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## ARTICLES

### HOW THE TAFT-HARTLEY ACT HINDERED UNIONS

*Steven E. Abraham\**

It is widely recognized among scholars in industrial relations that "U.S. unions are in a crisis."<sup>1</sup> As a result of the current situation in industrial relations, President Clinton established a commission entitled "On the Future of Worker-Management Relations," and one of the Commission's charges is to assess the National Labor Relations Act ("NLRA"), the statute governing private sector labor relations in the United States.<sup>2</sup> The vast majority of provisions in the NLRA that

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1. The very first sentence in the "Preface" to *The State of the Unions*, the annual research volume 12 of the Industrial Relations Research Association, specifically states: "[i]t is generally agreed that U.S. unions are in a crisis." See GEORGE STRAUSS ET AL., PREFACE TO THE FIRST EDITION OF INDUSTRIAL RELATIONS RESEARCH ASS'N SERIES: *THE STATE OF THE UNIONS* v (1st ed. 1991) (hereinafter *THE STATE OF THE UNIONS*). The two most obvious examples of unions' misfortunes are the declining unionization rate (especially in the private sector) and the frequent inability of unions to obtain favorable collective bargaining agreements for the employees they represent. A number of articles that address recent outcomes in industrial relations are found throughout *THE STATE OF THE UNIONS*.

2. 29 U.S.C. §§ 151-169 (1988). On June 2, 1994, the Commission issued its first report entitled BUREAU OF NAT'L AFFAIRS, FACT-FINDING REPORT ISSUED BY THE COMMISS-

are most detrimental to unions were added by the Taft-Hartley Act of 1947 (the "Act").<sup>3</sup> In order to shed light on the sections of the NLRA that are most responsible for the difficulties unions currently face, this paper will examine the Taft-Hartley Act in detail and explain which sections most hindered unions.<sup>4</sup>

Assessments of the Taft-Hartley Act and how it hindered unions have been written previously.<sup>5</sup> Some of these works have treated the Act in its entirety, while others have discussed how a specific section or sections of the Act have worked to the detriment of unions.<sup>6</sup> What distinguishes this paper from most of these other works, however, is that this paper provides empirical support for the provisions that are identified as being detrimental to unions. That support, albeit indirect, will be made by reference to numerous works that have shown empirically that both unionism (the situation in which a firm's employees are represented by a union for collective bargaining purposes), and certain specific events associated with unionism, reduce shareholder wealth (the value of shareholders' claims to firm profits as measured by security returns).<sup>7</sup>

The empirical works cited in this paper employ a methodology known as the event study. In the labor relations context, event study methodology examines the change in security returns that occurs when unexpected information about a particular labor relations event becomes available to the investing public.<sup>8</sup> The change in security

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report entitled BUREAU OF NAT'L AFFAIRS, FACT-FINDING REPORT ISSUED BY THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, Daily Lab. Rep. (BNA) No. 105, d34 (June 3, 1994). The Commission's report reviews a number of the adverse outcomes currently faced by unions and discusses several sections of the NLRA that are responsible for the unsatisfactory situation that currently exists in United States industrial relations.

3. The Taft-Hartley Act is officially entitled the Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136 (1947).

4. This paper will discuss only sections of the Taft-Hartley Act that hinder unions. Other provisions of the NLRA will not be addressed.

5. Many of the articles assessing the Act were written in the first several years after its passage and are listed in U.S. NATIONAL LABOR RELATIONS BOARD, LIBRARY, SELECTED BIBLIOGRAPHY OF THE LABOR MANAGEMENT RELATIONS ACT (Philip A. Hazelton comp. 1950).

6. *Id.*

7. A showing that shareholder wealth is reduced by unionism is essentially a showing that profits are reduced by unionism. See generally Brian E. Becker & Craig A. Olson, *Labor Relations and Firm Performance*, in HUMAN RESOURCES AND THE PERFORMANCE OF THE FIRM (Morris M. Kleiner et al. eds., 1991) (discussing various measures of profits, including shareholder wealth that are used to measure the effect of unionism on profits).

8. *Id.* at 49. The return to any security in time (*t*) is equal to its price change in that period plus any dividend disbursements:

returns that occurs when information about a specific event becomes available to the investing public is an estimate of the change in shareholder wealth due to that event.<sup>9</sup> This change in security returns is also interpreted as an unbiased estimate of the change in future discounted profits to the firm.<sup>10</sup> Therefore, a change in security returns in response to a labor relations event is also an unbiased estimate of the change in profits due to that event.<sup>11</sup>

The relationship between the effect of a provision on profits and its effect on unions is as follows: the reduction in profits due events associated with unionism will be greatest when the power of unions is greatest. It is unions' power that is the source of their ability to induce those events. This paper will discuss the sections of the Taft-Hartley Act that made it more difficult for unions to induce the events that reduce firm profits. If a provision of the Act made it more difficult for unions to reduce firm profits, it is essentially the same as saying that it hindered unions.

This paper will discuss the provisions of the Taft-Hartley Act that hindered unions in five sections: (A) provisions that made it less likely that a union would be elected to represent a firm's employees in an NLRB representation election; (B) provisions that made it less likely that unions would be able to obtain favorable collective bargaining agreements for the employees they represent; (C) provisions that made it less likely that the employees represented by unions would strike; (D) provisions that made it more likely that a union would be decertified in an NLRB decertification election; and (E) miscellaneous provisions of the Taft-Hartley Act.<sup>12</sup> Table 1, attached as an appendix, provides a listing of each provision of the Taft-Hartley Act, its specific effect on the NLRA and how it hindered unions.<sup>13</sup>

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$$R_{it} = \frac{Price_{it} - Price_{i,t-1} + Dividends_{it}}{Price_{i,t-1}}$$

*Id.*

9. *Id.* at 50.

10. *Id.*

11. *Id.* Data on firm returns are maintained by "CRSP" — the Center for Research on Security Prices connected with the University of Chicago School of Business. *Id.* at 55.

12. While I have chosen these five categories for organizational purposes, there are several provisions of the Act that could be placed in more than one of the five (because the provision affected more than one of the events that has been shown to influence shareholder wealth). I will discuss these provisions where they fit best in the overall discussion, and refer to them again elsewhere when appropriate.

13. See table 1, pp. 34-37.

# A. PROVISIONS THAT MADE IT LESS LIKELY THAT A UNION WOULD BE ELECTED TO REPRESENT A FIRM'S EMPLOYEES IN AN NLRB REPRESENTATION ELECTION

The first article to employ event study methodology in the labor relations context investigated the effect of NLRB representation elections on shareholder wealth.<sup>14</sup> Using a sample of 253 elections held in units of 750 or more employees between 1962 and 1980, Ruback & Zimmerman reported: (1) the average net effect of a union victory in a representation election was a 3.84% reduction in shareholder wealth (profits) in the firm that became unionized; (2) the average net effect of a union loss was a 1.32% reduction in firm profits; (3) the average net effect of all NLRB elections that were held, irrespective of the outcome of the election, was a 1.86% reduction in firm profits.<sup>15</sup> The application of different econometric methods to the same data revealed results similar to Ruback & Zimmerman's, confirming that union victories in NLRB representation elections decrease firm profitability.<sup>16</sup>

Based upon Ruback & Zimmerman and Bronars & Deere, it can be concluded that provisions of the Taft-Hartley Act that made it more difficult for a union to organize and represent a firm's employees would have hindered unions.<sup>17</sup> A number of provisions of the

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14. Richard S. Ruback & Martin B. Zimmerman, *Unionization and Profitability: Evidence from the Capital Market*, 92 J. POL. ECON. 1134 (1984).

15. The 1.86% decrease and the 3.84% decrease were statistically significant from zero; the 1.32% decrease and the difference between the 3.84% decrease for winners and the 1.32% decrease for losers were not significant. *Id.* at 1144 table 2 (summarizing the cumulative abnormal returns for selected holding periods).

16. Stephen G. Bronars & Donald R. Deere, *Union Representation Elections and Firm Profitability*, 29 INDUS. REL. 15-17 (Winter 1990).

