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Bertram F. Willcox

Elizabeth Storey Landis

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GOVERNMENT SEIZURES IN LABOR DISPUTES

BERTRAM F. WILLCOX AND ELIZABETH STOREY LANDIS*

Work stoppages caused by labor disputes in public utilities or other industries vitally affecting the public health or safety have recently become a matter of widespread agitation.¹ The response to the prob-

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¹Since the beginning of the Second World War, twelve states have passed statutes dealing with some phase of the problem: FLA. STAT. ANN. (Supp. 1947) §§ 453.01-453.17, 2A CCH LAB. LAW SERV. ¶ 43,402 (1947); IND. ANN. STAT. (Burns, Supp. 1947) §§ 40-2401-40-2415, 2A CCH LAB. LAW SERV. ¶ 43,409 (1947); MASS. ANN. LAWS (Supp. 1947), c. 150B, §§ 1-7, 3 P-H LAB. LAW SERV. ¶ 47,788 (1947); MINN. STAT. ANN. (Supp. 1947) § 179.38, 2A CCH LAB. LAW SERV. ¶ 43,404A (1947); MO. REV. STAT. (Supp. 1947) §§ 10178.101-10178.122, 3 P-H LAB. LAW SERV. ¶ 47,740 (1947); NEB. LAWS 1947, L. B. 537, 2A CCH LAB. LAW SERV. ¶ 43,402 (1947); N. J. STAT. ANN. (Supp. 1947) §§ 13 B:1-26, 2A CCH LAB. LAW SERV. ¶ 42,514 (1947); N. D. REV. CODE (1943) tit. 37, § 37-0106; PA. STAT. ANN. (Purdon, Supp. 1947) tit. 43, §§ 206, 213, 215, 2A CCH LAB. LAW SERV. ¶ 42,501-18; TEX. STAT., REV. CIV. (Vernon, 1947) art. 5154b, 2A CCH LAB. LAW SERV. ¶ 43,412 (1947); VA. CODE (Michie, *et al.*, Supp. 1948) § 1887 (113-40), 2A CCH LAB. LAW SERV. ¶ 43,406 (1947); WIS. STAT. (Brossard, Supp. 1947) § 111.50-111.65, 2A CCH LAB. LAW SERV. ¶ 42,502-17 (1947); and see the emergency Virginia statute dealing with ferries only, VA. CODE (Michie, *et al.*, Supp. 1948) § 2072 (33).

In addition, the Kansas statute of World War I vintage, KAN. GEN. STAT. (Corrick, 1935) § 44-603, which declared the food, clothing, fuel industries and transportation of them, as well as public utilities, to be "affected with public interest and subject to state supervision," has been supplemented by a provision for emergency action in case of work stoppage. KAN. GEN. STAT. (Corrick, Supp. 1947) § 44-620, 2A CCH LAB. LAW SERV. ¶ 43,402 (1947).

The intense feeling aroused by the problem is indicated by the statements of public policy prefacing these statutes. For example, the Nebraska statute reads: "The continuous, uninterrupted, and proper operation of public utilities is essential to the welfare, health and safety of the citizens of the state. It is contrary to the public policy of the state to permit any substantial impairment or suspension of the operation of any public utility by reason of industrial disputes therein and the state will exercise every power at its command to prevent the same so as to protect its citizens from any dangers or catastrophes which would result therefrom. The services of such public utilities are clothed with a vital public interest and to protect same it is necessary that the relations between the employers and employees in such industries be regulated by the state to the extent and in the manner herein provided.

"No right exists in any natural or corporate person or group of persons to hinder, delay or suspend the continuity or efficiency of any public utility service, either by strike, lockout, or any other means."

The Texas statute reads: ". . . continuous service by public utilities furnishing electric energy, natural or artificial gas, or water to the public is absolutely essential to the life, health and safety of all the people, and . . . the wilful interruption or stoppage of such services by any person or group of persons is a public calamity which cannot be endured. . ."

See also Gerhart, *Strikes and Eminent Domain*, 30 J. AM. JUD. Soc'y 116 (1946); TWENTIETH CENTURY FUND LABOR COMMITTEE, STRIKES AND DEMOCRATIC GOVERNMENT 24-29 (1947); REPORT OF THE GOVERNOR'S LABOR-MANAGEMENT COMMITTEE, MASS. H. R. Doc. No. 1875 (Mar. 1947); Slichter, *To End Strikes in Essential Industries*, N. Y. Times, Jan. 12, 1947, § 6, p. 7; SLICHTER, THE CHALLENGE OF INDUSTRIAL RELATIONS 167-69 (1947).

Where the government failed to act in the case of the virtual lockout on the Toledo, Peoria and Western Railroad, the initiative was taken by private interests representing the affected community. In an action for equitable relief, the District Court for the Southern District of Illinois held that the court might appoint a receiver to run the railroad in the interests of the general public. *Farmers Grain Co. v. Toledo, Peoria & Western R. R.*, 66 F. Supp. 845 (S. D. Ill. 1946). The circuit court reversed, but allowed a mandatory injunction to issue in behalf of petitioners requiring the railroad

lem, however, has at best been sporadic and usually quite limited in its scope. While nearly all the states have legislation providing for public conciliation, mediation and voluntary arbitration services, only one-quarter of them provide by statute for some further relief where these measures fail;² and in only four cases does the legislation affect work stoppages in industries not covered by the term "public utilities."³ The Federal Government itself has provided, under the Taft-Hartley Act,⁴ for no more than a temporary stay through injunctive relief. Six states, Kansas, Massachusetts, Missouri, New Jersey, North Dakota and Virginia, have statutes providing for seizures.

Unfortunately, any realistic program dealing with labor disputes must anticipate the problem where collective bargaining, even implemented by voluntary government services, may fail to prevent a strike or lockout, and where the public interest necessitates uninterrupted maintenance of the service or supply affected.⁵ In such a situation

to maintain its service. 158 F. 2d 109 (C. C. A. 7th 1946). The court further decreed, Major, J., dissenting on this point, that the railroad was entitled to an injunction against interference by strikers, despite the provisions of the Norris-LaGuardia Act.

²This is apart from general provisions dealing with riot, disturbing the peace, etc., such as N. Y. Mil. Law §§ 8, 115. Many of the states provide for fact-finding boards, with publication of the findings where disputants refuse to accept the board's proposed settlement. See, e.g., ME. REV. STAT. (1944) c. 25, § 12 which provides that the board's findings shall be published immediately.

However, where publicity fails, statutory remedies usually are lacking.

³In general, the statutes include water, light, heat, gas, electric power, and public passenger transportation or communication as within the term "public utilities" or "essential industries." Massachusetts adds food and fuel to the list, and North Dakota includes coal mines. Kansas in one sweeping paragraph includes: "(1) The manufacture or preparation of food products . . . in any stage of the process . . . ; (2) The manufacture of clothing and . . . wearing apparel in common use . . . ; (3) The mining or production of any substance or material in common use as fuel . . . ; (4) The transportation of . . . [the above] . . . from the place where produced to the place of manufacture or consumption; (5) All public utilities. . . ." Minnesota, on the other hand, limits the provisions of its law to public charitable hospitals.

While the essential character of public utility services is indisputable, it is equally clear that in modern urban society many other industries, including the producers and distributors of certain consumers' goods, may be equally necessary to public health and safety. This has been dramatically illustrated by the coal strike of late 1946. And see Teller, *Government Seizure in Labor Disputes*, 60 HARV. L. REV. 1017, 1056-57 (1947).

Where Minnesota recognized the need for uninterrupted hospital service by statute, New York and Pennsylvania have in effect achieved the same result by court decisions which acknowledge what Justice Pecora termed the "frantic immediacy" of hospital emergency cases when he held that, "The necessity of avoiding . . . tragic consequences to the public clearly outweighs the sound general policy favoring the protection of labor's right to strike. . . ." *New York Hospital v. Hanson*, 185 Misc. 937, 943, 59 N. Y. S. 2d 91, 96 (Sup. Ct. 1945). See *New York Hospital v. Hanson*, 185 Misc. 934, 60 N. Y. S. 2d 589 (Sup. Ct. 1945) (preliminary hearing); *Beth-El Hospital v. Robbins*, 186 Misc. 506, 60 N. Y. S. 2d 789 (Sup. Ct. 1946); *Western Pennsylvania Hospital v. Lichliter*, 340 Pa. 382, 17 A. 2d 206 (1941). But see *Northwestern Hospital of Minneapolis v. Public Building Service Employees' Union Local No. 113*, 208 Minn. 389, 294 N. W. 215 (1940).

⁴61 STAT. 155-56 (1947), 29 U. S. C. §§ 179-80 (Supp. 1947).

⁵Even the much vaunted Railway Labor Act, 44 STAT. 577 (1926), as amended, 45 U. S. C. § 151 (1946), with the famous provision for a "cooling-off period," could not prevent a strike which ultimately necessitated government seizure during the war, nor again in the spring of 1948.

there appears to be no alternative to government compulsion in some form,⁶ whether it be by injunction,⁷ compulsory arbitration,⁸ government seizure,⁹ or nationalization.¹⁰ It is the writers' belief that of the methods listed above, temporary government seizure until agreement can be reached by private negotiation is the most feasible and the least antipathetic to the preservation of free enterprise and free

⁶Gerhart, *Labor Disputes—Their Settlement by Judicial Process*, 32 A. B. A. J. 752, 803 (1946) lists nine methods of settling labor disputes in order of increasing legal compulsion, from conference between the parties to making striking treason.

