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## Guidelines for Alleviating Local-Emergency Work Disruptions

Joshua Greene

*University of Michigan Law School*

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## GUIDELINES FOR ALLEVIATING LOCAL-EMERGENCY WORK DISRUPTIONS

The disruption of essential services<sup>1</sup> by strikes and lockouts is one of the most critical problems confronting the United States today. As metropolitanization makes increasing numbers of people dependent on the same suppliers of utilities, transportation, and food, the potential harm from a disruption in the supply of any of these items grows ever more serious. In the last decade alone, Americans have witnessed the devastating impact of walkouts by sanitation workers, police officers, and other essential public<sup>2</sup> employees.<sup>3</sup> Less frequent but equally serious have been disruptions in private industries that supply such basic local services as fuel and health care. In 1968, for example, a one-week strike by New York City's fuel deliverymen left several hundred thousand New Yorkers without heat for as long as three weeks and forced many schools, businesses, and even hospitals to close.<sup>4</sup> Despite the power of such strikes by private-sector workers to paralyze entire communities, few writers have considered the inadequacy of existing legislation to prevent or limit shutdowns in

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<sup>1</sup> As used in this article, the term "essential services" refers to the provision of all goods and services, (1) lacking readily available and comparably priced substitutes and (2) necessary for maintaining public health and safety. Typical essential services include police and fire protection, sanitation, telephone and other utility services, and provision of food and water. Public provision of education, however, does not qualify.

<sup>2</sup> In this article, the terms "public" and "public sector" refer to agencies, departments, and enterprises whose employees are government employees. The words "private" and "private sector" denote all other organizations and enterprises.

<sup>3</sup> Throughout this article, references to "employees," "unions," and "strikes" are used as a form of shorthand and are not intended to indicate that employees or their organizations are the primary "causes" of labor disputes in the United States. Thus, the terms "employers" and "lockouts" would be interchangeable with "employees" and "strikes" in most instances.

<sup>4</sup> In addition, the City Board of Health felt obliged to declare a "state of imminent peril" that lasted through the fourth week following the walkout. *See* New York Times Index, 1968, at 1055.

For accounts of other serious, private-sector walkouts, *see* New York Times Index, 1960, at 839 (Pennsylvania Railroad strike); New York Times Index, 1972, at 1853-54 (Long Island Railroad strike); New York Times Index, January 16-31, 1973, at 97 (Long Island Railroad strike); New York Times Index, 1973, at 1312 (New York City private hospital strike).

essential private industries.<sup>5</sup> For this reason the present article focuses primarily on the difficulty of restricting work stoppages in the private sector.

The first section of this article summarizes the vast differences between the rights of public and private employees to strike. The second section focuses on likely obstacles to a governmental suit to enjoin shutdowns in the broadest segment of American private industry—the segment in which labor relations are governed by the National Labor Relations Act (NLRA).<sup>6</sup> The final section of the article suggests a legislative solution to the problem, fashioned after existing statutory remedies for limiting certain strikes by public employees.

## I. THE RIGHT TO STRIKE IN PUBLIC AND PRIVATE EMPLOY COMPARED

The principal reason why local-emergency work disruption in private industry appears legally unstoppageable is the failure of American labor law to make potential harm from a strike the primary criterion for determining what shutdowns are enjoinable. The following section describes how Congress and the courts, using ownership of the workplace to distinguish prohibited from permissible shutdowns, has made strikes by government employees far easier to restrict than walkouts by comparable employees in private industry.<sup>7</sup>

### A. *The Right of Government Employees to Strike*<sup>8</sup>

In general, the law affords ample means for avoiding and terminating walkouts by government employees. In forty-four states and the District of Columbia, strikes by public employees are

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<sup>5</sup> The Index to Legal Periodicals for the years 1968 to date lists no articles discussing the legal issues arising from serious private-sector shutdowns having only local or regional impact. Among the few recent articles on *national* emergency work stoppages in private industry are Crossland, *Public Interest Labor Disputes: An Economic and Legal Analysis Beyond the Pale of Title II of the Taft-Hartley Act*, 12 WAYNE L. REV. 780 (1966); Jones, *Toward a Definition of "National Emergency Dispute,"* 1971 WIS. L. REV. 700; and Lewis, *Proposals for Change in the Taft-Hartley Emergency Procedures: A Critical Appraisal*, 40 TENN. L. REV. 689 (1973).

<sup>6</sup> 29 U.S.C. § 141 *et seq.* (1970).

<sup>7</sup> See parts A-D *infra*.

<sup>8</sup> Throughout this section, the terms "public employees" and "government employees" are defined as employees of state and local governments. Federal government employees are forbidden to strike by 5 U.S.C. § 7311 (1970) and 18 U.S.C. § 1918 (1970).

illegal, either by statute<sup>9</sup> or by common law.<sup>10</sup> In all forty five of these jurisdictions, courts may enjoin strikes by governmental employees and impose penalties for non-compliance with the court order. In addition, many of these jurisdictions impose various statutory penalties, such as loss of employment<sup>11</sup> or limitation of subsequent pay increases.<sup>12</sup> In the remaining states, state and local employees are expressly permitted to strike, albeit under varying restrictions with regard to exhausting preliminary bargain-