17. While Ruback & Zimmerman and Bronars & Deere are the only studies showing specifically that union victories in representation elections reduce firm profitability, many other studies have shown that unionism reduces firm profits. In fact, studies measuring the effect of unionism on profits began being published in the early 1980's. *See, e.g.,* Kim B. Clark, *Unionization and Firm Performance: The Impact on Profits, Growth and Productivity*, 74 AM. ECON. REV. 893 (1984); *see generally* RICHARD B. FREEMAN, *UNIONISM, PRICE-COST MARGINS AND THE RETURN TO CAPITAL* (National Bureau of Economic Research Working Paper No. 1164, July 1983). Since then, quite a few studies have attempted to measure this effect and, without exception, they all reach the same basic conclusion: profits and shareholder wealth are less in firms whose employees are represented by unions than they are in firms whose employees are not represented by unions, *ceteris paribus*. *See* John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits, and Growth: Has the Long Run Arrived?*, 7 J. LAB. ECON. 72 (1989) (compiling these studies); *see generally* Dale Bellman, *Unions, The Quality of Labor Relations, and Firm Performance*, in *UNIONS AND COMPETI-*

Act had this effect.<sup>18</sup>

In *Collective Bargaining and Industrial Relations*, Thomas A. Kochan and Harry C. Katz identify eight steps in the union organizing and representation election process.<sup>19</sup> To make this section easier to follow, I will address six of the eight steps identified by Kochan & Katz sequentially and discuss the provisions of the Taft-Hartley Act that hindered unions at each step.<sup>20</sup>

### 1. A Union Begins Organizing a Group of Employees

In order for the NLRB to hold a representation election among a unit of employees, certify a union that wins the election and require the employer to bargain with the union, the employer, the employees and the union all must be covered by the NLRA.<sup>21</sup> The Taft-Hartley Act hindered unions by reducing the percentage of the U.S. labor force that was entitled to the protections of the NLRA.<sup>22</sup>

The rights provided in the NLRA (specifically, the right to be represented by a union for collective bargaining purposes), apply only to "employees," as defined in Section 2(3).<sup>23</sup> Therefore, individuals not within the Act's definition of "employee" are not entitled to the rights provided by, and the protections of, the NLRA. The Taft-Hartley Act amended Section 2(3) to exclude from the NLRA several categories of workers who had originally been considered employees under the Wagner Act: supervisors (as defined in Section 2(11)),

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TIVENESS (Lawrence Mishel & Paula B. Voos eds., 1992). Since each of these studies shows that unions decrease firm profitability, they also show, by inference, that any provision of the Taft-Hartley Act that made it more difficult for a union to organize and represent a firm's employees would have hindered unions.

18. See table 1, pp. 34-37. These provisions either reduced the likelihood that a representation election would even be held or reduced the probability that a union would win a representation election that was held. Both types of provisions would have made it less likely that a union would be chosen to represent a firm's employees in a representation election and thus, would have hindered Unions.

19. THOMAS A. KOCHAN & HARRY C. KATZ, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* 107 (L.L. Cummings & E. Kirby Warren eds., 2d ed. 1988).

20. I will discuss only six of the eight steps in the organizing process identified by Kochan & Katz because the Taft-Hartley Act did not hinder unions in the other two steps.

21. See Labor Management Relations Act, ch. 120, secs. 2(2), 2(3), 7, 8(a)(1), §§ 152(2), 152(3), 157, 158(a)(1), 61 Stat. 137, 140 (1947) (current version at 29 U.S.C. §§ 152(2), 152(3), 157, 158(a)(1) (1988)).

22. See, e.g., Robert J. Rosenthal, *Exclusions of Employees under the Taft-Hartley Act*, 4 INDUS. & LAB. REL. REV. 556, 557 (1951).

23. 29 U.S.C. § 152(3) (1988). The majority of "rights" in the NLRA are contained in Section 7, which applies to "employees," as defined in § 2(3) of the NLRA. 29 U.S.C. § 157 (1947) (current version at 29 U.S.C. § 157 (1988)).

independent contractors, individuals “employed by an employer subject to the Railway Labor Act,” and individuals employed “by any other person who is not an employer as herein defined” were all removed from the NLRA’s definition of “employee” by the Taft-Hartley Act.<sup>24</sup> According to Gerhard P. Van Arkel, *each* of these changes — even those which appear to be fairly inconsequential — meant that a number of employees lost the protection of the NLRA following Taft-Hartley’s passage.<sup>25</sup>

The majority of commentators agree that the most important effect which resulted from amending Section 2(3) was that supervisors were no longer protected as employees under the NLRA. As stated by Howell John Harris, “[supervisory unionism] was not a situation management could come to tolerate . . . it was a threat to the very structure of management itself, and the most serious problem facing management [prior to the Taft-Hartley Act].”<sup>26</sup> What makes the exclusion of supervisors from the definition of “employee” even more of a hindrance for unions is that more and more categories of workers have been held to be “supervisors” by the Board and the courts in the years since the Taft-Hartley Act was passed.<sup>27</sup> As the definition of “supervisor” expands, the importance of this amendment to Section 2(3) grows.

Estimating the quantitative effect of the provisions just discussed is difficult. According to the estimates of one commentator,<sup>28</sup> the average annual civilian labor force in 1948 was 61,442,000.<sup>29</sup> Had the Taft-Hartley Act not been enacted, 34,343,000 (55.9%) workers would have been covered by the NLRA (and therefore entitled to the

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24. 29 U.S.C. §§ 152(3), 152(11) (1947) (current version at 29 U.S.C. §§ 152(3), 152(11) (1988)). The Taft-Hartley Act also removed the right of a union to invoke the NLRA’s protections unless the union filed certain information with the Secretary of Labor, 29 U.S.C. § 159(f) (1947), and kept that information current. 29 U.S.C. § 159(g) (1947). In addition, every officer of a labor organization was required to file a “non-Communist” affidavit with the NLRB. 29 U.S.C. § 159(h) (1947). Finally, the Act also removed certain employers from the NLRA’s coverage. 29 U.S.C. § 152(2) (1947).

25. GERHARD P. VAN ARKEL, *AN ANALYSIS OF THE LABOR MANAGEMENT RELATIONS ACT, 1947* (PLI 1947).

26. HOWELL JOHN HARRIS, *THE RIGHT TO MANAGE* 25 (1982) (citation omitted). See generally SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY* (1985).

27. See Patrick S. Bryant, Special Project: *Hybrid Employees: Defining and Protecting Employees Excluded From the Coverage of the National Labor Relations Act*, 41 VAND. L. REV. 601, 606-07 (1988).

28. Robert J. Rosenthal, *Exclusions of Employees under the Taft-Hartley Act*, 4 INDUS. & LAB. REL. REV. 556 (1951).

29. *Id.* at 557 table 1.

Act's protections).<sup>30</sup> However, only 30,905,167 (50.3%) were actually covered by the NLRA as amended by the Taft-Hartley Act.<sup>31</sup> Thus, according to Rosenthal, the Taft-Hartley Act reduced the percentage of labor force members entitled to the NLRA's protections by over 10 percent.<sup>32</sup>

2. Union Asks the Employer for Recognition as the Bargaining Representative. If the Request is Denied, an Election Petition is Filed.

Section 9(c)(1)(B) of the Taft-Hartley Act hindered unions at this stage of the union organizing process in the following way: when the NLRA was originally passed, it did not address who was or was not entitled to file a petition that would invoke the NLRA's election procedures. The Board had decided early on, however, that the only way it would initiate the process for determining whether a union was to be certified as the representative of a unit of employees was if the employees, or the union itself, filed an election petition. The Board would not accept petitions from employers, since employers might file petitions "under conditions that would frustrate rather than effectuate true collective bargaining."<sup>33</sup> Since unions had sole discretion to decide when they would petition the NLRB for an election, they could file their petitions when they felt their chances of winning the election would be greatest. Section 9(c)(1)(B) of the Taft-Hartley amendments gave employers the right to file a petition whenever presented with a claim for recognition, whether from an employee or a union.<sup>34</sup> Donald H. Wollett points out how this provision could be used by management wishing to defeat a union organizing drive:

[I]t is conceivable that an employer who wishes to stop an organizational drive by a union in his plant may prematurely force that union into an election which it will lose, by encouraging one or

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30. *Id.*

31. *Id.*

32. *Id.*

33. 1 NLRB ANN. REP. 26 (1936). See also HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 160-63 (1950) (describing the rationale for adopting this rule).

It should be noted that the Board amended its policy in 1939 so as to allow an employer to file a petition if presented with claims for recognition from two or more unions. *Id.* at 161.

34. 29 U.S.C. § 159(c)(1)(B) (1947) (current version at 29 U.S.C. § 159(c)(1)(B) (1988)).



more individuals or another labor organization, even though he or it has no substantial support, to present him a claim of recognition as the bargaining representative.<sup>35</sup>

In other words, employers might find it tactically advantageous to file an election petition before the union attempting to organize the firm's employees has built enough support to win a representation election (the union will not file an election petition until it feels that it has obtained enough support to prevail in an election).

