importance of this case, which I think the Government fully recognizes, we feel that it is of the utmost importance to the parties involved and to the country at large that this issue of the right of the President to direct the seizure of the property

of these companies be tested out at the earliest possible moment.

We therefore are here this morning to respectfully move [fol. 1207] your Honor to advance this case for hearing and set it down for trial on the merits at the earliest possible date.

The Court: Now, what was heard yesterday, a motion for a restraining order?

Mr. Jones: A motion for a temporary restraining order without notice.

The Court: You are not moving for a temporary injunction?

Mr. Jones: No, sir; but at the moment we want the matter finally decided on the merits.

The Court: Take evidence and hear the whole case?

Mr. Jones: Yes; such evidence as there may be.

The Court: You are appearing for Republic Steel?

Mr. Jones: Republic Steel Corporation. I think that the motion that I just made will be joined in by the other plaintiffs in the other three cases.

Mr. Wilson: Your Honor, I have no voice. I used it up on Judge Holtzoff yesterday.

I appear for the Youngstown Sheet and Tube Company. What Mr. Jones is saying is what I would like to say.

The Court: Who else appears?

Mr. Wilson: Your Honor, may I present Mr. John C. Bane of Pittsburgh, who appears for Jones & Laughlin. He is a member of the Bar of the highest court of Pennsylvania and of the United States Supreme Court. I should like to move his admission for the purpose of this case.

[fol. 1208] The Court: Was he before the Court yesterday?

Mr. Wilson: No, sir; but he is not so far behind that it makes any difference, if your Honor please; if I may be so bold as to suggest it.

The Court: Then he is not pressing for a restraining order?

Mr. Bane: I have not done so as yet.

The Court: You move that he be admitted for the purpose of the case?

Mr. Wilson: Yes.

The Court: That will be done.

Mr. Bane: Jones & Laughlin Steel Corporation got into this rather hurriedly. We filed our complaint late yesterday after the hearing was closed.

I haven't had time yet to discuss with my clients the expedience of making an immediate motion for a restraining order. However, we do join in Mr. Jones' motion, I think if the trial is advanced it will enable us to get along without a separate hearing on a motion for a temporary injunction or for a restraining order, and probably save everybody's time. We can't say yet.

The Court: How long will the trial take?

Mr. Bane: I would have to consult these other gentlemen. I should think not a great deal of time, because the question is primarily one of law.

Mr. Jones: I would say, if your Honor please, not over [fol. 1209] two days.

The Court: How can the case be advanced before an answer is filed?

Mr. Jones: Well, there, it seems to me, if your Honor please, that the Government recognizes the urgency and the importance and the emergency of this matter.

Now, I don't think that the case could be advanced before answer is filed, but I would think that the Government would be—should be and will be—just as anxious as we are to test out the legality of this seizure. There is no reason why the Government, unless it wants to, should take the full twenty days in which to answer. I say "The Government": We are suing Mr. Sawyer in his individual capacity.

Mr. Sawyer, represented by the Department of Justice, can file the answer in a few days. We can then set the trial date. We don't want to press unreasonably, but we think this is a matter of such national importance that it should be promptly disposed of, and this very serious question determined.

Mr. Broun: Your Honor, before you proceed, I should like to say that I am local counsel for the Bethlehem Steel Company and am appearing in Case No. 1549-52. We also join in the same motion in that case that Mr. Jones has made in his.

I also take the opportunity to introduce to your Honor

Mr. Bruce Bromley of the New York Bar, and a member of the Bar of the Supreme Court of the United States. [fol. 1210] I move that he be admitted for the rest of the proceedings.

The Court: I will be glad to have you gentlemen in the case.

Mr. Bromley: Thank you, your Honor.

The Court: Is there anybody else for the plaintiffs?

What does the Government have to say?

Mr. Baldridge: If the Court please, we feel as do the moving parties that this is a most important matter for the courts to decide. Because it is an important and serious matter, as both sides agree, we don't feel that we should be rushed into an early trial. We are willing to go to trial within a reasonable time, but insofar as——

The Court (interposing): Those words are relative. What do you mean by "reasonable time"?