<sup>9</sup> At this writing, the state statutes prohibiting some or all public employees from striking included the following: ALA. CODE tit. 37, § 450(3) (1967); ALASKA STAT. § 23.40.200 (1962) (police, firefighters, correctional workers, and state mental hospital employees); CONN. GEN. STAT. REV. § 7-475 (1965) (municipal employees); DEL. CODE ANN. tit. 19, § 1312 (Cum. Supp. 1970); FLA. STAT. ANN. § 839.221 (1971) (repealed, Supp. (1974)); GA. CODE ANN. § 89-1301 (1971); IDAHO CODE § 138-11 (1970) (strikes barred for duration of labor agreement); ILL. REV. STAT. ch. 111-2/3, § 702.19 (Supp. 1973) (public transit employees); ch. —, [1974] Iowa Laws 107 §§ 10, 12 (CCH Lab. Law Rep. ¶ 47,112 (1974)); KAN. STAT. ANN. § 75-4333(c)(5) (Supp. 1973) (excluding teachers); KY. REV. STAT. ANN. § 345.130 (1972) (firefighters); LA. REV. STAT. § 23.890 (Supp. 1972) (public transit disputes submitted to binding arbitration); ME. REV. STAT. ANN. tit. 26 §§ 964(2)(c)(3), 979-C(2)(c) (Supp. 1974) (public transit employees; state employees); MD. ANN. CODE art. 1, § 64B(D) (1974) (Allegheny County employees), art. 77, § 160A(m) (1974) (nontertified teachers in most counties); MASS. GEN. LAWS ANN. ch. 150E, § 9A (1974); MICH. COMP. LAWS § 423.202 (1947); MINN. STAT. § 179.64 (1971); MO. REV. STAT. § 105.530 (Supp. 1967) (no right to strike); NEB. REV. STAT. § 48-802 (1974); NEV. REV. STAT. § 288.200 (Supp. 1973) (strikes by local government employees enjoinable at governor's discretion); N.H. REV. STAT. ANN. § 98-C:6 (1969) (all public employees except police and firefighters); *id.* § 105-B:11 (1972) (police and firefighters); N.J. STAT. ANN. § 34:13A-8 (1968) (no right to strike); N.M. STAT. ANN. § 14-53-16 (1973) (municipal transit employees); N.Y. CIV. SERV. LAW § 210 (McKinney 1973); OHIO REV. CODE ANN. § 4117.02 (Page 1973); OKLA. STAT. ANN. tit. 11, § 548.14 (1971) (police and firefighters); R.I. GEN. LAWS ANN. § 36-11-6 (1966); S.D. COMPILED LAWS ANN. § 3-18-11 (Supp. 1973); TENN. CODE ANN. § 6-3809 (1971) (public transit employees); TEX. REV. CIV. STAT. ANN. arts. 5154c, § 3 (1947) (excluding police and firefighters), 5154c-1, § 17(a) (1973) (police and firefighters); UTAH CODE ANN. § 11-20-31 (1965) (public transit employees); VA. CODE ANN. § 40.1-54.1 (1950) (hospital employees); WASH. REV. CODE ANN. § 41.56.120 (1967); WIS. STAT. § 59.969 (1973) (county mass transportation employees); *id.* § 111.84(e) (1973) (state employees).

<sup>10</sup> A check of statutes in force as of October, 1974, failed to locate relevant legislation in the following states: Arkansas, California, Colorado, Mississippi, North Carolina, South Carolina, West Virginia, and Wyoming. According to the general rule enunciated in *Anderson Fed'n. of Teachers v. Anderson City School*, 252 Ind. 558, 251 N.E.2d 15 (1969), *rehearing denied*, 252 Ind. 558, 254 N.E.2d 329 (1970), *cert. denied*, 399 U.S. 928 (1970), and cases cited in Annot., 37 A.L.R.3d 1147 (1971), strikes by public employees in these states also are illegal.

<sup>11</sup> The state statutes so providing, as of October 1974, were GA. CODE ANN. § 89-1303 (1972); MASS. GEN. LAWS ANN. ch. 150A, § 15 (1968) (employees subject to discharge proceedings); MINN. STAT. § 179.07 (1971) (striking employees put on two years' probation); N.H. REV. STAT. ANN. § 98-C:6 (1969) (strikers subject to court action); OKLA. STAT. ANN. tit. 11, § 548.14 (1971); *cf.* TEX. REV. CIV. STAT. ANN. arts. 5154c, § 3 (1947) (all public employees except police and firefighters), 5154c-1, § 17(e) (1973) (police and firefighters placed on probation); VA. CODE ANN. § 40.1-55 (1950).

<sup>12</sup> As of October, 1974, the state statutes so providing were GA. CODE ANN. § 89-1303 (1972); OHIO REV. CODE ANN. § 4117.03 (1947) (striking employees penalized concerning advancement and salary increases); TEX. REV. CIV. STAT. ANN. art. 5154c-1, § 17(e) (1973) (applicable to police and firefighters).

ing procedures and giving notice to the government employer of an intent to strike.<sup>13</sup> In four of these jurisdictions, courts are permitted to enjoin walkouts where the government employer can prove that the strike is likely to endanger public health or safety.<sup>14</sup> In the other two, a court may enjoin the strike or allow it under certain precautionary conditions.<sup>15</sup> In both the "no-strike" and the "limited-strike" jurisdictions, it has been possible to enjoin walkouts by sanitation, transit, and other employees.<sup>16</sup> Thus, it is fair to say that legal tools for restricting strikes by government employees exist.<sup>17</sup>

### *B. The Right of Nonprofit Hospital Employees to Strike*

As with strikes involving government employees, strikes by employees of nonprofit hospitals are generally illegal. Since the NLRA expressly excludes these employees from its coverage,<sup>18</sup> the right to strike or lockout in these institutions is subject to state law.<sup>19</sup> In three states, legislation has been enacted forbidding walkouts by these employees,<sup>20</sup> and on at least one occasion an anti-strike statute has enabled a local court to enjoin a walkout by hospital employees.<sup>21</sup> As in the case of government employees

<sup>13</sup> ALASKA STAT. § 23.40.200 (1962) (excludes certain key employees); HAWAII REV. STAT. § 89-12 (Supp. 1971); MONT. REV. CODES ANN. §§ 59-1603(1), 59-1614 (Supp. 1973) (excludes teachers, hospital workers, nurses, and certain other employees); ORE. REV. STAT. § 243.726 (1973); PA. STAT. ANN. tit. 43, § 1101.1003 (Supp. 1971) (excludes police and firefighters); VT. STAT. ANN. tit. 21, § 1730 (1973) (excludes municipal employees).

