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The Taft-Hartley Act—Punishment or Progress

By James R. Richardson*

I. INTRODUCTION

It is the writer's rather firm conviction that the Labor-Management Relations Act of 1947, hereinafter referred to by its unpopular name, the Taft-Hartley Act, is a constructive, progressive and comprehensive approach to equitable labor-management relations, rather than a living example of vengeful legislation as its opponents would have us believe.

With this premise flatly stated it necessarily becomes the purpose of this article to attempt to justify such by examining the labor picture prior to the enactment of the Taft-Hartley Act, and then to seek, through reference to decisions of the courts, National Labor Relations Board (NLRB) rulings, and the Act itself, the material changes in labor-management relations effected by the Act.

Much has been said about the Taft-Hartley Act. Much has been written and will be written about this embattled Act, which has to date fully withstood the onslaughts of organized labor in both Democratic and Republican dominated Houses of Congress. It is a fair assumption to state that all indications are to the effect that in the main it will continue to withstand attacks from all sources. The American Federation of Labor and the Congress of Industrial Organizations, having failed in a joint attempt to defeat Senator Robert Taft in the Ohio senatorial election and seeing their espoused candidate lose in the past presidential election, now speak of amendment rather than outright repeal. President Eisenhower stated during his campaign, in an address directed to the attention of labor, that it was important that we continue in law the encouragement of collective bargaining; the right to strike; an advance notice before a strike is called; a requirement

* A.B. 1930, Eastern Teachers College; LL.B. 1935, University of Kentucky; 1944-48, Assistant Attorney General of Kentucky; Associate Professor of Law, University of Florida; member of Kentucky and Florida bars and American Bar Association.

that both unions and employees remain true to their contracts; and the assurance that members of unions get a regular report on their organization's finances. Examination of this pronouncement coupled with the make-up of the present Congress will lead one to the conclusion that the Taft-Hartley Act will undergo no more than amendment in the foreseeable future, with fundamental provisions remaining intact.

As to amendments to the Act it was inescapable that such a far-reaching piece of legislation would develop "bugs" in application that would require ironing out through necessary legislative action. We will have more to say with respect to possible changes in the Act later.

The writer, in commenting on the Taft-Hartley Act, is chiefly motivated by the conviction expressed above as to the soundness of the Act and the further belief that the Act receives its most forceful attacks from self-serving interests, from those who actually receive benefit from it, and from those who are not informed on the subject. In the self-serving category we may place labor leaders who refuse to accept the fact that the pendulum was bound to swing back in time, and those who make political capital of a subject that has great collective vote-getting appeal. This belief, is not without basis in fact and can be substantiated by certain statistical data. In the summer of 1948 a magazine with large national circulation published the results of a poll of labor itself on the Taft-Hartley Act.² The result, if not startling, may at least incidentally reveal that we Americans, in the exercise of our prerogatives, will express an opinion on anything from such a prosaic subject as the weather to nuclear fission with only the slightest of encouragement. So the writer ventures to state that a majority of those who condemn the Act could not name an instance in which it amends the National Labor Relations Act of 1935, hereinafter referred to by its popular name, the Wagner Act.³ Let this statement be taken, not as criticism of lack of knowledge of a highly technical piece of legislation, but rather, as an indication of how well-directed and oft-repeated propaganda can mold public opin-

ion and thus influence, if not control, social legislation as well as that in other fields.

The poll of labor referred to above, conducted by the opinion Research Foundation, revealed that of all the employee-class polled only 32% approved passage of the Taft-Hartley Act as such while at the same time they approved its ten major features in percentages ranging from 51% to 86%. Briefly, 69% approved prohibition against job discrimination by unions; 78% approved the 60 day cooling off period before strikes are called; 79% approved the provision for the union shop; 86% favored union financial reports being made available to union members; 76% favored the anti-communist oath by union officials; 76% favored unions liability to management for breach of contract; 68% favored the prohibition as to compulsory check-off of union dues and fees; 56% favored prohibition as to contributions to union political fund; and 78% favored the national emergency provision for vote on “last offer” after 80-day period prior to a strike being called.

Consider the results of this poll. What are its implications? What does it demonstrate to you? Organized labor is the avowed enemy of the Act and has, through political action, made the Act its chief target. The poll shows quite emphatically that the laboring man favors the actual provisions of the Act when disassociated from it, but opposes the Act by name. This disapproval we conclude is due to repeated propaganda barrages by the unions, which have convinced their members that the Act is bad medicine. We will not pass judgment on the motives of the union officials, but rather leave it to the reader to decide whether this condemnation is sincere.

It is significant that those most directly concerned, the workers themselves, favor the Act in principle while labor union officials, and even a former President of the United States, freely use the rabble-rousing phrase, “Slave Labor Act”, while invariably not citing one specific instance wherein labor is unduly prejudiced by the Act.

Further, it is much to be doubted that the average rank and file labor union member can distinguish between the closed shop and the union shop. Yet opinions are freely passed on the Taft-Hartley Act which bans the closed shop and recognizes the union shop—a democratic institution approved by labor individually.
It is quite within reason that those who are either anti-labor or anti-capital will remain adamant in the face of argument in favor of the Taft-Hartley Act. Yet, it is believed that those who may be classified with the great majority, as pro both elements, will find the Act acceptable. The Act is the culmination of months of painstaking work and research, of committee reports and hearings and of Congressional debate in an attempt to equate the rights of labor and management and reconcile that which might well be termed the irreconcilable. It is a highly intricate form of legislative drafting and is a tribute to the efforts of its authors, though study and analysis of it may well result in spots before the eyes at times.4

From a slightly facetious deviation let us return to a further serious conviction of the writer that in order to preserve private enterprise and free labor, the Taft-Hartley Act, or its substantial equivalent, must not only remain on the statute books, but must be accepted in a spirit of give and take by the parties in interest lest we drift further down the road to the left on the wings of some “ism”, be it socialism or statism, which is the dole in disguise—the concomitant of national decay.

