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LEGALITY OF THE MARYLAND PUBLIC UTILITIES DISPUTES ACT

By Bernard J. Seff*

In order effectively to attempt an evaluation of the legality of the Maryland Public Utilities Disputes Act, (hereinafter referred to as the Seizure Bill), which was enacted on March 2, 1956, it would be helpful to establish the perspective of an appropriate frame of reference. It would seem that this can best be accomplished by setting forth a brief statement of the factual background of the labor dispute which led to the passage of the Seizure Bill. A succinct statement of this information appears in the Labor Law Journal of October 1956 which is generously quoted from below:2

"Maryland . . . became the ninth state of the union to enact legislation providing for compulsory settlement machinery for disputes in public utilities. The Maryland Public Utilities Disputes Act, which provides for voluntary arbitration, seizure, compulsory mediation and compulsory arbitration, was passed specifically to stop a 37-day-old strike involving 2,000 employees of the Baltimore Transit Company, members of Division 1300, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO.

"Its enactment came as a desperation move by the state, and only after exhaustion of almost every mechanism for voluntary settlement employed by the City of Baltimore, the State of Maryland, and the Federal Mediation and Conciliation Service. Even a bizarre attempt by Maryland's House of Delegates, which sat as a 'super grand jury', heard testimony and issued public recommendations, failed to break the impasse between the transit company and the union. Negotiations over economic differences were clouded and confused by charges and countercharges of refusal to bargain, by the delicate question of a rise in transit fares should a

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1 Md. Laws 1956, Ch. 41.

wage increase be granted, and by lengthy debate on the evils of absentee ownership of the company, and possible municipal ownership. As the strike became prolonged, public confusion and protest mounted, and with the apparent ineffectiveness of conventional settlement devices, there seemed little recourse but for the state to forcibly intervene and revive service on Baltimore's public transportation system.

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"The strike began at midnight, Sunday, January 29, 1956, over issues which are normally bargained in labor negotiations: wages, which the union asked be raised from $1.90 to $2.15 hourly; hours (a 40-hour week and an eight-hour day); and a variety of fringe items and other changes in working conditions peculiar to the transit industry. Participation of Baltimore Mayor Thomas D'Alesandro, Jr., in negotiations had not induced a retreat from the positions taken by both parties when bargaining began. The union adhered to its economic demands, and the company . . . refused to consider any wage increase until the union 'dropped its demands for large sums of money and special fringe benefits — including make-work rules' (1). The union, just prior to work stoppage, had approved a 30-day moratorium on strike action contingent on binding arbitration of all issues in dispute at the end of that period. The company's reply was that 'arbitration [was] not a subject for collective bargaining', and local union President Frank P. Baummer, charged the transit company with refusing to make an offer (2)."

Against a backdrop of mounting public indignation and the frustration felt by public officials, all of whose efforts to settle the strike had shattered themselves on the twin obstacles of union resistance and company obduracy, Governor McKeldin threatened the disputants with legislative action in the form of a seizure bill. The members of the Maryland general assembly had an understandable reluctance to become identified with legislation of a compulsory nature directed against a labor union. They came up with a device, less drastic but equally dramatic, which

*Ibid, 607-8. The statements indicated by the footnotes (1, 2) within the quoted text are from the Baltimore Sun, January 29, 1956.
it was hoped would still the public clamor and hopefully, because of the floodlight of publicity attendant upon its use, might force the parties into a settlement. Baltimore delegates to the general assembly thereupon voted to force a "grand inquest" into the dispute. The inquest, having lain dormant on Maryland's statute books for many years, had never been used before. It vests in the state general assembly broad powers to demand records and summon witnesses. It was hoped that in the context of the paralysis in public transportation caused by the crippling strike of the transit workers in the City of Baltimore the use of the inquest would illuminate the causes of the strike and perhaps facilitate legislation to restore transit service and prevent future disputes.

The general assembly voted in favor of the grand inquest on February 3, 1956; the inquest ended on February 23 after ten days of hearings replete with charges and countercharges hurled by both sides against each other. The public was regaled with reams of newspaper headlines that did succeed in ventilating the differences between the parties. The legislative halls were used by both disputants to generate more heat than light and as a consequence the stage was set for the passage of remedial legislation.

The legislators appeared to be torn between demands for action and pleas from both the union and the company for caution. At this juncture, while the delegates began preparation of their recommendations, the Baltimore Transit Company presented its "final offer": a three year contract and an 18¢ wage raise over the three year period. The company also revealed its intention to seek approval of a fare raise from 18 to 20 cents from the Public Service Commission. The union executive board urged its membership to reject this offer and the members complied with a 100 per cent standing vote against the proposal.