<sup>14</sup> ALASKA STAT. § 23.40.200 (1962); MONT. REV. CODES ANN. § 59-1614 (Supp. 1973); PA. STAT. ANN. tit. 43, § 1101-1003 (Supp. 1971); VT. STAT. ANN. tit. 21, § 1730 (Supp. 1973).

<sup>15</sup> HAWAII REV. STAT. § 89-12 (Supp. 1971); ORE. REV. STAT. § 243.726 (1973).

<sup>16</sup> Anti-strike injunctions in the forty-five "no strike" jurisdictions are legion. Many cases in which they were authorized are collected in Annot., 37 A.L.R.3d 1131 (1971). For an example of how an injunction can be issued in a "limited-strike" jurisdiction, see *Southeastern Pa. Transp. Authority v. T.W.U. Local 234*, 77 L.R.R.M. 2489, 66 C.C.H. Lab. Cas. ¶ 52,593 (1971).

<sup>17</sup> Their effectiveness, of course, depends on the willingness of employees to obey court injunctions.

<sup>18</sup> See 29 U.S.C. § 152(2) (1970).

<sup>19</sup> See *Amalgamated Motor Coach Employees v. Missouri*, 374 U.S. 74 (1963) [hereinafter cited as *Motor Coach Employees*].

<sup>20</sup> As of October, 1974, the state statutes so providing were MINN. STAT. § 179.36 (1973); N.Y. LAB. LAW §§ 713, 716 (McKinney 1973); WASH. REV. CODE ANN. § 49.66.060 (1972). Indiana and Massachusetts, by contrast, allows strikes by nurses in private hospitals. See *Peters v. Poor Sisters of St. Francis*, 148 Ind. App. 453, 267 N.E.2d 558 (1971), *trans. denied*, 274 N.E.2d 530 (Ind. Sup. Ct. 1971); MASS. GEN. LAWS ANN. ch. 150A:9 (1970).

<sup>21</sup> The injunction, however, was defied. See *League of Voluntary Hospitals and Homes v. Local 1199, Drug & Hosp. Union*, 84 L.R.R.M. 2988 (S.D.N.Y. 1973), *aff'd.*, 490 F.2d 1398 (T.E.A.C. 1973).

strikes, however, court injunctions have not always been obeyed.<sup>22</sup>

### C. *The Right of Rail Employees to Strike*

The law governing employees of privately owned railways generally allows strikes and lockouts to occur once parties<sup>23</sup> have exhausted the various negotiating procedures mandated by federal statute.<sup>24</sup> With the exception of disputes regarding construction and application of existing contracts and grievances arising thereunder (termed "minor disputes"),<sup>25</sup> the law provides no means for imposing a settlement on the parties.<sup>26</sup> If a dispute comes before the National Mediation Board, the administrative agency established by Congress to hear railway labor disputes,<sup>27</sup> either by submission from one of the parties or at the Board's initiative, a

<sup>22</sup> *Id.*

<sup>23</sup> For the remainder of this article, the term "parties" is defined as those persons or organizations legally responsible for negotiating labor contracts and resolving labor disputes, *i.e.*, labor unions and management.

<sup>24</sup> The Railway Labor Act, 45 U.S.C. § 152 First (1970), imposes on parties the duty . . . to settle all disputes, whether arising out of the application of such [labor] agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier . . .

Courts have generally interpreted this to require a good-faith attempt to negotiate a dispute as the minimum prerequisite for justifying a strike or lockout. *See, e.g.*, *Baker v. UTU*, 455 F.2d 149, 154 (3rd Cir. 1971) and cases cited therein. During major disputes (meaning those "arising out of the formation or change of collective agreements covering rates of pay, rules, or working conditions," *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-27 (1945)), parties are also entitled to request mediation and the assistance of the National Mediation Board [hereinafter cited as "the Board"]. *See* 45 U.S.C. § 155, First (1970); *Brotherhood of Ry. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1968). Alternatively, the Board may volunteer its service if it considers the dispute a "labor emergency."

If the dispute reaches the Board, the parties are prohibited from striking or locking out until (1) one or both parties have rejected binding arbitration and (2) in emergency cases, thirty days have elapsed since the submission of a report prepared by an emergency fact-finding commission summoned by the President of the United States pursuant to § 10 of the Act, 45 U.S.C. § 160 (1970). Otherwise, the parties are free to strike or lock out following either (1) unsuccessful termination of negotiations or (2) wrongful unilateral imposition of new work rules. *See Brotherhood of Ry. Trainmen v. Jacksonville Terminal Co.*, *supra*, at 378-79.

<sup>25</sup> *See, e.g.*, *Missouri-Ill., R.R. v. Order of Ry. Conductors and Brakemen*, 322 F.2d 793 (8th Cir. 1963); *Rutland Ry. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2nd Cir. 1962) *cert. denied*, 372 U.S. 954 (1963); *Hilbert v. Pennsylvania R.R.*, 290 F.2d 881 (7th Cir. 1961), *cert. denied*, 368 U.S. 900 (1961).