Perhaps the writer, by the foregoing introductory remarks, has fully convinced the reader of a biased mind. Possibly such is the case, and our purpose is to dissipate old prejudices and create new ones. If such can be done by no misstatement of facts it is a legitimate objective, for Chief Justice Holmes once remarked to the effect that any man who claimed he was unbiased on any particular subject was either a prevaricator or uninformed thereon. The desirable bias is one equally favoring capital and labor, with the day to become only a memory when members of Congress are labeled “friends” or “enemies” of labor.

For purposes of continuity and as a stage setting, it will serve at least incidentally the main objective of this writing to consider briefly the history of the so-called labor movement in America.

Labor’s early struggle to achieve even the bare right to organize in order to bargain on a basis of equality in regard to wages

4 Judge Learned Hand once wrote thusly in regard to the income tax law: “The words of such an act as the Income Tax merely dance before my eyes in a meaningless procession” (a pity the aptly named judge apparently permitted such an act to influence some of his opinions to so affect the writer). Davidson, Judge Learned Hand: Titan of the Law, Coronet, Sept. 1949, p. 111.
and hours is a familiar story, and forms a sordid part of the history of our otherwise magnificent industrial growth. Management's answer to labor's most effective pressure device, the strike, became known as "government by injunction" and this phase of our economic history is equally familiar to those interested in the field of labor relations.

Organized labor's long and determined struggle to reach a position from which it could wage an unhampered two-fisted fight with management was inevitably to be crowned with success under a democratic form of government and it rapidly became a reality with the philosophy of the New Deal Administration of 1932 and a Supreme Court which became amenable thereto.

Looking backward for a moment, let us recall that in 1917 the Supreme Court had held that a court of equity might properly cause an injunction to issue restraining attempts to organize employees bound by contract with their employer not to join a labor union. This "yellow-dog contract" became widely used by employers and, under continued legal sanction, would have been the death knell of organized labor. Unions found it increasingly difficult to maintain hard won gains and practically impossible to organize new areas or new industries. Organizational efforts in the face of company enforced "yellow-dog contracts" resulted in blood, violence and defeat, whereby union leaders very rightly became convinced that new legislation was necessary if their development was not to be frustrated and their very existence was not to be threatened.

Union leaders made insistent demands in both the fields of substantive and procedural law. Specifically, they desired a greatly restricted use of the injunction in labor disputes; outlawing of the "yellow-dog" contract; widening of the bounds of legitimate labor purposes to permit strikes and picketing in the absence of employer-employee relationship; abolition of judicially applied tests of what constituted restraint of trade; abatement of the common law conspiracy as applied to union activity; and nonliability of unions for unauthorized acts of violence by individuals.\footnote{Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).} \footnote{Teller, Government by Injunction, 1 LABOR L. J. 41 (1949).} \footnote{See Witte, THE GOVERNMENT IN LABOR DISPUTES 277 (1932).}
The use, or more properly misuse, of the injunction, whereby in an ex parte proceeding a temporary restraining order frequently issued with its sole basis being a petition backed by specious affidavits of representatives of private investigative agencies was most bitterly fought by the unions. Though the order might ultimately be dissolved on hearing to make permanent, more often than not management’s objective was obtained by the long drawn-out court proceedings resulting in the strike being effectively broken up before final order was entered on the extended hearing.

Final and almost complete victory over the labor injunction was achieved when the Norris-LaGuardia Act became law in 1932. The purpose of this so-called anti-injunction statute was to prevent the federal courts from issuing injunctions against union activities occurring within the context of “labor disputes” which (reference to the Act will show) are not limited to the existence of an employer-employee relationship. Through passage of this Act labor apparently achieved its full program, including a provision in Section 3(a) of the Act which declared the “yellow-dog” contract to be against public policy and unenforceable. The Act did not fully outlaw the labor injunction, but it did so for all practical purposes, for now the shoe was on the other foot and the injunction could issue only after a full hearing, with a showing of irreparable damages, and that local law enforcement agencies could not or would not give protection. Many states thereafter passed their own “little Norris-LaGuardia Acts.”

To demonstrate further labor’s triumph through friendly legislation we see the federal judiciary broadly interpreting the Act and denying itself the right to inquire into the background of labor activity so long as a “labor dispute” was found to exist, refusing to inquire as to the purpose of a strike, holding that picketing in the absence of a strike is legal and that secondary boycotts are legal and unenjoinable.

Despite these extraordinary and positive gains by the unions, their leaders soon found that employers could still hamper their

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10 Wilson & Co. v. Birl, 105 F. 2d 948 (3d Cir. 1938).
organizational efforts through such means as discharge of union agitators and the refusal to bargain collectively. The unions turned again to the government for assistance, this time seeking affirmative relief in their efforts to organize labor. The answer to their demands and pleas came in the form of the Wagner Act, above mentioned, which was the first attempt at a labor relations act which had as its purpose the promotion of collective bargaining. In this respect, as in others, the Act was strictly unilateral in spirit and substance as the burden of bargaining collectively in good faith was not placed on the unions. Whereas the anti-trust and anti-injunction statutes provided a negative type of relief, such an act as the Wagner Act affirmatively declares that the employer cannot interfere with employee organizational activity and that employers are under a legal duty to bargain collectively with labor representatives. As in the case of the Norris-LaGuardia Act, the Wagner Act soon found its counterpart enacted in many states seeking to get on labor's booming band wagon.

