II. "WE DIDN'T HAVE TIME TO TRAIN THE MONKEYS!"

The 2002 Presidential Board of Inquiry on the Work Stoppage in the West Coast Ports

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The Call

The first call came late in July 2002. I answered the phone in my office and heard a secretary say, "Please hold for the Solicitor of Labor, Eugene Scalia." This was not quite as surprising as it might have been. Although I did not know Gene Scalia well, he had appeared before me twice in labor arbitrations between United Parcel Service and the International Brotherhood of Teamsters.[1] Still, those cases had been three years earlier and I hadn't had any contact with him since, certainly not after his appointment as Solicitor of Labor.

In a moment, Gene came on the line. After a few pleasantries, he turned quickly to business. He mentioned the developing labor problems on the West Coast ports, where dock employers (organized as the Pacific Maritime Association or PMA) and the International Longshore and Warehouse Union (ILWU) were going through one of their periodic bargaining disputes. I had gleaned

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I first presented this paper to a faculty colloquium at the University of South Carolina School of Law in February 2003. At the time it bore the title *Serving on a Presidential Board of Inquiry, or, The Cypher.* As an epigram I used the Oxford English Dictionary's definition of "cipher" or "cypher":

> **Cipher, cypher** ME. [a.OF. *Cyfre, cyffre* (mod. *chiffre*), med.L. *cifre, ciphra*, f. Arab. *cifr* the arithmetical symbol 'zero' or 'nought', . . . f. *cafara* to be empty.] **1.** An arithmetical symbol or character (0) of no value by itself, but which . . . when placed after a figure or series of figures in a whole number it increases the value . . . tenfold. . . . **2.** *fig.* A person who fills a place, but is of no importance or worth, a nonentity, a 'mere nothing' . . . **4.** *gen.* A symbolic character. . . . **7.** The continuous sounding of any note upon an organ, owing to the imperfect closing of the pallet or valve. . . .

The Oxford English Dictionary, 2d ed. (Simpson & Weiner, eds., 1989), at 224–25. My colleague Pat Hubbard persuaded me to change the title to the present one, *"We Didn't Have Time to Train the Monkeys!"* The significance of both the old and the new titles will become clear by the end of this paper.

[1]For the record, his client won one case and got a split decision in the other.

from the professional press that this dispute, like several previous ones, involved problems of job loss from the introduction of new technology. Beyond that, I knew almost nothing about the dispute except that it had the potential of closing all the ports on the West Coast.

Gene familiarly mentioned the Taft-Hartley Act's emergency dispute provisions, obviously confident that I knew them as well as he. His confidence was misplaced. Although I had taught labor law and related subjects for more than a quarter century, I had carefully skipped over those portions of my casebooks. No president had sought a Taft-Hartley injunction since a failed attempt by Jimmy Carter in 1976, so there always seemed to be some more pressing topic to occupy my class time. He reminded me that a preliminary step to an injunction was the creation of a Board of Inquiry to report to the President. Gene's immediate problem, he told me, was to come up with three suitable members for such a Board, should one become necessary. The members would have to have some credibility in labor relations, yet not be so partisan as to suggest bias. We talked about several talented people, mostly labor law academics and labor arbitrators, but just before ending the call, Gene managed to ask me if I might be willing to serve. I admitted that I would be, and that was the end of the discussion.

As soon as I hung up, I thought I had better look into the authorizing statute and its history. For the first time in decades, I read the Taft-Hartley Act's emergency dispute provisions, 29 U.S.C. §§ 176–180. Here is what I learned.

The Taft-Hartley Act's Emergency Dispute Provisions

The "Problem"

At the end of World War II, the labor movement sought both to make up ground it had lost during wartime wage controls and to protect workers from the consequences of an expected inflationary surge. The result was the greatest strike wave the nation had ever seen, which lasted through the winter of 1945–1946. Strikes shut down utilities and the longshoring, trucking, refinery, meatpacking, automobile manufacturing, and steel industries, among many others. Republicans used this labor unrest as a major theme in their successful campaign to regain control of Congress in the 1946 elections. In January 1947, the new Republican majority began to reform the Wagner Act of 1935, which many Republi-

cans blamed for the power labor unions had demonstrated the previous year.

