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Alternative Proposals for the Regulation of an Emergency Strike in the Health Care Industry

Susan A. Jones

NOTE

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I. INTRODUCTION

In order to give approximately 1,400,000[1] health care employees the protection enjoyed by employees under the National Labor Relations Act (NLRA), Congress amended the Act in 1974 to make health care institutions[2] "employers."[3] Recognizing the public's dependence upon the unique services provided by health care facilities, Congress was hesitant, however, to extend coverage under the Act to health care employees without providing additional safeguards. These safeguards are embodied in the following special provisions: (1) the extension of the sixty-day notice requirement for

1. Carroll, *Health Care Institution Coverage Under the National Labor Relations Act*, 38 TEX. B.J. 257 (1975); Vernon, *Labor Relations in the Health Care Field Under the 1974 Amendments to the National Labor Relations Act: An Overview and Analysis*, 70 NW. L. REV. 202 (1975).

2. 29 U.S.C. § 152 (Supp. V 1975) defines a health care institution as "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons."

3. Act of July 26, 1974, Pub. L. No. 93-360, § 1(a), 88 Stat. 395 (amending 29 U.S.C. § 152(2) (1970)).

modification of an expiring contract to ninety days;[4] (2) the creation of a thirty-day notice requirement of a dispute when bargaining for an initial contract following certification;[5] (3) the imposition of a ten-day notice requirement prior to striking in both expiring and initial contract negotiations;[6] (4) the involvement of the Federal Mediation and Conciliation Service (FMCS) early in the proceedings;[7] (5) the delegation of discretion to the director of the FMCS to appoint a board of inquiry;[8] and (6) the imposition of a duty on the union to participate in the mediation efforts of the FMCS.[9]

The explicit purpose of these provisions is to facilitate the collective bargaining process in the health care industry.[10] Implicitly, Congress devised the amendments to achieve two potentially antithetical objectives—to ensure the continuity of patient care[11] and to furnish employees with an arsenal of economic weapons.[12] The conflict inherent in the implied objectives is manifested by the health care strike.

Although Congress recognized that strikes would occur[13] and included in the amendments extraordinary safeguards to regulate all interplay between a health care institution and its employees prior to a strike,[14] it intentionally declined to regulate strikes.[15] Assuming a strike is confined in scope, such a policy of inaction seems consonant with the basic purpose of the employee protections embodied in the NLRA. If, however, a strike is directed at the only hospital in a large rural community; or at large, highly specialized hospitals providing treatment for very limited types of patients who cannot be adequately cared for at other area facilities; or at one hospital whose services are larger and more extensive than other available services in an area;[16] or at the majority of hospitals in a community because they aided the primary employer,[17] the societal

4. 29 U.S.C. § 158(d)(A) (Supp. V 1975).
5. *Id.* § 158(d)(B).
6. *Id.* § 158(g).
7. *Id.* § 158(d)(C).
8. *Id.* § 183(a).
9. *Id.* § 158(d)(C).
10. *See id.* §§ 158(d), 183; Carroll, *supra* note 1, at 258; Vernon, *supra* note 1, at 209-10.
11. *See generally* 120 CONG. REC. 12,939-40 (1974) (remarks of Sen. Javits); *id.* at 12,970-73 (remarks of Sen. Taft and Sen. Dominick).
12. *See* notes 50-59 *infra* and accompanying text.
13. *See, e.g.*, 120 CONG. REC. 12,970 (1974) (remarks of Sen. Taft).
14. *See* notes 4-9 *supra* and accompanying text.
15. *See, e.g.*, 120 CONG. REC. 12,939, 12,973 (1974) (remarks of Sen. Javits).
16. *See generally id.* at 12,971 (remarks of Sen. Dominick).
17. *See generally id.* at 12,935 (remarks of Sen. Cranston).

repercussions are greater and the equities may change, thereby necessitating regulation.[18]

This Note will focus on these exceptional strikes, which can be classified as "emergency strikes," and will evaluate alternative proposals for legislative intervention and regulation. To ascertain the source of this legislation, historical and current perspectives on health care industry strikes will be presented, the 1974 amendments to the Act will be summarized and analyzed, and possible sources of regulation under existing state and federal law will be examined.

II. Health Care Strikes in Perspective

To understand fully labor relations in the health care industry under the 1974 amendments, it is important to examine the climate in the industry prior to 1974. A high incidence of strikes occurring in health care facilities emphasized the need for coverage under the NLRA. For example, most of the strikes occurring in nonprofit hospitals averaged thirty-two days and caused 3,967 idle employee work days for each struck facility.[19] In the absence of federal legislation, the states retained power to control health care industry strikes that arguably affected the health and safety of their citizenry.[20] Some legislatures enacted regulatory schemes ranging from absolute prohibitions against walkouts by any hospital personnel[21] to specific prohibitions against certain personnel whose services were, in the legislature's judgment, more critical.[22] Moreover, upon application to its courts, a state often could obtain injunctive relief to curtail a strike.[23] In spite of these statutory and judicial prohibitions, many

18. *See generally id.* at 12,971 (remarks of Sen. Dominick).

19. According to representatives of the Service Employees International Union, 95% of these strikes were recognitional in nature. *Id.* at 12,936 (remarks of Sen. Cranston).

20. As will be demonstrated in this Note, the states were not able directly to seize an industry after the Supreme Court's decision in Division 1287, Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Missouri, 374 U.S. 74 (1963).

21. Examples of state statutes that absolutely prohibited walkouts are: Minn. Stat. Ann. § 179.36 (West 1966); N.Y. Lab. Law §§ 713, 716 (McKinney 1977); Wash. Rev. Code Ann. § 49.66.060 (Supp. 1976). *See* Note, *Guidelines for Alleviating Local-Emergency Work Disruptions*, 8 U. Mich. J.L. Ref. 173, 176 (1974). Although these statutes have not been repealed, they would be pre-empted by the NLRA. *See* text accompanying notes 70-83 *infra.*

22. Examples of statutes allowing specific hospital personnel to strike are found in Massachusetts, Mass. Gen. Laws Ann. ch. 150A, § 9A (West 1971), and in Indiana, *see* Peters v. Poor Sisters of St. Francis, 148 Ind. App. 453, 267 N.E.2d 558 (1971). *See also* Note, *supra* note 21, at 176.