<sup>26</sup> Compulsory arbitration is available only for settling so-called "minor disputes," *i.e.*, disputes relating to the interpretation of existing labor agreements. *See Local 429, Brotherhood of R.R. Carmen v. Chicago and N.W. Ry.*, 354 F.2d 786 (8th Cir. 1965); *Railway Express Agency, Inc. v. Brotherhood of Ry., Airline & S.S. Clerks*, 437 F.2d 388 (5th Cir. 1971), *cert. denied*, 403 U.S. 919 (1971).

<sup>27</sup> *See* note 25 *supra*.

threatened stoppage can be temporarily enjoined by having the President, on recommendation of the Board, appoint a fact-finding commission.<sup>28</sup> Once the commission has reported, however, the parties are free to reject its recommendations and strike or lock-out.<sup>29</sup>

#### D. *The Right of Other Private Employees to Strike*

The law governing labor relations in the remainder of private industry generally allows strikes and lockouts to occur wherever the disruption would not amount to an unfair bargaining device.<sup>30</sup> Employees in these industries have no duty to exhaust certain bargaining procedures before striking. In addition, they need not fear the intervention of a federal administrative agency during their walkout, provided their employer can find no basis on which to label the strike an unfair labor practice.<sup>31</sup> For, unlike the Railway Labor Act, the National Labor Relations Act does not authorize a federal labor agency to intervene *sua sponte* in a dispute.<sup>32</sup> Rather, the National Labor Relations Board is permitted only to investigate those complaints referred to it by labor, management, or private citizens;<sup>33</sup> even then, its jurisdiction is limited to cases involving allegations of "unfair labor practices,"<sup>34</sup>

<sup>28</sup> Railway Labor Act, § 10, 45 U.S.C. § 160 (1970).

<sup>29</sup> *Id.*

<sup>30</sup> Although federal courts have stated on numerous occasions that the right to strike or lockout is protected only where both lawful means *and* a lawful objective are involved, *see, e.g.,* NLRB v. Teamsters Local 639, 362 U.S. 274, 281-82 (1960) and cases cited therein; in practice, the only requirement is that the shutdown not constitute an unfair labor practice under Sections 7, 8, or 10 of the Act, 29 U.S.C. §§ 157, 158, 160 (1970). Cases in which an allegation of unfair labor practices did not appear to trigger an injunction include NLRB v. Indiana Desk Co., 149 F.2d 987 (7th Cir. 1945) (strike called to compel employer to violate a wage-stabilization statute); and *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345 (3rd Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) ("strike" involving only a single individual not intending to influence other employees).

<sup>31</sup> This is because the jurisdiction of the NLRB is limited, under Section 10 of the Act, 29 U.S.C. § 160 (1970), to allegations of unfair labor practices.

<sup>32</sup> *Nash v. Florida Indus. Comm'n.*, 389 U.S. 235 (1967).

<sup>33</sup> *See, e.g.,* *Texas Indus., Inc. v. NLRB*, 336 F.2d 128 (5th Cir. 1964); *IUE v. NLRB*, 289 F.2d 756, 757 (D.C. Cir. 1960). However, any person, "even a stranger," may file charges of unfair practices against an employer on behalf of one or more employees. *Hercules Powder Co. v. NLRB*, 297 F.2d 424, 433 (5th Cir. 1961). *See also* *NLRB v. Local 42, Int'l Ass'n. of Heat & Frost Insulators*, 469 F.2d 163 (1972), *cert. denied*, 412 U.S. 940 (1973), upholding a Board rule to this effect.

<sup>34</sup> *See* Labor-Management Relations Act (Taft-Hartley Act) § 10(b), 29 U.S.C. § 160 (1970). *See also* *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958):

[T]he Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice.

*Id.* at 108.

a category that does not subsume all disruptions of serious local consequence.<sup>35</sup>

The LMRA does authorize the President, acting through the Attorney General, to petition in federal district court for an injunction when a strike or lockout threatens an entire industry (or a substantial part of it) in interstate commerce and might endanger the national health or safety.<sup>36</sup> However, in light of recent court decisions it appears that this provision will not apply to work stoppages having only local or regional consequences.<sup>37</sup> Thus, in the absence of further federal legislation limiting the right of employees in NLRA-LMRA industries to strike, it is apparent that a local-emergency work stoppage in some essential private industry could not be challenged in court or before any federal regulatory body. The following section, therefore, analyzes a number of measures that state or city governments might take to restrict or halt a shutdown in an essential private industry subject to the NLRA and LMRA. As will be demonstrated, each has serious pitfalls that limit its utility in protecting the public from potential harm.

## II. POSSIBLE MEASURES FOR CONFRONTING SERIOUS LOCAL WORK STOPPAGES IN PRIVATE INDUSTRIES SUBJECT TO THE NLRA-LMRA<sup>38</sup>

If employees in an essential private enterprise subject to the National Labor Relations Act (*e.g.*, the local telephone or electric company) were to strike or threaten to strike, the state or local government would have several weapons with which to attempt to avoid the shutdown. The first group of weapons involves direct action and includes mobilizing the National Guard to seize and operate the affected enterprise. The second entails suing in court for an injunction.

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<sup>35</sup> See, *e.g.*, *Motor Coach Employees*, *supra* note 19. *Tate v. Philadelphia Transp. Co.*, 410 Pa. 490, 190 A.2d 316 (1963).

<sup>36</sup> See Labor-Management Relations Act (Taft-Hartley Act) § 208, 29 U.S.C. § 178 (1970).

<sup>37</sup> For example, a petition to enjoin a shutdown of nine of Chicago's eleven grain elevators in 1971 was denied, despite evidence that the strike threatened serious economic injury. *United States v. Local 418, Int'l Longshoremen's Ass'n.*, 335 F. Supp. 501 (N.D. Ill. 1971).