The postwar strike wave caused Congress to focus on what were termed "National Emergency Strikes"—that is, strikes that were not of purely local concern but that posed some sort of "emergency," meaning that they threatened the "national health or safety." Simply outlawing such strikes would be ineffective without providing some alternative way to resolve the underlying issues. The primary alternative to tolerating those strikes was compulsory arbitration, but compulsion was antithetical to the Wagner Act's most fundamental principle, the belief that the parties themselves, encouraged by the economic costs of work stoppages, should settle their own disputes. More importantly, compulsory arbitration was anathema not only to the unions who had opposed the Republicans but also to the business interests that had supported them. With no major organized constituency supporting compulsory arbitration and two powerful ones dead set against it, the Wagner Act's congressional reformers had to abandon that option.

The remaining option was a package of delaying actions that would combine mediation with public and political pressure to encourage settlements. For lack of any acceptable alternative, Congress cobbled together a half-hearted compromise that was neither fish nor fowl—but would at least let the victors claim that they had solved the problem of national emergency strikes.

Congress's "Solution": A Myth Begets Futilities

At the heart of Congress's answer to the problem of national emergency strikes was the belief that radical labor leaders were forcing unwilling but sheep-like employees, against their better judgment, to strike. Thus, one object of the emergency provisions was to provide a way for employees to express their uncoerced opinions. Let employees vote on the employer's last offer, the thought went, and they would normally accept it rather than strike. Unfortunately, the means they adopted toward that end, sections 176–180 of the Taft-Hartley Act (see Appendix A), proved both inadequate and distracting. Here is a brief summary of the congressional compromise.

(1) When the President believes a current or pending strike might "imperil the national health or safety," he may appoint a "Board of Inquiry" to "inquire into the issues involved in the dispute and make a written report to him within such time as he

shall prescribe." The Board's report is to state the "facts with respect to the dispute . . . but shall not contain any recommendation."[2] Thus the Board of Inquiry was not designed to be a mediation committee, or an arbitration panel, or even a group of policy advisors. In fact, it is not clear from the statute just what the Board is supposed to be other than a group charged with writing a report on the "facts" of the dispute. The Board is to consist of a "chairman and such other members as the President shall determine" and may conduct hearings in public or in private "to ascertain the facts with respect to the causes and circumstances of the dispute."[3] The Board has the discovery powers provided in the Federal Trade Commission Act of 1914,[4] including the power to subpoena witnesses and documents.[5] (For their services, Board members are to receive $50 a day plus expenses.[6] More on that later.)

(2) On receipt of the report, the President may direct the Attorney General to seek an injunction. To ensure the district court makes the necessary findings, the Attorney General's motion is typically supported by affidavits from the relevant Cabinet members such as the Secretaries of Labor, Treasury, Defense, and Commerce. These usually take the form of statements to the effect that "without an injunction, the world as we know it will cease to exist because. . . ." The district court "shall have jurisdiction to enjoin any such strike or lock-out," provided it finds that the work stoppage affects "an entire industry or a substantial part thereof" and would "imperil the national health or safety."[7] The injunction is intended to provide a cooling-off period during which other procedures may solve the dispute; the injunction therefore may last no longer than 80 days.[8]

(3) During the injunction period the Federal Mediation and Conciliation Service (FMCS) will assist the parties in their negotiations. If those efforts fail, the Board is to reconvene and report again to the President about the current status and the efforts made

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[2]29 U.S.C. § 176 (2003).
[3]*Id.* at §177(a).
[4]15 U.S.C.A. § 41, et seq.
[5]29 U.S.C. §177(c).
[6]*Id.* at §177(b).
[7]*Id.* at §178(a). Note that the court is given authority to enjoin the strike, not commanded to do so. Nevertheless, almost without exception courts have granted requests for such injunctions.
[8]*Id.* at §179(b).

to resolve the dispute. The Board's report must include a statement by each party of its position "and a statement of the employer's last offer of settlement." Within 15 days, the National Labor Relations Board (NLRB) is to take a secret ballot of the employees on the employer's last offer and must report the results to the Attorney General within five days thereafter.[9]

(4) Regardless of the outcome of the vote, the Attorney General "shall" move the court to discharge the injunction, "which motion shall be granted and the injunction discharged." (Note Congress's use of "shall." That is, win, lose, or draw, the parties may resume the work stoppage 80 days after the injunction is issued.) When the court discharges the injunction, the President is to submit to Congress "a full and comprehensive report of the proceedings," including the Board's findings and the ballot results, "together with such recommendations as he may see fit to make for consideration and appropriate action."[10]

Of all these provisions, the only one that proved intensely controversial was the injunction. Just three years before the Wagner Act, American unions had finally succeeded in their half-century long battle to eliminate federal injunctions against labor activity. Prompted by Harvard Professor Felix Frankfurter's 1930 book accusing federal judges of misusing their injunction powers,[11] Congress adopted the Norris-LaGuardia Act of 1932. For the next 15 years, unions operated in virtual freedom from labor injunctions. The crushing loss of Congress in 1946 gave the Taft-Hartley Act's proponents enough votes to override President Truman's veto and thus led to the first retreat from the Norris-LaGuardia Act's ban on injunctions. Among other important changes, the Act specifically allowed injunction actions by the Board in certain cases.