23. An example of the issuance of an injunction against a walkout by hospital employees by a state court is found in League of Voluntary Hospitals and Homes v. Local 1199, Drug and Hospital Union, 84 L.R.R.M. 2988 (S.D.N.Y. 1973), *aff'd*, 490 F.2d 1398 (Temp. Emer. Ct. App. 1973). *See* Note, *supra* note 21, at 176.

strikes occurred illegally.[24]

Commentators analyzing the potential impact of strikes on the health care industry emphasized that fears concerning the societal repercussions of such strikes were exaggerated and that strikes did not need to be regulated by emergency measures.[25] Benjamin Taylor, writing in 1971, stated that an emergency in the health care industry was "probably more of an emotional danger than an actual one. . . ."[26] To support his reassuring conclusion, Taylor studied bed capacities at various hospitals and calculated that the hospital industry as a whole could absorb the patients of a struck facility with only minor inconvenience since hospitals often operated below optimum occupancy level. He also reasoned that all elective surgery could be postponed. Finally, Taylor thought it improbable that all hospital employees would belong to the same union and thus proposed that hospital employees could be replaced or transferred from one facility to another for the duration of a strike.[27]

Of the three reasons proffered by Taylor to justify his conclusion that the threat of an emergency in the health care industry had been exaggerated, only the second reason, relating to postponement of certain nonemergency operations, remains valid in light of the 1974 amendments. If hospitals, complying with Taylor's solutions to problems created by strikes, transferred patients to other facilities or hired and borrowed replacement personnel from other facilities, the aiding hospitals could be struck under the "ally doctrine," which allows a union to extend its economic activity to any employer whose employees perform work that would have been performed by striking employees but for the existence of a labor dispute.[28] Illustrating the application of this doctrine, the Committee report on the proposed amendments suggested that a secondary employer who lends a primary employer employees with critical skills, such as EKG technicians, might not lose its status as a neu-

24. *See generally* 120 CONG. REC. 12,973 (1974) (remarks of Sen. Javits).

25. *See, e.g.*, Taylor, *Emergency Disputes Involving Privately Owned Local Level Services*, 22 LAB. L.J. 453 (1971).

26. *Id.* at 457.

27. *Id.* at 457-59.

28. Reading excerpts from the committee report on the proposed amendments into the record, Senator Cranston recognized this possibility:

> It has been held that where during the course of a labor dispute, a secondary employer performs work that, but for the existence of such labor dispute, would have been performed by the striking employees of the primary employer, the secondary employer loses his status as a neutral, and the labor organization is entitled [under the ally doctrine] to extend its economic activity to the secondary employer.

120 CONG. REC. 12,935 (1974) (remarks of Sen. Cranston).

tral.[29] Conversely, a secondary employer would "enmesh" itself in the primary dispute if it provided supervisors, nurses, or other staff of a non-critical nature.[30] In the absence of congressional guidelines for classifying critical versus non-critical occupations, one can only speculate as to the scope of permissible aid that one facility may render to another. Nevertheless, one possible consequence of the ally doctrine is that a strike begun against a single primary employer could be transformed into a large-scale community or area-wide strike involving all facilities exceeding these ill-defined boundaries. Thus Taylor's reassuring conclusions devaluing the importance of health care strikes need reassessment in accordance with the 1974 health care amendments.

III. The 1974 Health Care Amendments

Congress hoped to reduce the number of strikes occurring in the health care industry by enacting extraordinary provisions governing the relationship between health care institutions and their employees.[31] Of primary importance for purposes of this Note are sections 8(d), 8(g), and 213. To gather the import of these sections, it is necessary to summarize briefiy the provisions of the 1974 amendments and their relationship to a potential emergency strike. Essentially, the amendments internalize three cooling-off periods and provide for early intervention by the FMCS.

Section 8(d)(A) requires a ninety-day notice of a party's intention to modify an expiring contract and to negotiate a new one.[32] Although the comparable notice period in other industries is sixty days,[33] Congress felt that section 8(d)(A)'s longer notice period would provide more time for negotiation and mediation and serve to avert a strike.[34] If the parties are unable to reach an agreement within thirty days, they are required to notify the FMCS and appropriate state agencies.[35] Under section 8(d)(C), the FMCS is directed to employ mediation and conciliation to bring the parties to agreement. During this period, the parties cannot strike, and they must participate in the FMCS meetings in good faith.[36]

29. *Id.*
30. *Id.*
31. *See, e.g., id.* at 12,939 (remarks of Sen. Javits).
32. 29 U.S.C. § 158(d)(A) (Supp. V 1975).
33. *Id.* § 158(d)(1).
34. *See, e.g.,* 120 Cong. Rec. 12,939 (1974) (remarks of Sen. Javits); *id.* at 12,971 (remarks of Sen. Taft).
35. 29 U.S.C. § 158(d)(B) (Supp. V 1975).
36. *Id.* § 158(d)(C).

Because of the unique nature of the health care industry, Congress further enacted section 8(d)(B) requiring a labor organization to give thirty days notice to the FMCS and appropriate state agencies whenever there is a dispute in the negotiation of an initial contract.[37] Although Congress had not imposed this thirty-day notice requirement on other industries, it believed that this additional safeguard would help to avert health care strikes.[38] Section 8(d)(B), like section 8(d)(A), requires labor organizations to refrain from striking and to participate in mediative efforts according to the provisions of section 8(d)(C).[39]

In addition to the 8(d)(A) and (B) notice periods, Congress enacted section 8(g), which requires a labor organization to give ten days written notice to the institution and the FMCS "before engaging in any strike, picketing, or other concerted refusal to work."[40] This section has two primary purposes—to provide the FMCS with another opportunity to mediate the dispute and to allow the employer a few days to make preparations to ensure continuous patient care.[41]

Under section 213, the director of the FMCS is given discretionary authority to take extraordinary action during the ninety- or thirty-day period.[42] The director is permitted to establish an impartial board of inquiry to investigate an impasse if "a threatened or actual strike or lockout will, if permitted to occur or to continue, substantially interrupt the delivery of health care in the locality concerned. . . ."[43] The board has fifteen days to issue a written report containing its findings of fact and recommendations for settling a dispute.[44] After a report is issued, the parties to a dispute must maintain the status quo for fifteen days,[45] unless they specifi-

37. *Id.* § 158(d)(B).

38. *See, e.g.*, 120 CONG. REC. 12,974 (1974) (remarks of Sen. Taft).

39. 29 U.S.C. § 158(d)(C) (Supp. V 1975).

40. *Id.* § 158(g).

41. *See* Carroll, *supra* note 1, at 260. Carroll bases his conclusions on NLRB General Counsel Memorandum 74-49, *Guidelines for Handling Unfair Labor Practice Cases Arising Under the 1974 Nonprofit Hospital Amendments to the Act* (Aug. 20, 1974), *reprinted in* LABOR RELATIONS YEARBOOK, 1974, at 343 [hereinafter cited as *Guidelines*].

42. 29 U.S.C. § 183(a) (Supp. V 1975).

43. *Id.*

44. The board's functions are comparable to those functions assigned the Board of Inquiry appointed by the President under the National Emergency Dispute provisions, except that under the former provisions the board is permitted to make recommendations. *Compare* 29 U.S.C. § 176 (1970) *with* 29 U.S.C. § 183(a) (Supp. V 1975).