⁷The states may have to amend their "little Norris-LaGuardia Acts" in order to give their courts jurisdiction to enjoin strikers in private industries, although the New York and Pennsylvania cases cited in note 3 *supra* indicate at least some authority to the contrary. This point was squarely raised in the case of the Duquesne Power and Light Co., Ct. of Common Pleas, Allegheny Co., Pa., No. 2978, Oct. Term, 1946. The City of Pittsburgh, in the name of its director of public health, obtained an injunction requiring (1) the employees to refrain from striking, and (2) the company to assemble its out-of-state directors to meet to negotiate with the union. The city's bill emphasized that it was seeking relief as the sovereign, and not as an antagonist, and was supported by affidavits made by the president and the secretary of the Allegheny County Medical Society, the secretary of the Hospital Council of Western Pennsylvania, the Director of the Department of Public Works in Pittsburgh, and the Director of Public Safety in the city. The union president was temporarily jailed for contempt of court for failure to obey the injunction. However, the case was never appealed, as the city and the union reached a compromise, and the bill was dismissed at the request of the city.

The use of injunctions against striking employees raises serious questions of policy as well as of law. First, there is the historic antagonism of labor against "government by injunction" coupled with the fear that they may be used by unsympathetic public officials as freely as by private employers. Secondly, the use of injunctions unduly favors the party that is attempting to maintain the status quo. He may continue his course of action without attempting to meet demands upon him, secure in the knowledge that the injunction prevents his opponents from using their most effective method of exerting pressure for change. The new Texas statute contains an example of exactly the type of provision that is feared by labor. Section 3 of the act makes it unlawful to picket the premises of any public utility to disrupt services or to intimidate employees to that end, and the court is empowered to issue a restraining order to prevent such action. But the Act does not deal with the problem of lock-outs at all.

⁸The Florida, Indiana, Minnesota, Pennsylvania and Wisconsin statutes make this the keystone of handling labor disputes in public utilities. The Nebraska statute empowers the State Court of Industrial Relations to perform the same function under a different name, and the New Jersey statute provides for compulsory arbitration to settle the issue after seizure.

Compulsory arbitration is, however, condemned generally by students of labor relations, labor, and management as destroying the concept of *free* collective bargaining. TWENTIETH CENTURY FUND LABOR COMMITTEE, STRIKES AND DEMOCRATIC GOVERNMENT 15 (1947); *Hearing before the Sen. Committee on Labor and Public Welfare on the Taft-Hartley Bill*, 80th Cong., 1st Sess., Part 2, p. 590 (1947) (statement by Ira Mosher, chairman of the Executive Committee of the National Association of Manufacturers on Compulsory Arbitration); *id.* Part 3, pp. 1207-10 (statement by Joseph A. Beirne, president of the National Federation of Telephone Workers); *id.* Part 3, p. 1531 (brief submitted by Walter P. Reuther, President of the United Automobile Workers, CIO). *But see* Huebner, *Compulsory Arbitration of Labor Disputes*, 30 J. AM. JUD. SOC'Y 123 (1946).

⁹Seizure was, of course, the method used by the Government under the War Labor Disputes Act, 57 STAT. 163 (1943), 50 U. S. C. § 1501 (1946), and has been suggested as a necessary measure in many studies dealing with the problem of work stoppages in essential industries. Gerhart, *Strikes and Eminent Domain*, 30 J. AM. JUD. SOC'Y 116 (1946); TWENTIETH CENTURY FUND LABOR COMMITTEE, STRIKES AND DEMOCRATIC GOVERNMENT 24-29 (1947); Slichter, *To End Strikes in Essential Industries*, N. Y. Times, Jan. 12, 1947, § 6, p. 7; SLICHTER, *THE CHALLENGE OF INDUSTRIAL RELATIONS* 167-69 (1947); REPORT OF THE GOVERNOR'S LABOR-MANAGEMENT COMMITTEE, MASS. H. R. Doc. No. 1875 (Mar. 1947).

¹⁰For example, the topic of the Labor Relations Forum Broadcast for Wednesday night, Dec. 4, 1946, was: "Should We Nationalize the Coal Mines?"

labor.¹¹ However, this paper does not attempt to recite the arguments supporting this policy,¹² nor to marshal the law upholding the right of the government to seize and operate essential industries.¹³ It is written to suggest some of the problems that may arise where seizure is adopted as the means of coping with work stoppages in necessary industries.¹⁴

¹¹Seizure is "a step short of government ownership, taken in a free-enterprise society in cases of extraordinary emergency." Teller, *Government Seizure in Labor Disputes*, 60 HARV. L. REV. 1017, 1018 (1947). It "appears at present to be a means of reconciling democratic institutions with the adequate handling of crisis situations." *Id.* at 1059. It is the only one of the four methods which allows free collective bargaining to continue without unduly favoring one of the parties, as in the case of injunction. See notes 7-10 *supra* and the statement of Donald R. Richberg during the 1948 railroad strike, N. Y. Times, May 16, 1948, § 4, p. 7, col. 6.

¹²For a thoroughgoing condemnation, see the Newsletter of the Federation of the Bar, Sixth Judicial District, containing a report on the March 21, 1947 meeting of the Federation Committee on Labor Law: "The Committee felt that the elements of the plan had been tried by the Federal Government under the Wartime Acts and that they should not be further perpetuated as their inadequacy had been proven and their totalitarian incidents would be destructive to individual liberty and opportunity. . . .

"In our anxiety to resolve our labor difficulties, we should be careful not to subvert our free institutions.

"The peacetime seizure of private industry by government; the concept of a man's job as property which may be appropriated by government; the peacetime suspension of the right to strike in what is essentially private industry; the compulsory fixing of wages and investment returns by government boards in peacetime—these are concepts which are foreign to our free enterprise system. If adopted in respect to our key industries, it is difficult to see how complete regimentation of our economy could be avoided—with all that means in the destruction of individual liberty and opportunity. . . .

"If, when set free, individual freedom and responsibility prove inadequate to the task, there will be time for the more drastic forms of government intervention, but we believe that in such event, we, as lawyers, should make it clear that it is not constitutional democracy, but something quite foreign to it, that has been called into play. . . ."

The writers believe that these excerpts from the committee's report show a serious misunderstanding of the suggestion of government seizure. In the first place, such procedure is designed for emergencies only, in the situation where a work stoppage is brought about by the failure of employees and employer to reach a working agreement and where the result would seriously affect the necessary community services. Is it "foreign," for example, to use compulsion to assure coal for homes or hospitals in below-zero weather, or to make sure there is water to fight fires, as well as for essential sanitary purposes? Secondly, the concept of what is "essentially private industry" seems somewhat doubtful when used in respect to *public* utilities, which are subject to relatively rigorous government regulation because of their importance to the welfare of the whole community. Third, the attributes of government seizure as stated by the committee seem to be exaggerated. For example, "compulsory fixing of wages and investment returns" sounds more like a reference to compulsory arbitration than to seizure, under which labor and management may continue to bargain as to the terms of employment to which they can mutually agree.

¹³For a thorough exposition of this point, see Gerhart, *Strikes and Eminent Domain*, 30 J. AM. JUD. SOC'Y 116 (1946). He argues that the government may take an interest less than legal title by eminent domain for a period limited by the duration of the public use. SECOND WAR POWERS ACT, 56 STAT. 176 (1942), 50 U. S. C. § 631 *et seq.* (1946), in § 632 provided for the acquisition of real property, "temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith," by condemnation.

The constitutionality of the New Jersey seizure and compulsory arbitration provisions has been upheld against attack by both employer and employees in *Van Riper v. Traffic Telephone Workers Federation of New Jersey*, — N. J. Eq. —, 61 A. 2d 570 (Ch. 1948).

¹⁴Plant seizure was a problem of the Federal Government during the war when the object was to maintain war production. At the present time it is more likely to be a state question. In general, however, the same problems will arise, whether the state or federal government acts, and the same considerations will apply. Except where otherwise stated, in the section dealing with future seizures, no distinctions will be made between federal and state governments.

The fact that the situation may be expected to occur only infrequently, and that any form of government intervention will be unpopular at best, does not lessen the need to anticipate questions that will arise upon those rare but crucial occasions. Each such occasion will be an emergency, with pressures and passions running high. Careful study and wise planning can be better carried forward ahead of the storm, in a quieter atmosphere. If such preparation should result in legislation, furthermore, advance knowledge of the full effects of such government intervention may induce the disputants to reach a satisfactory agreement by negotiation.

*Wartime Seizures*¹⁵

The Federal Government's wartime policy appears to offer relatively little assistance in formulating principles under which to operate in peacetime. During the war, seizure appears usually to have been little more than a formal gesture, sufficient only to bluff or cajole, in the name of the United States, employees and employers into continuing production despite their differences.¹⁶

The standard form of executive order empowering a federal official—usually the War or Navy Secretary¹⁷—to seize and operate a war plant contained seemingly broad powers, phrased in the following manner:

“[the specified official] . . . is authorized and directed, through and with the aid of any persons or instrumentalities that he may designate, to take possession of the plants and facilities of—located at —, and, *to the extent that he may deem necessary*, of any real or personal property, and other *assets wherever situated*, used in connection with the operations thereof; *to operate or to arrange for the operation* of the plants and facilities *in any manner that he deems necessary* for the successful prosecution of the war; to exercise any contractual or other rights . . . and to continue the employment of, or to employ, any persons, and *to do any other thing, that he may deem necessary for*, or incidental to, the operation of the said plants and facilities and the production, sale and distribution of the products thereof; and *to take any other steps*

¹⁵Included in this section are seizures after “V-J” day, but before the expiration of the President's powers under the War Labor Disputes Act.