Finally, on Wednesday, February 29, the house passed a seizure law and the senate followed suit on March 1. Governor McKeldin signed the bill into law and authorized the state attorney general to prepare legal orders and documents necessary for state seizure and operation. The gover-
nor planned to wait until Monday, March 5, and if there was still no settlement, seizure would take place at his mandate.

Last minute efforts at settlement failed and seizure power was invoked on March 5. It was hoped that service would be resumed by Friday, March 9. The union president promised to urge his members to return to work under protest and the union denounced the act as "invalid, unconstitutional, unfair . . . and unsound as legislation".4

The Maryland Public Utilities Disputes Act provides, inter alia, that after state seizure there immediately follows a 15 day period of mediation which may be extended for an additional 60 day period if the parties so elect. If mediation fails, the dispute is then referred to a three man board of arbitration which is empowered to render a final and binding decision.5

The transit employees returned to work, the company was granted a temporary fare increase by the Public Service Commission, for the "purpose of protecting the legality of State transit operation with a fare structure that would produce a reasonable return to the company for (the) use of its facilities".6

Now that seizure was in effect, the mechanics of compulsory settlement became operative and mediation talks began. After many unsuccessful conferences the mediation period expired and left both parties awaiting state action. The parties elected not to try another 45 days of mediation and the governor invoked compulsory arbitration and requested the parties to name one member each to a three man panel, with the third member to be selected by the labor and management members. The union said it was ready to name an arbitrator but the company promptly declined. At this point the company commenced action in the federal court designed to test the constitutionality of the law claiming that the Seizure Bill violated due process. Hearings before a three judge bench of the United States district court were planned for May 1, 1956.

4 Baltimore Sun, March 6, 1956.
5 Supra, n. 1, Sec. 1, 12F(2).
6 Baltimore Sun, March 9, 1956.
In the meantime the state tried to follow the procedures set forth in the Seizure Bill. The law contained no provision designed to cope with the situation created by the company's refusal to name its arbitrator. Accordingly an amendment was introduced empowering the governor to name arbiters to the arbitration board if either party to a dispute refused to comply. This amendment was passed on April 4 and the parties were given one week in which to appoint their arbitrators. Three days later Chief Judge Roszel C. Thomsen heard arguments for and against a temporary restraining order asked for by the company to prevent Governor McKeldin from appointing its arbitrator. Before the decision on this issue was rendered, the state and the transit company began to prepare for the hearings on the act's validity. Ironically, for the first time since the differences between the company and the union developed, the union found itself in agreement with the company and joined in the law action to contend that the state had no jurisdiction in the case. The state took the position that the constitution had not been violated, since a state has authority to act in such manner as to protect the health and welfare of its citizens; the state also maintained that since the transit workers, by the terms of the Seizure Bill, would technically become employees of the state, binding arbitration was legal.

The District Court issued a restraining order on April 10, preventing the holding of arbitration hearings until the constitutional test on May 1. The court sustained the company contention that it would suffer irreparable damage if compulsory arbitration were carried out on two grounds: (1) If the seizure law were to be invalidated, expenditures incident to arbitration would prove futile for all concerned; (2) If the law were to be declared invalid, free collective bargaining would be hampered because "any findings of the arbitration board would affect bargaining later on by indicating a basis for settlement". On April 11, 1956, the union executive board announced its approval of a settlement proposal made by the company which provided the

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* Baltimore Sun, April 11, 1956.
following terms: a 32 month contract; a 20¢ hourly increase to be spread over the length of the contract (a 10¢ hourly increase, effective immediately, and the remainder to be added in two steps of 5¢ each during the life of the agreement); liberalized vacation benefits and other adjustments. There was one condition tied to this package by the company: the fare increase would have to remain at 20¢, rather than revert back to 18¢ at the termination of seizure. Therefore action by the Public Service Commission would have to be obtained.

This proposal was accepted by the union, the governor was notified of the settlement and seizure was terminated by proclamation on April 26. The 20¢ fare was continued and after the return of the Baltimore transit facilities to private ownership, the law suit was dismissed by the federal court with the court's approval and without prejudice.