The *N.L.R.B. Annual Reports* show that employers did use 9(c)(1)(B) to their advantage in the years immediately following the passage of the Taft-Hartley Act. Employers filed 459 petitions under Section 9(c)(1)(B) in fiscal year 1947-48,<sup>36</sup> 479 in 1948-49<sup>37</sup> and 699 in 1949-50.<sup>38</sup> The vast majority of these petitions presumably were filed by employers who felt that there would be a tactical advantage to filing an election petition before the union attempting to organize their employees had built enough support to win a representation election. If the unions felt that they were ready to win a representation election, they would have filed the petition themselves.

### 3. The NLRB Decides Whether a Question Concerning Representation Exists; If so, It Orders that an Election Be Held and Determines the Appropriate Bargaining Unit for that Election.

#### a. Requiring Elections to Determine Majority Status

According to Section 9(c) of the NLRA as it read prior to 1947, if the Board had reasonable grounds to believe that a question concerning representation ("QCR") existed, it was authorized to "take a secret ballot of employees, or use any other suitable method to ascertain [sic] such representatives."<sup>39</sup> This gave the Board the power to use any procedure it deemed appropriate to determine the desires of the employees in a particular bargaining unit with respect to unionization. In most cases, the Board held a representation election before certifying a union as the bargaining representative of a unit of em-

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35. See DONALD H. WOLLETT, *LABOR RELATIONS AND FEDERAL LAW: AN ANALYSIS AND EVALUATION OF FEDERAL LABOR POLICY SINCE 1947* 43 (1949).

36. 13 NLRB ANN. REP. 98 table 1B (1948).

37. 14 NLRB ANN. REP. 158 table 1B (1949).

38. 15 NLRB ANN. REP. 220 table 1B (1950).

39. 29 U.S.C. § 159(c) (1935), *amended by* 29 U.S.C. § 159(c) (1947).

ployees and requiring the employer to bargain with that union.<sup>40</sup> On occasion, however, other devices were used. For example, unions were certified as representatives of bargaining units on the basis of authorization cards, membership cards and applications, and membership or authorization petitions which were cross-checked against the employer's payroll records to determine whether a majority of the employees in the unit desired union representation.<sup>41</sup> Under Section 9(c)(1) of the NLRA as instituted by the Taft-Hartley Act, once an election petition has been filed (by either the employer or the union), and the Board finds that a QCR does exist, "[the Board] *shall* direct an election by secret ballot and shall certify the results thereof."<sup>42</sup> In other words, once an election petition has been filed, Section 9(c)(1) precludes the Board from certifying a union to represent a unit of employees without utilizing the representation election to determine whether a majority of employees in that unit desire to be represented by that or any other union.

The most important effect of this change in the Act is that when any of these other devices were used, they were often used as soon as the union presented the NLRB with its claim for recognition and showing of majority support. Therefore, there was no opportunity for the employer to campaign against the union and convince the employees to oppose the union's organizing attempt. As will be discussed in subsection 5, research shows that the employer's preelection campaign *does* influence the outcomes of representation elections. Further, even if a majority of employees desired union representation at the time the petition was filed (so that a cross-check would have resulted in the union being certified), research has shown that the level of support for the union decreases between the petition date and the election date.<sup>43</sup> It is possible that the union will lose enough of its support during the campaign period so that it will lose the election and not be certified to represent that unit.<sup>44</sup>

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40. See, e.g., Paul Weiler, *Promises To Keep: Securing Workers' Rights To Self-Organization Under The NLRA*, 96 HARV. L. REV. 1769, 1806 n.137 (1983).

41. See, e.g., *Acme-Evans Co.*, 24 N.L.R.B. 71 (1940). See also BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS CUMULATIVE DIGEST AND INDEX §§ 62.6560-62.6576 (1946).

42. 29 U.S.C. § 159(c)(1) (1947) (emphasis added).

43. See, e.g., Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1 U. ILL. L. REV. 75, 76 (1981); Richard Prosten, *The Longest Season: Union Organizing in the Last Decade, aka How Come One Team Has to Play With Its Shoelaces Tied Together?*, in PROCEEDINGS OF THE THIRTY-FIRST ANNUAL MEETING 240, 243-44 (Indus. Rel. Research Ass'n 1979).

44. It should be noted, however, that, commencing with *Cudahy Packing Co.*, 13

## b. Appropriate Bargaining Unit Determinations

Unions were also hampered at this stage of the organization process by a change made by the Taft-Hartley Act with respect to the criteria used by the NLRB to determine the appropriate bargaining unit for the election. Prior to the passage of the Taft-Hartley Act, the only guidance given to the Board with respect to its bargaining unit determinations was Section 9(b), which required the Board to select the unit that would "insure to employees the full benefit of their right to self-organization and to collective bargaining."<sup>45</sup> This Section, in effect, *required* the Board to select the unit that would give a union the greatest chance of prevailing in the representation election. The Taft-Hartley amendments limited the Board's discretion in several ways, the most damaging of which is Section 9(c)(5), which states: "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."<sup>46</sup> The manner in which this amendment hampered unions' organizing efforts was explained by Jack Barbash:

The Board finds that a unit of two plants is the appropriate unit for collective bargaining. But the union has organized only one of the plants. The Board may not, under this provision, direct an election on the one-plant basis solely because it is the extent of union organization.<sup>47</sup>

Prior to the passage of Section 9(c)(5), the NLRB might have directed an election in the one plant the union had already organized, since that would have "insure[d] to employees the full benefit of their right to self-organization and to collective bargaining," as required by Section 9(b).<sup>48</sup> Section 9(c)(5) prevents the Board from selecting this as

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N.L.R.B. 526 (1939), the Board rarely used any of these devices unless the employer consented. Therefore, this change in the NLRA did not alter the practice of the Board in representation proceedings at the time the Taft-Hartley Act was passed. However, under the current version of Section 9(c) (which was inserted into the NLRA by the Taft-Hartley Act), the Board may not determine majority status by any means other than the representation election, even if it wished to do so. 29 U.S.C. § 159(c) (1988).

45. 29 U.S.C. § 159(b) (1935), *amended by* 29 U.S.C. § 159(b) (1947).

46. 29 U.S.C. § 159(c)(5) (1947) (current version at 29 U.S.C. § 159(c)(5) (1988)).

47. JACK BARBASH, LEAGUE FOR INDUSTRIAL DEMOCRACY, *TAFT-HARTLEY ACT IN ACTION, 1947-1954, AND ESSENTIALS OF A NEW LABOR POLICY* 28-29 (1956).

48. 29 U.S.C. § 159(b) (1935), *amended by* 29 U.S.C. § 159(b) (1947). *See also* May Dep't Stores, 53 N.L.R.B. 1366 (1943); Prudential Ins. Co., 46 N.L.R.B. 430 (1942).

the appropriate unit automatically.<sup>49</sup>

### c. Limiting the Frequency of Elections

Section 9(c)(3) of the Taft-Hartley amendments provides that an election cannot be held within a bargaining unit until after at least twelve months have passed from that unit's previous valid representation election.<sup>50</sup> Prior to the Taft-Hartley Act, a union that lost an election could petition the Board for another election within a few months, and the Board would have directed a new election, if the union could show a gain in membership during that interval.<sup>51</sup> The twelve-month rule in Section 9(c)(3) hampers union organizing efforts in the following way: the greatest support for a union (and therefore the union's greatest chance to prevail in a representation election), might be in the first few months after it or another union lost a representation election. The employer might have implied that the employees would receive certain benefits if the union was defeated and then failed to honor its promises.<sup>52</sup> The employer's failure to honor its promises might have given the union enough support to prevail in a second election held shortly after the first.<sup>53</sup> Since the Taft-Hartley amendments require the union to wait a full year before a second election is directed, and then to wait even longer before the election is held (since, as will be discussed in connection with step 5, the Taft-Hartley Act created delays in the election process), the union may lose much of that post-election support (and any subsequent election as well).

## 4. Preelection Procedures Are Used to Resolve Questions Relating to the Conduct of the Election

A change in Section 9(c) that hinders unions at this step of the organizing process concerns the timing of the election hearing. According to Section 9(c) of the Wagner Act, the Board was authorized to utilize the pre-hearing election, an election which is conducted

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49. 29 U.S.C. § 159(c)(5) (1947) (current version at 29 U.S.C. § 159(c)(5) (1988)). *See also* Standard-Coosa-Thatcher Co., 80 N.L.R.B. 50 (1948).