¹⁶“With the exception of the anthracite coal miners in 1945, the strikers during the war always did go back to work under government seizure. They were under no legal compulsion to do so, however, and many times it was doubtful up to the last minute whether even seizure would be effective.” Witte, *Wartime Handling of Labor Disputes*, 25 HARV. BUS. REV. 169, 172 (1947).

¹⁷Major exceptions: the Secretary of the Interior seized the coal mines; the Secretary of Commerce (with physical assistance from the Army) took over Montgomery Ward; the Secretary of Agriculture took over the meat processing plants; and the Director of the Office of Defense Transportation seized the railroads and other transportation system, including buses, trucking systems, Great Lakes boats, and New York Harbor facilities.

that he deems necessary to carry out the provisions and purposes of this order. . . ."¹⁸ (italics added.)

But in most cases these powers were then restricted by a paragraph which directed the Secretary to "permit the management of the plants and facilities taken under the provisions of this order to continue with its managerial functions to the maximum degree possible, consistent with the aims of this order."¹⁹

While presidential orders varied according to the circumstances and subject matter of the case involved,²⁰ a certain pattern of rights and liabilities of employees, employers, and government appears to be quite clear and consistent throughout the entire war period. The major recurring factors are listed below:²¹

Employees' rights

1. In general, the employees were protected in the exercise of their rights to continue membership in labor organizations, to bargain collectively, through representatives of their own choosing, and to engage in "concerted activity" for the purpose of collective bargaining or other mutual aid or protection, so long as these activities did not interfere with war production; they retained all rights under the National Labor Relations Act.²²

2. Employees retained rights to all statutory benefits available under private operation, such as social security, workmen's compensation, etc.²³ Where workmen's compensation was not in effect, employees

¹⁸Italics added. This example is quoted from Exec. Order No. 9477, 9 FED. REC. 10,941 (1944) (Cleveland Graphite Bronze Co.).

¹⁹*Ibid.* Naturally such a provision did not occur when seizure was caused by company non-compliance with War Labor Board orders.

²⁰The orders differed, of course, depending on whether non-compliance of labor or of management had caused the seizure. The greatest variations and the most specific detail were embodied in the orders seizing the coal mines, the railroads, Montgomery Ward Co., and certain other "problem" industries.

²¹This paper is limited to incidents of government seizure during and after the war only. As to the long government experience in operation of the railroads during World War I, pursuant to the seizure provision of the army appropriation bill of 1916, the Federal Control Act of March 21, 1918, and the Transportation Act of 1920 (termination), see Tomlinson, *Federal Wartime Control*, 51 C. J. 448-59 (1930); and particularly, North Carolina R. R. v. Lee, 260 U. S. 16, 43 Sup. Ct. 2 (1922); Missouri Pac. R. R. v. Ault, 256 U. S. 554, 41 Sup. Ct. 593 (1921); Kansas City So. Ry. v. Comm'r, 52 F. 2d 372 (C. C. A. 8th 1931).

²²*E.g.*, Exec. Order No. 9340, 8 FED. REC. 5695 (1943) (coal mines); Exec. Order No. 9727, 11 FED. REC. 5461 (1946) (railroads); Glen Alden Coal Co. v. NLRB, 141 F. 2d 47 (C. C. A. 3d 1944); Ken-Rad Tube & Lamp Corp., 56 N. L. R. B. 1050 (1944); West Kentucky Coal Co., 54 N. L. R. B. 358 (1944); Pscbirrer & Sons Coal Co., 50 N. L. R. B. 530 (1943).

²³*E.g.*, Solid Fuels Admin. Reg., Operation of Mines under Govt. Control, § 603.23, 8 FED. REC. 6655 (1943); Federal Mgr. of Motor Carrier Transportation, ODT Order, 9 FED. REC. 10,102 (1944).

retained their common law right to bring an action against the *private operator* for negligent injury occurring during the seizure period.²⁴

3. Employees might apply to the War Labor Board for changes in wages and working conditions, and the Board's order was binding upon the government agency in charge of seizure.²⁵ And where seizure was caused by company non-compliance with Board orders, such as failure to agree to a maintenance-of-membership clause in the contract, the government manager put such orders into effect.²⁶

Employees' liabilities, and limitations on their rights

1. Wages and conditions of employment in effect at the outset were continued during seizure subject, of course, to the provision for change by application to the War Labor Board.²⁷

2. Rights to engage in "concerted activity" were limited to activity that did not hinder the war effort.²⁸ Strikes and slowdowns were absolutely prohibited, although the right to quit work individually was assured.²⁹ To enforce this prohibition, the government had available: injunctive relief;³⁰ criminal sanctions;³¹ and administrative remedies,³² including action by local selective service boards,³³ although apparently this last was not often employed.

²⁴*Stanton v. Ruthhel Coal Co.*, 127 W. Va. 685, 34 S. E. 2d 257 (1945), *cert. denied*, 326 U. S. 740, 66 Sup. Ct. 53 (1945).

²⁵WAR LABOR DISPUTES ACTS § 5, 57 STAT. 163 (1943), 50 U. S. C. § 1505 (1946). The Act will hereafter be referred to as WLDA.

²⁶*E.g.*, Exec. Order No. 9484, 9 FED. REG. 11,731 (1944) ordered the Secretary of War upon seizing the Farrell Cheek Steel Co. to observe the terms and conditions of the directive order of the regional War Labor Board, with which the company had not complied.

²⁷WLDA § 4.

²⁸*E.g.*, Exec. Order No. 9340, 8 FED. REG. 5695 (1943).

²⁹WLDA § 6.

³⁰*United States v. United Mine Workers*, 330 U. S. 258, 67 Sup. Ct. 677 (1947).

³¹WLDA § 6. This section also applied to plants seized not under the authority of the War Labor Disputes Act. *United States v. McMenamin*, 58 F. Supp. 478 (E. D. Pa. 1944).

³²*In re California Metal Trades Association*, 14 LAB. REL. REF. MAN. 1681 (WLB Decision, Aug. 19, 1944) (on Navy's petition, War Labor Board canceled certain privileges union had enjoyed under expired contract); Exec. Order No. 9585, 10 FED. REG. 8335 (1945) (Goodyear Tire & Rubber Co.) (upon request F. B. I. to investigate "any matter affecting the operation of said plants. . ."). See *San Francisco Lodge No. 68 v. Forrestal*, 58 F. Supp. 466 (N. D. Cal. 1944) (where the Secretary of the Navy threatened to withhold clearances and referrals, through the War Manpower Commission, from any union member discharged for infractions of the rules and regulations, if the court were to rule on the petition for injunction as stating a cause of action, it would hold that denial of clearance was not a penalty, and therefore not beyond the power of the Secretary, but was remedial); *I. A. M. Lodge 68, Office of Director of Economic Stabilization Order*, 9 FED. REG. 10,214 (1944) (denying supplemental gasoline ration coupons because employees refused to work overtime).

³³*E.g.*, Exec. Order No. 9408, 8 FED. REG. 16,958 (1943) (Secretary of War authorized to request the War Labor Board to withhold or withdraw from Employees Association of the Western Electric Co. Breeze Point plants, all benefits, privileges, and rights accruing to the Association under terms of employment in effect until Association demonstrates willingness to comply with War Labor Board order, and to recommend to the authorized federal agencies the entry of appropriate orders relating to modification or cancellation of draft deferments or unemployment privileges, or both); Exec. Order

3. Civil service status and protection were not granted to any employees.³⁴

*Employers' rights*³⁵

1. Executive orders commonly provided that the managements of the seized plants were to be permitted to "continue their respective managerial functions to the maximum degree possible, consistent with the purposes of this order."³⁶

2. In general, terms and conditions of employment in effect at the outset were continued.³⁷

3. Existing contracts and agreements remained in full effect.³⁸

4. The seizing agency was directed to protect the plant property, employees returning to work and persons seeking employment.³⁹

5. Executive orders sometimes provided that no attachment by mesne process, garnishment, execution or otherwise should be levied against any property of the seized company without prior approval of the government agency involved.⁴⁰

Employers' liabilities

1. Employers were subject to: all provisions of the National Labor Relations Act;⁴¹ all existing employee benefit programs such as social security;⁴² and common law liability for negligent injury during seizure, where employees were not covered by workmen's compensation.⁴³

No. 9496, 9 FED. REG. 13,187 (1944) (certain companies near Toledo, Ohio; "All federal agencies, including . . . the National Selective Service System, and the Department of Justice, are directed to cooperate with the Secretary . . . in carrying out the purposes of this order . . .").

³⁴Solid Fuels Admin. Reg., Operation of Mines under Govt. Control § 603.23 (e) 8 FED. REG. 6655 (1943); Fed. Mgr. of Govt. Controlled Railroads, ODT Order, 11 FED. REG. 5512 (1946).

³⁵Throughout this paper "employers," "owners," and "management" are used to mean an identical interest. It is recognized that in actual fact there will often be a conflict between these groups, and that the owners may be penalized for the labor policy of a management over which in reality they have very little control. However, ownership cannot with justice be allowed to shift this penalty to the public generally or to labor; that problem must be resolved within the framework of internal corporation administration. For a possible remedy available to stockholders, see *Abrams v. Allen*, 297 N. Y. 52, 74 N. E. 2d 305 (1947).