CONSTITUTIONALITY OF THE SEIZURE BILL

Even though the immediate reason for the passage of the Seizure Bill, the transit strike in Baltimore City, has long since receded from the public mind and has become as stale as yesterday's newspaper it would appear desirable to analyze the constitutionality of the law because the Act is due to come up for consideration in the January 1957 session of the legislature. This is so because as the law was originally enacted by the legislature it contained this provision:

"And be it further enacted, That this Act shall continue in effect only until 15 days after the adjournment of the regular session of the General Assembly of Maryland held in the year 1957." 

In view of the above, making it obligatory on the Maryland legislature to consider whether to allow the Seizure Bill to expire by inaction or to continue it in effect on the statute books, it appears appropriate to determine at this time whether the law, as it now stands, would be likely to survive a court test if such should be directed against it.

*Supra*, n. 1, Sec. 5.
The constitutional questions revolve around the fundamental doctrines of due process and federal jurisdictional pre-emption, on the one hand, and the right of a state to step in and protect the health and welfare of its citizens, on the other. Discussion could range far and wide over the many faceted legal problems that this controversial piece of legislation invites. Since it would appear that, altogether apart from other aspects of the law, the Seizure Bill is fatally vulnerable in the area of the federal doctrine of pre-emption it will be the major purpose of this article to keep the focus sharply on this feature of the law.

The Maryland Public Utilities Disputes Act appears to intrude upon a field fully occupied by Congress. In 1951 the United States Supreme Court, in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, et al. v. Wisconsin Employment Relations Board*, set aside as unconstitutional, a statute of the state of Wisconsin which prohibited strikes in certain public utilities. That statute was declared invalid in a case involving the Milwaukee local transit system and the local gas utility. The transit line had no vehicles or equipment that operated outside of the state of Wisconsin and all the properties of the gas company were physically located within the state of Wisconsin. The court held that Congress had pre-empted the field insofar as regulation of such strikes concerned industries which affect interstate commerce and under the Supremacy Clause of the Constitution of the United States, Congress had closed it to state regulation. The above enunciation of this basic federal doctrine is embedded in the law of the land and has been many times explicitly adjudicated by the United States Supreme Court.10

It appears that, in the field of labor relations, the application of the federal pre-emption concept has served to

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*340 U. S. 383 (1951).*

narrow state jurisdiction practically to the vanishing point. In one of the fountainhead cases on this point, *Amalgamated Motor Coach Employees v. Wisconsin ERB*, the Supreme Court, speaking through Mr. Chief Justice Vinson, held as follows:

"We have recently examined the extent to which Congress has regulated peaceful strikes for higher wages in industries affecting commerce. *Automobile Workers v. O'Brien*, 339 U. S. 454 (1950). We noted that Congress, in Section 7 of the National Labor Relations Act of 1935, as amended by the Labor-Management Relations Act of 1947, expressily safe-guarded for employees in such industries the 'right... to engage in... concerted activities for the purpose of collective bargaining or other mutual aid or protection'. 'E.g., to strike.' We also listed the qualifications and regulations which Congress itself has imposed upon its guarantee of the right to strike, including requirements that notice be given prior to any strike upon termination of a contract, prohibitions on strikes for certain objectives declared unlawful by Congress, and special procedures for certain strikes which might create national emergency. Upon review of these federal legislative provisions we held,...:

'None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation...'.\(^{11}\)

As further amplification of the thesis of the instant article that Congress intended to occupy the field of labor relations in public utilities enterprises the following quotation from the Labor Law Journal seems distinctly apposite:\(^{12}\)

"The intent of Congress to occupy labor relations in public utilities (as 'affecting commerce') was expressed in a 1950 decision of the NLRB, in the matter of W. C. *King Company*.\(^{13}\) Here the Board asserted jurisdiction over a transit line employing 22 workers, and oper-

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\(^{11}\) *Supra*, n. 9, 389. Emphasis added.


\(^{13}\) 91 N. L. R. B. 630 (1950).
ating 15 busses, *within* the State of Tennessee. In one year, the company bought three buses and a quantity of tires (total $37,500), imported from outside the state. The transit line carried an average of 1,061 passengers daily. The NLRB concluded that the company was engaged in interstate commerce, and that:

"... public utilities, including public transit systems... have such an important impact on commerce as to warrant our jurisdiction over all cases involving such enterprises, where they are engaged in commerce or in operations affecting commerce, subject only to the rule of *de minimis*."

"The decision was to assert jurisdiction here, and in all other cases involving public utilities and transit systems, except in trifling instances.