50. 29 U.S.C. § 159(c)(3) (1947) (current version at 29 U.S.C. § 159(c)(3) (1988)).

51. *See, e.g.,* Ingalls Shipbuilding Corp., 73 N.L.R.B. 1263, 1265 (1947).

52. While such promises literally would have violated Section 8(a)(1) of the NLRA, an employer can "get away with" many such promises and still not be found to have violated the Act. *See* WOLLETT, *supra* note 35, at 91-92.

53. *See* WOLLETT, *supra* note 35, at 91-92.

without the NLRB holding any formal hearing.<sup>54</sup> A hearing was held after the election, but only if a party wished to raise objections.<sup>55</sup> Section 9(c)(1)<sup>56</sup> and Section 9(c)(4)<sup>57</sup> of the Taft-Hartley Act, read in conjunction, require that an election hearing be held *before* the election takes place. This causes the election process to be delayed.<sup>58</sup> Since research has shown that delays in the election process decrease the probability of a union winning an NLRB election, allowing the employer to delay the holding of a representation election will, decrease the chances of a union winning that election.<sup>59</sup>

## 5. The Preelection Campaign Takes Place

As far as the organizing process is concerned, perhaps the greatest hinderance for unions brought about by the Taft-Hartley Act relates to the preelection campaign. With the decline of unions' success in representation elections,<sup>60</sup> much empirical research has been done in an attempt to ascertain the determinants of unions' election success rates.<sup>61</sup> Although these studies address different variables that affect the likelihood of a union winning a representation election, there is one conclusion about which there is virtual unanimity: the preelection campaign process affects the outcome of the election in that the cam-

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54. 29 U.S.C. § 159(c) (1935), amended by 29 U.S.C. § 159(c) (1947) (current version at 29 U.S.C. § 159(c) (1988)).

55. As written in the Wagner Act, Section 9(c) stated:

Whenever a question effecting commerce arises concerning the representation of employees, the Board may investigate such controversy . . . In any such investigation, the Board shall provide for an appropriate hearing upon due notice . . . and may take a secret ballot of employees . . . .

29 U.S.C. § 159(c) (1935). Thus, prior to the Taft-Hartley Act, the Board was required to hold a hearing in connection with any petition that was filed. However, nothing was stated about when that hearing was to be held.

56. 29 U.S.C. § 159(c)(1) (1947) (current version at 29 U.S.C. § 159(c)(1) (1988)).

57. 29 U.S.C. § 159(c)(4) (1947) (current version at 29 U.S.C. § 159(c)(4) (1988)).

58. See BENJAMIN J. TAYLOR & FRED WITNEY, *LABOR RELATIONS LAW* 51-54 (6th ed. 1992).

59. See Roomkin & Block, *supra* note 43, at 76; Prosten, *supra* note 43, at 243-44. Currently, the Board is authorized to conduct stipulated and consent elections, in which the election is held before any hearing. Roomkin & Block, *supra* note 43, at 86-87. While these devices do not involve the delay associated with an election following the hearing, neither can be held without the employer's consent. Roomkin & Block, *supra* note 43, at 86-87.

60. William T. Dickens, *The Effect of Company Campaigns On Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983) (commenting that much of the decline in union representation elections may be attributed to "increased management resistance") (citations omitted).

61. See, e.g., *id.*

paid conduct of both the employer and the union are extremely important determinants of whether the union will win the election.<sup>62</sup> Many of the rules governing employers' and unions' campaign conduct were added to the NLRA by the Taft-Hartley Act.<sup>63</sup> These changes had the cumulative effect of making it more difficult for a union to win a representation election.

a. Expanding the Permissible Campaign Tactics for Employers

One of the most important sections of the NLRA added by the Taft-Hartley Act is Section 8(c), commonly known as the "free speech" provision:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this . . . [Act], if such expression contains no threat of reprisal or force or promise of benefit.<sup>64</sup>

This specific provision increases the likelihood that management will prevail in a representation election.<sup>65</sup> Furthermore, other studies have concluded that variables directly related to Section 8(c) increase the likelihood that management will prevail in such an election.<sup>66</sup> Although these studies cannot measure what the results of these elections would have been had Section 8(c) never been enacted, the fol-

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62. See, e.g., *id.* at 573 (stating that "[e]ven the most conservative estimates of the effect of the average campaign show [that they] reduce union victories by 17 percent."); William N. Cooke, *The Rising Toll of Discrimination Against Union Activists*, 24 IND. REL. L.J. 421 (1985) (demonstrating empirical support for the fact that discrimination against union supporters decreases the probability of a union victory in a representation election); Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 IND. & LAB. REL. REV. 351 (1989) (showing empirical support for the fact that management opposition, especially the actions of supervisors, decreases the probability of a union victory in a representation election); cf. JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976) (determining that workers pay little attention to the election campaign; most workers have decided how they will vote far in advance of any campaign conduct by either management or unions).

63. See 29 U.S.C. § 159 (1947) (current version at 29 U.S.C. § 159 (1988)).

64. 29 U.S.C. § 158(c) (1947) (current version at 29 U.S.C. § 158(c) (1988)).

65. See Weiler, *supra* note 40, at 1776-86.

66. John J. Lawler, *The Influence of Management Consultants on the Outcome of Union Certification Elections*, 38 INDUS. & LAB. REL. REV. 38 (1984) (showing empirically that the use of management consultants adversely affects a union's chance of election victory); John J. Lawler & Robin West, *Impact of Union-Avoidance Strategy in Representation Elections*, 24 INDUS. REL. 406 (1985) (demonstrating that the use of these consultants is facilitated by Section 8(c)).

lowing conclusion may be deduced from this research: since employer "speech" (in the generic sense of the word) decreases the probability that a union will win a representation election, and since Section 8(c) increased the types of employer "speech" that were protected by the NLRA, Section 8(c), decreased the probability that a union will win a representation election.

#### b. Restricting the Permissible Campaign Tactics for Unions

Under the Wagner Act, there were no statutory restrictions on unions' preelection campaign tactics.<sup>67</sup> The Taft-Hartley Act restricted those tactics in several ways. Section 8(b)(1) makes it an unfair labor practice for a labor organization "to restrain or coerce . . . employees in the exercise of the rights guaranteed in [Section 7]."<sup>68</sup> Since Section 7 of the NLRA was amended by the Taft-Hartley Act so as to guarantee employees the right to *refrain* from joining a union, Section 8(b)(1)(A) operates to prohibit unions from interfering with employees' right to refrain from joining a union. Several commentators have discussed how Section 8(b)(1)(A) prohibited unions from using certain types of campaign conduct that they had used with impunity under the Wagner Act.<sup>69</sup> For example, while unions had not been able to use physical violence or intimidation during the preelection campaign even before the Taft-Hartley Act, they had been able to do things such as make false promises regarding previous success elsewhere, call employees names such as "scab" and "union buster" if they opposed the union, and refer to rival unions as "weak and incompetent."<sup>70</sup> These statements were prohibited by Section 8(b)(1)(A).<sup>71</sup>

Section 8(b)(4) contains several restrictions on unions' use of economic weapons that had been frequently used in the preelection campaign prior to the passage of the Taft-Hartley Act.<sup>72</sup> Further,

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67. The Board had, however, overturned union election victories in cases of violence in the union's election campaign. See, e.g., *LaFollette Shirt Co.*, 65 N.L.R.B. 952 (1946).

68. 29 U.S.C. § 158(b)(1)(A) (1947) (current version at 29 U.S.C. § 158(b)(1)(A) (1988)).

69. See, e.g., Archibald Cox, Article, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1 (1947); James F. Foley, Note, *Union Unfair Labor Practices Under the Taft-Hartley Act*, 33 VA. L. REV. 697 (1947).

70. Cox, *supra* note 69, at 32 (citing *Corn Products Refining Co.*, 58 N.L.R.B. 1441, 1442 n.2 (1944)).

71. Senator Taft expressly stated that this is the type of campaign tactic Section 8(b)(1)(A) was designed to prevent. Cox, *supra* note 69, at 32.

72. 29 U.S.C. § 158(b)(4) (1947) (current version at 29 U.S.C. § 158(b)(4) (1988)).