45. This 15 day period overlaps with the 8(d)(A) and (B) periods and the 8(g) notice to strike period. Vernon, *supra* note 1, at 206-07, presents two time charts which clarify this sequence of events.

cally agree to do otherwise.[46]

Despite Congress' care to include comprehensive requirements regarding pre-strike negotiations and mediation in the 1974 amendments, it deliberately refused to impose special limitations on health care employees' right to strike.[47] Congress hoped that the extraordinary provisions enumerated above would eliminate the need for strike regulation by reducing the number of disputes actually reaching the strike stage. Moreover, having documented that ninety-five percent of all pre-1974 health care strikes were recognitional in nature, it believed that giving health care employees recognition under the NLRA would remove that source of strikes.[48] Congress, however, recognized that even with extensive pre-strike safeguards, strikes could not be prevented."[49] In fact, it did not want to

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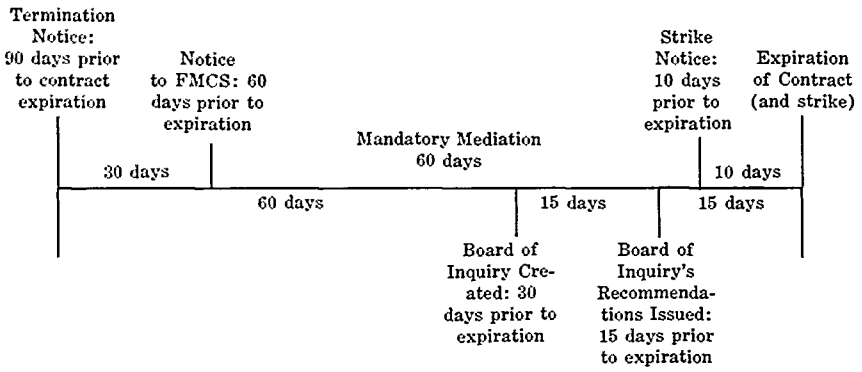
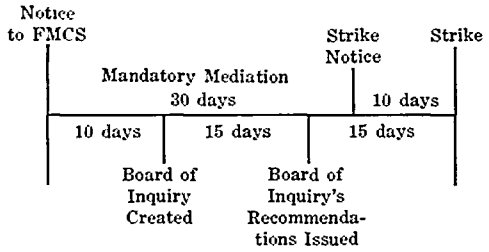
Vernon's time chart for the expiring contract is as follows:



Vernon's time chart for the initial contract situation is as follows:



46. 29 U.S.C. § 183(a) (Supp. V 1975).
47. *See, e.g.*, 120 CONG. REC. 12,939, 12,973 (1974) (remarks of Sen. Javits).
48. *See id.* at 12,939 (remarks of Sen. Javits).
49. *Id.* at 12,970 (remarks of Sen. Taft).

prevent all strikes and thereby deprive health care employees of an important economic weapon permitted by the NLRA. Thus section 8(g) implicitly approves two types of exceptional strikes that can occur at the end of the ten-day notice period.[50]

The first authorized exceptional strike arises when a health care institution is guilty of a "flagrant" unfair labor practice.[51] As an example, the committee report on the proposed amendments cited *Mastro Plastics Corp. v. NLRB*,[52] a case in which the employer interfered with the employees' right to select their own bargaining representative. The second exceptional situation in which strikes are expressly authorized occurs when an employer takes steps to undermine its bargaining relationship with a union.[53] Although a health care facility is permitted to take steps to ensure that the lives and safety of its patients will not be jeopardized by a strike, the facility would exceed permissible bounds if it stocked additional supplies or hired or borrowed large numbers of replacement personnel from other hospitals[54] in an effort to undermine employee concerted activities. According to guidelines issued to the Regional Offices,[55] a hospital is to make a written report, listing all preparations for an ensuing strike, and present this report to the union for its determination of whether the preparations are excessive.[56] If the union finds that the preparations are excessive and that the bargaining relationship is thereby undermined,[57] it may call a strike without waiting until the end of the ten-day period. The outer limit of "excessive preparations" has not been well defined, and consequently a union striking on this ground places itself in an insecure

50. *See* New York v. Local 144, Hotel, Nursing Home and Allied Health Services Union, 410 F. Supp. 225, 229 (S.D.N.Y. 1976); 29 U.S.C. § 158(g) (Supp. V 1975).

51. *Guidelines, supra* note 41, at 350. *See also* 120 CONG. REC. 12,935 (1974).

52. 350 U.S. 270 (1956).

53. Although the purpose of the ten-day period is to afford the health care institution an opportunity to prepare for a strike and ensure the well-being of its patients, Congress did not intend that the period be used to undermine employees' concerted activities. Senator Cranston, reading excerpts from the committee report into the record, stated: "Likewise, the public interest demands that employees of health care institutions be accorded the same type of treatment under the law as other employees in our society, and that the notice not be utilized to deprive employees of their statutory rights." 120 CONG. REC. 12,935 (1974).

54. *Id.*

55. *Guidelines, supra* note 41.

56. *Id.* at 31-32.

57. The *Guidelines* cite the following factors for determining whether an employer has abused the waiting period: the number of replacements being interviewed and/or hired, the permanency of the replacements, the number and type of supplies being ordered, the nature of the patients' illnesses, and the willingness of the union to permit the passage of supplies and personnel through its picket lines. *Id.* at 15.

position. Moreover, such an unexpected strike might endanger the lives of patients in the struck health care institution.[58]

The desire to ensure that unexpected strikes do not threaten patient safety led Congress to contemplate including a special provision relating to "emergency" disputes in the 1974 health care amendments. The contemplated regulatory scheme consisted of a cooling-off period analogous to the emergency provisions of the Railway Labor Act.[59] Fearing that the inclusion of a cooling-off period would preclude passage of any of the amendments, proponents strategically omitted this provision[60] and obtained letters of assurance from four major labor unions representing health care workers stating their belief that voluntary arbitration would be an appropriate technique to achieve a settlement.[62]

Unfortunately, Congress' reliance on the special provisions regulating bargaining and the letters of assurance from the unions might be undercut by definitional defects inherent in the statutory language. First, boards of inquiry, under section 213, must be established during the first thirty days of the 8(d)(A) mandatory mediation period or within the first ten days in 8(d)(B) initial contract negotiations.[63] As a practical matter, a strike could not occur during this period, and thus the determination of whether a board of inquiry should be convened must be made by conjecture long before a strike actually occurs.[64] Second, section 213 also requires a bargaining "impasse" before a board can be convened.[65] Because most impasses occur in the final days before a strike deadline, when it is too late to convene a board of inquiry,[66] the utility of section 213 may

58. *See* Carroll, *supra* note 1, at 260.

59. *See* 120 CONG. REC. 12,939 (1974) (remarks of Sen. Javits); *id.* at 12,970-73 (remarks of Sen. Dominick, Sen. Taft, and Sen. Javits).

60. In discussing this omission, Senator Javits stated:

> I did not offer such an amendment,. . . because I knew what a storm such an amendment would engender. [Instead] I sought to obtain all the assurance I could get from the labor unions involved in respect to this particular field as to voluntary action on their part to deal with this problem.

Id. at 12,939 (remarks of Sen. Javits).