"In the Wisconsin case,¹⁴ state legislation requiring compulsory arbitration of disputes in public utilities was struck down, over the argument that the law was a valid exercise of police power, held to be essential to the public health and safety. The Supreme Court ruled that the right to strike for legitimate objectives by traditional means was being restricted in industries where this right was protected by federal law. The Court pointed out that Congress, in enacting the Labor-Management Relations Act of 1947, had gone so far as to restrict the right to strike only in cases of national emergencies, and that the Wisconsin legislation was in conflict with federal law. The Court also did the following:

(1) reiterated federal jurisdiction over privately owned public utilities doing business within a single state, but 'affecting commerce';

(2) held that no distinction existed between public utilities and national manufacturing organizations in the administration of federal law; in fact, separate treatment had been suggested and rejected by Congress in 1947;

(3) described the Wisconsin act as 'not emergency legislation but a comprehensive code for settlement of labor disputes between public utility

employers and employees . . . and that the invoking of the Act does not necessitate the existence of an emergency.'

"In making the last point, the Court did not determine whether or not true emergency legislation would be upheld on the state level. It should be noted that the Wisconsin act had been applied indiscriminately to national and local strikes alike, many of which could not be properly classified as 'emergencies'.

"This decision, then, bars a formalized system prohibiting strikes in public utilities which could be easily invoked to deal with many kinds of labor disputes. In short, the inclusiveness of the Wisconsin law and its comprehensiveness led to its judicial downfall.

"The thesis here is that these defects were absent from the Maryland Public Utilities Disputes Act, when originally enacted. The restricted coverage and 'genuine emergency' character of the Maryland law have been discussed above; the law is clearly applicable to localized emergencies in specific industries; no over-all code for dispute settlement is constituted, but instead the use of cumbersome and formalistic emergency proclamation procedure is required."

Different from the position expressed by Mr. Seymour H. Lehrer, the author of the above quoted statement, the writer of the instant article is of the opinion that the Maryland Seizure Bill, as written, is in headlong conflict with the Supreme Court's decision in the Wisconsin ERB case. Thus the Maryland statute, no less than the Wisconsin law, is an intrusion into a field pre-empted by federal law and therefore would appear to be invalid.

It has been argued that despite the Wisconsin ERB and companion cases the Supreme Court has not completely closed the door to state regulation of industries operating in interstate commerce or operating in industries affecting commerce. The area still left ajar for state regulation concerns situations where the states are said to have the inviolate right to exercise regulatory authority, where by so doing the states are exercising their inherent police power. A state may always take action if such action is held to be
essential to safeguard the health and safety of its citizens. Some of the cases usually cited in support of this proposition are the following:

*Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board,* 15
*Auto Workers v. Wisconsin ERB,* 16
*Algoma Plywood & Veneer Co. v. Wisconsin ERB,* 17
*United Construction Workers v. Laburnam.* 18

It has been urged that, based on the reasoning contained in the above enumerated cases, the State is not precluded from enacting laws in the field of labor relations merely because Congress has entered this field. The right to engage in concerted activities, while guaranteed to employees by Congress in the Labor-Management Relations Act, 19 is not an unqualified right. Similarly the right to picket, which is protected by the free speech and assemblage provisions of the Constitution, is also not unqualified. When either or both of these privileges collide with other federally guaranteed liberties then it becomes necessary to strike a balance between these conflicting immunities in order to best serve the utilitarian needs of our citizens. Put in another way it can be said that:

"The states may, under [their] police power, regulate the means employed in a strike (that is, cases of violence, mass picketing . . .). The objectives of a strike in an industry under federal jurisdiction are subject to NLRB regulation and the federal courts alone, unless the NLRB chooses to delegate authority to the states. The net effect is that no state may prohibit or hinder a legitimate strike over wages, hours or working conditions." 20

Thus, the *Allen-Bradley* case dealt with the validity of an order issued by the Wisconsin labor board restricting mass picketing and threatened violence. The Court reviewed the

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15 315 U. S. 740 (1942).
17 336 U. S. 301 (1949).
20 Note, *supra,* n. 12, 616.
legislative history of federal legislation and with respect to mass picketing and violence concluded that:

"The Committee Reports on the federal Act plainly indicate that it is not a 'mere police court measure' and that authority of the several States may be exerted to control such conduct."21

However, the Court was careful to note that:

"If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise."22

Likewise, the Auto Workers23 case dealt with an area which the Court found had not been touched by the Federal Act, i.e., intermittent work stoppages. The Court found the state order prohibiting this conduct to be valid because that kind of practice "was neither forbidden by federal statute nor was it legalized and approved thereby".