Section 10(l) *requires* the NLRB to give prompt attention to all charges alleging violations of Section 8(b)(4) and, moreover, *requires* the Board to petition a federal court for injunctive relief pending the final resolution of the charge if the Director “has reasonable cause to believe such charge is true.”<sup>73</sup> Finally, Section 303 of the Taft-Hartley Act authorizes employers injured by strikes that are conducted in violation of Section 8(b)(4) to sue those unions responsible for damages in federal court.<sup>74</sup>

Section 8(b)(4)(A) of the Taft-Hartley Act prohibited the secondary boycott.<sup>75</sup> A secondary boycott occurs when a union engaged in a labor dispute with Employer A (i.e., trying to organize the employees of Employer A) puts economic pressure on Employer B (a neutral employer that does business with Employer A but with whom the union has no dispute), in order to put indirect economic pressure on Employer A.<sup>76</sup> The secondary boycott had often been used by unions in their organizing efforts prior to the Taft-Hartley Act.<sup>77</sup> Thus, removing the secondary boycott from unions’ arsenal of campaign tactics greatly restricted the weapons available to them in organizing campaigns.

Section 8(b)(4)(B) of the NLRA, as it existed after the Taft-Hartley amendments, prohibited unions from attempting to “forc[e] or requir[e] any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . . .”<sup>78</sup> Although this section did not prohibit unions from using the primary strike for recognition purposes, an illustrative example of how Section 8(b)(4)(B) *did* restrict unions’ organizing tactics is presented by Cox:

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73. 29 U.S.C. § 160(l) (1988). Section 10(l) authorizes federal district courts to enjoin a union’s violation of Section 8(b)(4), notwithstanding the provisions of the Norris-Laguardia Act. *Id.*

74. 29 U.S.C. § 187 (1988).

75. 29 U.S.C. § 158(b)(4)(A) (1947). Under the present version of the NLRA, the prohibition on secondary boycotts is contained in Section 8(b)(4)(B). 29 U.S.C. § 158(b)(4)(B) (1988).

76. *See, e.g.,* Foley, *supra* note 69, at 717.

77. *See, e.g.,* Foley, *supra* note 69, at 717-18; Claude E. Taylor, Jr., Note, *Some Union Unfair Labor Practices Under the Taft-Hartley Act*, 5 WASH. & LEE L. REV. 13, 24-26 (1948).

78. 29 U.S.C. § 158(b)(4)(B) (1947) (current version at 29 U.S.C. § 158(b)(4)(C) (1988)).



The impact of this [Section] on the techniques of organization will also be important. The International Brotherhood of Teamsters, for example, whose members are employed by trucking concerns, frequently was able, by refusing to handle supplies or products, to force the employees of other enterprises to join the Teamsters Union and their employers to recognize it as collective bargaining representative. Section 8(b)(4)(B) prevents this tactic by prohibiting a labor organization from encouraging a strike or concerted refusal to work on or handle goods, where an object thereof is "forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9."<sup>79</sup>

In sum, the Taft-Hartley Act greatly hindered unions in the preelection campaign by expanding the tactics management could use and restricting the campaign tactics unions could use.

## 6. The Election is Held

The rules governing NLRB representation elections were changed by several of the Taft-Hartley Act provisions and, consequently, made it more difficult for unions to be victorious in such elections.

### a. Preventing Economic Strikers Who Have Been Permanently Replaced From Voting

The version of Section 9(c)(3) enacted by the Taft-Hartley Act stated: "[e]mployees on strike who are not entitled to reinstatement shall not be eligible to vote . . . ."<sup>80</sup> In *NLRB v. MacKay Radio & Tel. Co.*,<sup>81</sup> decided prior to the passage of the Taft-Hartley Act, the Supreme Court ruled that permanently replaced economic strikers are not entitled to reinstatement when the strike is concluded.<sup>82</sup> Therefore, following the Taft-Hartley Act, Section 9(c)(3) and *MacKay Radio* operated to prevent economic strikers who had been permanently replaced from voting in a representation election that was conducted after the strike had been called. Instead, it was the permanent replacements who voted. Board policy prior to the Taft-Hartley Act was

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79. Cox, *supra* note 69, at 25-26 (quoting 29 U.S.C. § 158(b)(4)(B) (1947)).

80. 29 U.S.C. § 159(c)(3) (1947) (current version at 29 U.S.C. § 159(c)(3) (1988)).

81. 304 U.S. 333 (1938) [hereinafter *MacKay Radio*].

82. *Id.* at 345-46.

to allow economic strikers to vote even if they had been permanently replaced — a policy consistent with the definition of “employee” in Section 2(3).<sup>83</sup> Senator Pepper described how this provision could be used by an employer desirous of “breaking a union” (and thus prevailing in a representation election):

Under [this provision,] all an employer has to do is provoke his workers to strike, recruit replacements, and put them in permanent status, and call for an election, if there has not been an election in a year, and his new strikebreakers would elect new representatives [or no representatives], and the old union would be effectively disposed of.<sup>84</sup>

#### b. Including “No Union” on Certain Ballots in Runoff Elections

Subsection 9(c)(3) also hampers unions’ likelihood of prevailing in certain representation elections by altering runoff elections. This change is best illustrated by the following example:<sup>85</sup> an election is held in which the ballot includes “Union A,” “Union B,” “Union C” and “No Union.” The results are “Union A” (31%), “Union B” (14%), “Union C” (25%) and “No Union” (30%). Under Board policy prior to 1947, the ballot in the runoff election would have included only “Union A” and “Union C” — the two unions that received the

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83. 29 U.S.C. § 152(3) (1988). Section 2(3) states that “[t]he term ‘employee’ shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . .” *Id.* Thus, an economic striker who has been permanently replaced would still qualify as an “employee” under the NLRA.

84. MILLIS & BROWN, *supra* note 33, at 519 n.33. In 1959, Section 9(c)(3) was amended and currently reads, “[e]mployees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike.” 29 U.S.C. § 159(c)(3) (1988). Thus, the version of the NLRA currently in effect provides that both the striking employees and the strike replacements may vote in any election conducted within twelve months of the commencement of an economic strike. After twelve months, only the strike replacements vote. See Martin Crane, Note, *Equal Access in NLRB Elections: Determining the Voting Eligibility of Economic Strikers*, 58 GEO. WASH. L. REV. 549, 552 (1990). Thus, the 1959 amendments obviate some, but not all, of the hinderance Section 9(c)(3) caused for unions. From a union’s perspective, the best result would be for the striking employees to be the *only* people to vote in any representation election called after the commencement of an economic strike.

The text discusses the version of Section 9(c)(3) enacted by the Taft-Hartley Act, since the title of this paper is “How the Taft-Hartley Act Hindered Unions.”

85. See Walter L. Daykin, *Collective Bargaining and the Taft-Hartley Act*, 33 IOWA L. REV. 623, 631 (1947-48). The percentages used in the above example are not Walter Daykin’s, but have been inserted by the author for illustrative purposes.

highest number of votes in the original election. The employees could no longer vote for "No Union." The Board reasoned that, even though "No Union" had received more votes than "Union C" in the original election, since at least one of the unions had received more votes than "No Union," the employees had indicated that they wished to be represented by a union. The runoff was needed only to select the employees' union of choice. The version of Section 9(c)(3) legislated by the Taft-Hartley Act requires the runoff to be between "Union A" and "No Union," and the employees are given a second opportunity to reject union representation, a choice they did not have prior to 1947.

Based on the preceding discussion, one would ask whether the Taft-Hartley Act actually reduced the number of representation elections and/or the union victory rate in those elections following its passage. The *NLRB Annual Reports* provide the following statistics on representation elections held in the two years immediately preceding and following the Taft-Hartley Act's passage: 3,222 representation elections were held in fiscal year 1948<sup>86</sup> and 5,514 were held in 1949<sup>87</sup> (the first two years the Taft-Hartley Act was in effect), as compared with 5,589 in 1946<sup>88</sup> and 6,920 in 1947<sup>89</sup> (the last two years under the Wagner Act). These figures show that there was a decrease in the number of representation elections of over 50% in the year following the Taft-Hartley Act's passage. In addition, unions won only 72.5% of the elections held in 1948<sup>90</sup> and 70.5% in 1949,<sup>91</sup> as compared to 79.6% of the elections held in 1946<sup>92</sup> and 75.0% of those held in 1947.<sup>93</sup> These numbers show a decrease in both the number and percentage of union victories in NLRB representation elections following the Act's effective date.<sup>94</sup>

There is another point that needs to be made regarding the effect of the Taft-Hartley Act on union membership. It is true that union

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86. 13 NLRB ANN. REP. 112 table 17 (1948).

87. 14 NLRB ANN. REP. 173 table 17 (1949).

88. 11 NLRB ANN. REP. 86 table 17 (1946).

89. 12 NLRB ANN. REP. 77 table 16 (1947).