The Wagner Act was actively enforced through an administrative agency, the National Labor Relations Board, created by the Act itself. Cease and desist orders issued almost indiscriminately from this Board requiring abstinence from interference with any and all union activity, including numerous orders for reinstatement of employees with back pay and many orders requiring employers to bargain collectively. This eager activity of the NLRB in the early years of its inception can perhaps be excused or explained by the "growing pains" or "new broom" theory and the necessity for settling down onto an even keel, which usually follows in time in a well ordered society. As a result of the Norris-LaGuardia Act, the Wagner Act, and liberal interpretation and application thereof by the courts, the labor movement received prodigious impetus, with union membership increasing from about three million persons in the early thirties to sixteen million in the late forties. These figures standing alone show that unions are bound to exert a powerful force in our political and social economy and such is a healthy situation if the organizations know their own strength and realize their obligations to the general public.

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14 CCH, A GUIDEBOOK TO LABOR RELATIONS LAW 10 (1950).
The 16,000,000 union members may on the face of it seem relatively small when it is pointed out that as of May, 1950, the Bureau of Census of the U. S. Department of Commerce estimated the civilian labor force at nearly 63,000,000. Of this number, approximately 43,000,000 were wage and salaried workers, who constitute the potential union area. Union membership, then, accounts for about 38% of the regular wage and salary earners. This percentage is not impressive until one considers the number of non-organized workers presently considered not easily organized by the unions' own standards. This includes over 8,000,000 agricultural workers, plus domestic help and the middle-class white collar workers.

On the other hand, and to the credit side for the unions is the fact that labor is 80 to 100 percent unionized in transportation, coal and metal mining, the steel industry, automobile and aircraft, clothing and shoe industries, shipbuilding, construction, rubber products, telegraph, newspapers and communications, and motion pictures.\(^1\)

From 1935 till the enactment of the Taft-Hartley Act in 1947 our national labor policy can be likened to a man attempting to hold to a straight course in a rowboat with only one oar in an oarlock. As Mr. Teller has commented in his excellent article heretofore referred to, "... singlemindedness, though it may often be a virtue among individuals, is rarely a mark of wisdom in legislation."\(^2\) For the period of years just mentioned we were, most unfortunately and inequitably, totally without a bilateral policy to govern labor and management in their inseparably close relations. Management became the "whipping boy" on which labor could vent its anger for wrongs of the past, real and fancied. To illustrate: no order could be entered by the NLRB against labor unions under any authorization of the Wagner Act, because that Act directed itself mainly to employer violations or wrongdoing. And, in general, no mandate against unions could be issued under any federal law, because the Norris-LaGuardia Act, as interpreted, had pretty thoroughly withdrawn union activity from the purview of the courts.\(^3\) Further in point, be it noted that

\(^1\) P-H, THE HOUSE OF LABOR 60-63 (1951).
\(^2\) Teller, Government by Injunction, 1 LABOR L. J. 40, 43 (1949).
\(^3\) United States v. Hutcheson, 312 U.S. 219 (1941).
while, as we have mentioned, the Act required only the employer to bargain collectively with the employees' duly designated bargaining agent,\textsuperscript{18} it failed to protect the employer from a union claim of unfair labor practice when a third party boycotted the employer to thereby upset the bargaining agreement.\textsuperscript{19} Nor was a remedy available when a union boycotted an employer because he assigned work to members of another union. Featherbedding, jurisdictional strikes and secondary boycotts were rife and were not the subject of legal intervention.\textsuperscript{20} Union officials were indeed unhobbled, and firmly seated in the saddle with sharp spurs.

As indicative of the trend and, as further indication of the need for corrective legislation, let us examine a few leading cases more closely. The landmark case of \textit{Thornhill v. Alabama}\textsuperscript{21} established the doctrine that peaceful picketing is protected activity under constitutional guarantees of free speech. That peaceful picketing is a legitimate, protected activity is not novel, but that picketing is a form of speech may well be. However, those who accept the doctrine as sound should find difficulty in rationalizing the refusal of courts, prior to the Taft-Hartley Act, to concede employers the right to advise their employees on labor-management problems under this same constitutional guarantee of free speech.\textsuperscript{22} Disregarding the one-sided application of the Constitution, it seems beyond argument that picketing constitutes an overt act, is not pure speech and that the doctrine of the \textit{Thornhill} case came about as a matter of expediency in overriding a state statute.

In \textit{NLRB v. Star Publishing Company}\textsuperscript{23} the company as a result of pressure from the Teamster’s Union, which halted delivery of all newspapers, discharged its circulation department employees who were members of a rival union. Despite the fact that the company was squarely in the middle of a jurisdictional strike it lost either way it turned, for the desperation move to save its

\textsuperscript{18} Elbe File & Binding Co., 2 N.L.R.B. 906 (1937).
\textsuperscript{19} United States v. Building & Construction Trades Council, 313 U.S. 539 (1941).
\textsuperscript{20} United States v. Musicians Union, 318 U.S. 741 (1942).
\textsuperscript{21} 310 U.S. 88 (1940). See, however, Hughes v. Superior Court, 339 U.S. 460 (1950), wherein the view is adopted that industrial picketing involves patrol of a particular locality and is more than mere speech, as the presence alone of a picket may induce action of one kind or other irrespective of ideas being disseminated.
\textsuperscript{22} NLRB v. Jones Foundry, 123 F.2d 552 (7th Cir. 1941).
\textsuperscript{23} 97 F.2d 465 (9th Cir. 1938).
business resulted in a finding of guilty of an unfair labor practice. A legislative solution, which the court suggested the company should seek, has been provided by the Taft-Hartley Act.