<sup>38</sup> This section is limited to "NLRA-LMRA disputes" because of the ability of the National Mediation Board, under Section five of the Railway Labor Act, 45 U.S.C. § 155, First (1970), to intervene voluntarily in emergency rail and airline disputes.

### A. Direct Seizure

The state or municipal government might try to mobilize the National Guard or state militia to run the affected enterprise for the duration of the shutdown. This has occasionally been done during strikes that fall outside NLRB jurisdiction.<sup>39</sup> In several states,<sup>40</sup> statutes authorize the governor to seize and operate privately owned utilities during an emergency shutdown, and on at least one occasion such legislation has been invoked to justify governmental seizure and operation.<sup>41</sup> In the only recent case on the subject, however, *Division 1287, Amalgamated Motor Coach Employees v. Missouri*,<sup>42</sup> the United States Supreme Court declared one such seizure and the legislation authorizing it invalid as conflicting with federal law on the subject.<sup>43</sup> Unless the Court is willing to reverse itself on this point, it is likely that future seizures of this type will also be subject to court challenge and eventual invalidation. Consequently, the technique of direct seizure cannot be recommended as a device for avoiding crippling private-sector shutdowns.

### B. Petition for Injunction

If seizure is unavailable and a request for a "national emergency injunction" under the LMRA is likely to fail because of the purely local impact of the shutdown, the state or municipality may try to sue in state court for an anti-strike injunction.<sup>44</sup> However, the failure of the NLRA-LMRA to provide any remedy for serious *local* work stoppages makes it extremely unlikely that such a petition could be granted. In response to such a suit any defendant could raise at least three valid defenses.<sup>45</sup> With the

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<sup>39</sup> See, e.g., President Nixon's mobilization of federal troops during the 1970 postal strike, *New York Times*, March 24, 1970, at 1, col. 8. See also *New York Times*, March 23, 1970, at 36, col. 6 for an account of other instances in which federal troops were ordered to replace striking workers.

<sup>40</sup> As of October, 1974, the following statutes authorized government seizure of critical private industries during strikes and lockouts: N.J. STAT. ANN. §34:13B-13 (1947); N.D. CENT. CODE § 37-01-06 (1960). Missouri's King-Thompson Act, MO. REV. STAT. § 295.180 (1959), was declared unconstitutional by the United States in *Motor Coach Employees*, *supra* note 19.

<sup>41</sup> See *Motor Coach Employees*, *supra* note 19, at 75-76.

<sup>42</sup> *Id.* at 74.

<sup>43</sup> *Id.*

<sup>44</sup> Suit must be brought in state court because federal courts are prohibited by Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107 (1970) from enjoining most nonviolent strikes and lockouts in private industry.

<sup>45</sup> See paragraphs 1-3, *infra*.

exception of a challenge to the government's standing to sue, all of these defenses pose major obstacles to the granting of meaningful relief.

1. *Lack of Jurisdiction (Pre-emption)*—The first and most difficult defense that could be raised is that federal labor law prevents the court of jurisdiction from hearing the suit. Since 1959<sup>46</sup> the Supreme Court has required lower courts to decline jurisdiction over cases “arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act,”<sup>47</sup> on the grounds that Congress has given the National Labor Relations Board exclusive jurisdiction over such cases.<sup>48</sup> While this rule (sometimes termed the “pre-emption” rule) has on rare occasions been waived, the Court has stated emphatically that exceptions will be made only in cases of “overriding state interest” in the subject matter,<sup>49</sup> or where

the activity regulated is merely a peripheral concern of the [NLRA-] Labor Management Relations Act or touches interests so deeply rooted in local feeling that, in the absence of compelling Congressional direction, the Court would not infer that Congress has deprived [the courts] of power to act.<sup>50</sup>

Thus far, the only exceptions allowed have involved cases alleging on-plant violence or the threat of violence,<sup>51</sup> malicious defamation of an employer,<sup>52</sup> and failure to process a grievance that resulted in loss of employment.<sup>53</sup> Thus, the critical question is whether a local-emergency work stoppage is a situation that merits an exception to the pre-emption rule.

One governmental argument, that the state has an “overriding interest” in preserving order and preventing widespread public injury, seems destined to lose. On two occasions, the Supreme Court has rejected this argument in holding that the NLRA prohibited state or federal courts from enjoining work stoppages on grounds of avoiding public emergency. In the earlier case, *Div. 997, Amalgamated Motor Coach Employees v. Wisconsin Em-*

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<sup>46</sup> *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

<sup>47</sup> *Linn v. United Plant Guard Workers*, 383 U.S. 53, 59-60 (1966) (quoting from *Local 100, Plumbers' Union v. Borden*, 373 U.S. 690, 693-94 (1963)).

<sup>48</sup> *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

<sup>49</sup> *Local 100, Plumbers' Union v. Borden*, 373 U.S. 690, 693-94 (1963).

<sup>50</sup> *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959).

<sup>51</sup> *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957).

<sup>52</sup> *Linn v. Local 114, Plant Guard Workers*, 383 U.S. 53 (1966).

<sup>53</sup> *Vaca v. Sipes*, 386 U.S. 171 (1967).

*ployment Relations Board*,<sup>54</sup> the Supreme Court cited extensive legislative history to hold that the NLRA and the supplementary Taft-Hartley Act were not designed to allow the states to regulate labor activities in "critical" sectors of private industry.<sup>55</sup> In the second, *Div. 1287, Amalgamated Motor Coach Employees v. Missouri*,<sup>56</sup> the Court held that the federal labor statutes were designed to permit such shutdowns notwithstanding their possibility for harm, citing Senator Taft's remark that no exceptions for utilities should be permitted.<sup>57</sup> Unless the present Supreme Court were to ignore both legislative intent and longstanding precedent, it would seem unlikely for any state or local government to persuade a court that state statutes or common law made the government's interest in avoiding chaos a reason for avoiding the pre-emption rule.