To put it bluntly, the entire "national emergency" procedure amounts to a delaying tactic, conducted in the hope that extra time and public attention would combine with the parties' good sense to produce a settlement that seemed unachievable a few months earlier. The myth of sheep-like workers thus begat two futilities, the

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[9] *Id.*

[10] *Id.* at §180.

[11] Frankfurter & Greene, The Labor Injunction (1930). More thorough recent research casts doubt on the accuracy of Frankfurter's allegations. *See* Petro, *Injunctions and Labor Disputes, 1880–1932; Part I: What the Courts Actually Did—and Why*, 14 Wake Forest L. Rev. 341 (1978) and *Assumptions and Premises of National Labor Policy: 1032 Points of Light on the Subject*, 26 Wake Forest L. Rev. 965 (1991).

Taft-Hartley injunction itself and the vote by the employees—"futilities" because the injunction itself does nothing to solve the underlying dispute and because the employees always reject the employer's final offer. Seventeen such ballots have been conducted; in each the employees rejected the last offer by majorities ranging from 2-1 to 10-1. In one early maritime poll, ILWU President Harry Bridges ordered his members to boycott the vote and not a single ballot was cast![12]

Previous Boards of Inquiry

There is almost universal agreement among affected employees and unions, and among academics who have studied the matter, that the Taft-Hartley Act's emergency provisions are at best ineffective and quite likely counter-productive.[13]

To begin with, the process is too cumbersome to be of much use—other than to interrupt the very economic pressures that would sooner or later force the parties to settle. The Act requires the involvement of six individuals or bodies and no less than 12 steps—a Presidential decision to initiate the process, appointment of a Board of Inquiry, production of a report by the Board, back to the President for a decision on whether to seek an injunction, a request by the Attorney General for an injunction, a hearing in federal district court, issuance of an injunction, mediation by the FMCS, a ballot conducted by the NLRB, a further report by the Board of Inquiry, another trip by the Attorney General to the district court, then once more back to the President—all before the problem finally reaches the one agency with power to resolve the dispute, Congress. (The legislative history of the national emergency provisions does not show any involvement by Rube Goldberg but an outside observer would be forgiven for suspecting that he was the chief draftsman.[14])

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[12]Rehmus, *Emergency Strikes Revisited*, 43 Indus. & Lab. Rel. Rev. 175, 177 (1990); Millis & Brown, From the Wagner Act to Taft-Hartley 584 (1950).

[13]This has been the case since the earliest serious study, see Millis & Brown, *supra* note 12, at 584–85, and continues to the present, Leroy & Johnson IV, *Death by Lethal Injunction: National Emergency Strikes Under the Taft-Hartley Act and the Moribund Right to Strike*, 43 Ariz. L. Rev. 63 (2001).

[14]For the benefit of younger readers, I should explain that Rube Goldberg was a celebrated cartoonist whose forté was imagining ridiculously complicated ways to accomplish simple tasks.

Keep in mind, too, that none of these steps carries any mandatory power other than the court's temporary injunction. The law specifically forbids the Board of Inquiry to include "any recommendations" in its report. The FMCS has authority only to assist the parties in their negotiations. The NLRB ballot could end the dispute, if the employees accepted the employer's last offer—but they never do. Even the President's recommendations to Congress are merely suggestions.

A second difficulty of particular importance for the Board of Inquiry is that the President has already decided there is a national emergency before he even appoints the Board. As a result, presidents normally give Boards very little time to complete their work. Typically the President officially appoints the Board on one day with directions to report the next. (One Board of Inquiry actually managed to submit its report on the very day it was appointed.) That extremely short fuse means that the Board cannot possibly conduct a serious investigation, which in turn means that its report can be nothing more than a bare-bones summary of the issues and positions. Moreover, even if the Board could conduct a serious investigation, the statutory ban on its making any recommendations would minimize the utility of any report it could produce.