Only a year prior to the above cited decision the New York Court of Appeals reached a somewhat unusual and interesting result in a case that purportedly involved a labor dispute. In this much discussed case the court held that the union’s activity in picketing a product in a retailer’s store was unenjoinable, and this where the dispute was with the manufacturer only. The court did not bother to go into the fine points of how a few cans of processed meat on the shelves of a general retail outlet could be picketed without picketing the entire stock in trade. How the picketing could be carried on without picketing the dealer, with whom no original dispute existed, defies explanation. Those experienced in the effectiveness of picket lines will never believe that all customers will cross a picket line to purchase unpicketed products. The court tried to distinguish this case from its prior holding that a sole proprietor could not be picketed to force him to employ union labor. Such secondary activity was widely countenanced on a much broader scale in the Wagner Act era.

In Senn v. Tile Layer’s Union the Supreme Court refused to enjoin picketing which was instituted to force Senn to quit working on his own small contracting jobs with two or three journeymen tile layers whom he employed. The complainant’s factual contention that he was ineligible for union membership; that he would be driven out of business if not permitted to work unmolested on his own job; and that an adverse ruling would in effect deprive him of the right to work with his own hands fell on unsympathetic ears. It is easy to imagine what this outraged citizen thought of the brand of justice dealt him by a court of justice.

In discussing two very significant labor cases of the Wagner era, it is necessary to refer to the Sherman Anti-Trust Act, the Clayton Act and early leading decisions thereunder. In the celebrated Danbury Hatters case the union instituted an effec-

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301 U.S. 468 (1937).
26 Stat. 209 (1890).
38 Stat. 730 (1914).
Loewe v. Lawlor, 208 U.S. 274 (1908).
tive nationwide secondary boycott, and, in this first labor case under the Sherman Act, the Court found that this interference with interstate trade was an unlawful combination in restraint of trade. Such decisions led to passage of the Clayton Act in 1914. In addition to limiting the use of injunctions by this Act, Congress apparently attempted to take labor unions out from under the anti-trust laws, to-wit: "... nor shall such organizations (i.e., labor unions) ... be held or construed to be illegal combinations or conspiracies in restraint of trade." Thereafter, when our Supreme Court was called upon in the Duplex case\textsuperscript{30} to construe the Clayton Act in regard to labor unions it circumvented Congressional intent and found that labor unions were still right where they were prior to this Act with respect to the anti-trust laws.

Returning now to the era of a new labor law philosophy after this sketchy history we pick up at the point when the Apex Hosiery case\textsuperscript{31} was before the Supreme Court. In this period of a well remembered wave of sit-down strikes, and when only eight of Apex's twenty-five hundred employees were union members, the union, in order to force a closed shop contract, directed a sit-down strike and plant seizure. The factory was taken over in its entirety and all building locks were changed. The union people, in addition to breaking windows and wrecking machinery, refused a plea of the company for permission to remove 134,000 dozen pairs of manufactured hosiery for which out of state orders were outstanding.

The company, relying on previous decisions, sought recovery of triple damages under the Sherman Act rather than avail itself of an action for damages in the state court. In denying recovery the court placed emphasis on "intent" as first set forth rather artificially in the Coronado cases\textsuperscript{32}. The court was of the opinion that the primary objective of this violent activity was to force the company to capitulate to the union's demand for the closed shop, and not for the purpose of controlling the silk stocking market.

If any lingering doubts remained as to whether unions could in any circumstances become liable under the Sherman Act they

\textsuperscript{30} Duplex Printing Co. v. Deering, 254 U.S. 443 (1921).
\textsuperscript{31} Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).
\textsuperscript{32} Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).
were dissolved by the decision in the *Hutcheson* case.\textsuperscript{33} We do not quarrel with the result but the manner in which it was reached.

By a shocking process of legalistic legerdemain the Court, speaking through Justice Frankfurter, expressed the opinion that Congress had in fact removed labor unions from the coverage of the anti-trust laws, thereby casting "intent" into discard and relieving the Court of the onerous duty of reversing its earlier decisions, notably the *Duplex* case, to reach the desired result, whereby the boycott in this case was held to be within the protective coverage of Section 20 of the Clayton Act.

The Court reached this result by finding that Sections 4 and 13 of the Norris-LaGuardia Act (which had become law in 1932, subsequent to the *Danbury Hatters* and *Duplex* decisions) redefined the protected union activity set out in Section 20 of the Clayton Act. It thereupon in effect wrote these sections back into the Clayton Act and within its so-called catch-all phrase, "... nor shall any of the acts specified in this paragraph be considered or held to be a violation of any law of the United States." The dissent described this result as, "a process of construction never, as I think, heretofore indulged in by this court."\textsuperscript{34} As a sole exception to the rule laid down, the Court in another case recognized union liability under the Sherman Act where the combination found to be in restraint of trade was by and between the union and an employer acting in concert.\textsuperscript{35}

Having attempted to point out the preeminent position labor had achieved under the Wagner and Norris-LaGuardia Acts, which resulted in the protected use of jurisdictional strikes, secondary boycotts, featherbedding and other make-work techniques without let or hindrance from strictures of the injunction or anti-trust laws, we have, so to speak, set the stage for the Taft-Hartley Act and the changes in labor-management relations sought to be achieved thereunder in the pursuit of that ever elusive industrial peace.

\textsuperscript{33} United States v. Hutcheson, 312 U.S. 219 (1941).
\textsuperscript{34} *Id.* at 245.
\textsuperscript{35} United States v. Brims, 272 U.S. 549 (1926).
II. TAFT-HARTLEY ACT

A. General Scope

In considering the Taft-Hartley Act, it is perhaps well to recall at this point that the Wagner Act, as amended, is incorporated and becomes Title I of the Taft-Hartley Act. Further, in speaking of labor relations law, we should make delayed mention of the fact that we are thinking of union activity and not the broader field of labor law which includes also child labor law, minimum wage and hours law, veteran’s reemployment preferences and social security.