Mr. Baldridge: Under the Rules——

The Court (interposing): And "rushed into it"?

Mr. Baldridge: Under the Rules, your Honor, we have sixty days in which to answer.

The Court: Yes.

Mr. Baldridge: And we would like the case to follow the usual course under the Rules.

Now, they have asked for a temporary injunction as well as for a permanent injunction.

May I ask, is it your idea, sir, to combine these hearings on those two matters?

[fol. 1211] Mr. Jones: Yes. In other words, if we can agree upon the date here for hearing this matter on the merits at a reasonably early date, there would be no necessity for a temporary injunction.

The Court: Well, if as one of the counsel says there is only a question of law, there is no reason why the whole matter shouldn't be decided in one proceeding. But I know of no rule, Mr. Jones, which permits me to advance the date of trial before the case is at issue.

Mr. Jones: I must agree with your Honor on that.

I was hopeful that the Government, because of the great emergency here, would consent to an early trial.

Now, Mr. Baldridge has said "a reasonable time". We would like to know just what he means.

On the sixty day rule, if your Honor please, we take the position in the Republic Steel Corporation case that we are suing Mr. Sawyer as an individual. I think that Rule 12 is applicable and that he is required to answer within twenty days, not sixty days. This is not a suit against the Government, and it is not a suit against a Government official. It just happens that the man at present designated to take over the steel plants happens to be a Government official. We are not suing him in that capacity. We are suing him in his individual capacity as the man who has seized our property, we say without right.

[fol. 1212] The summonses have been issued for twenty days.

Mr. Baldridge: Mr. Sawyer, your Honor, is an officer of the Government, and in this particular case the delegatee of the Chief Executive. We think under those circumstances that we are entitled to sixty days as provided by the Rules.

The Court: I am not called upon to decide that on this motion.

If you are unwilling to file an answer forthwith, or within two or three days, I don't see any grounds upon which I can advance the hearing until the answer is filed.

Mr. Jones: May I ask Mr. Baldridge a question?

Mr. Baldridge, would you be willing to have this case set down and get your answer in, and have it disposed of, let's say in the early part of May, or within thirty days?

We don't want to rush you into five days or six days.

Mr. Baldridge: Well, in all frankness, your Honor, this matter is suddenly laid in our laps as counsel for the Government, just as it was with respect to the complainants. It is a matter of tremendous importance. We want to make as thorough a preparation as we can. Until we have studied it a little more, I am not in a position to make any commitment as to an accelerated answer or a trial date other than that provided by the Rules.

Mr. Wilson: I should have thought, your Honor, that the Government of the United States would have known what [fol. 1213] the law was on this subject before the Executive Order was issued; and they wouldn't have to make their research after the injunction suits were filed.

I mean no reflection upon Mr. Sawyer, whom I do not

know, but I certainly do regard the attitude of the Department of Justice here today as one of stalling, and one of not being ready promptly to meet these issues.

The Court: Well, under these circumstances, I know of no rule which permits me to advance the case for hearing in its present posture. That, of course, is without prejudice to the plaintiffs' right to move for a temporary injunction. That is the remedy provided by the Rules.

Mr. Boyd: May I address your Honor on one phase of this?

If the Court please, I would not like to have our motion —I speak on behalf of Republic Steel together with Jones & Laughlin—I would not like to have our motion interpreted necessarily as seeking to shorten the period of time prescribed by law within which the defendant has to answer. The summons as issued in that case upon which I understand return has already been made by the Marshal ascribed to the defendant twenty days in which to answer. Could not the Court under those circumstances set this case down for trial immediately after the expiration of that twenty day period, and could not the Court at this time prescribe a date for trial on the merits twenty days hence? [fol. 1214] The Court: I think the motion is premature.

Mr. Boyd: Does your Honor feel that we have to wait until the answer is in?

The Court: Yes; because I see no way by which I could set a case down for hearing on the merits until the case is at issue.

Mr. Boyd: I anticipate, of course, that the Government would not engage in any dilatory tactics. If they do, in a manner which would necessitate postponement of the trial date, that situation could be dealt with when the Government's pleadings are made known to the Court.

But I thought that at the present posture of the case, your Honor might prescribe a trial date that could be postponed in the event the Government files motions that would make a postponement of the trial date necessary.