Whatever the Republican Congress of 1947 may have thought about President Truman's knowledge about major strikes, today it is safe to assume that the President knows the facts of the dispute and the positions of the parties from his agents in the Department of Labor and from the FMCS long before he appoints a Board of Inquiry. Thus the Board's report—especially one produced in a single day and that by statute may not contain any recommendations—normally adds nothing of any value. The lack of time and of function makes the Board of Inquiry, as Mine Workers President John L. Lewis inimitably put it, "a whistle stop on the road to an injunction."[15]

There is no indication that Boards of Inquiry have had much effect one way or another. When there is a settlement, either during the injunction period or more commonly after resumption of the work stoppage, it is typically despite, not because of, the Board of Inquiry or its Report. For that reason, among others, presidents gradually ceased seeking Taft-Hartley injunctions. The last to do so was the hapless Jimmy Carter, who in 1978 half-

[15] *Quoted in* Millis & Brown, From the Wagner Act to Taft-Hartley 579–80 (1950).

heartedly obtained a temporary restraining order against a coal strike. When it became clear he could not or would not enforce it, the court denied a permanent injunction. From then until 2002, no President deemed a labor dispute a "national emergency."

Labor Disputes in Longshoring

Before 2002

Longshoring has produced more disputes leading to Taft-Hartley injunctions than any other industry (11 coastwide shutdowns between 1947 and the 1960s, accounting for nearly a third of the 35 times the President used the Taft-Hartley powers before the 2002 dispute[16]). This was due to the unusual combination of a strong union with monopoly representation rights over an entire critical industry. For many decades, disputes in the industry centered on the issues of wages and job security, the latter because the introduction of labor-saving machinery drastically reduced the longshoring workforce. With surprising far-sightedness, the ILWU, which represented all longshore and harbor workers on the West Coast, agreed in the 1960s to accept the new technology of containerization in return for lifetime jobs and substantial wage increases. That decision gradually reduced the work force by 90 percent (to a mere 10,500 in 2002) but also placed the longshoremen among the best paid blue collar workers in the country.

The 2002 Dispute

The 2002 dispute was not over money, because the workers were already extremely well paid (about $80,000 a year including overtime) and employers were offering even more. Nor was it primarily over the new technology of bar codes and more computers, because the union professed willingness to accept those developments on certain conditions and the PMA indicated it would protect incumbent employees. Instead, the prime issue was the union's jurisdiction over the new jobs created by new technology.

Earlier technological advances had primarily affected employees engaged in difficult physical labor. Containerization, for example, eliminated most of the jobs one sees in old movies like Marlon Brando's *On the Waterfront*. Those changes still left a lot of

[16]Rehmus, *Emergency Strikes Revisited*, 43 Indus. & Lab. Rel. Rev. 175, 176–77 (1990).

work to be performed by "marine clerks"—making arrangements by telephone or fax with trucking companies and railroads, recording incoming and outgoing shipments, tracking the movement and storage of containers so that they could be loaded and unloaded efficiently, and so on. A new round of advances took advantage of computers and bar code scanning. Most threateningly, much of the work could be performed anywhere, from Hong Kong or Tokyo or Idaho, as easily as from the West Coast docks. Employers had begun shifting that work to foreign workers or to non-union (or at least non-ILWU) American workers. These developments threatened relatively few ILWU jobs (between 50 and 100, but probably closer to the lower number). In other words, the entire West Coast port system was closed because the union demanded jurisdiction over a few score of workers and employers refused to agree.

The secondary issue, which struck me as a make-weight thrown in by the union, concerned the parties' arbitration system—in particular, the choice of a successor to Coast Arbitrator Sam Kagel, who, still arbitrating at age 92, was chasing Strom Thurmond's longevity record. In the parties' dispute resolution system, the Coast Arbitrator ruled on appeals from decisions of the local-level arbitrators. The employers wanted a professional neutral arbitrator, preferably Sam's son (and former NAA President) John Kagel. The ILWU purported to want the Coast Arbitrator to be chosen from the same pool of industry people, chiefly retired union officers, as the local-level arbitrators were.