³⁶Except, of course, where seizure was caused by company non-compliance with War Labor Board orders. See, e.g., Exec. Order No. 9395B, 8 FED. REG. 16,957 (1943) (leather manufacturing plants near Salem, Peabody and Danvers, Mass.); Exec. Order No. 9463, 9 FED. REG. 9879 (1944) (various tool works located in San Francisco, Cal.).

³⁷WFLDA § 4.

³⁸E.g., Exec. Order No. 9727, 11 FED. REG. 5461 (1946) (railroads).

³⁹E.g., Exec. Order No. 9426, 9 FED. REG. 2113 (1944) (Department of Water and Power of City of Los Angeles, Cal.); Exec. Order No. 9484, 9 FED. REG. 11,731 (1944) (Farrell Cheek Steel Co.).

⁴⁰E.g., Exec. Order No. 9570, 10 FED. REG. 7235 (1945) (Scranton Transportation Co., Scranton, Pa.); Exec. Order No. 9693, 11 FED. REG. 1421 (1946) (New York Harbor facilities).

⁴¹See note 22 *supra*.

⁴²See note 23 *supra*.

⁴³See note 24 *supra*.

2. Government orders to employers were enforced by: replacement of private personnel who failed to cooperate when designated to act on behalf of the seizing agency;⁴⁴ ouster and denial of access to management;⁴⁵ or receivership.⁴⁶

3. Private companies remained subject to all provisions of federal, state and local statutes, ordinances and regulations, and were required to meet all federal, state and local taxes in the usual manner.⁴⁷

Government rights

1. The Government could enforce its orders against employees and employers by any of the methods noted above.⁴⁸

2. It could apply all statutes, ordinances and regulations to the seized companies and tax as usual.⁴⁹

3. The seizing agency could seek changes in existing wages and working conditions by application to the War Labor Board;⁵⁰ and where the refusal of private owners to put Board directives into effect had caused the seizure, executive orders empowered the agency to put the directives into effect and to pay out of net operating income wage increases accrued prior to taking possession.⁵¹

4. The Government's interest in plant property was protected by criminal laws protecting the United States.⁵²

5. The United States could not be bound, nor liability imposed upon it, by any plant executive in the absence of specific direction by the seizing agency.⁵³

Government responsibilities

1. All agencies were required to furnish persons and instrumentalities to aid in attaining the objectives of the seizure—to obtain

⁴⁴*E.g.*, Solid Fuels Admin. Reg., Operation of Mines under Govt. Control § 603.15 (b) 8 FED. REG. 6655 (1943).

⁴⁵The famous case illustrating this point is, of course, the forcible removal of Sewell Avery from his office in the Chicago Montgomery Ward headquarters. *N. Y. Times*, April 27, 1944, p. 1, col. 8; April 28, p. 1, col. 1; April 29, p. 1, col. 2.

⁴⁶The Toledo, Peoria and Western Railroad was in the hands of a government official acting as a receiver during the greater part of the war, due to the continued and uncompromising labor strife between the owners and the union. But see note 1 *supra* as to the propriety of a receivership granted at the instance of affected private interests.

⁴⁷*E.g.*, Exec. Order No. 9727, 11 FED. REG. 5461 (1946).

⁴⁸See notes 30, 31, 32, 33, 41, 42, and 43 *supra*.

⁴⁹See note 47 *supra*.

⁵⁰WLDA § 5.

⁵¹*E.g.*, Exec. Order No. 9480, 9 FED. REG. 11,143 (1944) (Twentieth Century Brass Works, Inc.); Exec. Order No. 9508, 9 FED. REG. 15,079 (1944) (certain plants of Montgomery Ward Co.).

⁵²*E.g.*, Solid Fuels Admin. Reg., Operation of Mines under Govt. Control § 603.24 (c), 8 FED. REG. 6655 (1943).

⁵³*E.g.*, Coal Mines Admin. Reg., Operation of Mines under Govt. Control, 8 FED. REG. 10,712 (1943) (amending coal mine regulations).

efficient war production;⁵⁴ and all agencies were required to aid in enforcement of seizure orders.⁵⁵

2. The army or other designated agencies were required to furnish protection to the seized property⁵⁶ and to employees returning to work or to persons seeking employment.⁵⁷

3. Where private plant managers were unwilling to take the responsibility for carrying out any order of the federal manager, the seizing agency took over the burden.⁵⁸

The railroad seizure of 1948

When contract negotiations between the railroads and the railway unions broke down in May, 1948, the president used an old pre-World War I statute as authority for army seizure of the railroads.⁵⁹ The statute provided that the president in time of war⁶⁰

“is empowered to take possession and assume control of any . . . systems of transportation . . . and to utilize the same . . . for the transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.”⁶¹ (italics added).

Under this authority, intended primarily to enable the president to transport troops or war supplies in case of need, the executive order, issued May 10, 1948,⁶² ordered the Secretary of the Army to seize the railroads.

The order might well have been one of those used in an earlier World War II seizure, with only the names and dates changed; the pattern of rights and duties of the parties was not changed; the Secretary was ordered to take only such possession and control as was necessary for operation of the nation's railway system. He was to permit the carriers “to continue their respective management functions to the maximum degree possible consistent with the purposes of this order.” The railroads were to continue in the ordinary course of business, and payments of dividends, interest, etc., were to be made as usual. The terms

⁵⁴*E.g.*, Exec. Order No. 9141, 7 FED. REG. 2961 (1942) (Brewster Aeronautical Corp.); Exec. Order No. 9496, 9 FED. REG. 13,187 (1944) (certain companies near Toledo, Ohio).

⁵⁵*Ibid.*

⁵⁶*E.g.*, Exec. Order No. 9554, 10 FED. REG. 5981 (1945) (motor carriers in and about Chicago, Ill.).

⁵⁷*Ibid.*

⁵⁸*E.g.*, Federal Mgr. of Motor Carrier Transportation, ODT Order, 9 FED. REG. 10,102 (1944).

⁵⁹39 STAT. 619, 645 (1916), 10 U. S. C. § 1361 (1946). This provision was stuck in the middle of a long army appropriation bill.

⁶⁰Since peace treaties had not yet been signed in May, 1948, the war still continued technically despite an earlier termination of the “war emergency.” See 22 LAB. REL. REF. MAN. 30 (1948).

⁶¹39 STAT. 619, 645 (1916), 10 U. S. C. § 1361 (1946).

⁶²Exec. Order No. 9957, 13 FED. REG. 2503 (1948).

and conditions of employment in effect at the beginning of the seizure were to continue, and employees were to have all their accustomed rights to engage in union activity, except the right to strike.⁶³

In granting the Government's petition for an injunction at the time of the seizure, Judge Goldsborough found that:

"Upon the assumption on May 10, 1948, of such possession, control and operation of the carriers by the United States, the United States became the employer of the employees performing services on the seized carriers. Such employee relationship has continued to the date of this hearing and at no time have the carriers themselves stood in the capacity of employers."⁶⁴

Nevertheless, this formal seizure by the Government was highly objectionable to the railway employees since it seemed to leave them exactly where they had been before but shorn of the right to strike to enforce their demands, while the carriers continued in *de facto* control and were apparently under no bargaining disadvantage. In a strongly worded statement the Railway Labor Executives Association demanded that the Government,

"having designated itself as the legal operator of the railroads, assume the full responsibilities of operation; that the Government take control of the revenues of the railroads as it has already taken control of the employees of the railroads, and proceed to bargain upon wages and working conditions."⁶⁵

But in granting the permanent injunction, Judge Goldsborough glossed over the carriers' continuing management. Such control, he said, was granted only by express delegation of the Secretary of the Army; and what power he had delegated, he might take away and grant to other subordinates of his own choosing.⁶⁶ In any case, the carriers in fact continued to direct railroad operations until the properties were officially returned.

In respect to future terms and conditions of employment, the Government took an unequivocal stand in favor of entirely private negotiation without intervention by the Secretary of the Army.⁶⁷ Whether this policy was based upon dislike of compulsory arbitration, fear of the political inexpediency of intervention with elections close at hand, or belief that this policy would improve the possibilities of permanent

⁶³This is not an exhaustive list of provisions, but merely those illustrating the similarity between this and previous seizure orders.

⁶⁴United States v. Brotherhood of Locomotive Engineers, 79 F. Supp. 485 (D. D. C. 1948), 22 LAB. REL. REF. MAN. 2148 (1948).

⁶⁵N. Y. Times, May 22, 1948, p. 1, col. 2.

⁶⁶United States v. Brotherhood of Locomotive Engineers, 79 F. Supp. 485 (D. D. C. 1948), 22 LAB. REL. REF. MAN. 2267 (1948).

⁶⁷N. Y. Times, June 12, 1948, p. 1, col. 1.

peace,⁶⁸ the Government maintained its position unmoved until the unions and the railroads finally composed their differences.

The history of the railroad seizure seems to indicate that the Federal Government had not prepared any plan to meet such emergency. The authority for the seizure was weak; the order showed no advance from wartime measures; and the admirable intent to let the parties work out their own solution without formal intervention was vitiated by a policy which deprived workers of their right to strike but allowed the carriers to continue to garner profits. State and Federal Governments should heed this experience and prepare in advance by carefully drawn statutes for possible future emergencies. This is one case where having a law "on the books" may serve a valuable purpose even if it is never used.

