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informed and when made aware that certain of their practices are objectionable, they will voluntarily abandon them.<sup>47</sup>

When prevention and persuasion have failed, more stringent action should be undertaken. The bar can urge the prosecution of laymen engaged in the unauthorized practice of law under criminal statutes, where they exist.<sup>48</sup> Whether such a statute exists or not, the bar has the right to bring an injunction action against such layman.<sup>49</sup> If the offender is a duly licensed attorney there are available both the statutory sanctions<sup>50</sup> and the traditional powers of the courts to control the conduct of its officers.<sup>51</sup> In any event, *action* is the answer.

DONALD W FARLEY

## *The Portsmouth Strike: Ohio's Hot Potato*

### PREFACE

One of the "hottest potatoes" ever to confront Ohio's lawmakers was recently laid in the lap of Ohio's General Assembly.<sup>1</sup> On November 26, 1956, Governor Frank J. Lausche called an extraordinary session of the legislature in an attempt to bring to a close the widely publicized telephone strike at Portsmouth, Ohio.<sup>2</sup> Nation-wide attention was focused upon the Ohio River community. The strike was one of the longest and most devastating labor disputes in Ohio's industrial history. Issues of vital significance were raised.

This article will recount the Portsmouth story and analyze the strike in retrospect. The success of other states in their handling of similar "hot potatoes" will be reviewed in light of recent United States Supreme Court decisions. The article will be limited to a discussion of work stoppages in privately owned public utilities. Labor disputes in publicly owned utilities, railroads and the atomic energy industry are not within the scope of this note.<sup>3</sup>

<sup>47</sup> *Unauthorized Practice Committee Presents*, 9 TEXAS B. J. 429 (1946); *Exhibit A*, 10 OHIO BAR 535 (1938)

<sup>48</sup> OHIO REV. CODE § 4705.07

<sup>49</sup> *Dworken v. Apartment House Owners Ass'n*, 38 Ohio App. 265, 176 N.E. 577 (1931); *State Bar v. Retail Credit Ass'n*, 170 Okla. 246, 37 P. 2d 954 (1934)

<sup>50</sup> OHIO REV. CODE §§ 2901.39, 2917.43 and 4705.01-06.

<sup>51</sup> *Judd v. City Trust and Savings Bank*, 133 Ohio St. 81, 12 N.E. 2d 288 (1937); *Norwalk and Portsmouth Bar Ass'n v. Brewery*, 161 Va. 833, 172 S.E. 282 (1934). For a digest of the reported Ohio cases concerned with the unauthorized practice of law see 27 OHIO BAR 1048 (1954). For a statement of principles of the Unauthorized Practice Committee of the American Bar Ass'n see, *Unauthorized Practice Committee Presents*, 9 TEXAS B. J. 426 (1946)

## THE PORTSMOUTH STORY

Prior to 1955, telephone service in Portsmouth and other communities in an area encompassing 24 southern Ohio counties was provided by the Ohio Consolidated Telephone Co. The Communication Workers of America represented the operators, linemen and maintenance men in bargaining with Ohio Consolidated. Through the years, labor relations had been most harmonious. In 1955, the General Telephone Co., a billion dollar corporation doing business in 31 states, and second in size only to the Bell system, acquired controlling interest in Ohio Consolidated.

The old collective bargaining agreement expired July 15, 1956. Contract negotiations reached a deadlock over such key issues as the union shop,<sup>4</sup> union membership of supervisory employees, and a "no strike" clause. The Communication Union had union shop provisions in several of its agreements with General Telephone in other states. It insisted that it could not give up conditions that it had gained over years of peaceful relationship with Ohio Consolidated.<sup>5</sup> It was evident that the community of Portsmouth was being made the testing ground for General Telephone's coming contract battles with the union in other states.

The 228 day strike paralyzed Portsmouth. Violence, cable slashings, mob riots and vandalism plagued the community. Company officials angrily charged that law enforcement was a shambles and refused to supply emergency phone service without adequate police protection. The

<sup>1</sup> 39 GONGWER NEWS SERVICE, No. 1 (Nov. 29, 1956).

<sup>2</sup> The special session called by Governor Lausche was, as he remarked, his "swan song" as governor of Ohio. At the expiration of his term in January, 1957, he assumed his new duties in Washington as United States Senator from Ohio.

<sup>3</sup> Railroad labor disputes are covered by the Railway Labor Act, 44 STAT. 577 (1926), 45 U.S.C.A. §§ 151 et. seq. (Supp. 1956). For an excellent discussion of collective bargaining problems in the atomic energy field see Newman, *The Atomic Energy Industry: An Experiment in Hybridization*, 60 YALE L.J. 1263, 1364 (1951).

<sup>4</sup> The union had worked under a union shop agreement with Ohio Consolidated for over 14 years. Under such proviso, employers were permitted to hire workers on the open market but all new employees were required to join the union within a specified period and had to continue their membership in good standing throughout the life of the agreement. Failure to do so automatically resulted in discharge by the employer.