The immediate stoppage prompting the President's intervention, interestingly, was not a strike but rather a lockout by employers in late September, in response to a union slowdown, euphemistically named a "safety campaign." The underlying dispute involved about 10,500 workers in 29 West Coast ports from San Diego to Seattle but affected many more employees. There is no doubt the work stoppage had significant effects on the economy. The affected ports handle $300 billion worth of goods each year, about half of the nation's container traffic. The timing of the stoppage magnified its impact: it occurred just as American merchants were gearing up for the Christmas season. For several days, 200 ships waited offshore for the docks to reopen.[17] Nevertheless, the estimates of economic harm were wildly inflated—$1 billion, then $2

[17] *United States v. Pacific Maritime Ass'n*, 229 F. Supp. 2d 1008, 1009–10 (N.D. Cal. 2002).

billion a day. The harm from longshoring work stoppages is always far less than anticipated, primarily because the disputes mainly shift production and shipping from one time period into another.

The 2002 Presidential Board of Inquiry on the Work Stoppage in the West Coast Ports

Formation

The final call came on Friday afternoon, October 4, as I returned to the office after a conference in Tampa. Solicitor Scalia told me that the President had decided to appoint a Board of Inquiry in order to start the emergency disputes procedure. He directed me to get to San Francisco by Sunday. On Saturday night, the members-to-be (former Tennessee Senator Bill Brock, University of Tennessee Law Professor and fellow NAA member Pat Hardin, and I) had a conference call about logistics. On Sunday night we met in San Francisco over dinner[18] to make final arrangements. The President was to sign the Executive Order (See Appendix B) at his breakfast on Monday morning, then have a press conference at 1:00 p.m. Eastern Time (10 a.m. Pacific Time). During our own breakfast, just before 9:00 a.m., we got word that the order had been signed but that the Secretary of Labor would hold the press conference–at Noon Eastern Time, or in just a few minutes by our time. So we rushed to an elevator to go to Senator Brock's suite to watch the press conference.

We boarded the elevator, which already had a few occupants, without noticing the sign limiting capacity to four passengers. Just before the next floor, the elevator jammed, ignominiously trapping the entire distinguished Board of Inquiry. It took the hotel about 15 minutes to free us, which meant that we missed the televised press conference announcing our appointment. We later learned, however, that the President had directed us to report to him the next day, preferably by *his* breakfast time. That of course meant three hours before *our* breakfast time in San Francisco. Only a plea passed on through the Solicitor of Labor's office gained us a three-hour extension in our deadline.

Unions immediately and predictably condemned the President's initiation of the Taft-Hartley emergency dispute process, as they

[18]At Scala's; I recommend the quail coq au vin.

had all previous Taft-Hartley injunctions. Their opposition seemed a bit odd on this occasion, however, because the President was moving against a lockout rather than a strike, and because the ILWU publicly professed to want to return to work. Perhaps it was just a knee-jerk reaction based on previous experience: When a President seeks an injunction, unions object. Or perhaps unions feared that acquiescence in an anti-lockout injunction would lessen their credibility when next they complained about an anti-strike injunction. Or, more cynically, perhaps the ILWU remembered that they had forced the lockout by their slowdown. Even the PMA was lukewarm about the injunction. It seemed that none of the players really wanted an injunction and almost no one thought it would contribute to a settlement. Nevertheless, President Bush, like Jimmy Carter before him, had little choice politically but to seek it. No President can appear to ignore a work stoppage causing serious harm to the economy.

Once we were official, our first act was to sign a letter "inviting" (rather than requiring) the parties to meet with us later that day. Before meeting the parties, we received a briefing from the government's chief mediator in the dispute, FMCS Director Peter Hurtgen. Mediation proceedings are strictly confidential, so Hurtgen could not reveal anything he had learned from the parties. Fortunately he had enough information from publicly available sources to educate us about the major issues and the positions of the parties on those issues.

Operation of the Board of Inquiry

We met with the parties Monday afternoon at 1:00 p.m. at the GSA building in downtown San Francisco. Federal buildings are extremely well secured after 9/11, but this one was especially so because of rumors the Longshoremen would demonstrate to protest the Board of Inquiry and the expected injunction. Entering the basement of the GSA building required stopping at a checkpoint and waiting for guards to remove a concrete barrier. Other guards met us in the basement and took us on what appeared to be a service elevator to the proper floor. One guard, a burly guy with a very large pistol on his hip (40 caliber, he told me), took charge of us. We finally got to the hearing room, which was locked. When he bent over to unlock the door, I noticed on the butt of his revolver a bright yellow happy face sticker. That just confirmed the somewhat surreal nature of the proceedings so far.