The Algoma Plywood24 matter dealt with a restriction employed by the state on the execution of a union security agreement. This restriction was found to be valid because the Taft-Hartley Act (in Section 14(b) thereof)25 specifically permits the states to adopt legislation on that subject more restrictive than that provided for in the federal law.

Each of the above cases was cited to and considered by the United States Supreme Court when it ruled invalid the utilities statute that forbade strikes in public utilities affecting commerce.

The Laburnum26 case dealt with tortious acts performed by a labor organization in the conduct of picketing and related activities in connection with a labor dispute, where certain unfair labor practices by the union were also involved, and where all the Court did was sustain the right of the state courts to award monetary damages for such tortious acts and conduct.

21 Supra, n. 16, 748.
22 Ibid, 751. (Emphasis supplied.)
23 Supra, n. 16, 264-5.
24 Supra, n. 17, 315.
26 Supra, n. 18.
In a very recent case decided by the Supreme Court on June 4, 1956, United Automobile, A. & A. I. W. v. Wisconsin Emp. Rel. Bd.,\textsuperscript{27} the Court was presented with a variation of the problems discussed above. The Court's scrutiny was directed to a situation concerning a cease and desist order issued by the Wisconsin labor board prohibiting the union from engaging in mass picketing and intimidation of non-striking employees of an interstate employer on the ground that such union action was violative of the Wisconsin Employment Peace Act. The question presented was novel in that the union contended the state had no right to entrust power to prevent such conduct to a labor board especially when, as here, the National Labor Relations Board had asserted jurisdiction over certain other labor practices arising from the same employer-union relationship. This contention was brushed aside by Mr. Justice Reed who delivered the opinion of the Court in the course of a full discussion of the applicable provisions of the National Labor Relations Act and prior adjudications of the Court concerning this subject:

"Appellant [union] concedes that a State may punish violence arising in labor relations controversies under its generally applicable criminal statutes. It does not admit or deny the charged violence. The union considers the coercion immaterial in this case. Its position is that a State may not exercise this police power with an agency that is concerned only with labor relations. The argument is that a State Board will use this power to stop force and violence in order to further state labor policy, thus creating a conflict with the federal policy as developed by the National Labor Relations Board. The union argues that Wisconsin has no jurisdiction to enjoin the alleged conduct under its labor act because such conduct would be an unfair labor practice under the National Labor Relations Act.

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"The Kohler Company is subject to the National Labor Relations Act. It seems agreed, and we think correctly in view of the findings of fact, that the alleged conduct of the union in coercing employees in the exer-

\textsuperscript{27} 76 S. Ct. 794 (1956), noted, 16 Md. L. Rev. 344 (1956).
exercise of their rights is a violation of §8(b)(1) of that Act. Since there is power under the Act to protect employees against violence from labor organizations by assuring their right to refrain from concerted labor activities, the National Labor Board might have issued an order similar to that of the State Board. The provisions of the National Labor Relations Act, as amended, cover the labor relations of the Kohler Company. . . . These provisions may be assumed to include not only the coercion of strikers but also other persons seeking employment with the plant.

"By virtue of the Commerce Clause, art. 1, §8, cl. 3, Congress has power to regulate all labor controversies in or affecting interstate commerce, such as are here involved. If the congressional enactment occupies the field, its control by the Supremacy Clause, art. 6, cl. 2, supersedes or, in the current phrase, pre-empts state power. . . . In the 1935 Act, §10(a), the Board was empowered to prevent unfair labor practices. By §10(a) this power was made 'exclusive'. In the Taft-Hartley amendments of 1947, the word 'exclusive' was omitted but the phrase, 'shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise', was reenacted without significant change.

". . . Appellant urges that this amendment eliminated the State's power to control the activities now under consideration, through state labor statutes.

"It seems obvious that §8(b)(1) was not to be the exclusive method of controlling violence even against employees, much less violence interfering with others approaching an area where a strike was in progress. No one suggests that such violence is beyond state criminal power. The Act does not have such regulatory pervasiveness. The state interest in law and order precludes such interpretation. Senator Taft explained that the federal prohibition against union violence would allow state action.