The Taft-Hartley law, as its stated policy denotes, attempts to strike a balance between labor’s and management’s rights, duties and obligations, stressing the great public interest in all such problems. The full effect of the Act and its impact on labor, management, the public interest and the national economy cannot be known at this time. It has been in effect approximately six years only, and has been in operation during what might be termed a boom period of peak employment and unusual economic circumstances. Further, as will be pointed out in more detail, management in the interest of amicable relations, has been reticent to attempt to fully enforce its rights thereunder.

It would be impossible in a limited space to examine the Act in detail with all its provisions and implications. Too, this would result in much speculation as much remains to be judicially construed by our highest court. The Act may be set up in brief outline as follows:

Title I. Amending the Wagner and Norris-LaGuardia Acts with new concepts of collective bargaining and unfair labor practices.

Title II. Creates a new mediation and conciliation service.

Title III. Provides for actions in court by and against labor unions.

Title IV. Creates a continuing Congressional committee to study and report on labor legislation requirements in the future.

B. Non-Communist Affidavit

Firstly, one of the Act’s most publicized and controversial

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provisions, strangely enough, is that in regard to non-communist affidavits by union officials.\textsuperscript{37} The section in question requires that labor union officials place on file, with the NLRB, affidavits to the effect that they are not members of the Communist Party or do not believe in or support any organization that seeks to overthrow the government of the United States by force. This provision is given teeth by the fact that, even though the employer is guilty of an unfair labor practice, the Board cannot hear the complaint unless the required affidavits are on file.\textsuperscript{38}

The controversial question on this provision has been whether the AFL and CIO were “labor organizations” within the meaning of the statute or whether it applied to officers of the union local only. There has been some disagreement between the Board,\textsuperscript{39} its General Counsel and the courts as to whether the Act included national officers of unions, although the wording seems clear enough to be all inclusive, and it has been finally so held.\textsuperscript{40}

One may well question the effectiveness of this section in smoking out other than known Communists. Despite the fact that some union offices have been proven to have been rife with Communists or fellow travelers (in justice it must be said that unions presently are doing a good job of house-cleaning), and that Communism and private enterprise are direct opposites in theory, labor has strongly urged that the section is discriminatory. This clamor is not expected to result in a repeal of the section but a safe prediction is that it will be amended to include management within its scope to remove the stigma of un-Americanism from labor as a class.\textsuperscript{41}

C. Good Faith Bargaining

Previous reference has been made to the fact that under the Wagner Act the employer who failed to bargain collectively in good faith, as interpreted by the courts, was guilty of an unfair

\textsuperscript{39} Bethlehem Steel Co., 89 N.L.R.B. 1476 (1950).
\textsuperscript{40} National Maritime Union v. Herzog, 324 U.S. 854 (1948).
\textsuperscript{41} Ed. Note: It was announced recently that among the several amendments to the Taft-Hartley Act the present administration plans to suggest to Congress was one which would require employers to sign the non-Communist affidavits if union officials must do so. The Louisville Courier-Journal, sec. 1, p. 8, col. 1 (July 20, 1953).
labor practice, and hence subject to a cease and desist order by the Board. The law is still the same in this respect. Employers are still required to bargain collectively with designated unions. But, most significantly, the union is now under the law also required to exercise good faith in bargaining and failure to do so is made an unfair labor practice under the Act. No longer may a union official, under sanction of law, enter a collective bargaining session and sit back with folded arms and dead-pan "make me an offer" attitude. Careful thought will fail to reveal any legitimate objections to the equities of such a bilateral requirement.

D. Freedom of Speech

Under our present labor relations policy, freedom of speech is also on a bilateral basis. An employer under the Act may express views, arguments and opinions on unionization provided such contain "no threat of reprisal or force or promise of benefit." This freedom of speech granted employers seems an unnecessary statutory guarantee of a constitutional right, but it is certainly in accord with our democratic processes and unobjectionable if subjected to the usual reasonable restraints on free speech.

In a rather recent case before the Board this statement of an employer to his employees was cited as an unfair labor practice:

"I heard that some of our employees had joined a union and are making it hard on employees who have not joined a union by refusing to talk to those who have not joined, by refusing to work properly with those employees who have not joined and by intentionally staying away from work. If this is true, and you employees know more about it than I do, then it justifies my belief that a union brings nothing but friction and unpleasantness of a kind that runs a company out of business. I am not going to tolerate this kind of thing. If our employees don't work the way they ought to, then we are going to have to get rid of them and replace them with people who are willing to work together. If that can't be done, we'll just have to shut this factory down and go out of business."

Obviously the Board was correct in reversing the trial examiner

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41 NLRB v. Montgomery Ward & Co., 133 F. 2d 676 (9th Cir. 1943).
44 "Rex Manufacturing Co., 86 N.L.R.B. 470 (1950)."
and finding that the above statement did in fact constitute a threat of reprisal within the meaning of Section 8(c).

On the other hand, the Board found no threat of reprisal in a letter sent all employees by their employer four days before a representative election, advising them to ask themselves if they wanted to continue working steadily at good rates with overtime, or whether, by unionization, they wanted to run the chance of strikes, lost wages and a contract that might result in no overtime.45 The Board’s ruling was that this statement contained a recital of possible consequences of unionization rather than a threat of what would happen from resultant employer action. Further in this vein, the Board has ruled that characterizing a union as “outlaw”, “wildcat” or “off breed” is not a violation of Section 8(c).46

Such permissive speech by the employer was, prior to Taft-Hartley, strictly taboo as an unfair labor practice. From consideration of the examples given, wherein the employer presents his views on unions, one might reasonably conclude that employer freedom of speech could result in a slowdown of union expansion, though it possibly will not react adversely on present union membership. In substantiation of this conclusion, it is a matter of record that union leaders have complained, doubtless with good reason, that Section 8(c) has resulted in a curb on the growth of union membership, particularly in the southern states.