90. 13 NLRB ANN. REP. 112 table 17 (1948).

91. 14 NLRB ANN. REP. 173 table 17 (1949).

92. 11 NLRB ANN. REP. 86 table 17 (1946).

93. 12 NLRB ANN. REP. 77 table 16 (1947).

94. I do not contend that the numbers cited were solely caused by the Taft-Hartley Act. Many variables could have contributed to the decrease in the number and percentage of union victories in NLRB representation elections following the Act's effective date. There is at least a possibility that the Taft-Hartley Act contributed to this decrease in representation elections and the union victory rate in such elections.

membership did not decrease considerably following the passage of the Act — either in actual numbers or as a percentage of the civilian labor force. However, Orley Ashenfelter and John H. Pencavel show that growth in union membership is positively related to economic variables such as price inflation and recent employment growth in highly unionized industries.<sup>95</sup> Generally, these economic variables would be extremely beneficial for union growth in the years following the passage of the Taft-Hartley Act. Therefore, as one commentator noted, “[u]nion growth would have been significantly greater during the . . . [years immediately following the passage of the Taft-Hartley Act] if there had been no Taft-Hartley.”<sup>96</sup>

Finally, as discussed in connection with the preelection campaign, a great deal of empirical research has been done on the factors affecting the union victory rate in representation elections. This research has concluded that things such as delaying the time between the petition and the election, campaigning by management, and the use of consultants by management all decrease the likelihood that a union will prevail in such an election.<sup>97</sup> Since the Taft-Hartley Act strengthened management in these areas, these studies at least indirectly support the view that the Taft-Hartley Act decreased the likelihood of a union being chosen to represent a firm’s employees in a NLRB representation election.

#### B. PROVISIONS THAT MADE IT LESS LIKELY THAT UNIONS WOULD BE ABLE TO OBTAIN FAVORABLE COLLECTIVE BARGAINING AGREEMENTS FOR THE EMPLOYEES THEY REPRESENT

Once a union is elected to represent a bargaining unit of employees, it attempts to negotiate a collective bargaining agreement covering those employees. John M. Abowd and Brian E. Becker both show that collective bargaining outcomes affect shareholder wealth (profits).<sup>98</sup> Abowd analyzed the effects of 4,212 collective bargaining agreements reached between 1976 and 1982 on security returns in the affected firms, and reported that unexpected increases in the value of

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95. Orley Ashenfelter & John H. Pencavel, *American Trade Union Growth: 1900-1960*, 83 Q. J. ECON. 434, 436 (1969).

96. Joseph Shister, *The Impact of the Taft-Hartley Act on Union Strength and Collective Bargaining*, 11 INDUS. & LAB. REL. REV. 339, 340 (1958).

97. See *supra* text accompanying notes 59-67.

98. John M. Abowd, *The Effect of Wage Bargains on the Stock Market Value of the Firm*, 79 AM. ECON. REV. 774 (1989); Brian E. Becker, *Concession Bargaining: The Impact on Shareholders’ Equity*, 40 INDUS. & LAB. REL. REV. 268 (1987).

collective bargaining settlements for employees were offset by virtual dollar-for-dollar decreases in the value of shareholder wealth.<sup>99</sup> Abowd interprets these results as supporting the finding that union-induced collective bargaining gains and losses came directly at the expense of shareholder wealth.<sup>100</sup> Becker attempted to determine the effect of unanticipated concession bargains (i.e., employee give-backs negotiated by unions) on shareholder wealth.<sup>101</sup> Using a sample of seventy collective bargaining settlements which he classified as "concessionary," Becker found that the unanticipated union give-backs in collective bargaining led to an 8%-10% increase in shareholder equity.<sup>102</sup> Thus, the same general conclusion can be drawn from both Abowd and Becker: collective bargaining settlements that are beneficial for unionized employees correspondingly reduce shareholder wealth, while those that are detrimental for unionized employees increase shareholder wealth.

The Taft-Hartley Act made it more difficult for unions to negotiate favorable terms in collective bargaining agreements both by decreasing the bargaining power of unions and by making it more difficult (or even illegal) for certain types of clauses to be included in collective bargaining agreements. Therefore, any provision of the Taft-Hartley Act that made it more difficult for unions to obtain collective bargaining agreements that were beneficial to employees would have hindered unions.

### 1. Decreasing Unions' Bargaining Power

Bargaining power is defined by Kochan & Katz as "the ability of one party to achieve its goals in bargaining in the presence of opposition by another party to the process."<sup>103</sup> Accordingly, provisions in the Taft-Hartley Act that decreased the bargaining power of unions made it less likely that unions would be able to secure provisions in collective bargaining agreements that benefitted employees.

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99. Abowd, *supra* note 98, at 793. Abowd also reported the converse to be true: unexpected decreases in the value of collective bargaining settlements for employees were offset by virtual dollar-for-dollar increases in the value of shareholder wealth. Abowd, *supra* note 98, at 793.

100. Abowd, *supra* note 98, at 774.

101. Becker, *supra* note 98, at 268.

102. Becker, *supra* note 98, at 272-73.

103. KOCHAN & KATZ, *supra* note 19, at 53-54.

a. Making it an Unfair Labor Practice for  
Unions to Refuse to Bargain

Under the Wagner Act, if a firm's employees were represented by a union, only the employer (the firm) was required to bargain; refusing to do so violated Section 8(5).<sup>104</sup> Unions had no legal obligation to bargain with the employer. Section 8(b)(3) of the NLRA, added by the Taft-Hartley Act, made it an unfair labor practice for a certified union "to refuse to bargain collectively with an employer . . . ."<sup>105</sup> In addition, Section 8(d), also added to the NLRA by the Taft-Hartley Act, stated that "to bargain collectively is the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."<sup>106</sup> Thus, Sections 8(d) and 8(b)(3), read in conjunction, required unions to bargain *in good faith* with the employer. As Archibald Cox explained, "[t]here have been some occasions when [unions'] tactics fell short of 'willingness . . . to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reason.'"<sup>107</sup>

In other words, prior to the Taft-Hartley Act, unions often bargained in ways that fell short of "good faith" without violating the NLRA. Requiring unions to bargain "in good faith" reduced union bargaining power in two ways: (1) tactics employed by a union that previously were not prohibited by the NLRA prior to 1947 would be in violation of Section 8(b)(3); and (2) there were cases prior to 1947 in which the NLRB and/or the courts found an employer guilty of refusing to bargain under Section 8(5) even though the union filing the charge was not engaged in good faith bargaining.<sup>108</sup> Once Sections 8(b)(3) and 8(d) were enacted, the courts held that an "employer cannot be guilty of a refusal to bargain if the Union is not itself bargaining in good faith."<sup>109</sup> If a union was not bargaining in good faith, the employer would not be held to have violated Section 8(a)(5)

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104. 29 U.S.C. § 158(5) (1935) (current version at 29 U.S.C. § 158(a)(5) (1988)).

105. 29 U.S.C. § 158(b)(3) (1947) (current version at 29 U.S.C. § 158(b)(3) (1988)).

106. 29 U.S.C. § 158(d) (1947) (current version at 29 U.S.C. § 158(d) (1988)).

107. Archibald Cox, Article, *Some Aspects of the Labor Management Relations Act, 1947, Part II*, 61 HARV. L. REV. 274, 283 (1948) [hereinafter Cox II] (quoting *NLRB v. George P. Pilling & Son*, 119 F.2d 32, 37 (3d Cir. 1941)).

108. See BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS CUMULATIVE DIGEST AND INDEX §§ 54.700-54.733 (1946).

109. *Superior Engraving Co. v. NLRB*, 183 F.2d 783, 794 (7th Cir. 1950), cert. denied, 340 U.S. 930 (1951).

by bargaining in bad faith.<sup>110</sup>

b. Limiting the Ability to Modify Existing Agreements

Section 8(d) of the Taft-Hartley Act delineates the appropriate procedure that a party wishing to amend or terminate an existing collective bargaining agreement must follow.<sup>111</sup> The party must: (1) serve written notice upon the other party at least 60 days in advance of the proposed change or modification; (2) offer to meet and confer for the purpose of negotiating a new (modified) collective bargaining agreement; (3) notify the Federal Mediation and Conciliation Service and the appropriate state and territorial agencies if no agreement is reached within 30 days of the notice required by (1) above; and (4) continue the existing collective bargaining agreement "*without resorting to strike or lockout*" until the agreement's expiration date or until the expiration of the notice required by (1) above, whichever is later.<sup>112</sup> Thus, Section 8(d)(4) limits the times when a union may strike. Since a union's bargaining power might be greatest if it called a strike during the times when it is prohibited from striking by Section 8(d)(4), that section also reduced the bargaining power of unions.