*   *   *   *   *   *   *

"There is no reason to re-examine the opinions in which this Court has dealt with problems involving federal-state jurisdiction over industrial controversies. They have been adequately summarized in Weber v. Anheuser-Busch, Inc., 348 U. S. 468. . . . As a general
matter we have held that a State may not, in the for-
therance of its public policy, enjoin conduct "which has
been made an "unfair labor practice" under the fed-
eral statutes" . . . But our post Taft-Hartley opinions
have made it clear that this general rule does not take
from the States power to prevent mass picketing, vio-
ence, and overt threats of violence . . . Nor should the
fact that a union commits a federal unfair labor prac-
tice while engaging in violent conduct prevent States
from taking steps to stop the violence.

* * * * * *

"We hold that Wisconsin may enjoin the violent
union contract here involved. The fact that Wisconsin
has chosen to entrust its power to a labor board is of
no concern to this Court."28

It is interesting to note that there was a vigorous dissent-
ing opinion in the above case, written by Mr. Justice
Douglas, with whom the Chief Justice and Mr. Justice Black
concurred which held as follows:

"Here the State has prescribed an administrative
remedy that duplicates the administrative remedy pre-
scribed by Congress. Each reaches the same identical
conduct. We disallowed that duplication of remedy in
Garner v. Teamsters, etc. Union, 346 U. S. 485 . . . In
that case we held that a state court could not enjoin
action which was subject to an unfair labor proceeding
under the federal Act . . . Today we depart from Garner
and allow a state board to enjoin action which is sub-
ject to an unfair labor proceeding before the federal
board. We sanction a precise duplication of remedies
which is pregnant with potentialities of clashes and
conflicts."29

It is interesting to note at this juncture that the Mary-
land Court of Appeals has explicitly acknowledged and ac-
cepted the federal doctrine of pre-emption in the case of
Sterling v. Local 438, Etc.30

It would seem clear from the above that the Maryland
Public Utilities Disputes Act cannot be said to avoid the

28 Ibid., 796-800.
29 Ibid., dis. op. 800.
proscriptions set forth in the Supreme Court's decisions referred to. The Baltimore Transit Company has been held to be engaged in interstate commerce within the meaning of the National Labor Relations Act. The strike in Baltimore and the picketing which accompanied it were orderly and peaceful. If there was a refusal to bargain in good faith committed by either the transit company or the union such action constituted an unfair labor practice for which an adequate remedy is provided by the federal statute. Analogous cases concerning public utility companies have consistently held that the congressional enactment of the Labor Management Relations Act occupies the field and thereby pre-empts state power in this area. It cannot be seriously argued that when the State of Maryland enacted its Public Utilities Disputes Act the said Act did not attempt to regulate labor relations. Indeed the causa sui for the passage of this statute came about solely and only because the City of Baltimore was paralyzed by a labor dispute. In fact the total scheme and purpose of the Seizure Bill concerns itself with a legislative intent to prevent strikes in public utilities. It would therefore seem clear that the Maryland Public Utilities Disputes Act is a statute intended to regulate labor relations within the meaning of the Garner and Anheuser-Busch cases and that it is invalid and unconstitutional.

Suggested Remedies

If it is true, as seems to be indicated by the present posture of the law concerning the operation of the federal doctrine of pre-emption, that the States are virtually impotent in this area to pass remediable legislation, what recourse is available to correct this situation? The most obvious suggestion is that the Congress take the necessary steps to dispel the cloud of confusion and frustration that seems to envelop this subject. Efforts have been made in this direction as witness the following:

Federal Preemption. The Senate Judiciary committee has voted to report a bill (S. 3142) sponsored by 12 Southern Senators that would deny preemption to federal laws unless they carry an express provision of supremacy or are in positive conflict with state law in the same field. The Senate bill is identical to H.R. 3 introduced by Congressman Smith (D., Va.) which was sidetracked by the House Judiciary Committee. The text of the bill follows:

"'That no Act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such Act operates to the exclusion of any state laws on the same subject matter, unless such Act contains an express provision to that effect. No Act of Congress shall be construed as invalidating a provision of state law which would be valid in the absence of such Act unless there is a direct and positive conflict between an express provision of such Act and such provision of the state law so that the two cannot be reconciled or consistently stand together.'"

While it is true that the above bills died in Committee in the 84th Congress they may be reintroduced in the 85th session of the Congress.

CONCLUSION

The Seizure Bill, while it solved nothing, nevertheless served a useful purpose. Passed at a time when the parties were deadlocked in what appeared to be a hopeless impasse, it did create leverage to break the log jam and it did catalyze the seemingly irreconcilable positions of the parties thus investing the bargaining climate with pressure which ultimately led to a settlement.