In the Portsmouth negotiations, General Telephone insisted on a maintenance of membership clause rather than a union shop, whereby membership in the union would not be required of new employees. They could join or not, as they preferred. Once they did join however, they were obligated to maintain their union membership in good standing for the life of the collective bargaining agreement as a condition of employment. Matthews, *LABOR RELATIONS AND THE LAW*, 447-448 (1953).

<sup>5</sup> It is almost axiomatic that a union will never give up a condition once won and that there will be a strike until the union is broken or until it wins retention of that condition.

Portsmouth area was completely devoid of telephone service from October 15th to December 16, 1956. Portsmouth's City Council declared that a state of emergency existed. The Portsmouth Medical Society asserted that the health of the entire community was in jeopardy. Emergency police, fire and hospital services were rendered virtually inoperative.

During the blackout, the union repeated its former offer to provide emergency service if the company would discharge the "strikebreakers" who allegedly had been hired to man the exchanges. The company refused and charged the union with instigating mob violence and destroying company property. The union repeatedly disclaimed any knowledge of the continued vandalism, asserting that such action was against union principles.<sup>6</sup>

The strike settled down to a sheer test of economic strength and holding power. Both parties adamantly held their initial ground. Repeated union offers to submit to arbitration were refused. Governor Lausche personally intervened at the early stages, but was unable to induce the disputants to make any concessions. The Federal Mediation and Conciliation Service<sup>7</sup> reported absolutely no progress in its continued efforts to effect an agreement. The State Highway Patrol was helpless to quell any rioting since its statutory authority extended only to any misconduct obstructing the free use of the state's highways.<sup>8</sup> Governor Lausche alerted the Ohio National Guard to be prepared to move into Portsmouth, but the people of Portsmouth strongly objected to such a measure.<sup>9</sup> In addition, the Ohio Industrial Commission<sup>10</sup> and the Public Utilities Commission<sup>11</sup> were without jurisdiction to cope with the matter.

<sup>6</sup> A union is not responsible *per se* for the actions of its members, since membership alone is not sufficient to show agency. *Matter of Irwin-Lyons Lumber Co.*, 87 N.L.R.B. 54 (1949). The illegal conduct must be traced to an officer or some person who is acting within the scope of his general authority. *Matter of Gammino Constr. Co.*, 97 N.L.R.B. 52, 29 L.R.R.M. 1103 (1951). For a complete analysis see *Union Responsibility for Acts of Officers and Members*, 63 HARVARD L.R. 1035 (1950).

<sup>7</sup> 61 STAT. 136 (1947), 29 U.S.C.A. § 173 (Supp. 1956)

<sup>8</sup> OHIO REV. CODE § 5503.02.

<sup>9</sup> Public opinion in industrial Portsmouth was strongly pro-union. The collective bargaining agreements of other unions in town provided for a union shop. One Portsmouth public official remarked that "General Telephone was like a bull in a china shop, coming into Portsmouth and disturbing labor relations that had been good for 14 years."

A city-wide sympathy strike was threatened if the National Guard were called in. The Portsmouth Voluntary Citizens Committee recommended that the Guard be called in "only as a matter of last resort."

<sup>10</sup> The Ohio Industrial Commission enforces and administers all laws relating to the health, welfare and working conditions of employees engaged in industrial activity within the State. It has no authority to mediate or conciliate labor disputes. OHIO REV. CODE § 4101.03. The Commission, however, rendered an advisory opinion in

A crisis had arisen. To avert disaster, Governor Lausche called an extraordinary session of the General Assembly. He asked that legislation be passed authorizing the State of Ohio to seize and operate a public utility when the Governor felt that an impasse in collective bargaining had been reached which resulted in a deprivation of utility services and had created an emergency in the area required to be served.<sup>12</sup> The bill was referred to committee and the hearings that followed were stormy. Union and General Telephone officials, in a rare display of unanimity, vehemently condemned the proposal, stating that it was unworkable and unconstitutional.<sup>13</sup>

The committee recommended against passage<sup>14</sup> and the bill was defeated. The special session ended but the strike continued in paralyzed Portsmouth. Ohio's legislators had bobbed the "hot potato," then tossed it back to the people of Portsmouth who were already scalded with third degree burns.

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the Portsmouth Strike, wherein it held that the union's stand for preservation of the union shop clause was valid and recommended that it be continued in the new agreement. The Industrial Commission also suggested that the issue of the scope of the bargaining unit be submitted to the National Labor Relations Board and that other disputed items be submitted to arbitration. The union offered to comply with the advisory opinion, the company rejected it.

<sup>12</sup> The Public Utilities Commission has the power to regulate public utilities and railroads in Ohio, but no provision is made for the handling of labor disputes in a utility. OHIO REV. CODE § 4905.04. However, in early November 1956, the irate citizens of Portsmouth presented a petition, signed by 20,000 Portsmouth area residents, to the Commission requesting that it revoke General Telephone's franchise and authorize another telephone company to furnish service to the community. The Commission ordered General Telephone to show cause why emergency service should not be furnished. The company filed a petition for a writ of prohibition in the Ohio Supreme Court, contending that the Commission was without jurisdiction in the matter. The company obtained a temporary restraining order against the Commission, prohibiting it from taking any further action until a preliminary hearing could be held on the petition of the company. 4 Ohio L. Rep. 35 (Nov. 26, 1956)

<sup>13</sup> H.B. 949, 101st Ohio Gen. Assembly, 3d Sp. Sess., 1956.