Preparing for Future Seizures

Assuming the necessity of seizure in work stoppages affecting public health and safety, the problems arising out of such government action⁶⁹ may be roughly classified into two general categories; those concerning substantive policy considerations, and those involving day-to-day administration of the seized facilities.

In the first category belong the problems of: (1) the degree of control exercised by the government, and the method of exercising it; (2) allocation of profits and losses during the period of government operation; (3) compensation for seizure and operation by the government; (4) change or maintenance of wages and working conditions during seizure; (5) the right to strike or to quit during seizure; (6) provisions for termination of control.

Problems in the second category include: (1) continuation of union activity of the kind prohibited to regular government employees; (2) continuation of private benefit systems, such as social security, etc.; (3) effect of government seizure upon contracts made prior to or during the period of government control; (4) tort liability; (5) application of federal, state and local taxes and regulatory provisions; (6) suits by or against the seized company; (7) bankruptcy, receivership and reorganization proceedings.

⁶⁸This argument was accepted by Judge Goldsborough in his decision of the application for the permanent injunction, *United States v. Brotherhood of Locomotive Engineers*, 79 F. Supp. 485 (D. D. C. 1948), 22 LAB. REL. REF. MAN. 2267 (1948).

⁶⁹This section relates only to actual seizure problems. A comprehensive statute might cover such points as voluntary conciliation, mediation, and arbitration services, fact-finding boards, "cooling-off" periods, etc.; provisions for seizure should be limited to last resort when all other methods fail.

The Virginia statute prohibits strikes or lock-outs for a period of five weeks after notice to the governor, during which time the state may train workers to replace workers who intend to leave their jobs.

Substantive Policy

1. *Degree and method of control:*

As noted above, during the war the control exercised by the Government was in most cases nominal.⁷⁰ In many cases the company president or another of its executive officers was named government manager, under the direction of the Secretary of War or Navy.⁷¹ The United States flag, a few military officials present at the outset, and a few placards, evidenced government control;⁷² and those combined with patriotic appeal induced workers to return where a strike had been called.⁷³ It is seriously questioned whether today the outward symbols alone would induce a return to work. Disputant employees might well feel that such an arrangement was a mere sham under which the same employers would profit by the continuance of work under the same old wages and working conditions. At the same time it is clear that it may be impossible—certainly highly impracticable—to install a complete hierarchy of government officials to take over and manage a going concern, one which by hypothesis must not fail to render continuous and efficient service to the community.

Thus the problem becomes one of a feasible compromise which will satisfy employees that actual control is being exercised by the government but which still will not place undue burdens upon the public officials who administer the plan. The minimum requirement would seem to be the nomination of a government manager, not connected with either of the parties or with the government conciliation or arbitration services (which presumably have failed to prevent the impasse), to replace the top private executive, and to take actual control. The wartime policy of naming a plant executive as government manager should *not* be followed. It is suggested that the government policy, in regard to company profits, discussed immediately below, may have a decided effect upon labor's attitude as to the genuineness of the control exercised by the government.

⁷⁰Teller, *Government Seizure in Labor Disputes*, 60 HARV. L. REV. 1017, 1040 (1947). Exceptional cases occurred when seizure was caused by company non-compliance. Among the most notorious cases are those involving Montgomery Ward & Co., S. A. Woods Co., and the Toledo, Peoria & Western Railroad.

⁷¹*E.g.*, Solid Fuels Admin. Reg., Operation of Mines under Govt. Control § 603.15 (a), 8 FED. REG. 6655 (1943) provides that operation of the coal mines is ordinarily to be entrusted to a company officer formerly in charge of operations, who is authorized to act for the company, and who will act as Operating Manager for the United States while continuing to serve as officer or employee of the company.

⁷²*See* Office of the Secretary of the Interior Orders, 10 FED. REG. 3983-84 (1945) (relating to seizure of the coal mines); Witte, *Wartime Handling of Labor Disputes*, 25 HARV. BUS. REV. 169, 175 (1947).

⁷³Witte, *Wartime Handling of Labor Disputes*, 25 HARV. BUS. REV. 169, 172 (1947). Note that the problem was somewhat different where the moving cause of seizure was company failure to obey a WLB directive, since seizure ended effective company resistance.

In general, the industries liable to seizure are public utilities, which are monopolies.⁷⁴ They should not, therefore, have grounds for serious complaint about government control as it would affect their future competitive position.⁷⁵ However, cases might arise where the seized company, such as a fuel processor or distributor, might be adversely affected as to future competitive ability by some policy adopted by government seizure officials, as for example, a decision affecting the price to be charged on long-term contracts, or effecting an expansion of marketing facilities. Even a utility, for that matter, might suffer from an expansionist policy. (The special problems involving wages and working conditions are discussed below under 4.) It is submitted that this nevertheless is not a sufficient ground for any differentiation in the degree of control exercised. Any competitive industry in which a strike occurs may suffer injury to its future competitive position from a strike; this is one of the factors upon which a union relies in seeking to obtain its demands. Where government seizure prevents the strike, there is no particular reason for eliminating the substituted pressure of possible detriment caused by a variation between a government management policy and the policy which the company would prefer,⁷⁶ provided the government manager acts in good faith.⁷⁷

To require no more than good faith, might seem naive to many, including those engaged in business management, who react allergically to "government bureaucracy" and all its works. Men who spend their days in setting policies for large corporations naturally distrust the ability of a government administrator, however well intentioned, to make those delicate decisions. It is the same feeling which comes out in objection to arbitration of any issue which might trench on management functions (or "management prerogatives," to use the bargain-

⁷⁴Exceptions would include essential industries not recognized as utilities, such as coal mines.

⁷⁵The rare exception would be the case of utilities whose products are competitive, such as, to a limited extent and in limited areas, gas and electricity.

⁷⁶It is doubtful if this danger is more than speculative, since the government manager would probably consult company officers on any long-term policy. If, as is advocated below, wages and working conditions existing at the time of seizure are continued until a change is agreed upon by the parties, the possibility of the government manager inaugurating a wage change that would make it impossible for the company to complete is eliminated.

In the provisions for seizure of the motor carriers, the carriers were allowed to make formal protest to the Federal Manager regarding any action required of them for which they were unwilling to take responsibility; the rule was thereupon suspended as to the protesting carrier until such time as the Federal Manager specifically directed that it be put into effect. Federal Mgr. of Motor Carrier Transportation, ODT Order, 9 FED. REG. 10,102 (1944).

⁷⁷Where he acts in bad faith or beyond the scope of his authority the government manager should be personally liable and the company should be able to obtain court relief against him personally, FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 253-54 (1928).

ing-table phrase) and which no arbitrator, no "outsider" however fair, can possibly know enough to handle wisely. To some extent these views are probably exaggerated, by the current way of thinking by business about government. (To say this is not to say that the exaggerations may be disregarded safely; they form a very real part of the conditions given, in which our problems must be solved.) To some extent the views are probably sound; they form a part of one of the most pressing questions of our era: to what extent can socialized business compensate for a probably lesser efficiency by a probably greater service of the general good? The difficulty would be enhanced here, furthermore, by the temporary nature of a government administrator, which would make it especially difficult for him to make wise decisions on policy.

Perhaps the dangers might be lessened by limiting the administrator's authority to those decisions reasonably necessary to the current operation of the plant during the probable period of seizure. Whether such a limitation would present a soluble problem in draftmanship, or an impossible one, is hard to guess in advance of study and trial in connection with a particular type of utility or other essential industry. We do not intend to belittle the difficulties. In broad perspective, however, they seem less formidable, for a business which must go on in the public interest, but which cannot agree with its workers on how to do so, than do the difficulties of compulsory arbitration or the difficulties of nationalization.

Enforcement of government policy against employees is discussed below under 5. Enforcement against company officials should be effected by summary dismissal of officers⁷⁸ who fail to follow directions or who willfully obstruct the program of the government manager. In the manager's discretion, they should thereafter be refused access to the company's property for part of the period of seizure, or the whole of it; and they should not be entitled to salary during the period of ouster.

Here again there are difficulties which ought not to be blinked. If management should refuse to follow the orders of the administrator, or if a large part of management should so refuse, the plant would have to shut down. This is as certainly true as the correlative fact, much more generally recognized, that if workers should refuse to return to their work, or to continue work, in spite of a government seizure, operations would have to cease. Unless and until all our freedoms go

⁷⁸This term should include all supervisory officials whose interests in the dispute are clearly connected with those of the management. Whether foremen and persons of similar status are included in this class will depend upon the facts of the particular case.

down under a machine-gunning State, these conclusions are unavoidable. The practical answer, which has served us fairly well thus far, is that the sense of responsibility to the public and its government, the pressures of public opinion and the fear of public indignation, combine to keep both management and labor pretty well at work under a governmental operation.