On the purely legal level the foregoing analysis of the adjudicated cases leads to the following conclusions: the operation of the federal doctrine of pre-emption in industries engaged in interstate commerce means that the federal government has occupied the field and thus closed it to state regulation. Unless and until the Congress passes legislation

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34 Labor Relations Reporter, News & Background, 38 LRR 140, June 18, 1956.
freeing the States from the operation of the pre-emption doctrine, attempted state regulation in this area is likely to be held to be invalid by the federal courts.

The Labor Relations Reporter succinctly summarizes the NLRB's authority to secure federal injunctive relief against state intrusion upon its jurisdiction:

"If a state court or board should invade the NLRB's exclusive jurisdiction, the NLRB may turn to a federal district court for injunctive relief to protect its jurisdiction. Ordinarily the applicable federal statute (28 U. S. Code 2283) severely limits the right of a U. S. court to enjoin state court proceedings, authorizing them only 'where necessary in aid of its jurisdiction . . . .' But the Supreme Court held in 1954 that the NLRB's exclusive jurisdiction might be protected by such an injunction (Capital Service, Inc. v. NLRB . . . 347 U. S. 501 . . . ). Other decisions have granted injunctions against state boards charged with invading NLRB's exclusive jurisdiction, but have made clear that only the NLRB may obtain such an injunction, there being no authority to issue one on the petition of an employer or a union."

This leaves the question as to areas where the States may act. In general:

"... jurisdiction over various aspects of labor relations and employment regulation is divided between the state and federal governments as follows:

(1) Jurisdiction over strictly intrastate matters rests exclusively with the states, since such matters are beyond the reach of the Federal Government's constitutional power. Where interstate commerce is involved, the federal jurisdiction is exclusive unless the matter comes within one of the exceptions to the federal preemption.

(2) The LMRA expressly authorizes concurrent state regulation of union security agreements. The federal law bars the closed shop but permits the union shop. Section 14(b), however, provides that the federal law shall yield to a stricter state law on the subject...

(3) An exception expressly noted in the Garner decision permits the states to act in cases of 'mass
picketing, threatening of employees, obstructing streets and highways, or picketing homes', even though the LMRA also regulates the same activities. The Supreme Court approvingly quoted its 1942 holding that a state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of the streets and highways (Allen-Bradley, 315 U. S. 740 . . . ).'

"(4) The Garner case also recognized state jurisdiction over certain other forms of 'coercive' employee conduct, regardless of whether interstate commerce is affected. These include 'sitdown' strikes and recurrent and unannounced 'quickie' strikes . . . .

"(5) The Laburnum decision . . . upheld the right of state courts to take jurisdiction of common law actions to recover damages for a union's tortious conduct, even though the case involves conduct and an employer within the NLRB's jurisdiction. . . .36

"(6) In the regulation of wages, hours, and child labor, there is concurrent jurisdiction. If the state standard is higher or stricter, it applies. If not, it gives way to the federal standard where the interstate commerce or the production of goods for interstate commerce is involved.

"(7) Certain fields still are wide open for state regulation, since no federal laws regulating them have been adopted. The states, . . . have a free hand regarding the regulation of racial and religious discrimination in employment, wage payment, payroll stuffers, and so forth regardless of the effect on interstate commerce. The regulation, of course, may not violate any other constitutional provision."37

The last question on this subject relates to the status of cases where the NLRB declines to assert jurisdiction even though interstate commerce is affected. This is still an open question and unfortunately, with respect to this so called "twilight zone" there would not appear to be any answers to be found in the adjudicated cases. The Supreme Court itself indicated, shortly after the Garner case, that it has

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36 Ibid, SLL 1:4 and 5.
not passed on this question. The General Counsel of the National Labor Relations Board has said that he does not believe that the Board will ever seek to block state action in situations where the NLRB chooses to desist from exercising jurisdiction because it believes the impact of the activity of the employer on commerce is insubstantial.

It might be interesting to note that by the passage of the Public Utilities Disputes Act, Maryland became the 14th state to enact legislation designed to regulate labor disputes in the field of public utilities.