Each party had about an hour to present its view of the issues. Neither seemed particularly happy to be there and neither told us much we didn't already know. Immediately after the hearing, the Board met for an hour to sketch out a report outlining the parties' positions, then adjourned to dinner,[19] during which time lawyers from the Solicitor's office typed a draft. After dinner, we edited the draft and went to bed. During the night the Labor Department lawyers slipped a revised copy under our doors so that we could review and sign it at breakfast[20] the next morning. We did so (you can read it at Appendix C), took a limo to the airport, and came home. The statute required that we might have to produce another report if employees rejected the employers' final offer. As it turned out, however, our job (such as it was) was done.

Near the end of our discussions, my fellow Board member Pat Hardin became as skeptical about the process as I was, commenting that "they could have sent a trio of trained monkeys out here to do what we did." I mentioned his remark in a telephone conversation the next week with Gene Scalia. Without missing a beat, Scalia responded, "But Dennis, we didn't have time to train the monkeys!"

Post-Report Developments

Following the ritual set out by the Taft-Hartley Act, the President submitted our report to the Attorney General, who then sought an injunction. As in previous national emergency cases, the Attorney General supported the motion with affidavits from cabinet members suggesting that the work stoppage threatened the national health and safety. Defense Secretary Rumsfeld, for instance, stated that the shutdown would, when combined with other factors, "adversely affect our ability to deliver military cargo to overseas destinations as required, and jeopardize the defense effort and the Global War on Terrorism." Secretary of Commerce Donald Evans warned that the West Coast ports are "a critical link in the nation's transportation system and economic infrastructure, particularly with respect to U.S. imports and exports." Secretary of Labor Elaine Chao speculated that "as many as 634,000 jobs would be adversely impacted by a 20-day shutdown."[21] It is hardly surprising

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[19] At Sam's; I recommend the "Sanddabs á la Sam."
[20] At the hotel; I don't recommend it.
[21] *United States v. Pacific Maritime Ass'n*, 229 F. Supp. 2d 1008, 1009–12 (N.D. Cal. 2002).

that the district court judge granted a temporary restraining order on October 8, the very day we submitted our report, and then granted a preliminary injunction eight days later.

The injunction started the 80-day countdown period. Three weeks of intense negotiations, aided by the FMCS, resolved the technological issue. The union secured jurisdiction over the jobs required by the new technology and agreed to eliminate 400 other jobs through retirements and transfers. In a few more weeks they resolved all remaining issues. The final agreement, signed on November 23, was to last for six years, thus guaranteeing there would be no repetition for quite some time. The union gained job security for all existing maritime clerks and won some increases in pay (to an average wage of over $90,000 per year), benefits, and pensions. Employers obtained union approval to use the latest cargo-handling technology and thus increase efficiency. In addition, the union dropped its arbitration proposal and accepted the appointment of John Kagel as the new Coast Arbitrator.

That settlement meant that the Board didn't have to issue a final report—which was a very good thing for me, because at the date it would have been due, December 6, I was camping on the Peruvian Amazon, without electricity let alone a telephone. Finally, in January 2003, union members ratified the settlement by the largest margin in the union's history, thus ending the only national emergency strike in two and a half decades.

Dénouement

There was one last, lingering dispute that did not involve the parties. Having completed our bit parts in this minor drama, the members of the Board of Inquiry submitted our expenses. Although the whole business only took us two days, the amounts were not trivial. Short-notice air fares to San Francisco were outrageous, not to mention those business dinners. The problem was that no one in Washington wanted to pay our bills. Budgets were tight, so each participating federal agency tried to get another to pay. The Solicitor of Labor's office had arranged our appointments and our investigation and drafting, but the FMCS was in charge of negotiations. Each wanted the other to foot the cost. Finally, the FMCS lost out. After many weeks we finally received our expense reimbursement. But our pay? Remember the $50 per diem? Congress has never amended the Emergency provisions, so that remains the statutory rate today. Apparently compensating the Board for its

labors would have pushed the Federal deficit to an unacceptable level, so neither the FMCS nor the Department of Labor could afford it. I'm still waiting for my $50.