2. *Allocation of profits and losses:*

According to Witte, during the war, plant owners retained whatever profits were earned during the seizure, while the Government bore the loss, if any.⁷⁹ With a few exceptions, executive orders did not deal specifically with this point, but the general approach was that seizure was to disturb the normal order of affairs to the minimum;⁸⁰ and presumably the continued garnering of profits (with possible resultant dividend payments) was within this approach.⁸¹

This policy has been attacked effectively as an unfair and unreasonable treatment of the problem.⁸² Whatever may have been its value in war, furthermore, the continuation of this rough-and-ready method would be entirely unjustified in any peacetime seizure. From the point of view of the employee who is restrained from striking to protest his side of the dispute, it must seem a one-sided justice indeed that allows his antagonist to continue to derive profits from his "forced" labor while the issue is still undecided. From the public's viewpoint, such a course of action must in the long-run be disadvantageous. It may tempt certain employers to prolong government control if they can reap the profits without the worries. This must ultimately result, first, in higher taxes to the public, who must pay the cost of government administration; second, in an impetus to permanent government operation and possibly also ownership, which, good or bad, should be clearly recognized as such; and third, in a general discrediting of the mechanism of collective bargaining. As the Virginia Supreme Court of Appeals said in a recent decision relating to seizure of a ferry under a special state statute:

"Rather it would be unjust under the circumstances to pay all the profits to the ferry company, regardless of whether they would exceed just compensation. To do so would make the Commissioner,

⁷⁹Witte, *Wartime Handling of Labor Disputes*, 25 HARV. BUS. REV. 169, 175 (1947). But see, as to losses, Coal Mines Admin. Reg., Operation of Mines under Govt. Control, 8 FED. REG. 10,712, § 301.17 (b) (1943).

⁸⁰This is discussed at page 178, under the sub-heading *Administration*.

⁸¹E.g., Exec. Order No. 9727, 11 FED. REG. 5461 (1946) provided for payments of dividends on the stock and of principal, interest, sinking funds, etc., on the bonds of seized railroads.

⁸²TWENTIETH CENTURY FUND LABOR COMMITTEE, STRIKES AND DEMOCRATIC GOVERNMENT 27 (1947); Gerhart, *Strikes and Eminent Domain*, 30 J. AM. JUD. SOC'Y 120 (1946).

contrary to the plain language and intentment of the Act, the agent of the ferry company, operating the ferries for the benefit of the ferry company and placing it in the happy position of having all to gain and nothing to lose by the Commissioner's continuing to operate the ferries. . . .

"Since the Commissioner has assumed control, the ferries are not to be returned to the ferry company until it is able and willing to operate them. If the ferry company could take all the profits, without having either to raise wages to end the strike, or to run the risk of a toll reduction, or to assume any other risks of operation, its willingness to take back its properties might not arrive on winged feet. There would be little incentive for it to try to settle its difficulties with its employees. The result would be to require the employees to work for the profit of the company while they are nominally the employees of the State."⁸³

The injustices of turning over profits to private companies are multiplied out of all reason by causing the government to bear any losses—a new sort of "heads I win, tails you lose" transaction.⁸⁴

3. *Compensation for government seizure and operation:*

Unlike government seizures during the war, peacetime seizure may not be based on the war powers of the president⁸⁵ or a War Labor Disputes Act. Among various possibilities, peacetime seizures may be predicated upon an extension of the government's inherent power of eminent domain.⁸⁶ This assures the company of just compensation and thus represents a fair and adequate method of handling the problem.⁸⁷ It meets the constitutional requirements of the Fifth and Fourteenth Amendments.

Under the eminent domain power as used in a labor dispute in essential industry, the government would take limited interests—*only* those necessary to accomplish its objective of keeping the industry running under circumstances conducive to restoring labor peace through

⁸³Anderson v. Chesapeake Ferry Co., 186 Va. 481, 498, 43 S. E. 2d 10, 19 (1947); Note, 23 N. Y. U. L. Q. REV. 198 (1948).

⁸⁴It is questionable how great a problem this would be, since most utilities show a relatively constant income, even during depressions. Railroads and other transportation utilities, some of which have been rather consistently "in the red," are an exception.

⁸⁵The president's power to take and use property in furtherance of the war effort was argued in National War Labor Board v. Montgomery Ward & Co., 144 F. 2d 528 (App. D. C. 1944), cert. denied, 323 U. S. 774, 65 Sup. Ct. 134 (1944).

⁸⁶See Gerhart, *Strikes and Eminent Domain*, 30 J. AM. JUD. SOC'Y 116 (1946).

⁸⁷As to the problem of compensation, Gerhart argues that compensation must be paid if the owner is deprived of any beneficial use of the property, and that mere government possession is sufficient to entitle the owner deprived of beneficial use to such payment. Ken-Rad Tube & Lamp Corp. v. Badeau, 55 F. Supp. 193, 200 (W. D. Ky. 1944); Teller, *Government Seizure in Labor Disputes*, 60 HARV. L. REV. 1017, 1056 (1947). But see Newsletter of the Federation of the Bar, Sixth Judicial District, reporting the March 21, 1947 meeting of the Federation Committee on Labor Law, as quoted in note 12 *supra*.

free collective bargaining. The interests would be taken by the government acting not as a traditional lessee in a condemnation procedure, but as a sovereign appropriator. The government would have the seize, in order to accomplish its objectives:

(a) Temporary (indefinite in time) control (management function)⁸⁸ with use of assets, including stockholders' capital.

(b) The potential profits accruing because of government operation during the period of seizure.

Any plan which does not provide government control of profits will fail to satisfy a primary objective of seizure, since there can be no free collective bargaining where the company continues to make a profit out of the labor of its employees who are negotiating with it while they are in practical effect required by government intervention to continue working. Since seizure is predicated upon a labor shortage that is at least in large part effective, the government intervention is responsible for the creation of *any* profits instead of the losses caused by idle plants.⁸⁹ As a practical matter, there is no way of restoring the profits to the consumers from whom they were derived; there is therefore no place for them to go except to the state, for in the last analysis the state most completely represents the consuming public, which is the source of revenue and in whose behalf the service has been continued.

Since the government takes only those interests which are necessary for it to accomplish its objectives, there is no reason for it to take over the burden of paying the company's operating losses. There is no reason for carrying over the arbitrary assumption from private law that government must assume all a lessee's burdens if it assumes a lessee's benefits, since there is in this case no traditional lessee relationship: the government takes *only* such interests as it needs for its purposes and pays compensation for those interests only. As a practical matter, the assumption of losses by the government might make it inexpedient to use seizure in the case of companies that regularly lose money (as certain transportation companies do). On the other hand, it might tempt financially embarrassed corporations to provoke labor trouble, in order to make government seizure and consequent assumption of losses necessary. It may be added that, to the extent the right to take profits is an element in determining the amount of "just compensation" to be awarded, any probability of government assumption of losses would reduce the compensation paid.

⁸⁸That there is such an interest has become orthodox economic doctrine since the days of BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119 *et seq.* (1933).

⁸⁹*Anderson v. Chesapeake Ferry Co.*, 186 Va. 481, 489, 498, 43 S. E. 2d 10, 15, 19 (1947).

While determination of the just compensation for these interests which the government takes in such a case would not be simple, the general problem is one with which courts are familiar and which they pass on traditionally. During the war, the Supreme Court enunciated a rule to ascertain the value of temporary interests condemned by the government.⁹⁰ And general criteria to be used in the case of ferry seizures under a special state seizure statute were worked out by the Virginia Supreme Court of Appeals when confronted by an appeal from the State Highway Commissioner's determination of compensation for the owner of a struck ferry.⁹¹ The court in that case held: (1) the fair rental value was just compensation for permanent seizure;⁹² (2) the fair rental value was the value which the owner lost—which here would be drastically reduced because of the fact that the owner could not operate during a strike effective enough to necessitate seizure—and not the profit made by the taker;⁹³ (3) profits arising from the commissioner's operation were not an automatic test for the fair compensation due, since that rule, applied to an unprofitable operation, would prohibit any compensation for the owner—an untenable position;⁹⁴ and (4) profits above the fair rental value must inure to the state, whose operation of the facilities had made them possible when the same operation could not have been carried on at all by the private owner.⁹⁵

While the use of "fair rental value" is a traditional approach to compensation in government seizure cases, it must never be forgotten that it is rental or compensation for the interest taken and for that alone. There is no simple leasehold here involved, but a taking of limited interests to accomplish a complex but essential public purpose. Perhaps

⁹⁰United States v. General Motors Corp., 323 U. S. 373, 65 Sup. Ct. 357 (1945), as modified by United States v. Petty Motor Co., 327 U. S. 372, 66 Sup. Ct. 596 (1946); Kansas City Southern Ry. v. Comm'r, 52 F. 2d 372, 379 *et seq.* (C. C. A. 8th 1931).

⁹¹Anderson v. Chesapeake Ferry Co., 186 Va. 481, 43 S. E. 2d 10 (1947).

⁹²*Id.* at 491, 43 S. E. 2d at 16.

⁹³"All the ferry company is entitled to is pay for what was taken at the time it was taken, not for what the taker made out of it after it was taken. What the Highway Commissioner made from the use of the property is not what the owner would have made if the property had not been taken. . . ." *Id.* at 491, 43 S. E. 2d at 16.

⁹⁴*Id.* at 492, 43 S. E. 2d at 16.

⁹⁵"The profits that have been made by the Highway Commissioner do not represent money that has been taken away from the ferry company. It is money that has been made by the Highway Commissioner by using the power of the State to quicken into action an idle enterprise. It would have remained idle and without any capacity to earn for its owners except for the exercise of the State's authority. That authority should not be used to make money for the owner that the owner could not have made for itself. . . ." *Id.* at 489, 43 S. E. 2d at 15.