E. Supervisory Employees

Foremen and other supervisory personnel have always occupied something of a hybrid position in the labor movement. Both labor and management have felt that a unionized supervisor, with divided loyalty, represented a spy in their midst, a snake in their bosom. In the Packard Motor Car case47 the Supreme Court held that foremen were employees within the meaning of the Wagner Act with the rights of self-organization and collective bargaining incident thereto. However, Section 2(3) of the Taft-Hartley Act amends the Wagner Act so as to specifically exclude supervisory personnel from the category of employees.

45 Cleveland Plastics, 35 N.L.R.B. 87 (1949).
This provision is generally regarded as a victory for management, as the unions had begun to reverse their earlier position and generally sought to organize supervisory workers. In any event, it seems that the supervisors are the losers, for while they may still organize foremen's unions, their classification as employers deprives them of the benefits and protection of the Act.

F. Contracts

The Act has provisions on Union-Management working agreements which may be classified as follows:

1. Closed Shop Contract, whereby the employer may hire only union members and retain them only so long as they are union members.

2. Union Shop Contract, which permits an employer to hire whom he pleases with the proviso that the employee must join the union within a specified period. Under the Taft-Hartley Act the time limit is thirty days, and such contract must follow an election wherein a majority of the employees have selected the particular union as its designated bargaining agent.

3. Preferential Contract, in which preference is given union members in the hiring and laying off of employees.

4. Maintenance of Membership Contract, under which one is not required to join a union but must stay in it if he joins (this agreement may be likened to the marriage status).

The Taft-Hartley Act has been construed to ban the Preferential and Closed Shop Contracts, while recognizing as legal the Union Shop and Maintenance of Membership Contracts.48

As to the affect of this provision on labor-management relations it should be noted that the Act is not retrospective and hence, closed shop contracts entered into prior to June 23, 1947, the effective date of the Act, are still legal and binding. Some unions anticipated passage of the Act and were able to negotiate long term closed shop contracts just prior thereto which are still in force. Further, it is very probable that new closed shop contracts will be negotiated, though driven under ground, so to speak, in instances where management does not want to stand fast for its rights. Nevertheless, this would seem to be another provision that will in time act as a deterrent to union expansion.

This may be considered desirable or undesirable as one's interests and beliefs may lie, but surely a public spirited unselfish union would prefer to further its aims and seek its destiny through the democratic union shop, where freedom of choice is a prerogative of the individual worker.

G. Secondary Boycott

Perhaps the most far reaching provision of the Taft-Hartley Act is the curbing of the unions' economic pressure devices by banning of the secondary boycott by declaring such action to be an unfair labor practice. The Act further empowers the Board to petition any United States District Court for a temporary injunction to bring to a halt any such unfair labor practice.

Whether given activity constitutes a proscribed secondary boycott often presents a very troublesome question. Robert N. Denham, Ex-General Counsel of the NLRB stated at a meeting of the Society For Advancement of Management in San Francisco on October 10, 1949, in part as follows:

These secondary boycotts are tricky things because what may appear to the layman to be a secondary boycott, finally turns out, when we measure it by the language of the law to be either a primary dispute or possibly one that just isn't covered by the law, even though in fact secondary.

In the current strike (February 1953) of 3,500 tugboat crewmen in New York harbor, pickets were ordered off the piers by a State Supreme Court as AFL longshoremen refused to cross the picket line. The injunction was vacated by a Brooklyn Appellate Court, and clearly the longshoremen's action involved no secondary pressure.

It has been held that where a union, which was engaged in a labor dispute with an employer, picketed the premises of a third party or parties to force them to refrain from doing business with the original employer, and to induce the employees of the third parties to refuse to handle or transport shipments made by or destined for the employer, the union was guilty of engaging in a secondary boycott in violation of the law.¹

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Undoubtedly the above is an example of a true secondary boycott: pressure directly applied against a neutral third party to thereby influence the action of another with whom a labor dispute exists, and within the proscription of the Act. As stated by Mr. Denham, secondary pressure can become rather complicated at times. However, a secondary boycott can usually be determined by ascertaining the direction of the threat or force exerted. If directed at a neutral third party it is secondary, if directed at the one with whom the primary dispute exists the pressure is primary. So, concerted voluntary refusal to cross a picket line, as in the case of the longshoremen, is primary only; and the effect on the longshoremen’s employer is incidental to the primary force.

Certainly unions have, due to the secondary boycott ban, largely ceased what was heretofore normal activity, but it will remain a debatable question as to whether secondary pressure is a desirable method in obtaining union objectives. A potent union pressure device is removed when strikes and picketing are localized to the area of the primary dispute. (As an interesting sidelight, it is recalled that this refusal to patronize acquired the name “boycott” from such practice with respect to a certain Captain Boycott, who fell into disrepute with his customers quite a few years past in Ireland.)

H. Injunctions and Damage Suits

The Taft-Hartley Act revives the injunction in a restricted manner in labor relations law, though it seems clear enough that the injunctive proceedings when instituted by action of an individual remain limited by the Norris-LaGuardia Act. With the private injunction remaining illegal it may safely be said that the Taft-Hartley Act does not reinstate private “government by injunction,” whereby union organization and growth were hamstringed in ex parte proceedings.

Sections 10(h), 10(j) and 10(l) of the act provide for injunctions in specified situations:

1. The NLRB may seek an injunction to prevent any change in position of the parties during proceedings in a U. S. Court of Appeals for the enforcement of an NLRB order.

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52 Bakery Sales Drivers’ Union v. Wagshal, 333 U.S. 437 (1948).
2. The NLRB may seek an injunction against any unfair labor practice after an order, with respect to the complaint, has been issued by the Board.

