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A Comparative Study of Compulsory Arbitration and Interstate Commerce

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bad. So many factors enter into the determination of its use that each situation must be considered in the light of its own merits. For this reason it is impractical to list fully the benefits and the disadvantages, but it is advisable to weigh them when considering the use of the estate.

The greatest advantage to the parties is that the entirety is a convenient means of protecting the surviving spouse from the tedious administration of the decedent's estate. Then, too, it is a means of protection against improvident debts of either of the parties. It is in these that the estate finds its peculiar and justifiable function.⁸⁷

On the other side of the ledger, taxing in the entireties does not usually work in favor of the estate.⁸⁸ Also, it is impossible for one of the spouses to obtain credit or to mortgage the estate without the joinder of the other. The rule, which requires such a joinder of the parties when encumbering the estate, protects the entirety against mismanagement by one party. Conversely, it has not left room for the situation where, for economic reasons, mortgaging would be advisable, but cannot be accomplished because of the unwillingness of one of the parties to join for some underlying and usually sentimental reason.

HOWARD ALAN MEYERS

A COMPARATIVE STUDY OF COMPULSORY ARBITRATION AND INTERSTATE COMMERCE

The Supreme Court in *Amalgamated Ass'n v. Wisconsin Employment Relations Board*¹ has recently declared the Wisconsin Public Anti-Strike law to be inoperative. Because of this ruling, the W.E.R.B. has been shorn of its power to check strikes in public utilities. Provisions quite similar to those in the Wisconsin act exist in many states,² and the present decision affects their status as law. This article will compare some of the other important and similar statutes with the instant case in an attempt to render a valid opinion as to their position as law.

STATE STATUTES

In the *Amalgamated* case, the Court interpreted the effect and applicability of the NLRA of 1935,³ as amended by the LMRA of 1947,⁴ and found in a 6-3 decision that the state statute⁵ was in conflict with the federal regulation and could not be permitted to be enforced. It was de-

87. *Fairclaw v. Forrest*, 130 F.2d 829 (D.C. Cir. 1942).

88. See note 54 *supra*.

1. 71 Sup. Ct. 359 (1951).

2. Florida, Indiana, Massachusetts, Michigan, Missouri, New Jersey, Pennsylvania, and Virginia.

3. 49 STAT. 449, 29 U.S.C. § 151 (1946).

4. 61 STAT. 136, 29 U.S.C. § 141 (Supp. 1949).

5. WIS. STAT. § 111.50 (1947).

terminated that Congress had regulated peaceful strikes in industries affecting commerce, and expressly safeguarded the "right" to engage in concerted action for the purpose of collective bargaining. Because the parties who were involved in the dispute had to⁶ submit themselves to compulsory arbitration in Wisconsin and could not engage in a strike or other concerted action, the Court held that this was an abridgement of labor's "right" and therefore a direct conflict existed. The act of Congress⁷ is the supreme law of the land and state law must yield when in conflict with it.⁸ The contention was asserted that Congress had intended to leave "local emergency" disputes to the state to regulate. The Court said that the Wisconsin act was far from being confined solely to emergencies⁹ and refused to consider this argument. It then cursorily disposed of this matter by reasserting that Congress intended to close the field of peaceful strikes to state legislation.

The statutes under consideration here will all be compared to the decision in the *Amalgamated* case as if that controversy had arisen within the jurisdiction of each state. Basically the statutes of all the states which have regulated the activities of public utilities have been based upon "police power"—to promulgate and protect the best interests and welfare of the populace. The policy is to facilitate the settlement of labor disputes in these public utilities and to provide the procedures necessary to effect this desired end. The diverse procedures as enumerated in the various acts usually become effective if and when the collective bargaining process threatens to or does in fact reach a point where it can no longer be used to avert a strike.¹⁰

Florida, Indiana, Pennsylvania, and Michigan

The Florida statute¹¹ does not specifically require that the disputing parties enter into compulsory arbitration as does the Wisconsin act. However, when the collective bargaining process is frustrated by a deadlock, either party to the dispute may petition to the governor for the appointment of a conciliator.¹² The governor in his discretion has the power to appoint one, and, only when conciliation fails, can he appoint a board of arbitration.¹³ It is a misdemeanor for anyone to violate the provisions of this act, and a fine of not more than \$1,000 and not more than twelve months in jail must be paid and served by the violator.¹⁴ Should a strike or

6. *Id.* at § 111.55.