That was my 15 minutes of fame. I'll close by returning to the definitions of "cipher" I quoted in my first footnote, as it should now be clear that members of Presidential Boards of Inquiry richly deserve that title. I wish I could say that the first definition applied to us—that is, a symbol of no value by itself but that increases the value of others tenfold. I cannot in conscience do so. The other players in the Taft-Hartley charade (with the notable exception of the FMCS mediators) had no independent value either, so the result would still be zero. The fourth definition, a "symbolic character," probably fits me in more ways than one, as does definition 2 (a person "who fills a place but is of no importance or worth, a nonentity"). The one that fits best, however, is definition 7: "The continuous sounding of any note upon an organ, owing to the imperfect closing of the pallet or valve."

Appendix A
Taft-Hartley Act National Emergency Disputes Procedure (1947), 29 USC §§ 176–180 (2003)
(emphasis added for clarity)

§ 176. National emergencies; appointment of board of inquiry by President; report; contents; filing with Service

Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, **imperil the national health or safety**, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. **Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations.** The President shall file a copy of such report with the Service and shall make its contents available to the public.

§ 177. Board of inquiry

(a) Composition. A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to **conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.**

(b) Compensation. Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) Powers of discovery. For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as

amended . . . are hereby made applicable to the powers and duties of such board.

§ 178. Injunctions during national emergency

(a) Petition to district court by Attorney General on direction of President. Upon receiving a report from a board of inquiry the **President may direct the Attorney General to petition any district court** of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and **if the court finds that such threatened or actual strike or lock-out—**

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, **will imperil the national health or safety**, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) Inapplicability of certain provisions. In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes" [Norris-LaGuardia Act] shall not be applicable.

(c) Review of orders. The order or orders of the court shall be subject to review by the appropriate circuit court of appeals [court of appeals] and by the Supreme Court upon writ of certiorari or certification. . . .

§179. Injunctions during national emergency; adjustment efforts by parties during injunction period

(a) Assistance of Service; acceptance of Service's proposed settlement. Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act [Federal Mediation & Conciliation Service]. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Reconvening of board of inquiry; report by board; contents; secret ballot of employees by National Labor Relations Board; certification of results to Attorney General. Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. **At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement.** The President shall make such report available to the public. **The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer** as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

§180. Discharge of injunction upon certification of results of election or settlement; report to Congress

Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the **President shall submit to the Congress a full and comprehensive report of the proceedings**, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

APPENDIX B
EXECUTIVE ORDER 13275, 67 FED. REG. 62869
(OCT. 7, 2002)

Creating a Board of Inquiry to Report on Certain Labor Disputes Affecting the Maritime Industry of the United States

WHEREAS, there exists a labor dispute between, on the one hand, employees represented by the International Longshore and Warehouse Union and, on the other hand, employers and the bargaining association of employers who are (1) U.S. and foreign steamship companies operating ships or employed as agents for ships engaged in service to or from the Pacific Coast ports in California, Oregon, and Washington, and (2) stevedore and terminal companies operating at ports in California, Oregon, and Washington; and

WHEREAS, such dispute has resulted in a lock-out that affects a substantial part of the maritime industry, an industry engaged in trade, commerce, transportation (including the transportation of military supplies), transmission, and communication among the several States and with foreign nations; and

WHEREAS, a continuation of this lock-out, if permitted to continue, will imperil the national health and safety;

NOW, THEREFORE, by virtue of the authority vested in me by section 206 of the Labor Management Relations Act, 1947 (61 Stat. 155; 29 U.S.C. 176) (the "Act"), I hereby create a Board of Inquiry consisting of such members as I shall appoint to inquire into the issues involved in such dispute.

The Board shall have powers and duties as set forth in title II of the Act. The Board shall report to me in accordance with the provisions of section 206 of the Act no later than October 8, 2002.

Upon the submission of its report, the Board shall continue in existence in order to perform any additional functions under the Act, including those functions set forth in section 209(b), but shall terminate no later than upon completion of such functions.

GEORGE W. BUSH
THE WHITE HOUSE,
October 7, 2002.

APPENDIX C
REPORT TO THE PRESIDENT SUBMITTED BY THE PRESIDENT'S BOARD OF INQUIRY ON THE WORK STOPPAGE IN THE WEST COAST PORTS

Background of Dispute

On October 7, 2002, the President of the United States created this Board of Inquiry by Executive Order. The President directed this Board of Inquiry to report to him by October 8 on the current labor dispute causing the shutdown of the West Coast ports.

The labor dispute involves disagreements between the International Longshore and Warehouse Union (ILWU) and the Pacific Maritime Association (PMA). The PMA is the bargaining representative for virtually all domestic and international shipping companies and stevedores operating on the West Coast ports. The ILWU represents approximately 10,500 longshore workers and marine clerks actively working at these ports.