61. The four unions were the National Union of Hospital and Nursing Employees, the International Brotherhood of Teamsters, the Service Employees International Union, and the Laborers' Union of North America.

62. Javits also stated that Congress could resort to ad hoc legislation if that were necessary. 120 CONG. REC. 12,940, 12,973 (1974) (remarks of Sen. Javits).

63. Vernon, *supra* note 1, at 212.

64. *Id.*

65. *Id.*

66. *Id.* at 212-13. Although it is technically possible for an impasse to occur in the early stages of bargaining, it is not likely.

be definitionally self-limiting. Third, Congress envisioned utilizing the facts and recommendations of the board of inquiry as the basis for an arbitrator's determination of the terms of a new contract.[67] If, however, a labor organization refuses to settle a contract because of its disagreement with the board's nonbinding recommendations, it is improbable that it will submit to binding arbitration based on the same findings and recommendations. These problems are not insurmountable, but they should be noted in evaluating the need for regulation of emergency strikes.

IV. Possible Regulation Under State or Federal Law

Having shown that Congress did not enact special provisions in the 1974 amendments regulating strikes, this Note will next examine possible regulatory legislation existing under state or federal law.[68] The standard of section 213, which is directed at strikes that "substantially interrupt the delivery of health care in the *locality* concerned"[69] suggests that the state arguably has the primary interest in regulating a work stoppage in the health care industry. The two principal alternative methods utilized by the states prior to 1974 to regulate work stoppages were direct seizure of the affected industry and injunction of the strike.[70]

The first method, direct seizure, enabled a state to seize an industry and use the National Guard to maintain services whenever a work stoppage jeopardized the well-being of its citizenry.[71] From a practical standpoint, direct seizure probably would not be a workable solution to a strike in the health care industry because of the unique services provided and the high cost of incompetence. In any event, direct seizure was eliminated completely as a viable alternative by the Supreme Court in *Division 1287, Amalgamated Association of Street, Electric Railway and Motor Coach Employees v.*

67. *Id.* at 213.

68. In NLRB v. Committee of Interns, 426 F. Supp. 438 (S.D.N.Y. 1977), the federal district court indicated that there is no national labor policy precluding state regulation of emergency strikes in the health care industry. In determining whether to enjoin a union's attempt to require a state labor board to assert jurisdiction over certain medical staff not employees under the Act, the court found that "there is no national labor policy which requires that housestaff be unregulated by all bodies of labor law and controlled only by the free play of economic forces." *Id.* at 453. As a practical matter, however, all state remedies may be pre-empted by the NLRA.

69. 29 U.S.C. § 183(a) (Supp. V 1975) (emphasis added).

70. Note, *supra* note 21, at 179-85; *see* notes 20-24 *supra* and accompanying text.

71. Note, *supra* note 21, at 180. This method had been applied mainly to public utility or transit company strikes.

Missouri (Division 1287).[72] In that case, the governor took possession under a Missouri statute of a public transit company and directed it to continue operations. Although the governor and the state court felt that the loss of the transit company's services would create a state of emergency, the Supreme Court held that direct seizure was in conflict with federal law.[73] Direct seizure of a health care facility, therefore, should be eliminated as a possible solution to the regulatory problem.

A closer question is presented by the second method previously available to the states to regulate work stoppages, that of an anti-strike injunction.[74] As in the case of industry seizure, the Supreme Court's holding in *Division 1287* is dispositive of the question whether an injunction against striking employees is a viable regulatory alternative. In *Division 1287* the state argued that the statute under which it sought an injunction to compel striking transit company employees to return to their jobs "represent[ed] 'strictly emergency legislation' designed solely to authorize use of the State's police power to protect the public from threatened breakdowns in vital community services."[75] The state court enjoined the strike, holding that the public interest, health, and welfare were jeopardized.[76] Recognizing the state's obvious interest in the dispute, the Supreme Court nonetheless held that the state legislation interfered with federally guaranteed rights and that the state's interest in preventing a local emergency was not sufficient to create an exception to the pre-emption rule,[77] which requires state courts to decline jurisdiction over cases arguably subject to the protection of section 7 of the NLRA.

Although the Court determined that the loss of public transit services did not give Missouri an overriding interest in regulating the dispute, it recognized certain specific instances in which a state would possess such interest: "[N]othing we have said even remotely affects . . . the right or duty of the chief executive or legislature of a State to deal with emergency conditions of public danger, violence, or disaster under appropriate provisions of the State's organic or statutory law."[78] It is arguable, therefore, that an emer-

72. 374 U.S. 74 (1963).
73. *Id.* at 82.
74. Note, *supra* note 21, at 180-85.
75. 374 U.S. at 80-81.
76. *Id.*
77. *Id.* at 81-82.
78. *Id.* at 83.

gency strike occurring in the health care industry and endangering the lives of community members could be distinguished from a public transit company strike and fit within the Court's exception. *New York v. Local 144, Hotel, Nursing Home and Allied Health Services Union (Local 144)*,[79] however, a case in point, may further restrict the applicability of this exception to health care strikes.

In *Local 144* New York sought an injunction in state court restraining the Union from striking the member facilities of the Metropolitan New York Nursing Home Association. While a temporary restraining order was in effect, the defendant union removed the action to federal court. The federal district court found that the 1974 amendments demonstrated that federal questions were involved in the dispute between nursing homes and their employees and that the amendments were intended to pre-empt state law.[80] Although the state attempted to distinguish nursing home strikes from less serious labor disagreements by arguing that the amendments "do not cover or pre-empt the State's interest in protecting its citizens and its exercise of the police power to enjoin strikes in the public interest,"[81] the court, citing *Division 1287,* held that federal law pre-empted the state's regulatory power and that section 8(g) of the amendments impliedly permitted strikes.[82] The holding in *Local 144,* applicable to a nursing home strike, presumably would negate state regulation of health care strikes under ordinary circumstances. If the situation truly endangered the lives of persons within these facilities, the state's interest might be greater and the situation might be categorized as an emergency meeting the criteria set forth in the exception to *Division 1287.*[83] With this possible exception, all state regulation utilized prior to 1974 is pre-empted by federal law.

The remaining current alternative for regulation of emergency strikes, the National Emergency Dispute provisions of the Labor Management Relations Act, outlines a procedure to be followed in the event "a threatened or actual strike . . . affecting an entire industry or a substantial part thereof . . . will, if permitted to occur or to continue, *imperil the national health or safety.*"[84] If in the

79. 410 F. Supp. 225 (S.D.N.Y. 1976).

80. *Id.* at 228.

81. *Id.*

82. *Id.* at 229.

83. This value judgment is based on the theory that maintenance health care services provided by a nursing home could be distinguished from emergency room and critical care services provided by hospitals.

84. 29 U.S.C. § 176 (1970) (emphasis added).