7. See note 4 *supra*.

8. U.S. CONST. Art. VI.

9. See note 1 *supra* ("the act has been applied to disputes national in scope").

10. FLA. STAT. § 453.01 *et seq.* (1949); IND. ANN. STAT. § 40-2401 *et seq.* (Burns Supp. 1949); MASS. ANN. LAWS c. 150B (1949); MICH. COMP. LAWS § 423 *et seq.* (1948); MO. REV. STAT. ANN. § 10178 *et seq.* (Cum. Supp. 1950); N.J. REV. STAT. § 34.13B *et seq.* (Cum. Supp. 1948-49-50); PA. STAT. ANN. tit. 43, § 213 *et seq.* (Supp. 1950); VA. CODE ANN. § 40-75 *et seq.* (1950).

11. FLA. STAT. § 453.01 *et seq.* (1949).

12. *Id.* at § 453.04.

13. *Id.* at § 453.06.

14. *Id.* at § 453.12.

walkout be actually engaged in, then \$10,000 per day is to be paid by the offending party.¹⁵ Any party who is injured by the violation of this act may ask for an injunction or restraining order.¹⁶

The Indiana,¹⁷ Pennsylvania¹⁸ and Michigan¹⁹ statutes are for the most part similar to Florida. The intent of all, similar to Wisconsin's, is to eliminate concerted work stoppage and lockouts in public utilities. They differ from the Florida law as to the penalty to be imposed for violating the act. Indiana merely stipulates that violation will constitute a misdemeanor;²⁰ Pennsylvania²¹ provides for a fine of not less than \$500 or more than \$2,500 and/or imprisonment for not more than six months; and Michigan²² provides for a fine of \$1,000 or six months in jail, or both. As in Florida, the right to the injunctive process in these states vests in any person who is adversely affected by violation of the act.²³

It is evident, from the reading of these statutes, that while compulsory arbitration is not expressly provided for, the failure to comply with the procedure of the statutes would place the parties in an unenviable position. A fine of \$10,000 per day is no small sum to be paid for the privilege of striking, and certainly appears to be a measure designed to force the parties to arbitrate. The fact that, aside from Florida, the other states provide for less stringent measures cannot overshadow the fundamental factor found in each of the statutes—to stop concerted activity and to restrict that which Congressional action allows. The effect of these statutes appears to be no less calculated to produce compulsory arbitration than if it had been an express stipulation in one of the clauses. These acts read in the light of the decision on the Wisconsin statute²⁴ can be no more effective than was that statute.

Missouri

The Missouri law provides for a State Board of Mediation to effect a settlement of labor disputes in the public utilities.²⁵ Only when this board fails to resolve the problem must the parties submit to compulsory arbitration.²⁶ If arbitration is not the proper measure and the participants still cannot agree, the state in its discretion may seize the plant and operate it until such a time as a satisfactory solution is reached by the parties.²⁷ This

15. *Id.* at § 453.13.

16. *Id.* at § 453.14.

17. IND. ANN. STAT. § 40-2401 *et seq.* (Burns Supp. 1949).

18. PA. STAT. ANN. tit. 43, § 213 *et seq.* (Supp. 1950).

19. MICH. COMP. LAWS § 423 *et seq.* (1948).

20. See note 17 *supra*, at § 40-2413.

21. See note 18 *supra*, at § 214.

22. See note 19 *supra*, at § 423-22.

23. See note 17 at § 40-2414; note 18 at § 215; note 19 at § 423.22a.

24. See note 5 *supra*.

25. MO. REV. STAT. ANN. § 10178.103 (Cum. Supp. 1950).

26. *Id.* at § 10178.118a.

27. *Id.* at § 10178.119.

statute also allows for restraint and injunctive proceedings for violation²⁸ and the penalty²⁹ imposed is the same as in the Florida act. Thus, the Missouri statute appears to be in conflict with the NLRA to an even greater extent, if possible, than the Wisconsin act. Once the Court has held the Wisconsin statute illegal, and it has been determined here that the Missouri act is a more extreme deviation from the NLRA, it seems to necessarily follow that this act would be unenforceable.