3. The NLRB may seek an injunction, at any time, against a jurisdictional strike, boycott, or picketing within Sec. 8(b) (4) (d) of the Act.

In any of the above named instances it is discretionary with the NLRB as to whether an injunction should be sought, and the General Counsel has stated this power will be exercised in emergency cases only. It is reasonable to assume that this will be a continuing policy, though the membership of the Board changes from time to time.

In addition to the above named situations there can be circumstances under which it is mandatory that the Board go into court and seek an injunction even before an unfair labor complaint is issued; for example, where the Board has reasonable grounds to believe that an unfair labor practice within Section 158(b)(4)(a), (b) and (c) has been committed. The Taft-Hartley Act also authorizes injunctions in national emergency cases and the procedure therefor is provided, wherein the President may act if in his opinion a strike or threatened strike imperils the national health or safety.

The past Truman administration was so unfriendly to the Taft-Hartley Act that the Chief Executive refused to use this national emergency provision and issued an executive order seizing the steel industry under a claim of implied powers, which power was denied by the Supreme Court. Irrespective of implied power in general, it defies explanation how such could be said to exist in a field where Congress has acted.

With the scrapping of price and wage controls by the present administration we may reasonably predict a widespread wave of strikes for higher wages throughout industry. A further prediction is that the present administration will not hesitate to use the national emergency provision of the Act if the national health or welfare is apparently threatened by such strikes.

Direct comment on certain salient features of the Taft-Hartley

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Act is concluded with reference to the fact that provision is made for damage suits by or against unions in claims arising out of the labor-management relationship. 56

III. CONCLUSION

As was stated at the outset, the full impact of the Act on labor, management and the public is yet to be experienced. One of the reasons, as previously stated, is that management has been reluctant to insist upon all its rights. The reason for such reluctance has been explained thusly:

"Management has grounds sufficient under the Taft-Hartley Act to swamp our courts with requests for injunctions, suits for violation of contract and damages, and prosecutions for unfair labor practices, to appear as a tidal wave compared to labor's portal-to-portal suits. Why, then, do our friends, who are faced with featherbedding, and other unfair labor practices specifically forbidden by the law, not go to court? Because they do not know their rights under the law? Hardly. The reason they are not filing briefs is due not to ignorance or the desire to play fair so much as it is prompted by the realization that, in the great majority of cases, the outcome of a court suit will have little effect upon management-labor relations in their own particular plant." 57

The above quotation merely boils down to the fact that such legislation should be used as a shield rather than as a sword by management in the quest for industrial peace. It seems that management generally regards the Act as being effective in creating a desirable balance in the respective rights of labor and management. In relation to this observation it is interesting to note the manner in which the Act itself has affected labor relations in the opinion of management. The following are some of the ways in which the Act has influenced management functions as noted by the industrial relations department of a large firm: 58

1. Psychological: more collective agreements have been consummated without strife.

2. Employee Communications: the freedom of speech pro-

57 Good, Some Effects of the Taft-Hartley Act, 1 LABOR L. J. 107, 112 (1949).
58 Ibid.
vision has resulted in open discussion of union issues between employer and employees.

3. Control over Supervisors: employers may deal with supervisory personnel on a merit basis and train them more easily.

4. Control over Labor Supply: management has some control over employees through the union shop. It may not discriminate in hiring or firing employees, nor is it now forced to fire employees at the behest of a union except for non-payment of dues.

5. Control over Production: union techniques which hamper production as boycotts, sympathy strikes, featherbedding and jurisdictional disputes are limited or illegal.

6. Control over Suppliers and Customers: if picketing to enforce secondary boycotts is effectively enjoined, employer is free to select his supplies and customers.

7. Collective Bargaining: genuine collective bargaining has been resuscitated.

The policy statement of the Taft-Hartley Act is to the effect that four major groups are involved in every labor dispute: employees, unions, employers, and the public. The statute further states that industrial peace will come when each of these groups recognizes the legitimate rights of the others, and when the first three accept the fact that the public interest prevails over all.

From the provisions of this broad labor relations act our present national labor policy may be summarized in terms of the following ends and means:

1. Industrial peace: continued production, uninterrupted by strikes and lockouts.

2. Collective bargaining: the settlement of industrial disputes through peaceable negotiations by both employer and employee in the exercise of good faith.

3. Self-organization of employees: free from interference of employer, and by employee in the exercise of good faith.

4. Discontinuance of certain labor activities: secondary strikes and boycotts, jurisdictional disputes and featherbedding are economically undesirable.

5. Every effort, short of compulsory arbitration must be utilized to prevent, postpone or settle strikes that imperil the national health or safety.

If the national labor policy as summarized, and the formula
for industrial peace as stated are accepted as sound, then it would seem to follow that the Labor Management Relations Act of 1947 should be acceptable as a noteworthy contribution toward achievement of those ends.

Perhaps industrial peace is entirely possible if labor and management will take the position that both are here to stay, that they are mutually essential and that each is equally dependent upon the other. Labor must define its objectives in view of the fact that labor and capital cannot become fused without private enterprise coming to an end.

Capital must recognize that labor regards the union as a powerful common bond and as a personal instrument of self-fulfillment. Capital must know that the union is a bread and butter proposition and more. Unionization must be recognized as not only a movement but also a political instrumentality that reaches beyond bare workshop economy to state and national politics, with matters of social engineering and foreign relations coming within the legitimate purview of the unions.

Perhaps it was inevitable that capital in an expanding age would reach an undesirable ascendency, as it did. Union leaders' determined effort in throwing off this yoke of inequality engendered bitterness that is hard to dissipate. It was just as inevitable that the pendulum would swing back in time to curb irresponsible unions. Now that unions have come of age we can expect to see them bargain without an inferiority complex. This may hold out hope for the future.