The only other plausible government argument is that a local emergency work stoppage, no matter how peaceful its on-site activity, qualifies as a "violent" stoppage for purposes of avoiding the pre-emption rule. To date, only one case appears to have considered the argument; there, the court seemed to reject it by terming "peaceful" a strike that "cause[d] enormous and irreparable damage to hundreds or thousands of innocent persons who are not involved in the strike," because no on-site bloodshed occurred or was threatened.<sup>58</sup> Moreover, it would be bad policy to blur the definition of "violent" shutdowns to include otherwise "peaceful" emergency shutdowns. Such a definition would, for example, contradict the commonly held standard of "violence" used in applying the Norris-La Guardia Act,<sup>59</sup> thereby introducing tension into the law that another approach to the problem (*e.g.*, the state's interest in maintaining order) would avoid. For this reason, the approach of classifying emergency work stoppages as "violent" to circumvent the pre-emption doctrine is

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<sup>54</sup> 340 U.S. 383 (1951).

<sup>55</sup> *Id.* at 389, 391-96.

<sup>56</sup> 374 U.S. 74 (1963).

<sup>57</sup> Senator Taft's remarks, quoted in 374 U.S. 74, 82, n.9, are as follows:

If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining.

<sup>58</sup> *Tate v. Philadelphia Transp. Co.*, 410 Pa. 490, 498, 190 A.2d 316, 320 (1963).

<sup>59</sup> *See, e.g., Local 721, R.R. Trainmen v. Central of Ga. Ry.*, 229 F.2d 901 (1956); *Heinz Mfg. Co. v. Local 515, UAW*, 20 F. Supp. 116 (W.D. Pa. 1937) (employer not entitled to injunction on ground of assaults and threats occurring outside the plant without evidence that the union or its officers committed or ratified such acts).

probably unwise as well as impractical. The problem, however, is that eliminating this avenue probably also eliminates the government's chance of repulsing the pre-emption defense to its lawsuit.

Unless the government is faced with a shutdown occurring during the term of the contract (in which case court jurisdiction exists under § 302 of the Labor-Management Relations Act),<sup>60</sup> it appears unlikely that the government will overcome the defendants' jurisdictional challenge. Thus, even in the absence of other objections, it would seem difficult for the government, operating under present labor laws, to enjoin even a catastrophic work stoppage in a privately owned corporation.

2. *No Standing*—In addition to the first defense, a defendant could challenge the state government's standing to sue. Because the genuine motivation for the suit is to protect the interests of local citizens, a defendant might argue that the government has failed to show the kind of direct injury necessary to justify its place as plaintiff. This argument, however, would be subject to rebuttal because of the well-established right of state (and sometimes local) governments to sue in their capacity as *parens patriae* for the protection of "quasi-sovereign" state interests.<sup>61</sup>

According to many Supreme Court decisions, state governments have standing to sue to enjoin firms and governmental agencies from acting in ways detrimental to the welfare of the state as a whole if the state can demonstrate some interest of its own distinguishable from the interests of private persons within its borders.<sup>62</sup> In numerous instances the Court has invoked this rule to allow states to sue out-of-state corporations and government agencies for allegedly polluting air and water within the boundaries of the plaintiff-state.<sup>63</sup> The Court has also applied the rule to uphold lower-court injunctions against diverting water<sup>64</sup> and natural gas<sup>65</sup> from a state. While the requirement of showing interests separate from those of individual state residents has frequently proved troublesome for state governments,<sup>66</sup> it would

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<sup>60</sup> *Humphrey v. Moore*, 375 U.S. 335 (1964).

<sup>61</sup> *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 451 (1945).

<sup>62</sup> *Id.*; *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972).

<sup>63</sup> *See Missouri v. Illinois*, 180 U.S. 208 (1901); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

<sup>64</sup> *Kansas v. Colorado*, 206 U.S. 46 (1907).

<sup>65</sup> *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

<sup>66</sup> *See, e.g., Hawaii v. Standard Oil Co., of Cal.*, 405 U.S. 251 (1972); *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir. 1973).

seem that the government's interest in preserving order would qualify as a "quasi-sovereign" interest in the case of suits to enjoin locally-crippling work stoppages. For this reason, the question of standing should pose little problem to a governmental agency attempting to halt or avoid a local emergency strike or lockout.<sup>67</sup>

3. *Lack of Power to Issue Injunctions*—If no other defense succeeds, a defendant should nonetheless have a winning argument in the inability of courts to enjoin walkouts accompanied by peaceful picketing. Under the Norris-LaGuardia Act,<sup>68</sup> federal courts are expressly forbidden to issue injunctions against strikes or lockouts in private industry where no threat of violence can be established.<sup>69</sup> In many states, comparable statutes similarly restrict the power of state courts to enjoin peaceful shutdowns and walkouts.<sup>70</sup> In the absence of a decision that the threat to public health and safety from disruptions in essential services constitutes "violence" within the meaning of these statutes, it would be most unlikely for any court, state or federal, to issue an injunction against the kind of work stoppage being discussed. Thus, it is altogether possible that a governmental unit, though able to challenge a severe shutdown in court, would be unable to obtain meaningful relief even if it could show the direst consequences flowing from such a strike or lockout.

