

ATTACHMENT A

DEPARTMENT OF TRANSPORTATION,
OFFICE OF THE SECRETARY,
May 18, 1967.

Subject: Emergency authority over transportation.
From: General Counsel.
To: The Secretary.

INTRODUCTION

You have requested an outline of the authority available to the Executive Branch in the event of a major shutdown in the rail industry.

We conclude that the President is not authorized to seize and operate the railroads or other transportation facilities under present circumstances. He is authorized, however, to assign priorities in the movement of traffic over those transportation facilities which remain in operation when he deems it necessary or appropriate to do so to promote the national defense. In addition, the Interstate Commerce Commission and the Civil Aeronautics Board may grant temporary authority to operating carriers under their jurisdiction to carry traffic for limited periods of time in areas in which regular service is insufficient.

DISCUSSION

Seizure

A. Inherent President Authority.—In 1952 President Truman seized most of the Nation's steel mills to avert a work stoppage which would, in his view, have "immediately jeopardize[d] and imperil[led] our national defense" and endangered the military forces then engaged in Korea. Executive Order 10340 (1952). Since there was no statutory authorization for the seizure, the President relied upon his Constitutional powers as Chief Executive and as Commander-in-Chief. The Supreme Court held the seizure unconstitutional. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Mr. Justice Black's opinion for the Court concluded that the President had no inherent constitutional seizure authority outside the geographical area in which U.S. forces were engaged in combat. There is nothing in the opinion to suggest that the President has greater constitutional authority with respect to the transportation industry than with respect to the steel industry.

In addition, Mr. Justice Frankfurter, concurring, noted that Congress had, in the Taft-Hartley Act, reserved to itself the power to fashion a remedy in the case of a particular dispute which was not resolved by the statutory procedures:

"By the Labor-Management Relations Act of 1947 Congress said to the President, 'You may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation.' This of course calls for a report on the unsuccessful efforts to reach a voluntary settlement, as a basis for discharge by Congress of its responsibility—which it has unequivocally reserved—to fashion further remedies than it provided." 343 U.S. at 603.

Mr. Justice Burton, Mr. Justice Clark and Mr. Justice Jackson expressed similar views in their concurring opinions. See, e.g., 343 U.S. at 639 (note 8), 657, 660, 663-4.

In the case of the Railway Labor Act, Congress appears to have similarly reserved to itself the power to provide remedies when the statutory procedures fail to resolve a dispute. In recommending enactment of the Railway Labor Act in 1926, the Senate Committee on Interstate Commerce declared that if the statutory procedures should fail to work

"so as to avoid any impairment of the public interest [in "adequate and uninterrupted transportation"] . . . Congress will be unembarrassed in adopting any means it sees fit to protect the public interest." S. Rep. No. 222, 69th Cong., 1st Sess. (1926) at p. 6.

Accordingly, the rationale of the concurring Justices in the Steel Seizure Case seems equally applicable to seizure of the railroads.

B. Statutory Authority.—The one statute currently in force which expressly authorizes seizure of the railroads is 10 U.S.C. § 4742 (1958), codified from the Act of August 29, 1916, 39 Stat. 619, 645 (1916), in which Congress has authorized the President "in time of war" to seize "any system . . . of transportation." The President has relied upon this law to seize major portions of the railroad