President's opinion the above standard is satisfied, he is authorized to appoint a Board of Inquiry, which will report to him its written findings of fact concerning the dispute in question.[85] Under section 208, the President then may direct the Attorney General to petition a district court having jurisdiction of the parties to enjoin the strike.[86] Before granting the injunction, however, the court must find that the strike meets the standard articulated in section 206.[87]

During the period when the injunction is in effect, the parties are under a duty, according to section 209, to make every effort to adjust and settle their differences with the assistance of the FMCS.[88] In the meantime, the Board of Inquiry will issue a second report elaborating the parties' relative positions and the employer's final offer of settlement.[89] The NLRB then will conduct a secret ballot election to determine whether the employees wish to accept the employer's last offer of settlement.[90] The results of this election are certified to the Attorney General, who moves the court to discharge the injunction.[91] If the parties settle their dispute without the aid of an election, the injunction also will be discharged.[92] Finally, the President reports to Congress his recommendations to enable Congress to take appropriate action.[93]

The threshold inquiry with regard to a "localized" health care industry strike is whether the strike satisfies the definitional standard of a national emergency dispute enunciated in section 206. For the purpose of such inquiry, the standard can be divided into relevant parts. The first requirement to be satisfied involves a determination that the strike in question imperils the national health or safety.[94] This terminology, unambiguous on its face, has been interpreted and modified by various court decisions. The word "safety" has become synonymous with defense and the phrase "health and safety" implies the national welfare,[95] which, ironically, was explicitly excluded from the standard in the congressional debates.[96] One

85. *Id.*
86. *Id.* § 178.
87. *Id.*
88. *Id.* § 179(a).
89. *Id.* § 179(b).
90. *Id.*
91. *Id.* § 180.
92. *Id.*
93. *Id.*
94. *See* note 84 *supra* and accompanying text.
95. Jones, *Toward a Definition of "National Emergency Dispute,"* 1971 WIS. L. REV. 700, 711-34.
96. *Id.* at 703-11.

of the few interpretations of the word "health," isolated from the remainder of the phrase, appears in Justice Douglas' dissent in *United Steelworkers v. United States*,[97] in which he stated: "Congress, when it used the words 'national health,' was safeguarding the heating of homes, the delivery of milk, the protection of hospitals, and the like."[98] Douglas' definition of the word "health," unlike an "economic well-being" interpretation, indicates that a strike in the health care industry is a primary target of the National Emergency Dispute provisions.

The question of coverage thus depends on whether a strike is considered to have national ramifications. The guidance afforded by prior case law must be utilized to determine the significance of the term "national." In this regard, the National Emergency Dispute provisions have been used to enjoin strikes affecting a single plant producing fissionable materials[99] and a steel strike in which one percent of the industry's work was defense related.[100] At the other extreme, they have been employed to enjoin a strike affecting shipping on the Atlantic, Pacific, and Gulf Coasts and the Great Lakes,[101] as well as a dockworkers' strike involving sixty-five thousand employees.[102] Each of these strikes had one factor in common—it affected the national defense or safety.[103]

One commentator has suggested that the liberal interpretation accorded national safety also should be applied to national health.[104] Health care strikes, however, unlike strikes threatening the entire nation, probably would be concentrated within a single community. Even if the ally doctrine widened the scope of the area affected by the strike, the effect would be at most regional.[105] Health care strikes thus would be classified as localized, and the National Emergency Dispute provisions would not apply.

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97. 361 U.S. 39, 62 (1959) (Douglas, J., dissenting).

98. *Id.* at 65.

99. United States v. Carbide & Carbon Chems. Corp., 21 L.R.R.M. 2525 (E.D. Tenn. 1948).

100. United Steelworkers v. United States, 361 U.S. 39 (1959).

101. United States v. National Maritime Union, 15 Lab.Cas. ¶ 64,599 (S.D.N.Y. 1948); United States v. National Maritime Union, 22 L.R.R.M. 2306 (N.D. Ohio 1948); United States v. International Longshoremen's Union, 78 F. Supp. 710 (N.D. Cal. 1948).

102. United States v. International Longshoremen's Ass'n, 116 F. Supp. 255 (S.D.N.Y. 1953).

103. Jones, *supra* note 95.

104. *Id.* at 735.

105. *See* notes 28-31 *supra*.

V. Alternative Legislative Proposals

Having determined that Congress did not enact special provisions regulating strikes in the health care industry, that the NLRA probably would pre-empt state legislation regulating strikes, and that the localized nature of a health care strike would preclude regulation under the National Emergency Dispute provisions, this Note now will focus on possible legislative alternatives that could be enacted to regulate emergency strikes.[106] Many of the alternatives have been proposed and critiqued as possible amendments to the NLRA. It is important, however, to reassess these alternatives as possible methods for regulating health care strikes because of the unique dependence the public demonstrates for the services provided by health care institutions.

In critiquing alternatives and determining which provides the most appropriate method for regulating health care strikes, the writer necessarily must make value judgments.[107] The biases inherent in this Note are: (1) that strikes are desirable economic weapons and should be curtailed only in true emergencies; (2) that self-determination and negotiated dispute settlement are superior to a governmentally imposed solution; but (3) that a strike jeopardizing the lives of patients within a health care facility and of the community at large necessitates some form of governmental intervention. This Note will attempt to ascertain the degree and form of intervention that best satisfy these biases in the regulation of emergency strikes.

A. Extension of the National Emergency Dispute Provisions

The first alternative is to extend coverage under the National Emergency Dispute provisions to local health care disputes. The purpose of these provisions is to avoid work stoppage and use federal intervention to maintain free collective bargaining and promote mature bargaining.[108] These goals, taken at face value, would be

106. Senator Javits suggests that ad hoc legislation can be used in particularly "nasty" situations. 120 Cong. Rec. 12,940 (1974) (remarks of Sen. Javits). *See* discussion at notes 135-47 *infra* and accompanying text.

107. In order to determine which legislative proposal offers more advantages than another, legislatures also must make both objective and subjective value judgments. This Note, therefore, will attempt to anticipate the balancing of advantages and uncertainties required in making such judgments.

108. Rehmus, *The Operation of the National Emergency Provisions of the Labor Management Relations Act of 1947*, 62 Yale L.J. 1047, 1048 (1953); Note, *The Compulsory Arbitration of Major Work Stoppages*, 8 Willamette L.J. 67, 68-69 (1972).

consonant with the purposes of the 1974 amendments.[109]

The National Emergency Dispute provisions, however, have been strongly criticized and might not be the most appropriate method of regulating health care strikes. Criticism is directed primarily at the procedural scheme to be followed in resolving an emergency dispute. First, critics note that section 206 leaves undefined the bases for the President's "opinion," which triggers the emergency provisions, and suggest that a more precise standard is needed.[110] The second criticism of the National Emergency Dispute provisions is directed at the restricted role played by the board of inquiry. Rather than assisting in the collective bargaining process, the board merely finds facts to support the President's utilization of the provisions.[111] Moreover, the board operates under two primary restrictions. The time constraints within which it must research and write its report are too brief for in-depth analysis and permit only an abbreviated resort to the media to inform the public of the issues involved in a labor disagreement, thereby eliminating public pressure that normally would be exerted on the parties to settle a dispute. In addition, the prohibition forbidding the board to make recommendations wastes the talents of its mediators.[112] The board could play a more helpful role in resolving emergency disputes if given a greater length of time in which to assess the criticalness of a dispute and the authority to make recommendations.[113]

The third criticism of the provisions is that the district court, basing its findings on the board of inquiry's report, merely rubber stamps the President's opinion and grants an injunction.[114] In the absence of independent judicial application of the standards set forth in the Act, the procedure for obtaining an anti-strike injunction is based solely on the President's assessment of the emergency

109. *See* note 10 *supra* and accompanying text.