<sup>14</sup> The proposed seizure bill was patterned after a Virginia Statute, VA. CODE ANN. § 56-510 *et seq.* (1956 Supp.). Virginia had found its seizure statute most successful in coping with utility stoppages.

<sup>15</sup> The House Judiciary Committee, upon conclusion of the hearings, found that much of the violence could have been prevented by adequate law enforcement in the Portsmouth area. The committee concluded that the bill should not be passed because (1) It was contrary to Ohio's constitution in that it provided for seizure of private property without just compensation prior to the taking; (2) It should be ineffective since it attempted to cover a field of legislation already found by the United States Supreme Court to have been pre-empted by the federal government under the National Labor Relations Act; (3) It required revision, being unworkable, and such could not be accomplished at that special session; (4) It would weaken collective bargaining to the detriment of labor relations in public utilities; and (5) The public interest would not be served by legislation conceived in the heat of the dispute and passed without adequate study.

In early January, 1957, the company declared that it had made its last offer, and if the workers refused to return to their jobs, replacements would be hired. The union charged the company with refusal to bargain in good faith and bitterly criticized it for attempting to break the morale of the strikers. Later, in January, General Telephone brought unfair labor practice charges before the National Labor Relations Board, claiming that union members were being coerced into continuing the strike. At the Board hearing, the entire 200 members of the Portsmouth local denied such charges. On the contrary, the hearing boomeranged, for three men testified under oath that they had been hired by a General Telephone official to "get four union leaders out of the picture."<sup>15</sup>

In February, newly elected Ohio Governor C. William O'Neill, during his first day in office, drew up the necessary papers to send the National Guard into Portsmouth if any further violence occurred. He informed the disputants that they must settle the strike. Finally, after a 25 hour bargaining session, an agreement was reached and the 228 day strike ended. The new agreement substituted a maintenance of membership clause for the union shop and the union agreed not to strike over any grievance that could be submitted to arbitration. The question of union membership of supervisory employees was submitted to the National Labor Relations Board. Neither side would say what broke the logjam which had continued after the company made its last offer.<sup>16</sup>

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<sup>15</sup> Company officials declared that such charges were trumped up and absurd and asserted that the company would not submit to such a libelous attack and would take appropriate action. The recent report of the trial examiner's opinion however, substantiated the union's position. The examiner found that company officials and outsiders hired to "break the strike" had deliberately provoked union members in the picket lines; had often initiated the violence; and had on several occasions, pointed loaded revolvers at the union men while threatening and taunting them. He found that violence was first perpetrated by the company itself, when a company official, in his automobile, deliberately and wilfully ran down and seriously injured a union member. N.L.R.B. Rep., (9th Region C.B. 327-328, (April 11, 1957)

In mid-July, 1957, the N.L.R.B. General Counsel took exception to the trial examiner's findings.

<sup>16</sup> The cost of the strike was estimated at two million dollars. The union said that its 600 strikers lost about \$950,000 in wages. The company estimated its property damages to be \$400,000. Later, on July 3, 1957, the Communication Union was sued by the company for three million dollars. The company alleged that its property damages exceeded \$500,000.00; that its employees were subjected to vile and obscene abuse of character; that in furtherance of the strike, an unlawful combination and conspiracy was wrongfully, maliciously and unjustifiably entered into by the union and its members; and that the union attempted to coerce and force the company to agree to union demands.

The union president remarked that the suit was "apparently a smokescreen to cover up the company's own activities." He stated that "it was really the company that made all the demands, all we wanted to keep was what we had." *Cleveland Plain Dealer*, July 4, 1957, p. 6.

## PORTSMOUTH IN RETROSPECT

The Portsmouth strike caught Ohio with its legislative guard down. There were no Ohio statutes dealing with such an emergency. Ground rules were made and broken as the strike wore on. It proved to be an economic "pier six brawl" which drew national headlines, aroused the people of Ohio, alienated the participants, and left Portsmouth a stunned, resentful community. Public passions were fanned by the newspapers. The union claimed that many distortions and half-truths were printed. Although the Communication Union had enjoyed excellent labor relations with Ohio Consolidated for over 14 years,<sup>17</sup> one Ohio newspaper indignantly described the union as:

The labor goons who have forfeited all claims to respectability. Once again the Communication Union has set itself above the law, and has fallen back on violence and destruction of property. This follows a pattern set by the union.<sup>18</sup>

As a result of such irresponsible reporting, the general public is often prone to think of the strike only as a dangerous and unwarranted evil. Any labor dispute, however inconsequential, is often fair game for a front page article with an indignant headline. Ignored is the fact that in most instances, collective bargaining is a peaceful process.