An additional clause in Section 8(d) (added by the Taft-Hartley Act), one that reduced unions' bargaining power, provided that "[a]ny employee who engages in a strike within the sixty day period [referred to in Section 8(d)] shall lose his status as an employee . . . for the purposes of . . . this Act."<sup>113</sup> The effect of the above-quoted clause, referred to by Archibald Cox as "the most objectional feature of Section 8(d)," can be devastating:

Unless the union happens to retain the support of a majority of the non-strikers, the employer is excused from continuing the bargaining which ordinarily offers the best hope of terminating a strike; and, so far as the strikers are concerned, he may employ labor spies, discriminate against union men, and engage in other acts of interference and coercion aimed at destroying the union.<sup>114</sup>

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110. *Id.*

111. 29 U.S.C. § 158(d) (1988).

112. *Id.* (emphasis added).

113. 29 U.S.C. § 158(d) (1947) (current version at 29 U.S.C. § 158(d) (1988)).

114. Cox II, *supra* note 107, at 281.

### c. Prohibiting Secondary Boycotts

Perhaps the greatest restriction on unions' bargaining power is the prohibition of secondary boycotts stipulated within subsection 8(b)(4)(A) of the Taft-Hartley amendments.<sup>115</sup> Prior to the passage of the Taft-Hartley Act, the secondary boycott had been used by unions as an effective collective bargaining weapon as well an organizing tactic.<sup>116</sup> Therefore, its prohibition reduced unions' bargaining power in addition to hampering their organizing efforts.

## 2. Limiting Types of Contract Clauses

The Taft-Hartley Act also made it more difficult (or even illegal) for certain clauses to be included within collective bargaining agreements, even if unions had sufficient bargaining power to secure them.

### a. Limits on Union Security Clauses

Three provisions of the Taft-Hartley Act limited the unions' ability to insert union security clauses in collective bargaining agreements. First, Section 8(a)(3) outlawed the closed shop entirely.<sup>117</sup> Second, if a union wished to secure a union shop clause in a collective bargaining agreement, Section 9(e)(1) required the union to win a Board-conducted election authorizing it to attempt to secure such a clause.<sup>118</sup> Third, Section 14(b) authorized states to enact right-to-work laws — laws that were even more restrictive in their treatment of union security clauses than the NLRA itself.<sup>119</sup> When the Taft-Hartley Act was passed, a number of states had already implemented more restrictive union security clauses than those contained within the NLRA; after Section 14(b) was enacted, the consensus was that more states would enact right-to-work laws.<sup>120</sup> Union security clauses in-

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115. 29 U.S.C. § 158(b)(4)(A) (1947) (current version at 29 U.S.C. § 158(b)(4)(B) (1988)). The secondary boycott was discussed in connection with unions' preelection campaign conduct. *See supra* text accompanying notes 75-77.

116. *See* Foley, *supra* note 69, at 697; Taylor, *supra* note 77, at 13.

117. 29 U.S.C. § 158(a)(3) (1947) (current version at 29 U.S.C. § 158(a)(3) (1988)).

118. 29 U.S.C. § 159(e)(1) (1947). While this requirement was deleted in 1951, Act of Oct. 22, 1951, ch. 534, sec. (e), § 9(e)(1), 65 Stat. 601, 601-02 (1951), it would have hindered unions when the Taft-Hartley Act was enacted in 1947.

119. 29 U.S.C. § 164(b) (1947) (current version at 29 U.S.C. § 164(b) (1988)). The effect of Section 14(b) and right to work laws will be discussed more fully herein at notes 165-171.

120. *See* Harry A. Millis & Harold A. Katz, *A Decade of State Labor Legislation 1937-*



crease the size of union membership in a number of ways. The union shop requires every member of a bargaining unit represented by a union to join that union<sup>121</sup> while the closed shop requires persons to join a union even before they are eligible to be employed by an employer (if the union has been chosen to represent the employer's existing employees).<sup>122</sup> While it is true that outlawing the closed shop and making it more difficult for unions to obtain union shops would not decrease the number of employees represented by unions and covered by collective bargaining agreements,<sup>123</sup> the limiting of union members and people not yet employed from having to become union members effectively decreased union membership and the wealth of unions' treasuries. Other benefits offered by the closed and union shops have been examined by Mancur Olson.<sup>124</sup>

#### b. Anti-Featherbedding Provision

Section 8(b)(6) makes it an unfair labor practice for a union to "cause or attempt to cause an employer to pay . . . for services which are not performed or not to be performed."<sup>125</sup> The intent of this provision was to prohibit "featherbedding" practices — "defined roughly as a practice of forcing the employer to retain more workers than the job warrants . . ."<sup>126</sup> Commentators have observed, however, that Section 8(b)(6) could also have been interpreted as prohibiting payment to employees for things such as break periods, travel to and from work, vacations, holidays, etc.; all provisions frequently included in collective bargaining agreements prior to passage of the Taft-Hartley Act.<sup>127</sup>

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1947, 15 U. CHI. L. REV. 282, 290-94 (1947-48).

121. See ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 641-42 (1976).

122. *Id.* at 642.

123. Once a union is certified as the bargaining representative of a bargaining unit, the duty of fair representation requires that union to represent all of the employees in the bargaining unit, whether or not they are union members. *Id.* at 381.

124. See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

125. 29 U.S.C. § 158(b)(6) (1988).

126. See HAROLD W. DAVEY, CONTEMPORARY COLLECTIVE BARGAINING 66 (Dale Yoder ed., 2d ed. 1959).

127. See, e.g., VAN ARKEL, *supra* note 25, at 59-60.

### c. Limiting Pension and Welfare Plans

Prior to the passage of the Taft-Hartley Act, pension and health and welfare plans were included in collective bargaining agreements with increasing frequency.<sup>128</sup> Section 302 of the Taft-Hartley Act imposed numerous rules and regulations that applied to these plans.<sup>129</sup> While the specifics of these rules and regulations are not important to this paper, Section 302 made it less likely for such plans to be included within collective bargaining agreements in two ways. First, certain types of plans that had been used prior to the Taft-Hartley Act were specifically made illegal.<sup>130</sup> Even more important, however, the parties found it difficult to comply with Section 302 and often decided not to include plans within their collective bargaining agreements, rather than attempt to comply with the section.<sup>131</sup>

### C. PROVISIONS THAT MADE IT LESS LIKELY THAT EMPLOYEES REPRESENTED BY UNIONS WOULD STRIKE

An event that sometimes occurs in firms whose employees are represented by unions is the strike. Several commentators have shown that strikes reduce shareholder wealth in firms that are the target of a strike.<sup>132</sup> Becker & Olson investigated the change in shareholder returns that occurred in a sample of 669 strikes involving 1,000 or more employees that occurred between 1962 and 1982.<sup>133</sup> The results of that investigation were that the equity value of the struck firms decreased by 4.16% over the period that encompassed thirty days prior to the commencement of a strike until thirty days after the strike was settled.<sup>134</sup> Further, comparing shareholder returns in a sample of firms in which strikes occurred with another sample in which contracts were reached without a strike, they concluded that the declines in shareholder wealth were due to the costs of the strike, not to the costs of the collective bargaining agreements that ultimately

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128. WOLLETT, *supra* note 35, at 136-41; VAN ARKEL, *supra* note 25, at 64.

129. Labor Management Relations Act, ch. 120, sec. 302, § 186, 61 Stat. 157 (1947) (current version at 29 U.S.C. § 186 (1988)).

130. DAVEY, *supra* note 126, at 64-66.

131. DAVEY, *supra* note 126, at 64-66.

132. Brian E. Becker & Craig A. Olson, *The Impact of Strikes on Stockholder Equity*, 39 INDUS. & LAB. REL. REV. 425 (1986); George R. Neumann, *The Predictability of Strikes: Evidence From the Stock Market*, 33 INDUS. & LAB. REL. REV. 525 (1980).

133. Becker & Olson, *supra* note 132, at 430.

134. Becker & Olson, *supra* note 132, at 430-31.

were reached.<sup>135</sup> An earlier study also found that strikes reduce shareholder wealth.<sup>136</sup> Although that study did not include statistical tests on the change in shareholder returns over the entire strike period, it did find that shareholder returns decreased by 0.4% on the day the strike was called and increased by 0.3% on the day it was settled.<sup>137</sup> Based upon these studies, provisions in the Taft-Hartley Act that reduced the ability of a union to call a strike also hindered unions.