<sup>67</sup> Presumably the government would also have little difficulty asserting standing if, as is possible, it were to sue in defense of its interest in maintaining government functions.

<sup>68</sup> 29 U.S.C. §§ 101-115 (1970).

<sup>69</sup> Although Section 7 of the Act, 29 U.S.C. § 107 (1970), speaks in terms of "unlawful acts," courts have consistently construed these words to mean "violence, breaches of the peace, and criminal acts." See *Local 721, Brotherhood of R.R. Trainmen v. Central of Ga. Ry.*, 229 F.2d 901 (5th Cir. 1956); *Wilson & Co. v. Birl*, 105 F.2d 948, 952 (3rd Cir. 1939); see generally, Note, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 *YALE L.J.* 70 (1960).

<sup>70</sup> As of this writing, the state statutes prohibiting state courts from enjoining peaceful strike included ARIZ. REV. STAT. ANN. § 12-1808 (1956); COLO. REV. STAT. ANN. § 80-4-16 (1963); CONN. GEN. STAT. REV. §§ 31-115, 31-116 (1968); 29 U.S.C. § 107 (1970) (Norris-LaGuardia Act—District of Columbia); HAWAII REV. STAT. § 380-4 (1963); IDAHO CODE § 44-703 (1948); ILL. REV. STAT. ch. 48, § 2a (Smith-Hurd 1971) (See *Interprecision Scientific Co. v. International Union of Mine, Mill & Smelter Workers*, 2 Ill. App. 2d 531, 120 N.E.2d 356 (1954)); IND. CODE § 22-6-1(4) (1971); KAN. STAT. ANN. § 60-904 (1949); MD. ANN. CODE art. 100, § 68 (1957) (enjoinable only when peace officers cannot furnish protection); MASS. GEN. LAWS ANN. ch. 214, § 9A(1-4) (1950) (enjoinable only when peace officers cannot furnish protection); MINN. STAT. §§ 185.10, 185.11 (1971); N.J. REV. STAT. § 2A:15-51 (1937); N.Y. LABOR LAW § 807(1) (1965); N.D. CENT. CODE § 34-08-05 (1960); OKLA. STAT. ANN. § 166 (1951); ORE. REV. STAT. §§ 662.050-662.070 (1973); PA. STAT. ANN. tit. 43, § 206f (1937); R.I. GEN. LAWS ANN. § 28-10-2 (1968) (enjoinable only when peace officers cannot furnish protection); UTAH CODE ANN. § 34-19-2 Supp. 1973); WASH. REV. CODE ANN. § 49.32.050(Supp. 1939); WIS. STAT. §§ 103.53, 133.07-133.08 (1974); WYO. STAT. ANN. § 27-241 (1967).

It appears that federal labor law, by protecting private-sector labor relations from unwanted governmental interference, has also enabled employers and employees in a handful of industries to paralyze a community if an impasse in negotiations convinces either party that a work stoppage would strengthen its bargaining position. If the decision in *Motor Coach Employees* is any guide, state action alone will be unable to close this potentially dangerous loophole in the law. Rather, Congress must decide to amend the existing federal labor statutes if the nightmare of strikes by members of essential private industries is to be avoided.

### III. PROPOSALS FOR REFORM

If locally crippling, private-sector work stoppages are to be avoided, American labor law must recognize that certain private-sector strikes and lockouts, while not endangering national health and safety, may nevertheless threaten public welfare sufficiently to warrant similar restriction. This requires new legislation that recognizes the unique ability of certain local shutdowns within the NLRA-LMRA jurisdiction to endanger public health and safety and provides special remedies for minimizing the consequences of such shutdowns or for avoiding them altogether. This section considers the justification for such legislation in light of the present public-private dichotomy within American labor law. It also suggests ways in which the public's interest in avoiding disruption can be served without eliminating this duality. Finally, the section discusses briefly the merits of three devices for avoiding disruption: the temporary injunction, the permanent injunction, and the mandatory injunction that allows a partial rather than total strike or lockout.

#### *A. The Place of Restrictions against Private-Sector Shutdowns within the Bifurcated Structure of American Law*

As has been suggested elsewhere in this article, American labor law has been molded in great part by concern over avoiding strikes by public employees. While legislators during the past four decades have been receptive to the need of private employees to strike and organize, fear of enabling government workers to "hold the public for ransom" or to "overturn carefully wrought budgetary decisions normally delegated to the legislature"<sup>71</sup> have pre-

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<sup>71</sup> Two court pronouncements to this effect appear in Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 959 (1969).

vented passage of humane labor statutes for governmental employees until very recently.<sup>72</sup> The result has been a dual system of labor law for public and private workplaces: the former law emphasizing a duty to serve the public; the latter recognizing no such duty.<sup>73</sup> While the differing right to strike in the two systems has recently come under serious attack,<sup>74</sup> the belief that private parties, unlike governmental organizations and employees, bear no general duty to provide service remains unchallenged.<sup>75</sup> So long as this dichotomy remains popular, it is important to demonstrate that the legislation proposed in this article would not seriously alter the dual system of labor law currently operating in the United States.<sup>76</sup>

While it is true that any restriction upon the right of certain private parties to strike or lockout would modify existing labor law, it is important to realize that such a change would not represent a radical departure from well-accepted labor policy in this country. For fifty years American law has recognized the duty of rail employers and employees to subordinate their right to disrupt operations during bargaining to the public's need for essential transportation service, a duty set forth in Sections 3, 5, and 10 of the Railway Labor Act.<sup>77</sup> Since 1948, Congress has imposed a similar obligation upon parties in other private industries whose disruption would seriously endanger national health and safety.<sup>78</sup> While the duties imposed by these statutes are not so restrictive as those imposed upon public employers and employees, their very existence reflects the feeling that public interests cannot be ignored while the freedom of private parties to strike

<sup>72</sup> Most state public employment relations statutes date from the mid-1960's. See notes 9-11 *supra*.