The right to strike is basic to all of labor's rights. Without it, labor would lose its bargaining power. Collective bargaining would fail if a strike was not permitted to run its natural course and eventually bring the parties to agreement.

If labor were to abuse its federally guaranteed right to strike,<sup>19</sup> untold harm would result to the disputants, the community, and labor's cause in general. Union violence and foul play are not protected by federal law. A state has a duty to protect its citizens from such unlawful acts. The right to strike is not without restrictions. Justice Brandeis, long a champion of the cause of labor, once stated:

Because I have come to the conclusion that both the Common Law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of justification of self interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of

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The action was brought in the Cincinnati Common Pleas Court. There has been no disposition of the case as of the date of writing.

<sup>17</sup> This fact was attested to by Portsmouth officials and the Ohio Industrial Commission.

<sup>18</sup> Cleveland Plain Dealer editorial, October 18, 1956, p. 16. For an interesting analysis of newspaper reporting of labor disputes see: Eaton, *A Capitalist Looks at Labor*, 14 UNIV. OF CHI. L.R. 332, 334 (1947).

<sup>19</sup> 61 STAT. 136 (1947), 29 U.S.C.A. § 163 (Supp. 1956).

the society in which they exist; above all rights rises the duty to community.<sup>20</sup>

Serious questions arise when the right to strike is considered in light of duties and obligations owed the community by a public utility. Public utilities are bound to serve all who offer to patronize them, without discrimination, at reasonable rates.<sup>21</sup> Almost all states have public utility commissions which regulate the rates and services of those utilities doing business within their borders. Monopoly and the resulting elimination of wasteful competition in the utility field are fostered. As a result, a utility is placed in a highly important relation with the public. It may not withdraw its services without state authorization.<sup>22</sup> It is evident that a public utility, since its continued operation is so essential to secure the health, welfare and safety of the public, would be subject to regulations whose constitutionality might be questionable if applied to purely private enterprises.

However, the right to strike is guaranteed by federal law. Although the Federal Act applies only to businesses engaged in interstate commerce, it has been held that public utilities come within its purview, even though they might operate solely within the borders of the state.<sup>23</sup> In protecting the right to strike in a public utility, the question arises whether Congress intended to preclude the states from exercising their inherent police powers to protect their citizens when a local emergency arises from a utility stoppage. This issue has often been brought before the courts. A brief outline of the history of federal versus state control over utility activities will be presented and the untenable position in which the states have been placed by recent Supreme Court decisions will be discussed.

#### FEDERAL PRE-EMPTION: STATE PERDITION?

In the area of labor regulation, the constitutional doctrine of federal supremacy<sup>24</sup> has proven to be a two-edged sword. While regulating at the national level, it has often invalidated controls at the state level.<sup>25</sup>

Early United States Supreme Court cases consistently held that in the national field, federal control was properly exclusive, but when the matter was local, the state had concurrent power to legislate in the absence of federal action.<sup>26</sup> Prior to the advent of the so-called "new deal" Supreme

<sup>20</sup> Duplex Printing Co. v. Deering, 254 U.S. 443, 448 (1921)

<sup>21</sup> Munn v. Illinois, 94 U.S. 113 (1877).

<sup>22</sup> Transit Commission v. United States, 284 U.S. 360 (1932).

<sup>23</sup> Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938); Nebbia v. New York, 291 U.S. 502 (1934); Munn v. Illinois, 94 U.S. 113 (1877)

<sup>24</sup> U.S. CONST. art. VI. cl. 2.

<sup>25</sup> MATTHEWS, LABOR RELATIONS AND THE LAW 835 (1953).

<sup>26</sup> Munn v. Illinois, 94 U.S. 113 (1877); Cooley v. Bd. of Port Wardens, 12 Howard 299 (1851)



Court in the 1930's, the prevailing philosophy of constitutional interpretation left control over industrial relations to the states.<sup>27</sup>

Following President Franklin D. Roosevelt's epic struggles with the "nine old men," the tide turned. In *Nat'l Labor Relations Bd. v. Jones and Laughlin*,<sup>28</sup> the Supreme Court held that the Wagner Act<sup>29</sup> was constitutional and confirmed the newly asserted power of the national government in regulating labor relations.<sup>30</sup> Even though the right of labor to bargain collectively and engage in concerted economic activities was now federally protected, the Supreme Court in the 1940's held that the states could still restrain unlawful union activities which endangered the welfare of their citizens.<sup>31</sup>

In the public utility field, the states had long exerted control over utilities rendering services within their borders. Acting under their police power, they reasoned that state controls over concerted activities were applicable to all businesses, whether interstate or intra-state, since Congress had not enacted legislation expressly excluding such state action.

One of the strongest measures taken by the states in controlling labor relations in public utilities was the passage of compulsory arbitration statutes.<sup>32</sup> In 1920, Kansas enacted such legislation. A court of industrial relations was given jurisdiction to prohibit strikes and lockouts in certain industries, including public utilities.<sup>33</sup> The Supreme Court immediately struck down certain provisions of the Kansas Act as violative of the due process clause of the 14th amendment.<sup>34</sup> The court, however, never addressed itself to the constitutionality of compulsory arbitration

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<sup>27</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by*, *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941); *Adair v. United States*, 208 U.S. 161 (1908).

