March 10, 1964

HONORABLE RICHARD J. HUGHES
Governor of New Jersey
Trenton, New Jersey

FORMAL OPINION 1964—No. 1.

Dear Governor Hughes:

In June 1963, the United States Supreme Court held unconstitutional a Missouri law which authorized the State to seize a public utility where the continuance of the company's operations is threatened or interrupted by a labor dispute.[1] Because of this decision you have asked for our opinion as to the legality of New Jersey's law regulating labor disputes in public utilities and providing for the seizure of public utilities by the State. N.J.S.A. 34:13B-1 *et seq.* For the reasons stated below it is my opinion that the New Jersey law in question is unconstitutional as it applies to a bus company whose operations are subject to the provisions of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947.[2]

Descriptions of the New Jersey statute are contained in *Van Riper v. Traffic Telephone Workers' Federation of New Jersey et al.*, 2 N.J. 335 (1949) and *New Jersey Bell Telephone Co. v. Communication Workers of America*, 5 N.J. 354 (1950). In brief, the New Jersey law, referred to herein as the Public Utility Strike Seizure Law, begins with a declaration of State policy that "heat, light, power, sanitation, transportation, communication and water are life essentials of the people * * *" (N.J.S.A. 34:13B-1) and that it is necessary for the welfare and health of the people to regulate public utilities operating under State franchise. Although the statute recognizes that employees shall have the right to organize and bargain collectively through representatives of their own choosing (N.J.S.A. 34:13B-2), it provides for seizure and operation of the utility by the State, through action of the Governor, where there is "a threatened or actual interruption of the operation of such public utility as the result of a labor dispute * * * strike, a lockout or other labor disturbance * * *." N.J.S.A. 34:13B-13. The law further provides that after seizure by the State, the persons employed by the public utility shall be deemed employees of the State, and they may not lawfully participate in any strike, work stoppage or refusal to work for the State as a means of enforcing their demands. N.J.S.A. 34:13B-19. Thereafter, the dispute "then existing between the public utility and the employees" must be submitted to a Board of Arbitration appointed in accordance with the law. N.J.S.A. 34:13B-20. The Board of Arbitration is required to arbitrate the dispute, hold hearings and render a decision and order which is to be "conclusive and binding upon all of the parties to the dispute * * *." N.J.S.A. 34:13B-21 and N.J.S.A. 34:13B-23. The statute also provides various penalties for violations, including a penalty of $10,000.00 per day for each day during a lockout, strike, work stoppage or failure to abide by the decision or order of the Board of Arbitration. N.J.S.A. 34:13B-24.

In the *Van Riper* case, *supra,* the Supreme Court held that Federal legislation in the labor relations field did not preclude the enactment of this State law, but that adequate standards had not been established to regulate the compulsory arbitration proceedings, and the court, therefore, declared the act unconstitutional in its entirety. The act was subsequently amended and its constitutionality upheld in the *New Jersey Bell Telephone* case, *supra,* decided by our Supreme Court in 1950. In this latter case our highest court expressly rejected the argument that Congress had preempted

the field by the National Labor Relations Act of 1935 and the Labor-Management Relations Act of 1947.

In the Missouri case mentioned above, decided in 1963 by the United States Supreme Court, a similar statute of the State of Missouri was declared unconstitutional. In that case, the Governor of Missouri issued an Executive Order to take possession of the plant, equipment and facilities of the Kansas City Transit, Inc. located in the State of Missouri for the use and operation by the State of Missouri in the public interest. 374 U.S. at 76. The Governor of Missouri had issued a proclamation that the public interest, health and welfare were jeopardized by the threatened interruption of the company's operations as a result of a strike called by members of a union after negotiations for a new contract had failed. The Supreme Court of Missouri upheld the constitutionality of the Missouri law and rejected the contention that it conflicted with Federal labor legislation. The United States Supreme Court reversed, holding the Missouri law unconstitutional on the express ground that it is in conflict with Federal law that has occupied the field. The Court said, 374 U.S. at 82:

> "The short of the matter is that Missouri, through the fiction of 'seizure' by the State, has made a peaceful strike against a public utility unlawful, in direct conflict with federal legislation which guarantees the right to strike against a public utility, as against any employer engaged in interstate commerce. In forbidding a strike against an employer covered by the National Labor Relations Act, Missouri has forbidden the exercise of rights explicitly protected by Sec. 7 of that Act. Collective bargaining, with the right to strike at its core, is the essence of the federal scheme. As in Wisconsin Board, a state law which denies that right cannot stand under the Supremacy Clause of the Constitution."[3]

The United States Supreme Court also rejected the contention that the State law may validly operate as "emergency legislation", citing its earlier decision in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board,* 340 U.S. 383, 71 S. Ct. 359, 95 L Ed 364 (1951). It was there held that a State may not deny the Federally guaranteed right of collective bargaining and the right to strike in cases of alleged emergencies where Congress itself has provided express limitations on these rights in cases of national emergencies only.