110. *See, e.g.*, Jones, *supra* note 95, at 702; Marshall, *New Perspectives on National Emergency Disputes*, 18 LAB. L.J. 451, 453 (1967).

111. Lewis, *Proposals for Change in the Taft-Hartley Emergency Procedures: A Critical Appraisal*, 40 TENN. L. REV. 689, 689 n.3 (1973); Marshall, *supra* note 110, at 454-55; Rehmus, *supra* note 108, at 1055-57.

112. *See* D. CULLEN, NATIONAL EMERGENCY STRIKES 65 (1968); Rehmus, *supra* note 108, at 1055-57. Congress originally feared that recommendations made by the board would assume the authority of arbitration awards and nullify its neutral status in the dispute. *See* Rehmus, *supra* note 108, at 1056.

113. *See* Marshall, *supra* note 110, at 455; Rehmus, *supra* note 108, at 1056-58. Interestingly, the board of inquiry appointed by the director of the FMCS during the 8(d)(A) and (B) notice periods does perform these functions. 29 U.S.C. § 183(a) (Supp. V 1975).

114. Marshall, *supra* note 110, at 453; *cf.* Jones, *supra* note 95, at 720-21 (district court's review role analogous to court of appeals review of an administrative agency).

nature of the dispute.[115]

The fourth and fifth criticisms are directed at the actual implementation of an injunction and the nature of governmental intervention rather than the decision-making process. For example, commentators characterize the cooling-off period imposed by the statute as a "waiting period" during which collective bargaining sessions become "hollow gestures"[116] because there is no pressure on the parties to settle a dispute. The provisions requiring a secret ballot election among employees on whether to accept an employer's last offer of settlement also have invoked criticism. Critics argue that the election is "futile," because employees ordinarily will vote in accordance with their labor union's desires,[117] and knowing this employers will not present their best last offer.[118] In theory, the election could promote industrial peace by ascertaining the true positions of the parties. In reality, it may be merely a vote of confidence[119] in the union.[120]

The 1974 amendments incorporate many of the positive attributes of the National Emergency Dispute provisions while omitting the most controversial provisions.[121] First, the amendments create three cooling-off periods[122] during which parties to a labor dispute are required to participate in meetings with the FMCS aimed at bringing the parties to agreement.[123] By exerting pressure on the parties, the FMCS can ensure that bargaining sessions during cooling-off periods do not become "hollow gestures." Second, the FMCS is authorized to empanel a board of inquiry,[124] which is empowered to make recommendations.[125] Thus a board of inquiry empaneled pursuant to the 1974 amendments, unlike its counterpart under the National Emergency Dispute provisions, plays a vital role

115. Marshall, *supra* note 110, at 453.

116. *See* Lewis, *supra* note 111, at 689 n.3; Rehmus, *supra* note 108, at 1059; Note, *supra* note 108, at 73.

117. *See* CULLEN, *supra* note 112, at 66; Lewis, *supra* note 111, at 690 n.3; Marshall, *supra* note 110, at 455; Rehmus, *supra* note 108, at 1060-62.

118. *See* CULLEN, *supra* note 112, at 66; Rehmus, *supra* note 108, at 1062.

119. Rehmus suggests that the only situation in which the employees would accept the employer's final offer would arise when there is internal dissension. Rehmus, *supra* note 108, at 1062.

120. *See* CULLEN, *supra* note 112, at 66; Rehmus, *supra* note 108, at 1062.

121. For example, the 1974 amendments do not provide for a final offer election to be held.

122. *See* notes 31-41 *supra* and accompanying text.

123. *See* notes 42-46 *supra* and accompanying text.

124. 29 U.S.C. § 183(a) (Supp. V 1975); *see* notes 42-46 *supra* and accompanying text.

125. 29 U.S.C. § 183(a) (Supp. V 1975).

in labor dispute settlement.[126] The foregoing provisions promoting dispute settlement, together with the weaknesses inherent in the National Emergency Dispute provisions, eliminate the emergency dispute provisions as a viable alternative to strike regulation in the health care industry.

B. Building an Additional Cooling-Off Period into the 1974 Amendments

A second alternative legislative proposal is a modified version of the National Emergency Dispute provisions. This alternative, presented by Senator Dominick as a proposed addition to the 1974 health care amendments, provides for an additional sixty-day cooling period[127] and vests in the director of the FMCS discretion to establish a board of inquiry to investigate the issues involved in a dispute when, in his opinion, "a threatened or actual strike . . . will, if permitted to occur or continue, substantially interrupt the delivery of health care in the locality concerned. . . ."[128] By the terms of the proposal, a labor organization and a health care institution involved in a dispute must maintain the status quo[129] for thirty days while the board investigates the issues in the dispute and thirty days thereafter.[130]

The purposes of a sixty-day cooling-off period, according to Senator Dominick, are to build an additional safeguard into the Act, to aid the FMCS in its mediative attempts by providing the board of inquiry with another opportunity to make recommendations and to engage in fact finding, to aid in the resolution of significant local level strikes, and to ensure continuous patient care to the public.[131]

The proposed amendment substantially parallels the National Emergency Dispute provisions,[132] and by so doing, it suffers from many of the defects inherent in the provisions.[133] For example, because the 1974 amendments already have internalized three cooling-off periods, an additional sixty days of FMCS intervention probably

126. *See* notes 111-13 *supra* and accompanying text.

127. 120 CONG. REC. 12,970-77 (1974).

128. *Id.* at 12,970.

129. The maintenance of the status quo would mean that the employees could not strike and the employer could not make excessive preparations or lock the employees out (an unlikely occurrence).

130. 120 CONG. REC. 12,970 (1974) (remarks of Sen. Dominick).

131. *Id.* Senator Dominick's primary concern was with emergency health care strikes as defined in this Note. *See* text accompanying notes 16-18 *supra.*

132. *See* text accompanying notes 84-93 *supra.*

133. *See* text accompanying notes 110-20 *supra.*

would not achieve dramatic results. Furthermore, an additional sixty-day waiting period could heighten tension and prolong negotiations.[134] Governmental intervention imposing another cooling-off period therefore would not be an effective means of assisting in the resolution of a health care dispute.