<sup>28</sup> 301 U.S. 1 (1937).

<sup>29</sup> National Labor Relations Act, 49 STAT. 449 (1935), 29 U.S.C.A. §§ 151-166 (Supp. 1956).

<sup>30</sup> See also *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

<sup>31</sup> *Allen-Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945); *Carpenters and Joiners Union v. Ritter's Cafe*, 315 U.S. 722 (1942).

<sup>32</sup> Any system of compulsory arbitration presupposes the existence of a governmental mandate requiring the parties to submit their differences to final settlement by some third party. Strikes and lockouts are forbidden. The third party's decision is enforceable by legal sanctions. See: *Compulsory Arbitration of Labor Disputes in Public Utilities: A Review of Recent Statutes*, 23 TEMPLE L.Q. 221 (1950)

<sup>33</sup> KAN. GEN. STAT. ANN. § 44-604 *et seq.* (1949).

<sup>34</sup> In *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923), the Supreme Court held the Kansas Act unconstitutional as far as it fixed compulsory wages in the meat-packing industry, since such activity was not clothed with a public interest. In *Dorchy v. Kansas*, 264 U.S. 286 (1924), the court held as invalid similar provisions applying to coal mines.

statutes in general. The Kansas statute, though not dead, had failed. Compulsory arbitration lay dormant for over 20 years.

Following World War II, a wave of strikes swept the country. Public resentment against such concerted work stoppages was evident. Several local emergencies had resulted from public utility strikes. The Federal Act had a provision concerning national emergencies resulting from work stoppages,<sup>35</sup> but since a utility strike only affected a particular locality, it did not fall within such Act. Consequently a number of states sought to fill the gap by enacting legislation prohibiting strikes in public utilities.<sup>36</sup> Under such enactments, arbitration, almost always compulsory, was substituted for the prohibited right to strike.

Labor and management joined in denouncing compulsory arbitration, asserting that it undermined the very foundations of free collective bargaining. Labor declared that compulsory arbitration eradicated the right to strike and to engage in other lawful forms of concerted labor activities. Management was equally adamant. It contended that compulsory arbitration was a long step in the destruction of private initiative in our free enterprise system.<sup>37</sup>

The compulsory arbitration battle raged on. Advocates pointed to congressional silence as indicative that the federal lawmakers had intended to cede jurisdiction over utility emergencies to the states. However the Taft-Hartley Act,<sup>38</sup> like its predecessor, the Wagner Act,<sup>39</sup> fostered free collective bargaining. Senator Taft himself, during a Senate debate prior to the passage of his bill, stated, concerning the question of whether compulsory arbitration should be provided in public utilities disputes:

Basically I believe that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based on that presumption. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours and working conditions. We have considered the question of whether the

<sup>35</sup> Labor-Management Relations Act, 61 STAT. 136 (1947), 29 U.S.C.A. § 141 (Supp. 1956)

<sup>36</sup> FLA. STAT. § 453.01 *et seq.* (1955); IND. ANN. STAT. § 40-2401 *et seq.* (1956); MASS. GEN. LAWS c. 150 (1956); MICH. STAT. ANN. § 17.454 (1952); MINN. STAT. § 179.07 (1955); MO. REV. STAT. § 295.180 (1956); NEB. REV. STAT. § 48-816 (1956); N.J. REV. STAT. § 34: 13 B-16 (Supp. 1956); PA. STAT. tit. 43 § 213.1 (1955); VA. CODE ANN. §§ 56-509 *et seq.* (Supp. 1956); WIS. STAT. §§ 111.50 *et seq.* (1949).

<sup>37</sup> For a thorough discussion of the comments and criticisms of compulsory arbitration see: *Compulsory Arbitration*, NATIONAL ASSOCIATION OF MANUFACTURER'S BULLETIN (August, 1951)

<sup>38</sup> Labor-Management Relations Act, 61 STAT. 136 (1947), 29 U.S.C.A. § 141 *et seq.* (Supp. 1956).

<sup>39</sup> National Labor Relations Act, 49 STAT. 449 (1935), 29 U.S.C.A. §§ 151-166 (Supp. 1956).

right to strike can be modified. We do not feel that we should put into law, as part of the collective bargaining machinery, an ultimate resort to compulsory arbitration if we impose compulsory arbitration, or if we give government the power to fix wages. I do not see how in the end we can escape a collective economy.<sup>40</sup>

#### DECLINE AND FALL OF COMPULSORY ARBITRATION

The compulsory arbitration statutes withstood early attacks upon their constitutionality.<sup>41</sup> The New Jersey Supreme Court stated, in discussing a utility strike:

Where, by reason of a strike, work stoppage or lockout, the flow of services of one of these essentials of community life is halted or impaired, the state not only has the right but a pressing duty to step in and prevent the continuance of such stoppage or impairment and to take appropriate measures to restore them.<sup>42</sup>

The court stressed the indispensable nature of utility services, especially telephone service, without which fire and police protection would be rendered relatively ineffective.