If America is to point the way in the present-day world's economy, and demonstrate that private capital and labor can coexist, opinions that once labelled unions as common law conspiracies must be accepted as no more absurd than this language quoted from an opinion by the Criminal Court of Appeals of Oklahoma:

Labor is natural; capital is artificial. Labor was made by God; capital is made by man. Labor is not only blood and bone but it also has a mind and soul, and is animated by sympathy, hope and love; capital is inanimate soulless matter. Labor is the creator; capital is the creature.

... Labor is always a matter of necessity. Capital is largely a matter of luxury. Labor has been dignified by
The Saviour of mankind was called the 'carpenter's son'. We are told in the bible that "the love of money is the root of all evil." This statement is confirmed by the entire history of the human race. The love of money is the cause of the organization of trusts and monopolies. With what show of reason and justice, therefore, can the advocates of monopoly be heard to say that capital is the equal of labor.\textsuperscript{59}

The judge of the Oklahoma Court, supra, who wrote of the "soulless" nature of capital displayed either consummate ignorance or supreme bias that caused disregard of the facts. His Honor overlooked the individual American who invests his savings in corporate stock to let business experts manage his assets at an overall average return of $6.7\%$ on the investment. He overlooked the small business men who have, through toil and self-sacrifice, accumulated capital and pooled their assets to make this country strong in spirit, high in standards of living and leaders in technological know-how. And, perhaps, he was not apprised of the fact that the "soulless" capital of the United States Steel Corporation is owned by more than a quarter of a million Americans; General Motors' Corporation is owned by over one-half a million stockholders; or that a short while ago a man and his wife, residents of an average American town in Michigan, purchased seven shares of stock in American Telephone and Telegraph, thus becoming its millionth shareholder. Stock ownership in private corporations is not a special privilege of the few, but rather, one of the most democratic privileges existing in our democracy. Only so long as this privilege remains with us will we remain free people. The alternative is filling of state imposed quotas and taxation that support government owned corporations without private participation in management or profits.

If our system of free enterprise under a capitalistic and democratic state is to be maintained, the continuing task of Congress will be to give both labor and management a maximum of freedom with a minimum of governmental regulation consistent with the national welfare. We can never completely submerge natural fundamental self-interest, but if labor and management will bargain, and legislative bodies will legislate, whilst motivated with the knowledge that capital represents fifteen million individual

\textsuperscript{59} State v. Coyle, 8 Okla. Cr. 686, 130 Pac. 316 (1913).
shareholder-partners, and that organized labor represents sixteen million individual workers, then perhaps a spirit of "live and let live" will eventually bring comparative industrial peace to a troubled area for the common good.

As to the future of the Taft-Hartley Act, it would be unsafe to predict beyond the near future, possibly encompassing the present administration, in view of changing political fortunes, and domestic economy as controlled by unsettled world conditions. It is reasonably certain that unless representatives of labor and management can find a common basis for revision of the Taft-Hartley Act it will undergo no major surgery this year. This statement must be qualified by referring to what may well be the most important factor influencing Congress on labor legislation, i.e., what will happen between the big unions and big corporations in the next few months now that most price and wage controls are gone.

Business will fight to keep the gains it has made, while labor, having abandoned hopes of outright repeal of Taft-Hartley, will apparently seek the same ends through announced political action programs that amount to piecemeal repeal.

The Executive Board of the CIO has recently in the interests of "justice and fairness" called for seven basic changes in the Taft-Hartley Act:

1. Elimination of injunction provisions, including the provision whereby injunctions may be obtained to delay national emergency strikes.
2. Removal of the ban against the closed shop.
3. Dropping of provisions which hamper unions from striking, picketing, and refusing to handle struck work.
4. Elimination of provisions making unions liable in damage actions for unfair practices.
5. Simplification of language and removal of technicalities with respect to union officers' filing non-Communist oaths and reports on union activity or finances.
6. Removal of certain provisions alleged to benefit the craft unions at the expense of the industrial unions (a craft union is composed of workers with similar skills, while industrial unions take in all types of workers in a plant or industry).
7. Elimination of employers' right to air their views on unionism.
This “just and fair” program would put labor back in the halcyon days of “anything goes,” of indiscriminate strikes and boycotts, full control over labor supplies, a silenced management and wrecking crews operating without fear of civil liability. Such a situation is just as antagonistic to democracy as is “government by injunction” in the days of imported strike breaking thugs.

Experience teaches us that industry-wide strikes can, especially during a national emergency, actually imperil the public health and safety. On the labor side of the picture, however, is the fact that the strike is labor's most potent economic pressure device. It goes without saying then that labor will militantly resist any and all attempts to further restrict the right to strike, now secured to it by positive law.60 At a time when this country was engaged in all-out war and crippling labor strikes loomed threateningly there was strong public sentiment for such strike legislation which did not crystallize into congressional action. It follows that, in the face of union opposition coupled with comparative peace on the labor front, should the bill to ban industry-wide bargaining receive favorable committee action, which is unlikely, it would most likely meet defeat on the floors of Congress.

The unions have also condemned certain “innocuous procedural changes.” These are described as mincing steps forward to camouflage steady strides backward. Such criticism would seem justified with respect to such measures as a proposed increase of the NLRB members to seven in number unless on a basis of case load. Certainly any change in Board membership that will aid in disposing of unfair practice complaints in a more expeditious manner and under an established policy of precedent upon which labor and management can rely is to be desired. It is an inescapable fact that the Board to function equitably must be staffed irrespective of political affinity.

We can conclude speculation on what lies ahead for the Taft-Hartley Act with the assurance that, with the National Association of Manufacturers marshalling forces to offset labor pressure on Congress, committee hearings and inevitable congressional debate, the months ahead will not lack for lively action for parties in interest.