Would your Honor do that?

The Court: No; I will not do that.

Is there anything else before me?

Mr. Wilson: Will your Honor indulge us a moment?

The Court: Yes; of course.

The Rules anticipate this by providing a remedy, to-wit, a motion for preliminary injunction.

Mr. Wilson: Yes; thank you, your Honor. We are aware of that.

Thank you very much.

(Thereupon the instant hearing was concluded.)

[fols. 1215-1217] Reporter's Certificate (omitted in printing).

[fol. 1218] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1550-52

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a body corporate, Youngstown, Ohio; The Youngstown Metal Products Company, a body corporate, Youngstown, Ohio, Plaintiffs,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

Civil Action No. 1655-52

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a body corporate, Youngstown, Ohio; The Youngstown Metal Products Company, a body corporate, Youngstown, Ohio, Plaintiffs,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

Civil Action No. 1539-52

REPUBLIC STEEL CORPORATION, a New Jersey corporation, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

[fol. 1219] Civil Action No. 1647-52

REPUBLIC STEEL CORPORATION, a New Jersey corporation, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

Civil Action No. 1732-52

E. J. LAVINO & Co., Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

Civil Action No. 1700-52

ARMCO STEEL CORPORATION, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

Civil Action No. 1549-52

BETHLEHEM STEEL COMPANY, et al., Plaintiffs,

vs.

CHARLES SAWYER, individually and as Secretary of Commerce of the United States of America, Washington, D. C., Defendant

[fol. 1220] Civil Action No. 1581-52

JONES & LAUGHLIN STEEL CORPORATION, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

Civil Action No. 1624-52

UNITED STATES STEEL COMPANY, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

Civil Action No. 1625-52

UNITED STATES STEEL COMPANY, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

Transcript of Proceedings—Filed April 28, 1952

MOTION FOR PRELIMINARY INJUNCTION

Washington, D. C.,
Thursday, April 24, 1952.

Counsel for the parties in the above-entitled causes of action, having at 10 o'clock a.m., on Thursday, April 24, 1952, in the court house in Washington, D. C., appeared in open court

[fol. 1221] Before Honorable David A. Pine, Judge of the United States District Court for the District of Columbia, There Being

PRESENT:

On behalf of The Youngstown Sheet and Tube Company and The Youngstown Metal Products Company:

John J. Wilson, Esquire, John C. Gall, Esquire, and J. E. Bennett, Esquire;

On behalf of Republic Steel Corporation:

Messrs. Hogan and Hartson, by Edmund L. Jones, Esquire, and Howard Boyd, Esquire;
Messrs. Gall, Lane and Howe, by John C. Gall, Esquire;
Messrs. Jones, Day, Cockley and Reavis, by Luther Day, Esquire, and T. F. Patton, Esquire;

On behalf of E. J. Lavino & Company:

James C. Peacock, Esquire, Randolph W. Childs, Esquire, and Edgar S. McKaig, Esquire;

On behalf of Armco Steel Corporation:

Joseph P. Tumulty, Jr., Esquire, and Charles H. Tuttle, Esquire;

On behalf of Bethlehem Steel Company:

Messrs. Cravath, Swaine & Moore, by Judge Bruce Bromley; and
Messrs. Wilmer & Broun, by E. Fontaine Broun, Esquire;

[fol. 1222] *On behalf of Jones & Laughlin Steel Corporation:*

Messrs. Jones, Day, Cockley and Reavis, by Sturgis Warner, Esquire; and
Messrs. Reed, Smith, Shaw & McClay, by John C. Bane, Jr., Esquire;

On behalf of United States Steel Company:

John Lord O'Brian, Esquire;
Theodore Kiendl, Esquire;
Messrs. Covington & Burling, by Howard C. Westwood, Esquire; and
Roger M. Blough, Esquire;

On behalf of the United States of America:

Holmes Baldridge, Esquire, Assistant Attorney General of the United States, and Marvin Taylor, Esquire, Assistant Attorney General of the United States.