The death knell for compulsory arbitration was first tolled in the case of *Automobile Workers v. O'Brien*,<sup>43</sup> where the United States Supreme Court held that Michigan's Labor Mediation Law<sup>44</sup> conflicted with federal law and hence was invalid. Michigan's law prohibited strikes in *any* industry unless state-prescribed procedure for mediation was followed and unless a majority of employees in a state-defined bargaining unit authorized the strike in a state-conducted election. The court held that Congress had completely occupied the field of regulation of peaceful strikes and precluded state regulation.

The *coup de grace* followed in the case of *Amalgamated Ass'n v. Wisconsin Employment Relations Bd.*<sup>45</sup> The Supreme Court held that a Wisconsin statute<sup>46</sup> which specifically prohibited public utility strikes and required the parties to submit to compulsory arbitration was in conflict with the federal law. The contention was made that Congress had only enacted legislation covering national emergencies but was silent as to local emergencies, thus leaving that area to state regulation. In reply, the court stressed that Wisconsin's Act was not confined to local emergencies, hav-

<sup>40</sup> S. Rep. No. 105, 80th Cong., 1st Sess. 13-14, 28 (1947)

<sup>41</sup> *State v. Traffic Telephone Workers*, 142 N.J. Eq. 785, 61 A.2d 570 (1948), *reversed on other grounds*, 2 N.J. 335, 66 A.2d 616 (1949); *Int'l Union v. Wisconsin Employment Relations Bd.*, 250 Wis. 550, 27 N.W. 2d 875 (1947).

<sup>42</sup> *State v. Telephone Workers Federation*, 2 N.J. 335, 345, 66 A.2d 616, 621 (1949)

<sup>43</sup> 339 U.S. 454 (1950).

<sup>44</sup> MICH. COMP. LAWS §§ 423.1 *et seq.* (1948).

<sup>45</sup> 340 U.S. 383 (1951).

<sup>46</sup> WIS. STAT. §§ 111.50 *et seq.* (1949).

ing been applied to labor disputes where no emergency existed. The court summarily disposed of the local emergency matter, citing the *O'Brien* case,<sup>47</sup> and concluded that Congress had excluded the field of peaceful strikes from state jurisdiction.

In a vigorous dissent, Justice Frankfurter stated that Congress should have been explicit if it desired to remove such matters of intimate local concern from the orbit of state regulation. He declared that the principle of "hands off collective bargaining" was no more absolute than the right to strike, and cited the national emergency provisions of the Taft-Hartley Act<sup>48</sup> as an affirmative indication that the force of collective bargaining may be limited in emergency situations. He stated:

But the careful consideration given to the problems of meeting nationwide emergencies and the failure to provide for emergencies other than those affecting the nation as a whole do not imply paralysis of State police power. Rather, they imply that the States retain the power to protect the public interest in emergencies economically and practically confined within the state. It is not reasonable to impute to Congress the desire to leave States helpless in meeting local situations when Congress restricted national intervention to national emergencies.<sup>49</sup>

Justice Frankfurter concluded that the wisdom of compulsory arbitration was not for the court to decide, but suggested that perhaps seizure, martial law, or other affirmative state action might better assure continuance of utility services and still preserve the concept of free collective bargaining.

As a result of the *Amalgamated* decision, several of the compulsory arbitration statutes were immediately overturned.<sup>50</sup> Serious doubt as to the validity of the remaining legislation was raised, since all public utilities, interstate or solely intra-state, were affected by the result. In so discarding the concept of state police power over local matters and extending federal regulation over all industries affecting interstate commerce, the Supreme Court may have controverted the intention of Congress. Public protection during emergency disputes would fail at the

<sup>47</sup> 339 U.S. 454 (1950)

<sup>48</sup> Labor-Management Relations Act, 61 STAT. 136 (1947), 29 U.S.C.A. § 176 (Supp. 1956)

<sup>49</sup> *Amalgamated Ass'n v. Wisconsin Employment Relations Bd.*, 340 U.S. 383, 406 (1951)

<sup>50</sup> In *Henderson v. Lee*, 65 So.2d 22 (Fla. Sup. Ct. 1953), the court held that the National Labor Relations Act had pre-empted the field of regulation of peaceful strikes in industries affecting interstate commerce, including public utilities and Florida's statute (FLA. STAT. § 453.04), limiting the right by a substitution of compulsory arbitration was invalid. A similar Indiana statute (IND. ANN. STAT. § 40-2406), was declared invalid in *Marshall v. Schrickler*, C.C.H. Lab. Cas. 66, 372 (Ind. C. C. 1951). Likewise Missouri's statute (MO. REV. STAT. § 295.180), was declared invalid by an opinion of the Attorney General of that state. See C.C.H. L. REP. § 49, 142.

local level, leaving the states virtually helpless. The *Amalgamated* result created a no-man's land immune from any regulation whatsoever.