C. *Compulsory Arbitration*

The third alternative legislative proposal is compulsory arbitration of a health care dispute. Compulsory interest arbitration is a process in which an impartial panel, appointed by the President, is charged with the duty of arriving at a settlement to be imposed on the parties to the dispute.[135] Congress could either enact an additional amendment imposing compulsory arbitration on the parties whenever an emergency strike occurs, or it could enact legislation on an ad hoc basis under the commerce clause.[136]

Most commentators advocating this method would impose it only as a last resort.[137] For example, if the parties repeatedly have failed to reach agreement through the bargaining process, it probably is more desirable to subject them to an imposed contract for a few years rather than to allow their intransigence to paralyze the entire economy.[138] In such circumstances, the parties arguably have abrogated their right to control the terms of the settlement.[139]

Conversely, the primary criticism of compulsory arbitration is that it undermines the collective bargaining process. Rather than bargaining and suffering the consequences of an economic test of strength, the weaker party, knowing that the dispute will be compulsorily arbitrated, will maintain an extreme position and allow the arbitrator to reach a compromise position.[140] In this vein, the differences between the parties are maximized, and the true needs of the parties may be obscured by their failure to negotiate an acceptable midpoint.[141]

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134. 120 CONG. REC. 12,971 (1974) (remarks of Sen. Taft).

135. *See* Note, *Ad Hoc Compulsory Arbitration Statutes: The New Device for Settling National Emergency Labor Disputes,* 1968 DUKE L.J. 905, 906-07.

136. *Id.* at 914.

137. Note, *supra* note 108, at 74; *cf.* Bernstein, *Alternatives to the Strike in Public Labor Relations,* 85 HARV. L. REV. 459, 467 (1971) (compulsory arbitration is an inherently unstable method for dispute resolution).

138. Note, *supra* note 108, at 75.

139. *Id.*

140. CULLEN, *supra* note 112, at 96-97; Bernstein, *supra* note 137, at 467; Lewis, *supra* note 111, at 692; Silberman, *National Emergency Disputes—The Considerations Behind a Legislative Proposal,* 4 GA. L. REV. 673, 682-83 (1970).

141. Lewis, *supra* note 111, at 692.

In addition, compulsory arbitration forces the government to play a major role in determining the content of a collective bargaining agreement, contrary to one of the basic purposes of the NLRA—to promote industrial peace through collective bargaining free from government intervention.[142] The parties engaged in the bargaining process likely will be jealous of their right to determine their terms and conditions of employment, and consequently, they will be unwilling to abide by a contract ultimately formulated by the government.[143]

Although compulsory arbitration would dispel public concern and probably would ensure continuity of patient care,[144] its desirability as an alternative to regulation of health care strikes is questionable in light of the rights of both health care institutions and employees[145] that would be sacrificed by its adoption. Health care institutions and employees are aware of the unique role health care plays in society, and their willingness to make some accommodations to the needs of the community probably will ensure continuity of patient care.[146] Moreover, it may not be desirable to dispel public concern because public pressure to settle a dispute is a valuable tool to bring the parties to voluntary agreement.[147]

D. Final Offer Selection

A fourth alternative by which health care strikes might be regulated, final offer selection, is analogous to compulsory arbitration. Final offer selection, like compulsory arbitration, is a process whereby an impartial tribunal decides the final terms of the parties' collective bargaining agreement. Unlike compulsory arbitration, however, each term of the contract is not arbitrated separately. Instead, the tribunal adopts one party's proposal[148] in its entirety. After the parties have submitted their proposals to the tribunal, they are required to bargain for a period of days with a designated mediator. During this period, the parties have a final opportunity to reach agreement and thus to avoid the possibility of being sub-

142. Silberman, *supra* note 140, at 683.

143. *See* Lewis, *supra* note 111, at 692; Note, *supra* note 135, at 905.

144. There is, of course, no guarantee that employees will not strike illegally. *See* 120 CONG. REC. 12,940 (1974) (remarks of Sen. Javits).

145. This alternative would necessitate the forfeiture of the employee's right to strike.

146. Employee awareness and willingness to make accommodations is evidenced in the four union letters of assurance. *See* text accompanying notes 61-62 *supra.*

147. The value of public pressure also was recognized in the context of settling disputes under the National Emergency Dispute provisions. *See* text accompanying note 112 *supra.*

148. Under most final offer schemes, each party would submit two proposals.

jected to the other party's more "reasonable" proposals. Because the more reasonable offer is adopted without modification, each party will, at least in theory, strive to present a middle ground proposal rather than assume an extreme position.[149]

Although final offer selection is less likely to undermine the collective bargaining process than compulsory arbitration, which discourages the parties from reaching a compromise position, critics predict that this method also would be subject to a kind of sophisticated gamesmanship between the parties.[150] Rather than reaching a reasonable position early in the bargaining sessions, the parties will state that their positions are firm until the final offers are made. At this time, each party, knowing that one proposal will be adopted in its entirety, will present its most reasonable overall proposal, which will include advantages on minor issues otherwise unacceptable to the other party.[151] Thus the parties can manipulate final offer selection to achieve results they cannot attain through bargaining.[152]

In order to evaluate the utility of the final offer selection proposal in the context of an emergency health care strike, legislators must determine whether gamesmanship will occur, and if so, whether it will undermine the proposal. In addition, the advantages of using this alternative as a regulatory device should be appraised. First, the proposal avoids interruption of crucial health care services.[153] Second, it exerts equal pressure on both a health care institution and its employees to act reasonably or be subjected to the other party's final offer for a term of years.[154] Third, government imposition of contract terms can be avoided if the parties make concessions during the period designated for negotiations after final offers are submitted.[155] These advantages, however, may be offset by the degree of government involvement they inject into the bargaining process and their requirement that employees forfeit the right to strike.[156]

149. Lewis, *supra* note 111, at 699-70; Silberman, *supra* note 140, at 688-90; *cf.* Rehmus, *Railway Labor Act Modifications: Helpful or Harmful?*, 25 INDUS. & LAB. REL. REV. 85, 92-93 (1971) (compromise offers more likely in salary disputes than in rules disputes).

150. *See, e.g.*, Lewis, *supra* note 111, at 699-700.

151. Rehmus suggests that experienced arbitrators would not willingly impose a contract on a party if it contained many minor injustices. Rehmus, *supra* note 149, at 93.

152. *See* Lewis, *supra* note 111, at 700; Rehmus, *supra* note 149, at 93.

153. This statement is qualified only to the extent that strikes always can occur illegally. *See* note 144 *supra.*

154. *See* Silberman, *supra* note 140, at 688.

155. *Id.* at 689.