New Jersey

The procedure in the New Jersey act³⁰ differs from the others already mentioned in that sixty days notice must be given to the State Board of Mediation if there is an intention to strike or have a lockout.³¹ If no satisfactory mediation occurs during this period, and a strike or lockout affecting general public welfare is in progress, the governor may seize and operate the facilities of the utility.³² A \$10,000 penalty provision,³³ as in Florida³⁴ and Missouri³⁵ is present in this statute, and tends to be a coercive measure intending to force compliance with mediation and arbitration procedures. Though this act deviates slightly from the others, because of the notice required, it is in effect the same, for purposes of forcing compulsory arbitration upon the parties. Thus, it too most likely will fail along with the Wisconsin, Florida, Indiana, Pennsylvania, Michigan and Missouri statutes.

Massachusetts

When the collective bargaining procedure in Massachusetts ceases to function, the Commissioner of Labor and Industry may certify this fact to the governor who then may appoint a moderator to induce the parties to submit to arbitration, or request directly that the parties submit to voluntary arbitration.³⁶ If the parties refuse to abide by either request, the governor, if necessary, may declare a period of emergency and he may either enter into arrangements for the continuance of plant operations or seize the plant.³⁷ The Commonwealth is the only party entitled to legal or equitable relief for disobedience of this act,³⁸ and there is to be no concerted cessation of work or lockout during this emergency.³⁹ The question of whether the action of the Commonwealth is proper during this emergency period is not discussed in the *Amalgamated* case. The power exercised by the state does not require anything to be done by the parties to avoid a strike, although they may voluntarily submit to arbitration. Therefore, the

28. *Id.* at § 10178.121, cl. 6.

29. *Id.* at § 10178.121, cl. 4 and 5.

30. N.J. REV. STAT. § 34:13B (Cum. Supp. 1948-49-50).

31. *Id.* at § 34:13B-7.

32. *Id.* at § 34:13B-13.

33. *Id.* at § 34:13B-24.

34. See note 14 *supra*.

35. See note 29 *supra*.

36. MASS. ANN. LAWS c. 150B-3A (1949).

37. *Id.* at c. 150B-4.

38. *Id.* at c. 150B-5.

39. *Id.* at c. 150B-3B.

objectionable compulsive methods found in the other statutes are lacking here. The period during which the state acts is one of emergency, and the action of the state is a protective measure. This regulation is a reasonable exercise of the police power of the state and is concurrent and supplementary to the federal action rather than in conflict with it. Logically, because the state act is reasonable and not in conflict with the federal statute, it is presumed that the courts would not or at least should not, interfere with its enforcement.

Virginia

In Virginia,⁴⁰ the governor may suggest voluntary arbitration to the parties upon notice of a disagreement.⁴¹ If the dispute continues and an actual strike or lockout is in progress, or the threat of one is imminent he may seize the plant.⁴² This action when exercised is for the public interest.⁴³ There are no penalty provisions in the statute, and as in Massachusetts, it becomes effective only when an emergency has arisen.⁴⁴ The sovereign right to protect the people of the state appears to be properly exercised here, and even in view of the case under discussion would apparently be permissible.

INTERSTATE COMMERCE

The supremacy of federal legislation to state law is indisputably contained in the Constitution.⁴⁵ However, the regulatory power applied by Congress in the domain of interstate commerce is not necessarily exclusive.⁴⁶ The power to regulate interstate commerce found in the Constitution⁴⁷ and interpreted by various cases⁴⁸ has gone through many changes. From the time of *Gibbons v. Ogden*,⁴⁹ where the word "commerce" required interpretation so that navigation would be within its powers, to the present, it must be conceded that this power has been expanded a great deal. It is now used to regulate transportation,⁵⁰ radio,⁵¹ railroads,⁵² waterpower,⁵³ securities,⁵⁴ taxation,⁵⁵ and other fields.

40. VA. CODE ANN. § 40-75 (1950).

41. *Id.* at § 40-78.

42. *Id.* at § 40-79.

43. *Ibid.*

44. *Ibid.* (Governor to seize when the action "will constitute a serious menace or threat to the public health. . .").

45. See note 8 *supra*.

46. *California v. Zook*, 336 U.S. 725 (1949); *California v. Thompson*, 313 U.S. 109 (1941); *Cooley v. Board of Wardens*, 12 How. 229 (U.S. 1851).

47. U.S. CONST. Art. 1, §§ 8, 9.

48. *United States v. South Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *Minnesota v. Blasius*, 290 U.S. 1 (1914).