The contract between the parties expired on July 1, 2002. Before the expiration of the contract, in May 2002, the parties began to negotiate over a new contract. Negotiations proved unsuccessful and, after the contract expired, the parties began to operate under short-term extensions of the contract. On September 1, 2002, the parties' practice of operating under short-term extensions of the contract ceased.

On September 26, the ILWU instructed its members to engage in what the ILWU terms a safety program, in part to pressure the PMA in negotiations. The safety program substantially reduced the workers' output. The PMA asserts that productivity fell by 60 percent because of this conduct. On September 27, the PMA responded with economic pressure by locking out the bargaining unit. That shut down the West Coast ports.

The parties began meeting with representatives of the Federal Mediation and Conciliation Service (FMCS) in early October. Despite some apparent but limited progress, the parties have been unsuccessful in resolving their differences. On October 7, the President of the United States created this Board of Inquiry. The Board conducted a fact-finding hearing the same day.

Under the national emergency provisions of the Taft-Hartley Act, the Board's function is to inquire into the issues involved in the dispute, to ascertain the facts with respect to the causes and circumstances of the dispute, and to make a written report to the

President. 29 U.S.C. §§ 176–177. The Act does not allow the report of the Board to contain recommendations. *Id.* at § 176.

Facts Concerning the Dispute

On October 7, the Board conducted a hearing, closed to the public, in San Francisco.

Representatives of the PMA and the ILWU made oral presentations and submitted written statements. The Board has carefully considered the parties' presentations and submissions.

Two main issues create the current impasse. As described by the parties, the fulcrum of the dispute concerns the introduction of new technology in the ports and the implications of that introduction for job security and work preservation. The parties also disagree about the appropriate arbitration process in the next collective bargaining agreement.

The Technology Issue

Neither party disputes that the employers must implement new technology. The West Coast ports lag behind, in many cases far behind, the efficiency of other ports in the United States and around the world. Introducing needed technology will eliminate jobs held by marine clerks of the ILWU. The PMA has offered to guarantee marine clerk work and pay to the individuals currently holding those jobs until they retire. Beyond this point, the parties do not agree on how to handle the jobs to be created, eliminated, and changed by the implementation of new technology.

The ILWU views the issue as one of work and job preservation. For years, the ILWU has claimed, and the PMA has denied, that employers of the PMA have outsourced certain "planning jobs to workers outside of the ILWU." Planning work is the work of charting the specific placement of cargo on vessels, dockside yards, and rail cars. To recoup what it claims to be lost jobs and to counter the possible loss of jobs that will come with new technology, the ILWU demands that all work that is functionally equivalent to work now or previously performed by marine clerks continue to be performed by ILWU members, without regard to where that work is performed.

In the PMA's view, this ILWU demand would obstruct the free flow of information. The PMA views this demand as a specific

impediment to modernization. According to the PMA, neither the ILWU nor any other entity has an exclusive right to process information regarding the movement of cargo. The PMA counters the ILWU demand with an offer to have certain new jobs, which the PMA asserts will come with the new technology, in the bargaining unit. The ILWU argues that the PMA has not provided any details whatsoever regarding the new jobs promised.

The Arbitration Issue

The essence of the arbitration dispute centers on the qualifications of prospective arbitrators. Under the expired agreement, Area Arbitrators quickly resolved disputes on the docks. Area Arbitrators came from the ranks of union and industry officials. The agreement also had an appeals process, concluding with the Coast Arbitrator, a position that for many years has been held by a professional neutral enjoying the respect of both the PMA and the ILWU.

The PMA insists that under a new agreement, the successor Coast Arbitrator should continue to be a professional neutral. The ILWU insists that the Coast Arbitrator should, like the Area Arbitrators, be drawn from within the industry.

Other disputes exist between the parties, such as terms involving wage increases, pension increases, and port security issues. Both parties, however, anticipate that they could reach agreement on these matters once the core issues involving technology and arbitration are resolved.

Board's Comments

We believe that the seeds of distrust have been widely sown, poisoning the atmosphere of mutual trust and respect which could enable a resolution of seemingly intractable issues. For example, the parties have been unable to agree even on such matters as the length of proposed temporary contract extensions although both know that their standoff costs the Nation billions of dollars. We have no confidence that the parties will resolve the West Coast ports dispute within a reasonable time.

William E. Brock, Chairman
Patrick Hardin
Dennis Nolan
October 8, 2002