Thereupon the following proceedings were had:

Proceedings

The Court: Before we proceed, gentlemen, I should like to make a few inquiries to ascertain exactly what is before

me, and the names of the counsel in the cases that are before me. The Clerk seems to have some little uncertainty about it, and I should like to have information on the subject.

Now, is the case of Bethlehem Steel Company, et al. vs. Sawyer before me?

Mr. Broun: Yes, your Honor, it is.

[fol. 1223] The Court: What counsel represent it?

Mr. Broun: I am E. Fontaine Broun of the Washington firm of Wilmer & Broun.

Mr. Bruce Bromley of the firm of Cravath, Swaine & Moore of New York City, will speak for the plaintiffs in that case; and I take this opportunity, your Honor, in the interest of saving time now to move his admission for this proceeding.

The Court: The motion is granted.

Judge Bromley: Thank you, sir.

Mr. Broun: Thank you, sir.

The Court: Mr. Bromley may participate.

The Government is represented by whom?

Mr. Baldridge: Mr. Baldridge, Mr. Marvin Taylor and Mr. Slade.

The Court: In all cases?

Mr. Baldridge: That is right.

The Court: I shan't inquire as to the balance of the cases as to whom the Government representatives are.

The United States Steel Company vs. Sawyer, No. 1625-52.

Mr. O'Brian: Justice, the United States Steel Company will be represented on this argument by Mr. Theodore Kiendl of the Bar of New York City; and I respectfully move at this time his admission for purposes of this argument.

The Court: Your motion is granted. You may participate.

Mr. Kiendl: Thank you, sir.

[fol. 1224] The Court: United States Steel vs. Sawyer No. 1624-52.

Mr. O'Brian: The same counsel.

The Court: E. J. Lavino & Co. vs. Sawyer, No. 1732-52.

Mr. Peacock: May it please the Court, this case is a little different from the other cases. It has everything in it that the other cases have, and we abide by the argument to be made for the industry generally. But in addition it has a further factor that we are engaged in the manufacture of

steel. We are not a party to this controversy; and we also submit that we are not within the terms of the order, entirely irrespective of its validity or invalidity.

We are represented by myself, James C. Peacock and Mr. Randolph W. Childs of the Philadelphia Bar. I would like to move his admission for the purposes of making the argument in this case.

The Court: Motion is granted.

Mr. Peacock: I ask that it be sufficient time after the general argument for his presentation of the general features of this case.

The Court: Very well.

You mean during the argument?

Mr. Peacock: Well, we don't want to inject this extra feature into the general industry case. But we do want to be sure to get on today because we want any decision in our case to be premised on both considerations.

[fol. 1225] The Court: Very well.

Jones & Laughlin Steel Corporation vs. Sawyer, No. 1581-52.

Mr. Warner: Jones & Laughlin Steel Corporation is represented by myself, Sturgis Warner, of the firm of Jones, Day, Cockley and Reavis, here in Washington; and by John C. Bane of the Pennsylvania Bar.

The Court: B-a-i-n?

Mr. Warner: B-a-n-e.

If I may I would like to move for the admission of Mr. Bane to argue the case in behalf of Jones & Laughlin.

The Court: The motion is granted.

Armco Steel Corporation vs. Sawyer, No. 1700-52.

Mr. Tumulty: Armco Steel Corporation is represented by myself, Joseph P. Tumulty, Jr., and Mr. Charles H. Tuttle, General Counsel of those companies. Mr. Tuttle will present the case in behalf of the plaintiffs; and I respectfully move his admission for the purpose of this proceeding.

The Court: Very well.

Republic Steel Corporation vs. Sawyer, No. 1539-52.

Mr. Jones: If your Honor please, Republic Steel is represented by myself, Edmund L. Jones, Mr. Howard Boyd, Mr. John C. Gall and Mr. Luther Day of Cleveland. At this time I would like to move Mr. Day's admission for the purpose of argument of this case.

[fol. 1226] The Court: The motion is granted.

Republic Steel Corporation vs. Sawyer, No. 1647-52.

Mr. Jones: The same counsel.

The Court: Youngstown Sheet and Tube Company vs. Sawyer, No. 1550-52.

