Mitchell's Musings 2-23-15: The West Coast Port Labor Dispute: Are Presidents Out of Practice?

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You probably have been reading about the West Coast longshore labor dispute that went on for months. News reports, as this musing is being written, indicated that a tentative settlement had been reached. Basically, the old contract between the Pacific Maritime Association (PMA - the employer group) and the International Longshore and Warehouse Union (ILWU) had expired last May and the union was working without a contract while negotiations continued. The PMA charged that the union was engaged in a work slowdown (as opposed to a full-fledged strike) as a bargaining tactic. But the union claimed that a variety of technical causes had led to delays in loading and unloading ships, apart from labor relations. It denied promoting a slowdown. The alleged causes, according to the union, were related to such issues as coordination with trucks servicing the ports, sorting of containers, and larger ships. The PMA, while not terming its actions a lockout, closed the ports on successive weekends, ostensibly to catch up with a backlog of containers needing to be processed.

The PMA seemed to want presidential intervention of some type. It was not clear, however, that such intervention would necessarily favor the employer position. In 2002, after a lockout occurred at the ports, President George W. Bush invoked an 80-day cooling off period under the 1947 Taft-Hartley Act. Perhaps the PMA was seeking a repeat of that action by President Obama. But the attitude of the Obama administration toward unions is surely different than the Bush administration's attitude. In any event, a complete lockout or strike might have triggered a Taft-Hartley intervention by the president, but weekend work pauses were unlikely to do so.

It could be, however, that PMA planned on ramping up its partial lockouts, hoping that the union would eventually call a complete strike in response and that the strike would then trigger Taft-Hartley intervention. However, there was no strike and the intervention by the president was more limited. President Obama sent out his Secretary of Labor, Thomas Perez, to intervene in the negotiations. There were calls by shippers and other commercial interests for someone to do something because of the impact of the problem at the ports in moving cargo in a timely fashion. Undoubtedly, however, the Federal Mediation and Conciliation Service (FMCS) – the agency which is supposed to provide assistance to parties in reaching settlements in labor disputes – was already involved. FMCS, it might be noted, is not part of the Department of Labor and does not report to the secretary of labor.

Full disclaimer: I have no inside information on what was actually going on within the union, within the PMA, at the negotiations, or in the minds of those folks in the Obama administration who made decisions on this matter. What interests me in this episode, however, is that it seemed like an event from a past era during which unions were common in major industries and were seen as important economic players. The fact that possible use of a 1947 statute was at issue makes that point. So let's do a little background history.

Unions began to expand rapidly during the Great Depression of the 1930s. Major strikes occurred and produced *ad hoc* forms of presidential intervention under the Roosevelt administration. Eventually, in 1935, the Wagner Act (National Labor Relations Act - NLRA) was enacted. The new law formalized a process of regulation of labor relations by establishing a National Labor Relations Board (NLRB) to deal with union-management relations in most of the private sector. (Railroads - and later airlines - are covered by a separate Railway Labor Act; agriculture and public sector workers were not covered by the NLRA.)

The expansion of unionization continued during World War II, a period of wage-price controls and bans on strikes to protect uninterrupted military production. But after World War II, as controls were lifted, a strike wave broke out. Conflicts that had been suppressed during the War broke out. At the same time, Congress had shifted to Republican control. Disruptive strikes became a matter of public concern. From the congressional viewpoint, the problem was that the NLRA was too pro-labor and needed to be amended to produce a "balance" between unions and management. The result was the Taft-Hartley Act which was partly an amendment to the Wagner Act, partly a response to the postwar strike wave, and partly a means of dealing with other issues such as political contributions by unions and firms.

Senator Robert Taft, the key personality in shaping the legislation, was a major figure in Republican politics and a possible presidential contender. He was conservative, but mainly in the libertarian sense. Thus, Taft-Hartley is itself a balancing act (no pun intended!) involving checking the power of unions *while not giving the federal government authority to determine wages and working conditions*. There is no compulsory arbitration, for example, built into the law. Ultimately, Taft-Hartley was vetoed by President Truman and then passed over his veto.