"If the application of that method results in profits to the State that the legislature did not expect to accrue, that is not the fault of the State. These profits result from the tolls paid by the public for the use of the properties owned by the ferry company and operated by labor which the Act makes the agents and employees of the State Highway Department. It is not inequitable for the Commissioner to retain for the benefit of the public such profits as remain after paying the ferry company just compensation for the use of its properties. . . ." *Id.* at 498, 43 S. E. 2d at 19.

one of the most difficult practical problems facing government officials under a seizure statute will be to convince the courts that compensation is not an equivalent of profits, granted to the owners in another form. It should not be a windfall, the salvation of a company close to insolvency, but a payment calculated with the purpose of the taking constantly before the court. It should be remembered that profits during the seizure accrue because the government keeps the struck plant running, and that the company should not benefit because of the seizure which is made for the benefit of the general public and not of the company.

It may be that compensation will have to be paid also to company officials under contract who are displaced during the seizure period. This will be true, of course, only if they are dismissed because the government takes over their functions without fault on their part. The degree to which management officials of an "essential industry" are responsible to the public for the character of the operation of their companies, including their labor policies, presents a question which cannot be explored here.⁹⁶

An alternative plan for seizure might be premised on the government's power to seek a receivership, and under the receivership to administer struck plants. In place of being paid just compensation, the company might take its profits but be required to pay a charge, as it would be in the case of an ordinary equity receivership, for the expense and inconvenience to the state of government intervention. The Virginia general seizure statute follows this line of approach, demanding 15% of net profits for the government; but a percentage of gross income or a flat fee based on net worth, or proportional to net worth, might be substituted. It would seem that if the objectives of government seizure were to be attained successfully, the fee would have to be high enough to make it impossible for the company to profit at the expense of the "forced" labor of its employees and yet it should not penalize the financially unstable company by imposing too heavy fees. To do that might defeat the interests of the workers as well as those of the company.

It may well be that the ideal statute should embody alternative provisions under which seizure may be accomplished, under different circumstances, in the government's option.

4. *Wages and working conditions during seizure:*

Wartime seizure orders usually specified that existing wages and

⁹⁶For proof that such a problem is coming to be recognized, see *Abrams v. Allen*, 297 N. Y. 52, 74 N. E. 2d 305 (1947).

working conditions should be continued during seizure;⁹⁷ in the rather exceptional cases where seizure was caused by the failure of the company to comply with War Labor Board directives concerning wages or working conditions, the Board's orders were put into effect immediately by the seizing agency.⁹⁸ The usual policy of continuing existing provisions could be followed in peacetime. Or the government might determine fair wages and put them into effect, just as it could determine fair compensation for the owners.⁹⁹

Despite the strong arguments in favor of establishing different ("fair") wages, the writers are, hesitantly, in favor of continuing existing wages and working conditions during seizure.¹⁰⁰ Where the government puts into effect its own determined "just" wages, it tends to put pressure on both sides somewhat equivalent to that of compulsory arbitration. For the pressure to accept these wages as the final figure in bargaining will be great, where neither side is free to resort to more extreme measures (strike or lockout) to gain acceptance of its views. As a practical matter, it is a fact that once a wage increase has been put into effect, it is nearly impossible under normally stable economic conditions to reduce wages again. The logical result is that the persons who determine the just compensation for employees during seizure are setting a minimum rate above which bargaining will take place, regardless of the bargaining power of the two parties. Thus the scope of *free* collective bargaining, desirable in the interests of self-government in industry, is diminished rather than enhanced.

By maintaining the same wages and conditions it may be argued that pressure of a different sort is exerted on the employees. The

⁹⁷In accordance with WLDA § 4. *E.g.*, Exec. Order No. 9570, 10 FED. REG. 7235 (1945) (Scranton Transportation Co.); Exec. Order No. 9639, 10 FED. REG. 12,592 (1945) (petroleum companies).

⁹⁸*E.g.*, Exec. Order No. 9480, 9 FED. REG. 11,143 (1944) (Twentieth Century Brass Works, Inc.); Exec. Order No. 9552, 10 FED. REG. 5757 (1945) (Cocker Machine & Foundry Co.).

It should be noted that War Labor Board directives were not enforceable or reviewable, and that reports made by it to the Director of Economic Stabilization and to the president because of non-compliance were merely advisory, so that their correctness could not be reviewed by the courts. *National War Labor Board v. Montgomery Ward & Co.*, 144 F. 2d 528 (App. D. C. 1944), *cert. denied*, 323 U. S. 774, 65 Sup. Ct. 134 (1944); *National War Labor Board v. U. S. Gypsum Co.*, 145 F. 2d 97 (App. D. C. 1944), *cert. denied*, 324 U. S. 856, 65 Sup. Ct. 857 (1945).

⁹⁹This plan is preferred by Gerhart, *Strikes and Eminent Domain*, 30 J. AM. JUD. Soc'y 116, 120-122 (1946). He argues that there is property in the job, which the government takes, in the same way that there is property in the seized plant; the employee is entitled to just compensation for the taking of his job (property): thus there is just compensation for all parties to the seizure. He also adds that as a practical matter, this proposal will work both ways—it will solve the problem when the company proposes a reduction in wages in periods of depression.

¹⁰⁰An exception might reasonably be made in case of disputes caused by health or safety hazards, where the dangerous effects of certain conditions might be sufficiently clear to warrant immediate remedial action. See *Interim Safety Requirements for Mines in Govt. Possession*, Coal Mines Admin. Order, 11 FED. REG. 6456 (1946).

answer to that appears to be that some pressure is inevitable, that an equal pressure is being applied to the company in the form of no profits, and that if the union is strong enough it can bargain to have wage arrangements made retroactive to the beginning of the dispute or of the seizure.

5. *Right to strike or quit during seizure:*

The current anti-work-stoppage acts have two factors in common. All of them prohibit strikes (conspiracy or concerted action by the union) during government arbitration or seizure. And all of them allow individual workers to quit their jobs at any time. Many of the laws provide heavy fines for each day the workers strike, with additional penalties levied against the union.¹⁰¹

While a heavy financial penalty imposed on union or worker, or both, is one very effective method of preventing a strike during seizure, it is submitted that an equally effective and better method may be found in that provided in the Virginia statute. Under that law, strikers lose their employee status; the company is allowed to rehire them only as new employees without benefit of seniority, pension rights, etc. that had accrued; and it cannot be compelled to rehire any of such strikers.¹⁰² Under this law the judgment-proof employee cannot escape the consequences of his act, and the union will not be irreparably injured by the "wildcat" action of any of its members, except as it loses individual members. And in such industries the union cannot afford to have such irresponsible members.¹⁰³ Of course, the right of the employees individually to quit employment cannot be questioned.¹⁰⁴

It is impossible to discuss this question without considering the problem of whose employees these workers are during the period of seizure. This problem appears to have been answered by the *Lewis* case, that for the limited purposes here involved they are government employees and subject to the applicable limits on the right of government employees to strike.¹⁰⁵ As indicated below, for other purposes the workers may

¹⁰¹Or they may make striking contempt of court. In those cases where there is no provision for seizure during compulsory arbitration, the laws usually provide for comparable fines against the companies for lockouts and for withdrawal of the certificate of convenience and necessity.

¹⁰²For the right of striking employees to return to their jobs, see *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 58 Sup. Ct. 904 (1938).

¹⁰³Slichter argues that employees in essential industry should be accorded special status, involving special privileges, in return for giving up the right to strike. Slichter, *To End Strikes in Essential Industries*, N. Y. Times, Jan. 12, 1947, § 6, p. 7; SLICHTER, *THE CHALLENGE OF INDUSTRIAL RELATIONS* 167-9 (1947).

¹⁰⁴*National Protective Association v. Cumming*, 170 N. Y. 315, 321, 63 N. E. 369 (1902). This was clearly recognized in WLDA § 6.

¹⁰⁵*United States v. United Mine Workers*, 330 U. S. 258, 67 Sup. Ct. 677 (1947).

still be considered private employees, for there would, for example, be nothing gained by assigning them temporary civil service status.¹⁰⁶

6. *Termination of seizure:*

During the war seizure was usually concluded by a simple notice in the *Federal Register* stating that it would be terminated at a certain date and time, and a release was executed by the company in favor of the government upon withdrawal of the army.¹⁰⁷ Termination may not be quite so simple in peacetime.

Seizure should be ended as soon as the two parties notify the government manager that they have reached an agreement (either a final settlement or a plan for voluntary arbitration) and are capable of carrying on the service without interruption. Calculation of profits to which the government is entitled should be a matter of ordinary corporate accounting in most cases.¹⁰⁸ In a few instances, however, it might involve complex or cumbersome problems, such as inventories of work-in-process.¹⁰⁹ It would be one of the problems of the government manager to determine whether the difficulties of such accounting would involve an unjustified expense; and, if so, to determine some approximately accurate substitute method, such as a pro-rated share of company profits for the year. Just compensation for the owners would be determined by the method suggested above.¹¹⁰ The government should not incur any liability for discretionary acts of its manager done in good faith.¹¹¹

¹⁰⁶The regulations of the Solid Fuel Administrator for operation of the coal mines specifically provide that company officials and workers are not officers or employees within the meaning of the statutes regarding federal employment, Solid Fuels Admin. Reg., Operation of Mines under Govt. Control §§ 603.16 (d), 603.23 (e) (1943), 8 FED. REG. 6655.