The Missouri statute is very similar to the existing New Jersey Public Utility Strike Seizure Law. The Missouri statute defines certain public utilities as "life essentials of the people" and declares that the possibility of labor strife in utilities operating under governmental franchise is a threat to the welfare and health of the people. 374 U.S. at 78. The act imposes requirements in connection with the duration and renewal of collective bargaining agreements similar to the New Jersey laws. 374 U.S. at 78, fn. 5; N.J.S.A. 34:13B-4. The Missouri statute creates a State Board of Mediation to aid in the settlement of labor disputes. Where the continued operation of the utility is threatened, it empowers the Governor of Missouri to "take immediate possession of" the utility "for the use and operation by the State of Missouri in the public interest." 374 U.S. at 79.

In the Missouri case, the United States Supreme Court found that the seizure of the utility under Executive Order of the Governor of Missouri did not in fact create "a state-owned and operated utility whose labor relations are by definition excluded

from the coverage of the National Labor Relations Act." 374 U.S. at 81. The Court held that the employees of the utility did not, in fact, become employees of the State; the State did not pay their wages; the State did not direct or supervise their duties; the State did not manage the company or change the conduct of the company's business; and the company's property was not actually conveyed, transferred or otherwise turned over to the State. Similarly, although the New Jersey law authorizes the Governor to take possession of a public utility through "such departmental agency of the government" as the Governor may designate (N.J.S.A. 34:13B-13), the law does not provide for acquisition of title to the property by condemnation, purchase or otherwise, nor could it appropriate current funds for such purpose. The same section of the New Jersey statute authorizing seizure requires the return of the utility's plant and facilities as soon as practicable "after the settlement of said labor dispute."

The New Jersey statute does not set up adequate machinery for the complicated operations of various utilities in the state. It simply recites that after the utility is seized "for the use and operation of the State" (N.J.S.A. 34:13B-19) the relationship between the State and the persons employed at the public utility "shall be that of employer and employee." In apparent reliance upon the provisions of the New Jersey Constitution of 1947, Article I, paragraph 19, this section of the statute makes it unlawful for any person employed at the utility to participate in any strike or refusal to work for the State "as a means of enforcing demands of employees against the State or for any other purpose contrary to the provisions of this act."

It is unlikely, however, that the employees are to be deemed State employees, whose employments are normally governed by the Civil Service laws of the State. See Article VII, Section I, par. 2 of the *1947 Constitution of New Jersey*. The statute does not contain any detailed provisions regulating the employment relationship between the State and the so-called new State employees. The employees could not be paid by the State with State moneys, in the absence of a current appropriation made by law. Article VIII, Section I, par. 2, *1947 Constitution of New Jersey*. It must be assumed, therefore, that the employees would be paid from funds of the utility and would continue on the payroll of the utility. Certainly "the dispute" continues to be a dispute between the private management of the utility and its "former" employees.

Of course we recognize the serious impact upon the welfare of the State and its citizens of a strike which interrupts the service of a public utility operating throughout a vast section of our State. We do not lightly disregard the public policy of the State desired by the Legislature, especially where this statute had previously been upheld by the highest court of our State. But that decision of our highest court was not tested in the United States Supreme Court and had been rendered before the highest court of our land announced its decision in the Wisconsin Employment Relations Board case, *supra,* which dealt with a public utility anti-strike law, and before the recent decision in the Missouri case. Decisions of the United States Supreme Court are the supreme law of the land, and conflicting decisions of State courts must bow to the mandate of the United States Supreme Court where Federal law controls.[4]

Mr. Justice Stewart, writing for a unanimous Court in the Missouri case, noted that in enacting the Taft-Hartley Act, Congress expressly rejected the suggestion that public utilities be treated differently from other employers. In footnote 9, 374 U.S. at 82, the late Senator Taft is quoted as saying:

> "If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the

> the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining."

See also the *Wisconsin Employment Relations Board* case, *supra*, 340 U.S. at 392, fn. 15, which recites that the Case Bill passed in 1946 proposed special treatment, including a denial of the right to strike, in connection with a labor dispute, affecting commerce, involving a public utility whose rates are fixed by some governmental agency. The President vetoed this bill and criticized the special treatment accorded to public utilities. Congress did not override the veto. Although such special treatment for public utilities was again proposed in 1947, it was not included in the Labor Management Relations Act of 1947, but provision was made for special procedures to deal with strikes which might create *national* emergencies.

At the present time employees of the Public Service Coordinated Transport are on strike. These are employees of various locals of the Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, A.F. of L.-C.I.O. This is the same national union that was involved in both the Wisconsin and Missouri cases referred to above in which the laws in question of those States were declared unconstitutional. The intrastate and interstate bus operations of the Public Service Coordinated Transport have been halted by the strike, with substantial inconvenience to the public. However, Congress has declared it to be the policy of our nation that the employees of such a company be guaranteed the right to bargain collectively through representatives of their own choosing and to strike, if necessary, as an incident to that collective bargaining process. It is clear that the Federal labor law applies to all industries affecting interstate commerce, and even to a privately-owned public utility whose business and activities are carried on wholly within a single state. *Wisconsin Employment Relations Board* case, *supra*, 340 U.S. at 391.

