12-1-1951

Labor Law -- Government Seizure -- Liability for Operating Loss

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A minority view is illustrated by the Illinois court. In *Aiken v. Insull* ¹⁵ the federal court in following the Illinois law (although criticizing it), held that an instrument which contained the following language, "Nothing in this agreement and compromise . . . shall be construed to operate or to affect any cause of action, claims or demands . . . against any person . . . other than any party to this settlement and compromise . . .", was a release because it was couched in the terms of a release although the obvious intent of the parties was otherwise.¹⁰ Still another minority view is taken by the Tennessee court which holds that any agreement which stipulates that it may be pleaded as a defense to an action against the covenantee is a release of all joint tort-feasors regardless of the form of the instrument.¹⁷

Confusion and perhaps injustice could possibly be avoided if a court when faced with such instruments would, instead of concerning itself with the technical language of the agreement, base its decision on the answers to the following questions: (1) What was the intent of the parties as determined by the agreement and the surrounding circumstances? (2) To what extent has the injured party received full compensation for the injury to him?¹⁸

ROY M. COLE.

Labor Law—Government Seizure—Liability for Operating Loss

Presidential Executive Order No. 9340¹ of May 1, 1943, directed the Secretary of the Interior to take immediate possession, so far "as necessary or desirable," of all coal mines in which a strike had occurred

¹⁵ 122 F. 2d 746 (7th Cir. 1941).
¹⁶ The Illinois rule is otherwise in contract cases. Parmelee v. Lawrence, 44 Ill. 405 (1867).
¹⁷ Byrd v. Crowder, 166 Tenn. 215, 60 S. W. 2d 171 (1933).
¹⁸ The practicing attorney should use great care in drafting an instrument which is intended to be only a covenant not to sue in order to avoid a possible interpretation by the court that it is an unqualified release of the claim for damages, and to insure against the finding that it was executed in return for what the plaintiff considered to be full compensation for the injury. The use of the word "release" should be avoided lest it be given its technical connotation. Aiken v. Insull, 122 F. 2d 746 (7th Cir. 1941). And neither should all-inclusive language be employed. Lisoski v. Anderson, 112 Mont. 112, 112 P. 2d 1055 (1941). It should be stated in the instrument that the amount paid was not intended as an accord and satisfaction of the entire claim for damages (Aljian v. Ben Schlossberg, Inc., 8 N. J. Super. 461, 73 A. 2d 290 (1950)) and that it was the intention of the parties that the agreement be merely a covenant not to sue and not a release. Chicago & A. R. Co. v. Averill, 224 Ill. 516, 79 N. E. 654 (1906). The agreement should contain a reservation of a right of action against the remaining tort-feasor (Aljian v. Ben Schlossberg, Inc., supra; Garbe v. Halloran, 150 Ohio St. 476, 83 N. E. 2d 217 (1948)) and this reservation should be included in the same instrument. Natrona Power Co. v. Clark, 31 Wyo. 284, 225 Pac. 586 (1924) (release discharges all liability instantaneously); but see, Wright v. Fischer, 24 Tenn. App. 650, 148 S. W. 2d 49 (1940) (allowed supplementary agreement to vary original agreement).

or was threatened. Among the mines seized on that date were those of the Pewee Coal Company, a Tennessee corporation, which subsequently sought to recover for a $36,128.96 operating loss sustained during the period of Government possession. The Court of Claims awarded $2,241.26, a sum representing that part of the loss found to have been occasioned by the effectuation of a War Labor Board order granting a fringe-wage increase to Pewee's employees.²

In affirming, the Supreme Court (though splitting on the question of compensation) unanimously agreed that there was a taking of the respondent's property, pointing out that in United States v. United Mine Workers of America³ they treated the seizure as making the mines Government facilities "in as complete a sense as if the Government held full title and ownership."⁴ It might be noted, however, that the Mine Workers opinion concerned itself with the status of the employees, and specifically refrained from expressing any conclusion as to the respective powers and obligations of the Government and the operators during the control period.⁵ It is suggested, too, that the Executive Order did not in itself constitute a taking since it was but a declaration of what could be done if "necessary or desirable,"⁶ and that the measure of operational control actually exercised by the Secretary was within the powers of governmental regulation.⁷ But the Government found itself in the somewhat awkward position of having to contend for no taking in a situation where, to all outward appearances at least, a taking had been precisely the objective sought to be attained;⁸ and this apparent anomaly, more than theory or precedent, was probably the undoing of that contention.⁹

As to the compensability of such a taking, Justice Black¹⁰ argued,

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⁶ And the "mere enactment of legislation which authorizes condemnation of property cannot be a taking." Danforth v. United States, 308 U. S. 271, 286 (1939).
⁸ Besides the requirement of compliance with the WLB order, Government directives ordered the flying of the American flag, posting of the property, compliance with OPA and safety regulations, continuance of the six-day week (evidently voluntary on Pewee's part), and certain reports to the Government. Respondent's president was assigned to serve as "Operating Manager for the United States." "If the Government was dishonest, if its protestations were lacking in integrity, what is there left in which we can place our trust?" Pewee Coal Co. v. United States, 88 F. Supp. 426, 429 (Ct. Cl. 1950). See also United States v. Pewee Coal Co., 71 Sup. Ct. 670, 671 (1951).
⁹ With whom concurred Justices Frankfurter, Douglas, and Jackson.
in the opinion of the Court, that the Government was responsible for all losses suffered by Pewee during the seizure. Justice Reed concurred, but only to the extent of the award below, contending that the Government should be responsible for only those losses occasioned by its intervention. The dissenting justices would have allowed no recovery, since they saw no proof of financial injury to the company.