¹⁰⁷A typical termination order read: "Pursuant to Executive Order . . . I hereby determine that possession and control of — by the United States is no longer necessary for the successful prosecution of the war, and . . . possession and control by the United States of — is hereby terminated and relinquished as of 12:01 o'clock a.m. . . . *No further action shall be required* to effect the termination of Government control." (Italics added.) Termination of Possession of Kan. Transport Freight Lines, ODT Order, 10 FED. REG. 2773 (1945). The Government did, however, provide in the original seizure regulations that it might require submission of information regarding operations during seizure in order to ascertain the existence and amount of any claims against it, so that the seizure order "may be concluded in an orderly manner." Termination of Possession of Tenn. Consol. Mines, Office of the Secy. of the Interior Order, 10 FED. REG. 5531 (1945).

¹⁰⁸In Federal Mgr. of Motor Carrier Transportation, ODT Order, 9 FED. REG. 10,102 (1944), carriers were ordered to keep their books so that transactions after government seizure would be separate.

¹⁰⁹This is less apt to be the case in public service companies, which are of primary concern in this paper, than in regular manufacturing establishments.

¹¹⁰This is discussed at page 171, under the sub-heading *Compensation for government seizure and operation*.

¹¹¹Even the Federal Tort Claims Act still exempts the government from liability for discretionary acts of its employees. 60 STAT. 845 (1946), 28 U. S. C. § 2680 (Supp. 1948).

Administration

Wartime seizures were primarily formalities:

"Until further order, you are hereby directed to continue operations in the usual and ordinary manner and course of business, as a going enterprise, . . . as fully as if possession and control had not been . . . assumed by the United States, subject, however, to . . . said Executive order, and to all general and special orders. . . . Title to the properties and other assets of which possession has been taken remains in the owners thereof. Possession by the United States is not exclusive and the United States asserts . . . only such control over the properties in its limited possession as may be necessary to accomplish the purposes of the Executive order."¹¹²

It is the writers' belief, as indicated, that this practice should not be continued in future seizures *where matters of policy are concerned*. The manner in which government control should be exercised has been discussed above. In day-to-day administration, however, the interest of the government was, and may rightly be, recognized as something less than total legal ownership. It may in fact be viewed as something akin to a management interest, which, however, for its limited purposes cannot be altered by the disapproval of the stockholders. This will give a certain dual character to the seizure, but such a situation, where different legal attributes are recognized for different purposes, is not unique in the law;¹¹³ and the writers believe that ultimately it will produce less confusion and result in better service than would complete government ownership. In the problems discussed below, the dual characteristics of seizure will be apparent. They should be considered in advance by government administrators so that the resulting questions may be anticipated.

1. *Continuation of union activity:*

Seizure orders during the war allowed the continuation of "concerted activity" on the part of employees so long as it did not interfere with war production.¹¹⁴ This policy should be continued, subject to the necessary prohibition on strikes or slowdowns. Although the workers are government employees during the seizure so far as the right to strike is concerned, they should not lose their status as private employees where the right to organize and join unions is in question. Government seizure should not be perverted so as to become a means of "union busting," even temporarily.

¹¹²Federal Mgr. of Govt. Controlled Railroads, ODT Order, 11 FED. REG. 5512 (1946).

¹¹³Marriage, for example, involves both contract and status; under civil service government employees continued to accrue seniority and other rights while they were on active duty in the armed services.

¹¹⁴See note 22 *supra*.

2. *Continuation of private benefit systems:*

Benefits enjoyed by private employees, such as a social security, should be continued, as they were during wartime seizure.¹¹⁵ It would be administratively impossible, as well as patently absurd, to shift all the workers of a seized plant temporarily onto a government pension plan (which is not interchangeable with social security and does not cover the same scope as the private systems, such as unemployment insurance) and then to return them to private plans.

3. *Effect on contracts:*

Government seizure should not affect the status of existing contracts, or obligations under them. In actual fact, the *company* for this purpose remains the *real party* to the contracts as much as it would in the case of a change of management by the board of directors, the difference being that in this case the change is imposed by the sovereign instead of by the representatives of the private owners. Similarly, contracts made by the government manager on behalf of the company during seizure should be binding upon the company for the contract period, subject to the usual remedies of reformation or rescission. In neither case should the government incur any liability on the contracts,¹¹⁶ since it has, for administrative purposes, merely an interest equivalent to that of management.

Among related problems which might be considered in planning seizure policy are the responsibilities of a government manager who discovers illegal contracts or contracts unnecessarily disadvantageous to a public utility. Is there a duty on him to disavow or to seek reformation or rescission; which remedy should he seek, and under what circumstances? What are his responsibilities to report such facts to a public service commission, taxing agency, or other branch of government which might have an interest therein?

4. *Tort liability:*

Tort liability for acts of employees during seizure should be the liability of the company in the same sense that contract liabilities are those of the company, and for the same reasons. In actual fact, whenever the company is held respondeat superior for the torts of an employee, the government will be affected, because a judgment against the company will be reflected in the profits for the period, to which the government is entitled.

¹¹⁵See notes 23 and 24 *supra*.

¹¹⁶Coal Mines Admin. Reg., Operation of Coal Mines under Govt. Control, 8 FED. REG. 10,712 (1943) specifically provided that no operating manager had authority to bind or impose any liability on the United States in the absence of specific direction.

5. *Taxes and public regulation:*

In view of the dual character of seizure, the company should, as was provided during the war,¹¹⁷ be subject to all federal, state and local taxes, and to all government regulatory provisions. The arguments applying to contract liability apply here also.

The profits to which the government is entitled under eminent domain should be those which would accrue to the company if it were operating independently at that time, which would of course be subject to taxes. In practice, the particular seizing government would gather through taxes most of what it would lose from potential profits; so there would be no difference in overall revenue to that government. Since inter-governmental immunity from taxation is now rather an obsolescent concept,¹¹⁸ little besides administrative confusion would result if the seizing government should refrain from taxing the company it seized; it would not be exempt from taxation by other governments merely because the seizing government did not levy a tax.

Somewhat similar considerations apply to the question of regulation. As a matter of public policy it would be thoroughly impolitic to require an industry to obey certain regulations as long as it was in private hands, but to relax the requirements for the short period of government seizure, which, as indicated, is for administrative purposes little more than mere possession. Then to again enforce against the industry the standards by which government management did not abide would make a farce of the whole regulatory system. The validity of any regulations subject to such vagaries would be open to question by both the industry and the public.

6. *Suits by or against seized companies:*

A problem that should be considered is the wisdom of requiring or permitting postponement of suits to be brought by or against the company during seizure,¹¹⁹ with any necessary provision for tolling the Statute of Limitations. Constitutional issues might be raised if such a statute was interpreted to limit the traditional jurisdiction of equity courts over suits involving questions of irreparable damage.¹²⁰ In general, however, assuming that seizure would be a rare and short-

¹¹⁷See note 47 *supra*.

¹¹⁸*New York v. United States*, 326 U. S. 572, 66 Sup. Ct. 310 (1946); *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 59 Sup. Ct. 595 (1939).

¹¹⁹Specific provisions allowing suits were made in a few cases during the war: *Solid Fuels Admin. Reg., Operation of Mines under Govt. Control* § 603.24 (b), 8 FED. REG. 6655 (1943); *Federal Mgr. of Motor Carrier Transportation*, ODT Order, 9 FED. REG. 10,102 (1944); *Federal Mgr. of Govt. Controlled Railroads*, ODT Order, 11 FED. REG. 5512 (1946).

¹²⁰*Callanan v. Judd*, 23 Wis. 343 (1868).

lived incident, postponement might not entail serious hardships on the parties involved.

War seizure orders often prohibited attachment, by mesne process or otherwise, without prior government consent.¹²¹ The necessity for continuing this provision should be determined and appropriate regulations prepared in anticipation of such a contingency.

7. *Bankruptcy proceedings:*

During the war the coal mines by executive order remained subject to the Bankruptcy Law,¹²² but in most cases, where any provision was made, prior consent of the government manager was required for such proceedings.¹²³ Whether, or under what circumstances, this policy should be continued in the case of peacetime seizures, is another problem to be considered in advance. Seizure statutes should be drawn so that they will not be used as a method of staving off insolvency or bankruptcy proceedings, rather than as a last resort in case of genuine labor disputes.

Conclusions

When a government determines that seizure is necessitated by work stoppage in any industry essential to the public health or safety, it must work out a plan that to some degree gives a dual legal character to the seizure and to the parties concerned. As to fundamental policy, the seizure should be directed to encourage free collective bargaining; it should be real, not merely formal, with fair compensation in lieu of profits to the company owners, while existing wages are continued for the employees, who are forbidden to strike. As to daily administration, the realities of temporary government seizure should be faced, if necessary at the expense of theory, by operating the plant for the most part under standards applicable to the private management from which it has been temporarily taken and to which it will again be returned.

¹²¹Exec. Order No. 9658, 10 FED. REG. 14,351 (1945) (Capital Transit Col.); Exec. Order No. 9661, 10 FED. REG. 14,591 (1945) (Great Lakes Towing Co.). *But see* Federal Mgr. of Govt. Controlled Railroads, ODT Order, 11 FED. REG. 5512 (1946) (railroads remain subject to attachment).

¹²²Warner Coal Co. v. Costanzo Transportation Co., 144 F. 2d 589, 593-94 (C. C. A. 4th 1944).

¹²³E.g., Federal Mgr. of Govt. Controlled Railroads, ODT Order, 11 FED. REG. 5512 (1946).