49. 4 Wheat. 1 (U.S. 1824).

50. *Houston and Texas Ry. v. United States*, 234 U.S. 342 (1914).

51. *Federal Radio Comm'n v. Neison Bros.*, 289 U.S. 266 (1933).

52. *Texas and N.O.R.R. v. Brotherhood*, 281 U.S. 548 (1930); *Dayton-Goose Creek Ry. v. United States*, 263 U.S. 456 (1924); *Baltimore & Ohio R.R. v. Interstate Commerce Comm'n*, 221 U.S. 612 (1911).

53. *United States v. Appalachian Power Co.*, *supra* note 48.

54. *North American Co. v. Securities & Exchange Comm'n*, 327 U.S. 686 (1946).

55. *Wagner v. City of Covington*, 251 U.S. 95 (1919).

Throughout this entire period of more extensive regulation by the federal government there still existed a certain vested right in the state to enact legislation in this field. Though the *Darby Lumber Co.*⁵⁶ case determined that the interstate commerce power was broad enough so that Congress could regulate any subject even remotely connected with it, the *Thompson*⁵⁷ and *Zook*⁵⁸ cases still preserved a certain limited right to the state.

The field of labor was entered into by the government in 1935 with the passage of the NLRA.⁵⁹ This was during the period of increasing regulation. The act dealt only with actions of employers, and at this time the state was permitted to regulate those matters which were not covered by the act. The amendment of 1947 restricted state action even more than the original act in 1935.⁶⁰ Several of the cases⁶¹ which arose out of litigation based on this statute, however, indicated that in certain instances the state would still be permitted to exercise dominion in the labor field. In *Auto Workers v. WERB*,⁶² a case where the Court allowed the Wisconsin Employment Relations Board to prevent systematic work stoppages because the national act did not cover this type of action, it appeared that the NLRA was not as all inclusive as it previously seemed. The *O'Brien* case⁶³ which arose later, held the Michigan Labor Mediation law to be in conflict with the federal statute. The result was that federal legislation once again tended to assume its broad powers.

There is a definite distinction between the *O'Brien*⁶⁴ and *Amalgamated*⁶⁵ decisions. The former case affected a *private manufacturing* concern engaged almost exclusively in *interstate* commerce; the latter was a *public utility* operating in *intrastate* commerce. The decision in the *Amalgamated* case is without the slightest regard for the positive need of the states to exercise legislation for their own protection. It reflects a strong tendency on the part of the Court to allow complete federalistic monopolization in the labor field. The need to curtail the strike was present at the time, but the federal policy,⁶⁶ by virtue of the NLRA, was to allow this concerted action. The Court might have averted the harsh effect of the decision and achieved the same result by holding that in times of emergency the state statute is applicable. The industries affected were local in nature and were

56. *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

57. *California v. Thompson*, *supra* note 46.

58. *California v. Zook*, *supra* note 46; *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261 (1943).

59. See note 3 *supra*.

60. See note 4 *supra*.

61. *Algoma Plywood Co. v. WERB*, 336 U.S. 301 (1949); *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949); *La Crosse Tel. Corp. v. WERB*, 336 U.S. 18 (1949); *Bethlehem Steel Co. v. New York State LRB*, 330 U.S. 767 (1947); *Allen-Bradley Local v. WERB*, 315 U.S. 740 (1942).

62. 336 U.S. 245 (1949).

63. *International Union of United Auto, CIO v. O'Brien*, 339 U.S. 404 (1950).

64. *Ibid.*

65. See note 1 *supra*.

66. 61 STAT. 136, 29 U.S.C. § 151 (Supp. 1949).

not commissioned to operate upon an *interstate* level. It is quite conceivable that a strike by this public utility could, if allowed to extend for a long period of time, create within the state a serious emergency. Without gas, lights, and transportation, the state would be crippled, and yet the national government would be committed to non-intervention until a national emergency arose. The problem in cases such as this becomes a question of which is more important, the public health, welfare, and interest, or the right of the employer and employee to bargain without restriction. A distinction must be drawn between legislation for the control of ordinary strikes and those which tend to create a state "emergency." While the right to regulate peaceful strikes would remain within the federal control, the states must not be deprived of the right to control local emergencies, since there is a hiatus between the time when a state and national emergency would occur.

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