Mr. Wilson: If your Honor please, Mr. John Gall and myself of the local Bar appear for Youngstown in two cases, No. 1550-52 and No. 1655-52. Mr. J. E. Bennett of Youngstown, General Counsel of the corporation, is here. If he should have occasion to speak I should like to move his admission for the purposes of this case.

The Court: The motion is granted.

Now, in order to avoid repetition so far as that is possible, have counsel made any arrangement among themselves for any particular one of them to present the case generally?

Mr. Bromley: Yes, your Honor; I think we have. We have agreed that Mr. Kiendl representing the United States Steel Company should bear the brunt of the argument and make the initial presentation, and the rest of us I take it will confine our remarks thereafter to matters which are not repetitious.

The Court: Very well.

Is the same true of the Government?

Mr. Baldridge: Yes, your Honor.

The Court: Or rather Mr. Sawyer.

[fol. 1227] Mr. Kiendl: Thank you, your Honor.

Mr. Baldridge: There will be a single argument in reference to all of the cases involved.

The Court: I have had an opportunity overnight to scan —and I use the word "scan" advisedly—the papers filed by the defendant.

I see that there has been placed on my desk this morning numerous files, presumably many briefs. Do counsel think that I would get more assistance in hearing argument if I took an hour now and attempted to go through their papers?

Mr. Kiendl: If your Honor please, speaking for the United States Steel Company, I think it would be to the advantage of the Court if you heard argument first; and it may save the necessity of going through all of these papers.

The Court: Very well; you may proceed.

Oral Presentation on Behalf of United States Steel Company

By Theodore Kiendl, Esquire:

Mr. Kiendl: May it please the Court, this is an application by the United States Steel Company primarily for an injunction restraining what we consider to be the imminent threatened changes in the terms and conditions of employment of a steel employee.

The United States Steel Company today has approximately 200,000 or more such employees. The Secretary of Commerce, the defendant, Mr. Sawyer, was directed by an [fol. 1228] Executive Order to take possession of such steel mills as he deemed in his discretion necessary to be taken to continue the uninterrupted flow of steel into industry; and Mr. Sawyer was directed to operate those steel mills.

Now, at the outset, we desire to call your Honor's attention to what we consider to be an important situation. This is not in any sense the situation which existed before your colleague, Judge Holtzoff, when there was argument before him a few weeks ago on April 9, 1952.

There the situation was this: Three of the steel companies, Youngstown, Republic and Bethlehem, had brought suit against Mr. Sawyer in his official capacity individually, and they joined in a motion for a temporary restraining order. After argument before Judge Holtzoff he decided that there was no irreparable damage shown, but in that connection he stated—in order to be absolutely accurate I would like to read his statement—he stated, and I am reading from Page 84 of the transcript of that record:

> "True, plaintiffs fear that other drastic steps may be taken which would displace the management or would supersede its control over labor relations. It seems to the Court that these possibilities are not sufficient to constitute a showing of irreparable damage. If these possibilities arise, applications for a restraining order, if they are proper and well founded, may be renewed [fol. 1229] and considered."

Judge Holtzoff there did decide that in considering the question of the balance of equities, the balance of conven-

iences, there was not sufficient to enable him to issue the requested temporary restraining order.

Judge Holtzoff there decided—erroneously, we think, and we will try to point out why—that the three steel companies had a perfectly sufficiently adequate remedy at law.

Now in our memorandum, in our Point Five, we discuss that situation, and I would like to briefly call your Honor's attention to some of the decisions that we think hold squarely that where the seizure is illegal there is no possibility of obtaining an adequate remedy at law under the Fifth Amendment of the Constitution for compensation for the taking of private property.

We call attention to the fact that in the Hooe case—if that is the proper way to pronounce it——

The Court: Is that in your Point Five?

Mr. Kiendl: That is in our Point Five. I just want to read one or two sentences from it. It is 218 U. S., and I haven't the pagination on my paper, if your Honor please.

The Court: Your Point Five.

Mr. Kiendl: I haven't it because the brief wasn't finished until very late this morning.

[fol. 1230] Page 3 of Point Five.

There the Supreme Court said:

> "The constitutional prohibition against taking property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. 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."

And another case on the next page, your Honor. The United States vs. North American Transportation and Trade Company. The Supreme Court in 1920 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."