Congressional attempts were made, following the *Amalgamated* decision, to amend the Taft-Hartley Act and return jurisdiction over such local matters to the states.<sup>51</sup> All such attempts failed, however, despite the intervention of President Eisenhower, who focused the national spotlight on the problem in 1954, when he stated, in a message to Congress:

The act should make clear that the several States and Territories, when confronted with emergencies endangering the health or safety of their citizens, are not, through any conflict with the Federal law, actual, or implied, deprived of the right to deal with such emergencies. The need for clarification of jurisdiction between the Federal and State and Territorial government in the labor-management field has lately been emphasized by the broad implications of the most recent decision of the Supreme Court dealing with this subject.<sup>52</sup>

Although the *Amalgamated* decision has virtually hamstringed the traditional state police powers, it appears that the states may still resort to various alternatives to cope with a local crisis. The Court might have averted the harsh effect of its holding by stating that in times of emergency, the state statute would be applicable. The court pointed out that the Wisconsin statute was not confined to emergency situations, consequently a statute applicable only after a local emergency had arisen might be upheld. However it is believed that such a statute should exclude any provisions for compulsory arbitration, which emasculates the federally protected right to strike.

The court in the *Amalgamated* case, although it asserted that the federal government had pre-empted the area of public utility labor disputes, took pains to point out that the Wisconsin act was inconsistent with federal law. Recently, the Supreme Court held that the states may only regulate labor disputes if the National Labor Relations Board has ceded them jurisdiction and if their legislation complies with federal laws.<sup>53</sup> Consequently if a state were to enact legislation, similar to the national emergency provisions of the federal act, which spelled out that when a clearly defined emergency resulting from a public utility stoppage *had already*

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<sup>51</sup> S. 2650, 83d Cong. 2d. Sess. (1954); S. 1535, 82d Cong. 1st Sess. (1951)

<sup>52</sup> President Eisenhower's message referred to the recent case of *Garner v. Teamsters, Chauffeurs and Helpers*, 346 U.S. 485 (1953), where the Supreme Court barred state action restraining picketing which falls within the province of the National Labor Relations Board, even though such picketing violated state laws.

<sup>53</sup> *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 77 Sup. Ct. 609 (1957). The *Fairlawn* Case involved an Ohio labor dispute. The result indicates that Ohio has no existing agencies which comply with Federal requirements. Consequently the N.L.R.B. may not cede it its jurisdiction, and Ohio would be unable to take any steps to control a non-violent labor dispute, affecting in any way, interstate commerce.

*arisen*, it could take steps to prevent disaster, it is believed that such legislation would be upheld. If the Supreme Court were to overturn such an emergency measure it would, in effect, be telling the states that they have no right to take any action to protect the lives of their citizens during a crisis.

An alternative to compulsory arbitration was presented to Ohio's lawmakers when they met to decide the feasibility of Governor Lausche's request for power to seize and operate strike-bound utilities until the labor dispute had been settled. The Portsmouth area was badly in need of help. The strike had crippled the community. Some legislative action was obviously necessary.

### OHIO JUGGLES THE HOT POTATO

The Ohio legislature felt that the seizure bill was too hasty a measure. However, haste is sometimes necessary in times of peril. It is conceded that hastily drawn legislation often results from the stresses of an emergency situation but such enactments should at least provoke further efforts to meet the crisis.

Seizure<sup>54</sup> was not offered as a panacea. It is often an intricate process, and many weighty issues arise when the state seizes and operates a utility.<sup>55</sup> But it had been tried and proven successful in Virginia.<sup>56</sup> It was that state's answer to the unreasonable *Amalgamated* decision. Seizure is not an adjunct of collective bargaining, nor a method of assisting or avoiding a breakdown in collective bargaining. It does not directly interfere with the right to strike. It is purely a crisis measure.

In piously paying homage to the doctrine of pre-emption, Ohio's lawmakers offered little hope to the people of Portsmouth, or to future Portsmouths which could just as easily suffer similar experiences.<sup>57</sup> The spe-

<sup>54</sup> "The term 'seizure' in the field of labor-management disputes, refers to the taking of possession, by the government, of a business which has ceased or is likely to cease its operation by reason of a threatened or actual work stoppage, for the purpose of securing its continued operation during the period of underlying controversy. It is regarded as a step short of government ownership taken in a free enterprise society in cases of extraordinary emergency. Seizure implies that the particular emergency is expected to be temporary in nature and that upon adjustment of the underlying controversy, the business activity will be returned to its owner." — Remarks of Dr. Ludwig Teller before a conference on Training of Law Students in Labor Relations, University of Michigan Law School, Vol. III of Committee Reports, p. 779 (1947)

<sup>55</sup> For an excellent discussion of the constitutional and procedural questions involved when a state seizes a public utility see: Teller, *Government Seizure in Labor Disputes*, 60 HARVARD L.R. 1017 (1947)

<sup>56</sup> 39 GONGWER NEWS SERVICE, No. 2 (Nov. 30, 1956).