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39 34 LRRM 78, 80.
40 See tables in Appendix, taken from LRRM pp. 3058, 3059.
## APPENDIX

### Table 6. Regulation of Disputes in Public Utilities, Government Service, and Essential Industries

<table>
<thead>
<tr>
<th>State and Date of Law</th>
<th>Provision Against Strikes in Other Essential Industries</th>
<th>Provisions For Seizure</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Public Utilities</td>
<td>Government Service</td>
</tr>
<tr>
<td>Florida 1947</td>
<td>x^1</td>
<td></td>
</tr>
<tr>
<td>Hawaii 1949</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Docks</td>
</tr>
<tr>
<td>Indiana 1947</td>
<td>x^1</td>
<td></td>
</tr>
<tr>
<td>Kansas 1920</td>
<td>x</td>
<td>Industries affected with the public interest^2</td>
</tr>
<tr>
<td>Massachusetts 1947</td>
<td>x^3</td>
<td>Distribution of food, fuel, hospital and medical services^3</td>
</tr>
<tr>
<td>Michigan 1949</td>
<td>x^1, 8</td>
<td>Hospitals^1</td>
</tr>
<tr>
<td>Minnesota 1947</td>
<td></td>
<td>Charitable</td>
</tr>
<tr>
<td></td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Missouri 1947, 1949</td>
<td>x^3, 7</td>
<td>x</td>
</tr>
<tr>
<td>Nebraska 1947</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>New Jersey 1946,</td>
<td>x^8, 4</td>
<td>x</td>
</tr>
<tr>
<td>1947, 1949, 1950</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York 1947</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>North Dakota 1943</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Ohio 1947</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Pennsylvania 1947</td>
<td>x^1</td>
<td>x</td>
</tr>
<tr>
<td></td>
<td>1947</td>
<td>x</td>
</tr>
<tr>
<td>Texas 1947</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td></td>
<td>1947</td>
<td>x^5</td>
</tr>
<tr>
<td>Virginia 1946</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td></td>
<td>1950</td>
<td>x</td>
</tr>
<tr>
<td></td>
<td>1952</td>
<td>x^9</td>
</tr>
<tr>
<td></td>
<td>1952</td>
<td>x^10</td>
</tr>
<tr>
<td>Wisconsin 1947</td>
<td>x</td>
<td>x</td>
</tr>
</tbody>
</table>

^1 No strike until such time as all of the procedure provided for by law has been exhausted.
^2 The ban on strikes has not been exercised, since other features of the Kansas Industrial Relations Act were declared unconstitutional.
^3 No strike after the public utility has been taken over by the state.
^4 No strike for six weeks after written notice of intention to strike to the board of mediation and the other party.
^5 No strike for five weeks after mediation fails and the governor has been notified.
^6 No strike for 60 days after written notice of intention to strike to the board of mediation and the other party.
^7 Act unconstitutional, in opinion of State Attorney General (27 LRRM 69).
^8 Act unconstitutional by U. S. Supreme Court (28 LRRM 2082) as applied to an employer engaged in interstate commerce.
^9 No ban on strikes. Provides for mediation of public utility disputes.
^10 No ban on strikes. Provides for temporary replacement of all employees who do not want to work for the Government during seizure.
### Table 7. Compulsory Mediation and Arbitration

<table>
<thead>
<tr>
<th>State and Date of Law</th>
<th>Industries Included</th>
<th>Provision for Compulsory Mediation</th>
<th>Compulsory Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida 1947</td>
<td>Public utilities</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Indiana 1947</td>
<td>Public utilities</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Kansas 1920</td>
<td>Industries affected with the public interest</td>
<td>x</td>
<td>x^1</td>
</tr>
<tr>
<td>Minnesota 1939</td>
<td>Any dispute, on petition of either party</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>1939</td>
<td>Industry affecting public interest</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>1947</td>
<td>Charitable hospitals</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Missouri 1947^2</td>
<td>Public utilities</td>
<td>x</td>
<td>x^2</td>
</tr>
<tr>
<td>Nebraska 1947</td>
<td>Public utilities</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>New Jersey 1947, 1949, 1950</td>
<td>Public utilities</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>North Dakota 1953</td>
<td>Any dispute</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Pennsylvania 1947</td>
<td>Public utilities</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Virginia 1952</td>
<td>Public utilities</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Wisconsin 1947</td>
<td>Public utilities</td>
<td></td>
<td>x</td>
</tr>
</tbody>
</table>

^1 The U. S. Supreme Court in decisions in 1923 and 1925 declared that it is unconstitutional to fix wages by compulsory arbitration in the meat packing industry. However, the act may still apply to the railroad and public utility industries.

^2 If no agreement is reached, a public hearing panel is established which must make recommendations for settling the dispute.

^3 Act unconstitutional, in opinion of State Attorney General (27 LRRM 69).