And another case in the Supreme Court in 337 U. S., Larson vs. Domestic and Foreign Commerce Corporation, on Page 5.

The Supreme Court there said:

> "There is no claim that action constituted an uncon- [fol. 1231] stitutional taking. There could not be since the respondent admittedly has a remedy in a suit for breach of contract in the Court of Claims, only if the Administrator's action was within his authority could such a suit be maintained."

Consequently we contend that whereas here the seizure was wholly illegal and wholly unconstitutional, there can be no remedy under that line of cases.

Judge Holtzoff also decided, and we think clearly erroneously, that an action would lie under the Federal Tort Claims Act. In that connection we point out in the same section of the brief at Pages 8 and 9, that the language of the Act and the decisions construing are directly against that proposition.

The Act provides that the United States has given its consent to suits based on the negligence of an employee while acting within the scope of his office or employment. Here there is no negligence on the part of the Secretary of Commerce that is even remotely alleged; and certainly he was not acting within the scope of his office or employment if his acts were illegal and unconstitutional as the plaintiffs here contend.

By a specific provision of that very Court of Claims Act this situation was exempted. The Act is not applicable to any claim based upon an act or omission of the employee of the Government exercising due care in the ex- [fol. 1232] ecution of a statute or regulation, whether or not such statute or regulations be valid.

That has been construed by cases—there are seven of them, I think that we set down on Page 9 of Point V of our brief. That has been construed to include an Executive Order.

Now, if the decision in those cases, Old King Coal Company, Jones, Lauterbach, Toledo, Boyce, and McCrary are correct, then the holding of Judge Holtzoff on a short and preliminary argument, we think, is demonstrably in error.

Now, passing from the situation before Judge Holtzoff to the situation that now confronts your Honor, it is the contention of the United States Steel Company that the situation has been drastically changed. And I think the best way to demonstrate to your Honor that that situation has drastically changed is to point out the important events that transpired in connection with this issue chronologically.

Now much has been said in the Government affidavit and will probably be said by counsel for the Government about the fact that here was an imminent threat to our national safety and our national defense.

I want to point out to your Honor first that we will go back to the year 1950, December 16, when, as your Honor [fol. 1233] will recall, there was a Presidential Proclamation on the existence of a national emergency, and this situation was then somewhat foreseen.

But I will skip from that declaration of the national emergency down to the year 1951 and to the end of that year December 22nd. On December 22nd, 1951, there was an Executive Order referring to the dispute that had arisen between steel management and steel labor to the Wage Stabilization Board. That was nine days before a strike had been called by the Steel Workers Union of the C.I.O., and nine days before the expiration of the contract between the Union and the steel company.

Early in January, the Wage Stabilization Board, to whom the President had referred this dispute, appointed a six man panel, consisting of two public members, two industry members, and two labor members, and they brought in a report after extended hearings on March 13, 1952. That report is part of the opposing papers of the Government.

That panel report resulted in a board report, the Wage Stabilization Report. As that report is of some importance in the disposition of this controversy, I want to take the liberty of calling it to your Honor's attention by summarizing some of its more important provisions.

The Court: What is its relevancy? The controversy [fol. 1234] between the steel companies and the Union is not before this Court for adjudication.

Mr. Kiendl: Not at all; your Honor. But the recom-

mendations made by the Wage Stabilization Board touch on the very increases of wages and changes of terms of employment that the Secretary of Commerce has threatened to put into effect. We want to show what the effect of those changes, if adopted by the Secretary of Commerce, will be.

The Court: On the basis of irreparable injury?

Mr. Kiendl: Apparently that, your Honor, of course.

The Court: What is the other part?

Mr. Kiendl: The other part of it is to show that in reality what the Government is trying to do now is not to preserve the production of steel in this country, but to force on management, on industry, these increases in wages that the C.I.O. have demanded, and to some extent have been recommended by the Wage Stabilization Board.

The Court: How does the motive have any relevancy?

Mr. Kiendl: The motive, I don't think that has any relevancy, if your Honor please, but the facts have an important bearing on the effect of the Secretary of Commerce taking the threatened action. I am only going to summarize the dollar amounts involved so that your Honor will get a picture of what this amounts to.