156. Evaluated in accordance with the hierarchy of values stated at the beginning of section IV, neither a governmentally imposed contract nor total forfeiture of the right to strike

E. A Non-Stoppage Strike

The fifth alternative legislative proposal, a non-stoppage strike, although originally proposed as a device to be utilized in the public sector,[157] also may be an appropriate means of regulating an emergency health care strike. In the non-stoppage strike, operations continue as usual, but the employees specify a certain percentage of each employee's wages to be deducted from his salary, and paid into a special fund along with a comparable amount contributed by the employer. Financial penalties are imposed on both parties for failing to settle their dispute by certain specified deadlines.[158] This alternative thus imposes economic pressures on both parties similar to the pressures experienced during a strike without interrupting services.[159] Moreover, employees can exert additional pressure by increasing the specified percentage of wages directed into the special fund.[160]

Although a non-stoppage strike would ensure the continuity of vital health care services, would simulate the economic pressures of a strike, and would produce an agreement through the bargaining of the parties, its effectiveness in the private sector may be limited.[161] The first major obstacle to utilization of a non-stoppage strike in the health care industry is that of administration.[162] In order to apply economic pressure on a health care institution, administrators would be required to derive a formula by which to account for the amount of profits the employer is spared from losing.[163] Such a determination should be made whether the economic pressure will be equalized or will be calculated according to the parties' relative bargaining strengths.[164] The second major obstacle is enforceability of a non-stoppage strike.[165] It would be difficult, if not impossible, to ensure that "striking" health care employees are working at their usual levels of efficiency when their take-home pay

is a desirable outcome. They must, however, be weighed against the advantages to be gained by adoption of tbis regulatory device.

157. Bernstein, *supra* note 137, at 469-70.

158. CULLEN, *supra* note 112, at 103.

159. *Id.* at 104; Bernstein, *supra* note 137, at 470; Lewis, *supra* note 111, at 698.

160. Bernstein, *supra* note 137, at 470.

161. *See* CULLEN, *supra* note 112, at 104-06; Bernstein, *supra* note 137, at 473.

162. CULLEN, *supra* note 112, at 104-05; Lewis, *supra* note 111, at 698.

163. Bernstein, *supra* note 137, at 473. The problem of accounting for profits is nonexistent in the public sector, and thus bargaining strengths can be assessed more evenly. *Id.*

164. *Id.*

165. CULLEN, *supra* note 112, at 105; Lewis, *supra* note 111, at 698.

is reduced by a significant percentage[166] and when they are deprived of the "psychological release" experienced by employees participating in a walk-out.[167] The health care institution is confronted with the dilemma whether to discipline employees who are less efficient in their work or who participate in absenteeism.[168]

Although the alternative of a non-stoppage strike produces a collective bargaining agreement negotiated by the parties, rather than an agreement imposed by the government, the administrative difficulties manifested in the proposal may be insurmountable. Because of the uncertainties involved in this proposal, it should not be considered as a viable regulatory device for the health care industry at the present time.

F. The Partial Strike

The final alternative examined in this Note is the partial strike. Under this proposal, the government would determine what degree of operation was "minimally" necessary in order to continue vital services to the community while the parties attempted to resolve their dispute.[169] During the partial strike, certain employees would be selected to work under the old employment conditions, and others would stay out on strike.[170] The labor organization thus has the advantage of exerting economic pressure on the employer while the bargaining is in process and settlement is reached, but an emergency is averted by the continued partial operation of the employer's business.[171]

Critics of the partial strike alternative point out the difficulty in determining what level of operation is necessary to avert an emergency and, at the same time, maintain the proper level of economic pressure on the employer.[172] Determining which employees will work and be paid or which facility will continue operations also poses a difficult problem.[173] Furthermore, the employees selecting to work

166. Lewis, *supra* note 111, at 698.

167. CULLEN, *supra* note 112, at 105.

168. *Id.*

169. *Id.* at 85; Silberman, *supra* note 140, at 686.

170. Lewis, *supra* note 111, at 696-97; Silberman, *supra* note 140, at 686.

171. *See* CULLEN, *supra* note 112, at 85, 118-20; Silberman, *supra* note 140, at 687-88.

172. Lewis, *supra* note 111, at 697; Silberman, *supra* note 140, at 687. Moreover, the pressure of partial operation could, in some cases, be greater than the economic pressure of a complete shutdown. CULLEN, *supra* note 112, at 119; Lewis, *supra* note 111, at 697; Silberman, *supra* note 140, at 687; *cf.* Rehmus, *supra* note 149, at 92 (no guidance for such determination in transportation disputes).

173. CULLEN, *supra* note 112, at 119; Lewis, *supra* note 111, at 697; Silberman, *supra* note 140, at 687.

while their peers are striking may experience diminished incentive to maintain their usual level of efficiency. The employer, as in the case of non-stoppage strikes, is faced with the dilemma whether to discipline inefficient employees.[174] Finally, partial operation may lessen public pressure to settle the dispute and thereby prolong the strike.[175]

Despite these criticisms of the partial strike provision, it might be the most appropriate[176] regulatory device for resolving emergency health care strikes. Although the determination of the degree of operation necessary to continue vital services would be nearly impossible in some industries, the determination probably could be made with reasonable accuracy for the health care institutions involved in a labor dispute.[177] Moreover, because the unions involved have displayed a willingness to cooperate to ensure patient safety,[178] health care employees undoubtedly would cooperate and voluntarily increase health care operations if a natural disaster or major accident occurred.[179]

The second concern of this proposal's critics can also be dismissed. Although continued partial operation may be more expensive for health care institutions,[180] financial concern is outweighed by society's dependence on health care services. Furthermore, the municipality or community benefited by the continued operation might be able to reimburse the employer from the public treasury, thereby ameliorating any financial difficulties.

The two most noteworthy advantages to be gained from utilization of a partial strike are: (1) that the process of free collective bargaining is encouraged and the settlement of the dispute is negotiated; and (2) that the health care employees are not deprived of the strike as an economic weapon. This alternative thus presents a viable solution to the need for regulation of an emergency strike in the health care industry.

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174. *See* Lewis, *supra* note 111, at 697.

175. Public pressure on both parties can assist in negotiating a settlement. *See* notes 112 & 147 *supra.*

176. "Appropriateness" is obviously a value judgment made in accordance with the hierarchy of values set forth at the beginning of section IV *supra.*

177. There have been many studies made of hospital efficiency levels. *See, e.g.,* notes 25-27 *supra* and accompanying text. Moreover, the government probably could estimate the minimum number of health care employees necessary to maintain partial operation by examining hospitals' admission records.

178. *See* text accompanying note 62 *supra.*

179. *Id.*

180. *See* text accompanying notes 172-73 *supra.*

VI. Conclusion

Arguably, an emergency strike in the health care industry might never occur. If an emergency strike does not occur, the 1974 amendments will adequately protect all parties to a dispute and foster free collective bargaining. In the event such a strike does occur, however, it cannot be regulated effectively by existing legislation under either federal or state law. With the objectives of providing minimal governmental interference and of retaining the employees' right to exert economic pressure on the health care institution, this Note has examined various alternative legislative proposals to regulate an emergency strike. Only the final offer selection proposal and the partial strike proposal satisfy these objectives in the unique context of the health care industry, and they alone should be considered as viable alternatives for the regulation of health care strikes.

Susan A. Jones

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