The Taft-Hartley provisions that were at issue in the current port labor dispute provide for limited presidential intervention in labor disputes *that rise to the level of creating a "national emergency."* Essentially, the president appoints a fact-finding Board of Inquiry to determine what is at issue in the dispute but not to make any recommendations. If the president believes that a national emergency is being created by a work stoppage, an eighty-day injunction (cooling off period) can be sought from a court. If the court agrees that there is a national emergency, any strike or lockout is forbidden during the 80 days. As noted, there is no provision for the president or anyone else to engage in binding arbitration and to determine what the terms of the settlement should be. But there is a provision for management's last offer to be put to workers for an up-or-down vote conducted by the NLRB during the period between day 60 and day 75. If workers accept those terms (thus going over the heads of their union leaders in doing so), the terms presumably become the new settlement. (The statute is a bit vague on that point.) If there is no settlement, both sides are as free to engage in a strike or lockout as they were before at the end of the 80-day period. The president would have to seek additional legislation from Congress for any further authority.

There are two implicit assumptions in the Taft-Hartley process. One is that the impasse that caused the work stoppage was a function of the parties not having enough time to negotiate a settlement. Thus, if the parties are given another 80 days, perhaps they will reach an agreement on their own. But the fact that settlements are often reached at the midnight hour, i.e., just before the old contract expires, may create an illusion of a tendency to run out of time in labor disputes. In fact, however, it is in the nature of the bargaining process that bluffing stops when the deadline is at hand. Last minute settlements are to be expected. Moreover, if the parties think that the federal government is likely to step in and add another 80 days to their contract, they will take the true deadline to be at the end of the injunction, not the original ending date of the contract.

The other Taft-Hartley assumption – inherent in the vote procedure – is that union officials are leading their members astray and that the members, if given a chance, are more amenable to going along with the employer than their (radical, militant) leaders. Again, the assumption is questionable. Nonetheless, the Taft-Hartley Act – which reflects conditions and political attitudes of the late 1940s – is still the law of the land and the only formal method of presidential intervention in labor disputes covered by the NLRA.

At one time, when unions were major factors in key industries, Taft-Hartley injunctions were repeatedly invoked in a variety of sectors. The issue of whether these cases were truly national emergencies was not much discussed and courts gave the president what he wanted. By the 1970s, however, Taft-Hartley injunctions were mainly at issue in longshoring. When President Carter sought an injunction in a coal mining dispute, a court did not go along with granting his request on the grounds that there was no true national emergency. But because of the impact on international trade and the ripple effects therefrom, courts remained less likely to be dubious in longshore situations. Thus, as noted above, President Bush obtained an injunction in a West Coast longshore dispute as recently as 2002.

Still, thirteen years have gone by since 2002. Whether a court would view a complete work stoppage in longshore as a national emergency in 2015, is unclear. Courts haven't had much practice in handling now rare Taft-Hartley injunctions. The notion that longshoring is inherently a sector in which any major stoppage is a national emergency is no longer routine.

If we go back in time to the era of Taft-Hartley's enactment and the next decade or so, presidential intervention in labor disputes was much more common than it is today. In earlier musings, I have used White House recordings from the Kennedy, Johnson, and Nixon administrations to illustrate the tendency of presidents to involve themselves and their labor secretaries in work stoppages. Such disputes tended to be visible but not necessarily even close to national emergencies. A newspaper strike over the displacement effects of automation – computerized printing – during the early 1960s in New York City was a prime example. Automation was a general public concern in that period. And, in addition, the Kennedy-Johnson administrations had promoted voluntary wage-price guidelines for anti-inflation reasons and were anxious that visible union settlements not exceed the guidelines. Later, the Nixon administration imposed mandatory wage-price controls and, again, it was anxious to see that the rules were being followed.

In short, presidents and their advisors back in the day were more familiar with labor relations and more accustomed to involving themselves in labor disputes than is now the case. They were aware that there is a political danger inherent in such involvement. What happens if there is presidential intervention and no settlement is reached?

The current secretary of labor is reported to have pushed the parties to the longshore dispute to settle or be called to the White House for negotiations. Note that there is no law, certainly not Taft-Hartley, which could require the parties to a labor dispute to move to the White House. And there is no certainty that if they did so move, there would be a settlement as a result. In the mid-1960s, President Johnson tried such a strategy in an airline dispute and ultimately failed to achieve a settlement that complied with his wage guideposts. That high-profile failure is generally seen as the *de facto* end of the Kennedy-Johnson wage-price guideposts program and a presidential defeat.

What's the lesson to be learned? The ILWU and the PMA have been engaging in labor negotiations for decades. They are old pros. One suspects there is much less experience in labor relations among the political advisors to the president. In this case, at least in public perception, the president sent out the secretary of labor and a settlement was reached. That result was a PR plus for the president. Did anyone in the White House see the potential dangers to the president that could have arisen from an unsuccessful intervention? What if the parties had not reached a settlement? It's an interesting question to which we will not know the answer.