The dollar damages here are almost incalculable, and [fol. 1235] I propose to demonstrate to your Honor that they are not the small amounts that were involved in the appropriately named case, the Pewee case, that was two thousand dollars, but this runs into hundreds of millions, literally.

Now, I would like to call your Honor's attention, if I may, briefly, to the summary of recommendations made by the Wage Stabilization Board in that report. I promise not to take much time doing it.

The Court: The time has not been limited. My inquiry was to ascertain its relevancy.

Mr. Kiendl: Yes, your Honor. I understand that, but I wanted to show you that I will try to conserve your Honor's time as much as I possibly can.

The first recommendation is regarding a general wage increase, and there the recommendation was that the wage increase be 12½¢ cents an hour until the middle of the year; then 2½ cents more; and then 2½ cents more.

The recommendations regarding the geographical differential your Honor will read in the moving papers and in the briefs. They have a differential in the steel industry whereby in the southern plants the employees receive ten cents less per hour than in other parts of the country. The recommendation of the Wage Stabilization Board there was that that wage differential be reduced to 5 cents an hour.

Then there was a recommendation regarding a shift dif-
[fol. 1236] ferential. These are some of the fringe benefits that your Honor will read in these papers.

The shift differential, increasing the second shift from 4 cents an hour more to 6 cents an hour; and the third shift from 6 cents an hour more to 9 cents an hour.

Then on the question of holidays, the Board recommended that the employees be given two times the hourly wages for Sunday work instead of one and a half times.

And on the question of vacations you had to work for twenty-five years before you were entitled to three weeks vacation with pay. That was reduced to fifteen years.

Then there was time and a quarter allowed for Sundays, where the custom and practice of the industry was to pay the same rate on Sunday as on every other day.

Finally—and perhaps even more important—the Wage Stabilization Board report recommended that there be put into effect a compulsory Union shop provision.

After that report came in a steel strike was called for one minute of twelve on the morning of April 9, 1952.

On the day before, on April 8th, the steps taken which are here involved were these:

The President issued an Executive Order No. 10,340. In that order the Secretary of Commerce was authorized to take possession of all the plants he deemed necessary to insure the continued and uninterrupted flow of the produc-
[fol. 1237] tion of steel.

The President in his order said that that continued flow of steel was indispensable to the national defense and the national safety, and that any stoppage in the work in the steel plants and industry which had stoppage or substantially an industry which had stoppage would prove disastrous; and by specific provision of that Order, Paragraph 35 stated that the Secretary of Commerce should

have the power to determine and prescribe the terms and conditions of employment.

Now that Executive Order is attached to and made a part of our complaint as Exhibit C. Accompanying that Executive Order there is an exhibit B attached to our Complaint, the Order No. 1 that Mr. Sawyer issued taking possession of all the plants included in the list, and they are practically every steel plant in the United States.

The Court: May I interrupt you right there?

Mr. Kiendl: Yes; your Honor.

The Court: Will you inform me percentagewise the amount of the industry represented in this court this morning?

Mr. Kiendl: My best guess would be it would be close to one hundred percent.

The Court: It is very substantial, isn't it?

Mr. Kiendl: Very substantial percentage.

[fol. 1238] The Court: I notice that there are a great many others named in the Order No. 1 who are not before the Court this morning.

Mr. Kiendl: They haven't brought suit, some of them, as yet, just like we brought our suit somewhat later than Bethlehem.

The Court: They are small companies?

Mr. Kiendl: Comparatively small. I think all of the big companies, it is safe to say, are represented here.

Judge Bromley says it is closer to seventy per cent that are represented.

The Court: Seventy per cent?

Mr. Kiendl: That is what I am informed.

Now, on April 8th, after this General Order of the Secretary of Commerce was issued, he sent a telegram to the United States Steel Company, taking possession of all its plants. That telegram is made part of our Complaint as Exhibit A.

Now, in answer to that telegram, and we think this is important, Mr. Fairless of the United States Steel Company sent a telegram to Mr. Sawyer. It is not very long, and I take the liberty of reading it.

> "I acknowledge receipt of your telegram of April 9th."