In rare instances we are compelled to express the view that a statute enacted by the New Jersey Legislature, expressive of the public policy of this State is unconstitutional because of conflict with the New Jersey Constitution or with the United States Constitution. See *Wilentz v. Hendrickson*, 133 N.J. Eq. 447 (Chan. 1943), aff'd 135 N.J. Eq. 244 (E.&A. 1944). The Attorney General is a constitutional officer. Article V, Sec. IV, par. 1, 3, *1947 Constitution of New Jersey*. Like other State officers, I have taken an oath required by the New Jersey Constitution to support the Constitution of this State and of the United States. Art. VII, Sec. I, par. 1. It would be a violation of that oath to say that New Jersey and its Governor are not bound by the holding of the United States Supreme Court in the *Missouri* case. See *Cooper v. Aaron*, 358 U.S. 1, 16-20, 78 S. Ct. 1401 (1958), where the court held that because the Federal Constitution is the supreme law of the land, its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) and companion cases, involving racial segregation in school districts of Kansas, South Carolina, Virginia and Delaware, was binding on those states as well as all other states. In the *Cooper* case, *supra*, the court said at p. 18, "No state legislator or executive or judicial officer can war against the (Federal) Constitution without violating his undertaking to support it." See also *Lionel Corp. v. Grayson-Robinson Stores*, 15 N.J. 191, 197-198 (1954); and *McKinney v. Blankenship*, 154 Tex. 632, 282 S.W. 2d 691 (Sup. Ct. Texas 1955), where the highest court of Texas also rejected the contention that Texas was not bound by the United States Supreme Court's decision in the Brown school segregation case simply because the constitution and statutory provisions requiring segregation in Texas schools were not before the United States Supreme Court in the *Brown* case.

Here we are concerned with the applicability of a decision of the United States Supreme Court in the *Missouri* case. In 1954, in its Report to Governor Robert B. Meyner, at p. 48, the Governor's Committee on Legislation Relating to Public Utility Labor Disputes noted the following:

> "In Missouri, which has a statute almost verbatim identical with ours, (Mo. Rev. Stat. Annot. Section 10178.101 *et seq.*) the State Attorney General, in a letter to the members of the House, dated March 19, 1951, advised that the statute was unconstitutional and void.
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> "Although all of these statutes remain on the books, enforcement of compulsory arbitration has practically ceased in most places since the Wisconsin case. * * *"

It is noted also that Attorney General Theodore D. Parsons filed a brief for the State of New Jersey as *amicus curiae* in the *Wisconsin Employment Relations Board* case, calling to the attention of the Supreme Court of the United States the New Jersey statute and the decision of our highest court upholding that statute. The attorneys general for Michigan and Pennsylvania also appeared as *amici curiae* in an effort to uphold the constitutionality of the Wisconsin Public Utility Anti-Strike Law, but, as noted above, that effort failed. The declaration of unconstitutionality of the Wisconsin statute in a case in which the Attorney General of this State participated made it clear as early as 1951 that the New Jersey statute was of questionable validity. In my opinion, the decision of the United States Supreme Court in 1963 in the Missouri case removes all doubt from this conclusion.

For the reasons stated above, in my opinion the New Jersey statute is unconstitutional as applied to the interruption of service of a bus company whose operations are subject to the Federal labor laws.

Respectfully yours,
ARTHUR J. SILLS
Attorney General

By: THEODORE I. BOTTER
First Assistant Attorney General

1. *Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, et al. v. State of Missouri*, 374 U.S. 74, 83 S. Ct. 1657, 10 L. Ed. 2d 763 (1963).

2. 49 Stat. 449, Ch. 372, 29 U.S.C. sec. 151 *et seq.*; 61 Stat. 136, Ch. 120, 29 U.S.C. (Supp. III) sec. 141 *et seq.*

3. The Court noted, however, that its decision does not affect the right of the State to own or operate a public utility or any other business, nor the right of the State to deal with emergency conditions of public danger, violence or disaster under appropriate provisions of State law.

4. The legality of New Jersey's law had been questioned apart from the cases in the New Jersey courts testing its validity. See Bernard Cushman, *Compulsory Arbitration in Action—the New Jersey Bell Telephone Case*, 2 *Syracuse Law Review* 251 (1951); Charles Christenson, *Legality of New Jersey's Anti-Strike Law*, 3 Labor Law Journal 767 (1952). See also The Governor's Committee on Legislation Relating to Public Utility Labor Disputes, *Report to Governor Robert B. Meyner of Sept. 9, 1954*, starting at page 47: "Therefore, the constitutionality of the New Jersey statute is now a matter of considerable uncertainty." This committee (at page 54) recommended the repeal of the New Jersey statute.