The dissenting opinion represents a view which would leave upon the plaintiff the burden of demonstrating that losses were suffered during the seizure in excess of any which would have been sustained but for that seizure. Such a view finds a measure of support in many cases. Justice Reed used language of similar import, but felt that the company had successfully carried its burden by proving that there was a Government act which (as he saw it) increased operating expenses unnecessarily. Both of these views purport to follow the general principle of *Marion & Rye Valley Ry. v. United States*, the difference between them running to questions of proof. The opinion of the Court, on the other hand, apparently represents a departure from the theory of that case, inasmuch as it is said to be enough that there were operating losses and that the plaintiff sued for them—the crucial fact being that the Government chose to intrude. In fashioning its argument the opinion cited no precedent, but explained:

"When a private business is possessed and operated for public use, no reason appears to justify imposition of losses sustained on the person from whom the property was seized. This is conceptually distinct from the Government's obligation to pay fair com-

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12 Id. at 674 (concurring opinion).
13 Id. at 674 (dissenting opinion).
14 Together with the dissent below, Pewee Coal Co. v. United States, 88 F. Supp. 426, 431 (Ct. Cl. 1950).
16 "Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss." 270 U. S. 280, 282 (1926).
17 Wheelock Bros., Inc. v. United States, 88 F. Supp. 278 (Ct. Cl. 1950), vacated on jurisdictional grounds, 71 Sup. Ct. 730 (1951), involved the seizure of motor carriers who had refused to comply with a WLB order. The suit was for just compensation, and the Court of Claims award, as in the companion *Pewee* case, was in the amount of increased wages. There the court admitted that it was not sure that the increase really occasioned a net loss to the company, since losses might have been heavier absent seizure, but satisfied itself that the value of such "speculation" was outweighed by the actual fact of an increased operational cost ordered by the Government. This spells out one difference between Justice Reed and the dissenters in the principal case. They also apparently disagreed as to the necessity of proving the non-enforceability of WLB orders. As to the latter point see *National War Labor Board Termination Report* 415-424 (1946).
pensation for property taken, although in cases raising the issue, the Government's profit and loss experience may well be one factor involved in computing reasonable compensation for a temporary taking.\textsuperscript{18}

Such a distinction, however, could create more problems than it solves, because of its "heads I win and tails you lose" aspect,\textsuperscript{19} because it might render seizures impractical in some cases, and because it could inspire money-losing companies to solicit seizure.\textsuperscript{20} Furthermore, it would seem more realistic to say that a company which has been seized as a national defense measure should recover only resultant losses, rather than profit from the transaction, at public expense, to the extent of recovering all its other losses.\textsuperscript{21}

In \textit{Kimball Laundry Co. v. United States}\textsuperscript{22} it was held that the proper measure of compensation for the temporary taking of a laundry was the rental which probably could have been obtained plus an award for damage to machinery and equipment in excess of ordinary wear and tear. \textit{United States v. General Motors Corp.}\textsuperscript{23} held, similarly, that the condemnee was entitled to compensation for fixtures and permanent equipment destroyed or depreciated in value by the taking, in addition to the value of the occupancy. Accordingly, granted there was a taking, it may be argued that an award to Pewee equivalent to the amount of all losses could be justified as representing property destroyed during the period of Government seizure.\textsuperscript{24} This contention, though not mentioned as such in the opinion, resembles that of Justice Black to the effect that the "proprietor" should reap any profits and bear any losses.\textsuperscript{25}

And it is submitted that the answer to both these propositions lies in this distinction: in each of the two cited cases the Government appropriated and used the properties for its own purposes, that being the very object of the seizure; while in the \textit{Pewee} case the company was allowed (with one exception) to operate as it saw fit, the object there

\textsuperscript{18} United States v. Pewee Coal Co., 71 Sup. Ct. 670, 672 (1951).
\textsuperscript{19} The condemnee (as here) would not have to bear losses but yet "might" receive, in the calculation of conceptually distinct "fair compensation," the benefit of a consideration of any profits made. This consideration, moreover, could be the dominant one. Prince Line, Ltd. v. United States, 283 F. 535 (E. D. N. Y. 1922), \textit{writ of error dismissed}, 263 U. S. 727 (1923).
\textsuperscript{21} Just compensation "must, of course, be just to the public as well as to the owner." C. G. Blake Co. v. United States, 275 F. 861, 867 (S. D. Ohio 1921), \textit{aff'd}, 279 F. 71 (6th Cir. 1922). See also Bauman v. Ross, 167 U. S. 548, 574 (1897). It is submitted that this solicitude for the public welfare should obtain regardless of conceptual distinctions.
\textsuperscript{22} 338 U. S. 1 (1949).
\textsuperscript{23} 323 U. S. 373 (1945).
\textsuperscript{24} Brief for Plaintiff, pp. 181-182, Pewee Coal Co. v. United States, 88 F. Supp. 426 (Ct. Cl. 1950).
\textsuperscript{25} United States v. Pewee Coal Co., 71 Sup. Ct. 670, 672 (1951).
being merely the continuation of operations. On the one hand an offending, on the other an unoffending sovereign. As Justice Reed said: "The most reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case." 27

