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CONSTITUTIONAL LAW-EMINENT DOMAIN-GOVERNMENT SEIZURE OF BUSINESS PROPERTY TO AVERT STRIKE AS A "TAKING" UNDER FIFTH AMENDMENT-AMOUNT OF WAGE INCREASE AS MEASURE OF "JUST COMPENSATION"

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CONSTITUTIONAL LAW—EMINENT DOMAIN—GOVERNMENT SEIZURE OF BUSINESS PROPERTY TO AVERT STRIKE AS A “TAKING” UNDER FIFTH AMENDMENT—AMOUNT OF WAGE INCREASE AS MEASURE OF “JUST COMPENSATION”—In 1943, in an attempt to end a strike of the United Mine Workers which threatened the national war effort, the Government, acting under an executive order¹ directing the Secretary of the Interior to take possession of the mines where necessary, seized most of the nation’s coal mines. Although mine officials were required to agree to conduct operations as agents of the Government, to keep separate books for the period of government operation, to fly the American Flag over the mines, and to post notices that the mines were “United States Property,” they were instructed to carry on the mining business as before. Title to assets, profits or losses, and substantial control of the ordinary business functions remained in the individual companies. The business was carried on without hindrance by the Government except in one respect: on a merely advisory recom-

¹ Executive Order 9340, 8 Fed. Reg. 5695 (1943), directing the Secretary of the Interior “. . . to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage . . . is threatened. . . .”

mentation by the War Labor Board, the Secretary of the Interior ordered modification of the wage agreement under which the mines had been operating before the strike, by authorizing an increased vacation payment and the refund of certain occupational charges. Plaintiff coal company complied with the order, but brought an action in the Court of Claims to recover all operating losses incurred during the period of government operation. The Court of Claims allowed recovery only for "losses" incurred through the wage increase; on appeal to the Supreme Court by the Government, *held*, affirmed. Such government intervention constitutes a "taking" within the meaning of the Fifth Amendment, and "just compensation" for the taking is the amount of the wage increase granted during the period of government operation. Justice Black delivered the judgment of the Court and an opinion in which Justices Frankfurter, Douglas, and Jackson concurred. Justice Reed wrote a concurring opinion; and Justice Burton, joined by Chief Justice Vinson and Justices Clark and Minton, dissented. *United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S.Ct. 670 (1951).

For the present, it seems well settled that governmental seizure under an executive order of strikebound industries is a taking within the meaning of the Fifth Amendment. In the principal case, the Court was unanimous in so holding. On principle, the soundness of this conclusion may be questioned. The Court relied heavily on the fact that the order was phrased in terms of "taking possession,"² and while the Court might hesitate to declare that such possession was a sham or pretense designed to disguise the purpose of the order,³ the fact remains that its purpose was regulatory, its objective being to end the strike and restore production to the mines. Moreover, no possession or control was assumed by the Government beyond that which was necessary to effect that end, and once production had been restored, the mines were immediately returned to private operation.⁴ Since, however, the Court has decided that this is a taking within the meaning of the Fifth Amendment, for which just compensation is required, and not a regulation of business, for which compensation would be unnecessary, it is faced with an additional difficult problem in determining what that compensation shall be.⁵ The ordinary measure of compensation for a tem-

² *Ibid.*

³ Principal case at 116.

⁴ In holding that there was a taking, the Court followed *United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677 (1947), where it was necessary for the Court to find that the Government was the employer of the miners in order to sustain an injunction and the contempt fines for its violation. See also the dissent of Justice Murphy, at p. 337, to the effect that this was not a taking.

⁵ It is possible that the courts will not be burdened with the problem much longer. In the case of a very similar executive order directing the seizure of strikebound trucking lines during the war, Congress enacted the Motor Carrier Claims Commission Act, 62 Stat. L. 1222 (1948), 49 U.S.C. (Supp. IV, 1951) §305 note, which set up a special claims commission to hear the claims for compensation of the seized motor carriers. Although this act did not provide for it, this may be the first step toward a special statutory measure of compensation for takings of this nature.

porary taking is the reasonable value of the property's use, i.e., the rental value.⁶ In the principal case, the use had remained in the coal company, while the Government had only taken certain elements of control. The theory of compensation expressed by Justice Black is that where there is a taking, the Government should pay the rental value and, as proprietor, assume the risk of profits or losses.⁷ It is submitted that this theory is unrealistic where the purpose of the taking is to restore production and not to secure the use of the facilities, and where, in fact, the use of the facilities remains in the seized company.⁸ Under this theory, which was urged by the plaintiff in the Court of Claims in attempting to recover for all of the operating losses and not merely those caused by the wage increase, the Government, during the period of operation, assumes all of the losses of the company for whatever reasons they may be sustained. This in effect puts the Government in the position of having to indemnify against loss any company which must be seized, regardless of the fact that the company might have been forced to operate at a loss if there had been no seizure. The theory adopted in the dissent, in the concurring opinion of Justice Reed, and in the majority of the Court of Claims, that recovery should be limited to losses incurred by governmental operation, which would not have existed but for the governmental operation, seems much more reasonable under the circumstances.⁹

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⁶ *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434 (1948); *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357 (1945).

⁷ Principal case at 118, 119.

⁸ See Gerhart, "Strikes and Eminent Domain," 30 J. AM. JUD. Soc. 116 at 120 (1946); Wilcox and Landis, "Government Seizures in Labor Disputes," 34 CORN. L.Q. 155 at 170-174 (1948); 64 HARV. L. REV. 338 (1950); but see Teller, "Government Seizure in Labor Disputes," 60 HARV. L. REV. 1017 at 1029 (1947).

⁹ All of these judges felt that the company should recover only those losses which were caused by governmental operation. However, Justice Reed and the majority of the Court of Claims considered that mere proof of the wage increase was sufficient to establish the loss as being caused by the Government, while the dissent in the principal case and in the Court of Claims felt that it was incumbent on the plaintiff company to prove that they could have operated during this period without incurring this or other losses. Since the plaintiff did not appeal, he did not recover all of the operating losses incurred during the period of government operation. The only question actually before the court was whether or not it could recover the losses arising out of the wage increase.