<sup>73</sup> See part I *supra*.

<sup>74</sup> See Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970). *Contra*, H. WELLINGTON & R. WINTER, *THE UNIONS AND CITIES* (1971); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969). Other relevant articles include Anderson, *supra* note 71, and Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQUESNE L. REV. 357 (1972).

<sup>75</sup> See *Tate v. Philadelphia Transp. Co.*, 410 Pa. 490, 190 A.2d 316 (1963) for an especially forcible statement of the effect in the private sector.

[A] peaceful strike, like peaceful picketing, conducted in a lawful manner and for a lawful purpose is lawful even though it shuts down, bankrupts, or puts out of business a company or firm which is struck and even though it also causes enormous and irreparable damage to hundreds or thousands of persons who are not involved in the strike.

190 A.2d at 320.

<sup>76</sup> Even Burton & Krider, *supra* note 74, do not reverse their argument to suggest that private parties have a duty to provide service.

<sup>77</sup> 45 U.S.C. §§ 153, 155, 160 (1970).

<sup>78</sup> Labor Management Relations Act, 29 U.S.C. §§ 176-181 (1970).

and lockout is protected. Extending the class of affected industries to include *locally* essential activities would thus be at most an extension, rather than a revision, of existing policy. If the statute were drafted to define essential industries not by name but by the likelihood that their disruption would seriously endanger public health and safety, as is done in the present statutes which regulate national-emergency labor disputes and strikes by state and municipal employees; if government officials were required to post a substantial bond before suing to enjoin a threatened or existing work stoppage; and if the available remedy were limited to a temporary injunction or a mandatory order that basic services be maintained during the shutdown; the proposed legislation would limit only modestly the freedom of private employees and employers to use "concerted action" in support of their bargaining positions. By including suitable restraints upon government interference in work stoppages, such legislation would not fundamentally alter the existing dichotomy between private- and public-sector labor law. Rather, it would eliminate the worst features of the system while perpetuating the underlying notion that private-sector work stoppages, unlike those in the public sector, generally promote the public's interest by making viable employment agreements possible.

### *B. The Choice of Remedies*

While this article is not intended as an exhaustive analysis of specific legislative proposals, there are several proposals which, though previously advocated as reforms of the existing national-emergency dispute resolution procedures, could also serve as means for insulating the public from local-emergency work stoppages.<sup>79</sup> It has already been suggested that proposals entailing some form of compulsory arbitration violate the accepted policy of allowing private-sector parties some freedom to disrupt operations during even the most severe labor disputes. A second reason for rejecting such proposals is the danger that their enactment will weaken the incentives for parties to compromise their demands during bargaining.<sup>80</sup> According to many experts, the tendency of arbitrators to "split the difference" encourages parties

<sup>79</sup> For discussion of proposals, see Crossland, *Public Interest Disputes: An Economic and Legal Analysis Beyond the Pale of Title II of the Taft-Hartley Act*, 12 WAYNE L. REV. 780 (1966); Lewis, *Proposals for Change in the Taft-Hartley Emergency Procedures: A Critical Appraisal*, 40 TENN. L. REV. 689; and Note, *National Emergency Disputes in the Transportation Industry: An Analysis of Final Offer Selection as a Solution to the Problem*, 42 U. CINN. L. REV. 101 (1973).

<sup>80</sup> See generally Lewis, *supra* note 80.

to stick to their initial demands in the hope of presenting the strongest possible position to the arbitrators.<sup>81</sup> The result is to make meaningful negotiations far less likely than would be the case if only mediation, fact-finding, or the prospect of a temporary injunction existed. In light of both arguments, it makes little sense to recommend a proposal requiring binding arbitration.

Of the remaining proposals for reform, the two that seem most promising are the temporary anti-stoppage injunction (sometimes termed the "cooling-off" injunction) and the "limited-strike" order. The former, which is the backbone of the present federal restrictions on private-sector emergency stoppages, retains widespread popularity despite its failure to prevent strikes and lock-outs from occurring in several critical industries.<sup>82</sup> To at least one scholar this approach, combined with substantial fact-finding and mediation services, presents the optimal means for avoiding serious disruption in essential industry.<sup>83</sup> The second remedy, which would enable a court to permit shutdown on condition that certain basic services are maintained, is a promising idea that has yet to enjoy widespread acceptance. It appears that this remedy offers the greatest opportunity for simultaneously preserving the public's interest in maintaining service while allowing bargaining parties their freedom to support bargaining positions through "concerted action." Hopefully, it will not be ignored during any discussion of remedies for locally-crippling private shutdowns.

#### IV. CONCLUSION

This article has attempted to show the consequences of American labor law's failure to account for a dangerous and not altogether unlikely contingency. It has demonstrated the inability of private citizens or their elected officials to prevent a handful of strong-willed individuals from paralyzing their communities and metropolitan areas and injuring many people by their failure to resolve disagreements. What remains now is for Congress to redefine the extent to which private employees and employers may endanger public welfare by striking or locking out. If Congress acts thoughtfully, the resulting legislation can significantly increase public protection without seriously limiting the right of private parties to engage in free and vigorous bargaining.

—Joshua Greene

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<sup>81</sup> *Id.* at 692.

<sup>82</sup> Note, *supra* note 80, at 105-07.

<sup>83</sup> See Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459 (1971). Hawaii has a statute granting state courts the power to sanction "limited strikes" by public employees. HAWAII REV. STAT. § 89-12 (Supp. 1971).