Anderson v. Chesapeake Ferry Co. 28 is an interesting case to compare with Pewee. It was a three-to-two decision to the effect that where the Virginia Highway Commissioner seized temporarily the properties of a strike-bound ferry, the fair rental value to which the company was entitled was to be determined with reference to the value of the properties at the time of taking and their earning capacity under the circumstances at that time. Under this decision the State kept the profits, since they represented, according to the majority, money made by virtue of the "power of the State to quicken into action an idle enterprise" which would have remained "idle and without any capacity to earn for its owner except for the exercise of the State's authority." 29 This is clearly speculation, paralleling the views of the dissents in both Pewee cases, since no one can really know that the strikers would not have been forced into submission had there been no seizure. However, the opposing view, which is akin to the majority opinions in both cases, is open to a similar accusation in that it insists upon treating the ferry company as a "going concern" 30—thus disregarding the strike situation. Which of the two ideas is preferable would seem to be a matter all too susceptible of argument either way, but it may be mentioned, in passing, that it would probably be hard to conceive of a union less likely to yield to company pressure than the United Mine Workers.

Also of interest in the comparison of the Pewee and Anderson cases is the role which labor-management considerations played, or may have played, in the respective results. There is no doubt that such considerations influenced the Virginia decision, since the majority opinion observes that if the company could take all the profits without assuming operational risks "its willingness to take back its properties might not arrive on winged feet." 31 This decision may be said to award labor a bargaining advantage, even though the right to strike was suspended, inasmuch as wages were continued but company revenues practically obliterated. Conversely, the dissent, in awarding profits as the correct

28 186, Va. 481, 43 S. E. 2d 10 (1947).
29 Id. at 489, 43 S. E. 2d at 15.
30 Id. at 511, 43 S. E. 2d at 26.
31 Id. at 499, 43 S. E. 2d at 20.
measure of compensation, would have given the upper hand to management, the authority of the State then becoming a hobble upon the bargaining strength of labor.\textsuperscript{32} In the \textit{Pewee} case (involving, of course, losses instead of profits) there was no discussion of bargaining powers, but Justice Black would have given the advantage to management: clearly, a company which is losing money as Pewee was\textsuperscript{33} will have no incentive to settle its differences with the union so long as all its losses are borne by someone else; more than that, such a decision would be a strong incentive toward continuation of Government control, and might even induce some companies to seek such control. The concurring opinion (and the holding) does not offer asylum to the financially sick, but it, too, does seem to favor management, since the company, upon settlement, would accomplish nothing more than the assumption of whatever increase was finally agreed upon. In either of these two situations, whether or not the employees were satisfied with their temporary agreement would matter little or nothing to management, economically speaking; but if they were satisfied then they also would have at least no particular reason to strive for de-control, thus compounding the odds against good-faith bargaining. Under the dissent’s view, however, the company would have had to pay everything, including the increase in wages, and, consequently, the question of advantage to one side or the other would seem to depend solely upon how satisfied each was with the temporary settlement. It is submitted that this view is preferable to either of the other two in respect of labor-management relations, inasmuch as Government’s place in that respect should be “in the middle”—favoring, as nearly as possible, neither side.\textsuperscript{34}

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\section*{Liens—Subcontractors—Acquisition and Priorities}

In 1874, the Supreme Court of North Carolina held, in \textit{Wilkie v. Bray},\textsuperscript{1} that there was no right to a lien under the statute\textsuperscript{2} providing for mechanic’s, laborer’s, or materialman’s liens unless there was a contract

\textsuperscript{32} For a discussion of this problem (which, however, apparently leaves open the question of what is fair rental value under such circumstances) see Gerhart, \textit{Strikes and Eminent Domain}, 30 J. Am. Jud. Soc’y 116 (1946).

\textsuperscript{33} Net loss for the period of seizure (May 1 to October 12, 1943) was $36,128.96.

\textsuperscript{34} “The greatest danger in the establishment of government seizure policy is that the normal processes of collective bargaining will be disrupted. Crisis measures should be reserved for crisis problems, voluntary mediation for normal collective bargaining. This implies two requirements: first, that voluntary mediation machinery of the government should be perfected before emphasis is placed on supplementary procedures; second, that seizure should not be permitted to be used as an instrument of economic pressure by either management or labor.” Teller, \textit{Government Seizure in Labor Disputes}, 60 Harv. L. Rev. 1017, 1054 (1947).

\textsuperscript{1} 71 N. C. 205 (1874).