<sup>57</sup> On May 1, 1957, 2,600 members of the Utility Workers Union, Local 270, went on strike against the Cleveland Electric Illuminating Co. The strike, affecting over 550,000 consumers in several northeastern Ohio counties, lasted seven days. Company personnel provided maintenance service. Although no serious altercations

cial session left unanswered the burning question of what the State of Ohio was to do when a lawful, Taft-Hartley protected strike resulted in a public utility work stoppage. The special session found the "potato" too hot to handle.

During the following session of Ohio's General Assembly, two bills dealing with public utility labor disputes were submitted. One<sup>58</sup> authorized the governor to order the state highway patrol into an area where a "disaster or an emergency existed or where any public utility service was suspended" to enforce all state laws and to preserve the public peace. The bill was offered as an answer to the break-down of law enforcement during a strike, one of the underlying causes of the Portsmouth emergency.<sup>59</sup>

The other bill was submitted by Representative Robert A. Taft, Jr., whose late father co-authored the Taft-Hartley Act. It attempted to meet the real issues, unanswered by the emergency session.<sup>60</sup> The bill authorized the governor to appoint an inquiry board to investigate a public utility labor dispute and report back to him within 14 days. After receiving the report, the governor could ask the state's attorney general to petition the courts for an injunction against a utility strike, lockout or slowdown. Such injunction, if granted, would last for 60 days. The bill, in effect, applied the national emergency provisions of the federal act,<sup>61</sup> which provides for mediation and a 60 day "cooling off" period, after which the disputants could strike. Mr. Taft's bill was a reiteration of his late father's belief that free collective bargaining and the lawful exercise of the right

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were reported, and the public suffered relatively little inconvenience, dire consequences might have arisen had an electrical storm or some similar emergency created a quick need for the restoration of electrical service.

<sup>58</sup> H.B. 794, 102nd Ohio General Assembly, Regular Session, 1957

<sup>59</sup> Hearings on H.B. 794, which would have amended OHIO REV. CODE § 5503.02 and enacted OHIO REV. CODE § 107.21, were started before the House Judiciary Committee on April 13, 1957. Labor representatives bitterly opposed the bill, claiming that it would have given the Governor of Ohio dictatorial powers, since he alone would decide when an emergency existed. They asserted that the State Highway Patrol would become his personal police force, which could have been used as a strikebreaking instrument.

H.B. 794 failed to pass. It was sent to the House Judiciary Committee on April 4, 1957, but never left committee.

<sup>60</sup> House Bill 749 would have amended OHIO REV. CODE §§ 4975.01-4975.09 and enacted OHIO REV. CODE § 4975.99. At the time of writing, the bill had not been printed and no copies were available. In a personal correspondence, Mr. Taft wrote that his bill "in effect, applies the national emergency provisions of the Labor Management Relations Act to local public utility disputes."

H.B. 749 was not enacted. It was sent to the House Industry and Labor Committee on April 17, 1957, but never left committee.

<sup>61</sup> Labor-Management Relations Act. 61 STAT. 155 (1947), 29 U.S.C.A. § 176 (Supp. 1956).

to strike should not be impeded by compulsory arbitration, seizure or other emergency measures.<sup>62</sup>

The effectiveness of the 60 day "cooling off" period has been seriously questioned. Some union leaders have contended that it actually impedes free collective bargaining, since it might induce the employer to rely on statutory rules forbidding a strike. They contend that the "cooling off" period, since it forces employees to work under terms and conditions that they have not agreed to, does not really "cool off" any one, but rather adds fuel to an existing controversy which may be already highly flammable.

It is submitted that the all-important question of what the state is to do when a strike finally occurs is still left unanswered. Mr. Taft's "cooling off" period might delay the strike, but if such provision only serves to fan the tempers of the disputing parties, despite federal and state mediation, and a strike resulting in an emergency does occur, the State of Ohio would still be unable to meet the peril. It would again be forced to waive the white surrender flag of pre-emption, as it remained mired in the no-man's land of local emergencies not covered by the national emergency provision of the Federal Act.

#### CONCLUSION

The Portsmouth Strike graphically indicated the inadequacy of Ohio's public utility labor law. At the emergency session, the legislators dropped the "hot potato." House Bill 749, introduced by Robert Taft, Jr., attempted to pick it up. The bill, with its junior Taft-Hartley emergency provisions, would undoubtedly be upheld by the courts. It recognized and protected the freedom of collective bargaining and the right to strike (once the 60 day "cooling off" period had expired). Rather than governmental intervention and compulsion, the weight of public opinion would bring pressure upon the parties to resolve their differences. Voluntary arbitration would be encouraged. However, the free collective bargaining process is sorely tested when a public emergency results from an impasse in a utility dispute. It is of small consolation to the people whose very lives are jeopardized by the lack of utility service to assure them that such dangers are the cost of a free society.

It is believed that House Bill 749 did not go far enough in coping with the problem. It did not say what the State of Ohio was to do when the "cooling off" period expired and a crippling utility strike rendered an Ohio community helpless. Keeping in mind that the federal law does not mince words in absolutely protecting the lawful exercise of the right to strike, it is contended that Ohio, because its utilities are affected with

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<sup>62</sup> See note 40, *supra*.