### 1. Prohibiting Certain Types of Strikes

Section 8(b)(4) of the Taft-Hartley Act prohibited certain strikes if the *objective* of the strike was illegal.<sup>138</sup> Subsection 8(b)(4)(A) outlawed both the secondary boycott or strike and strikes used to force an employer or a self-employed person to join either a union or an employer association.<sup>139</sup> This provision prevented unions from striking in order to induce employers to engage in industry-wide bargaining.<sup>140</sup>

The type of strike prohibited by Subsection 8(b)(4)(B) was discussed in connection with the Taft-Hartley Act's limitations on unions' preelection campaign tactics.<sup>141</sup>

Section 8(b)(4)(C) prohibited a union from striking with the objective of "forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9."<sup>142</sup> Thus, if two or more unions have support from employees in the same bargaining unit, one union, and the employees who support

135. Becker & Olson, *supra* note 132, at 430-31.

136. Neumann, *supra* note 132, at 532.

137. Neumann, *supra* note 132, at 529.

138. 29 U.S.C. § 158(b)(4) (1947). References will be to section numbers as they existed in 1947, although the current section numbers are slightly different. Wollett gives a thorough explanation of Section 8(b)(4). WOLLETT, *supra* note 35, at 88-101.

139. 29 U.S.C. § 158(b)(4)(A) (1947) (current version at 29 U.S.C. § 158(b)(4)(B) (1988)). See also *supra* text accompanying notes 75-77 (discussing the secondary boycott in connection with limitations on unions' preelection campaign tactics and limitations on unions' bargaining power).

140. See VAN ARKEL, *supra* note 25, at 50-52 (explaining how this provision was harmful, particularly to unions in the trucking industry).

141. See *supra* text accompanying notes 78-79.

142. 29 U.S.C. § 158(b)(4)(C) (1947) (current version at 29 U.S.C. § 158(b)(4)(C) (1988)).

that union, may not strike if another union has been certified as the representative of that bargaining unit.

Finally, 8(b)(4)(D) prohibited what is known as the “jurisdictional work dispute” — a dispute in which the employees represented by one union strike to force the employer to assign work to them rather than to a different group of employees (whether or not the other employees are unionized).<sup>143</sup>

Prior to the passage of the Taft-Hartley Act, all of these strikes were legal. By making them illegal, Section 8(b)(4) in and of itself would have reduced the number of strikes. In addition, as previously noted, the effects of Section 8(b)(4) were compounded by Section 10(l)<sup>144</sup> and Section 303<sup>145</sup> of the Taft-Hartley Act, further reducing the likelihood that employees represented by unions would strike.<sup>146</sup>

## 2. Restricting Timing of Strikes

Section 8(d) of the Taft-Hartley Act has already been discussed in connection with the modification of collective bargaining agreements.<sup>147</sup> By limiting the times when certain strikes could be called, that section also reduced the number of strikes that would occur. In sum, a number of provisions of the Taft-Hartley Act reduced the likelihood that (employees represented by) unions would strike.

## 3. National Emergency Disputes

In certain specific situations, employees’ (and unions’) right to strike was restricted by Sections 206 through 210 of the Taft-Hartley Act — the “national emergency disputes” provisions.<sup>148</sup> Essentially, if the President finds that a strike or lockout will “imperil the national health or safety,”<sup>149</sup> he is authorized to apply to have that strike or lockout enjoined, despite the Norris-Laguardia Act’s ban on injunc-

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143. 29 U.S.C. § 158(b)(4)(D) (1947) (current version at 29 U.S.C. § 158(b)(4)(D) (1988)).

144. 29 U.S.C. § 160(l) (1947) (current version at 29 U.S.C. § 160(l) (1988)).

145. Labor Management Relations Act, ch. 120, sec. 303, § 187, 61 Stat. 158 (1947) (current version at 29 U.S.C. § 187 (1988)).

146. *See supra* text accompanying notes 78-79.

147. *See supra* text accompanying notes 111-14.

148. Labor Management Relations Act, ch. 120, sec. 206-210, §§ 176-180, 61 Stat. 155-156 (1947) (current version at 29 U.S.C. §§ 176-180 (1988)).

149. 29 U.S.C. § 176 (1988).

tions.<sup>150</sup> In addition, soon after the injunction is issued, the NLRB must take a ballot of the bargaining unit members to determine whether they wish to accept the employer's last offer.<sup>151</sup> These provisions had the effect of preventing primary strikes that would have been lawful prior to the passage of the Taft-Hartley Act.<sup>152</sup>

#### D. PROVISIONS THAT MADE IT MORE LIKELY THAT UNIONS WOULD BE DECERTIFIED IN NLRB DECERTIFICATION ELECTIONS

Another event that may occur if employees of a firm are represented by a union is the decertification election — an election in which employees represented by a union vote on whether they wish to continue their union representation.<sup>153</sup> While Ruback & Zimmerman's results show that representation elections in which a firm's employees choose to be represented by a union decrease shareholder wealth,<sup>154</sup> a similar study by Huth and MacDonald shows that the corollary result is also true — decertification elections in which a firm's employees choose to abandon their union representation increase shareholder wealth.<sup>155</sup> Focusing on the ten-year period 1977 through 1987 and analyzing a sample consisting of 203 firms which held decertification elections involving at least 250 employees, Huth & MacDonald examined the stock market response on the date the decertification petition was filed and on the date the results of the election were certified by the NLRB.<sup>156</sup> They found that the filing

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150. 29 U.S.C. § 178(a) (1988). This section allows the President to direct the Attorney General to petition the district court having jurisdiction over the parties involved in the labor dispute to enjoin the threatened or actual strike or lockout. *Id.* If the court determines that the threatened or actual work stoppage "if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lockout, or the continuing thereof, and to make such other orders as may be appropriate." *Id.* § 178(a)(ii).

151. 29 U.S.C. § 179(b) (1988). The ballot is not binding, however. Thus, even if the employees vote to accept the employer's last offer, the union is not bound to accept that offer. The result of the employees' vote is however, submitted to the United States Attorney General. *Id.*

152. Although the national emergency dispute provisions have been used infrequently, it was thought that they might be used with relative frequency at the time the Taft-Hartley Act was enacted. See John Thomas Delaney et al., *The NLRA at Fifty: A Research Appraisal and Agenda*, 39 INDUS. & LAB. REL. REV. 46, 63 (1985); WOLLETT, *supra* note 35, at 52-56.

153. William L. Huth & Don N. MacDonald, *Equity Market Response to Union Decertification Petitions and Elections*, 11 J. LAB. RES. 193, 194-95 (1990).

154. See *supra* text accompanying notes 14-16.

155. William L. Huth & Don N. MacDonald, *Equity Market Response to Union Decertification Petitions and Elections*, 11 J. LAB. RES. 193 (1990).

156. *Id.* at 196.

of the decertification petition itself had no effect on shareholder wealth.<sup>157</sup> However, shareholder wealth increased by .65% on the date the election results were certified by the NLRB if the union was decertified and decreased by .61% if the union was not decertified.<sup>158</sup> In other words, successful decertification elections (for the petitioning employees) increased shareholder wealth while unsuccessful decertification elections decreased shareholder wealth.<sup>159</sup>

Under the NLRA prior to the Taft-Hartley Act, decertification elections were not permitted.<sup>160</sup> The only way a union certified as the representative of a bargaining unit could lose its right to represent that unit was if the employees could show substantial support for a rival union.<sup>161</sup> In that case, an election would have been held with only the two (or more) unions on the ballot, and the winner would have been certified as the bargaining representative for that unit ("No Union" was not a choice on the ballot). Irrespective of which union ultimately won that election, the employees were still represented by a union. There was no way for the employees to opt to abandon their union representation entirely prior to the passage of the Taft-Hartley Act.<sup>162</sup> Under Section 9(c)(1)(A)(ii) of the Taft-Hartley amendments, however, a unit of employees currently represented by a union may file a decertification petition and the ultimate result of such a petition may be an election in which the union loses its right to represent the employees in the unit.<sup>163</sup>

The *NLRB Annual Reports* have promulgated the following numbers with respect to decertification elections: between 1987 and 1991, an average of 637 decertification elections were held per year, and unions were decertified in 459 (72.08%) of these elections.<sup>164</sup> Fur-

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157. *Id.* at 199.

158. *Id.*

159. Although it would have been interesting to compare Huth & MacDonald's results to those reached by Ruback & Zimmerman in showing that union victories in representation elections decrease shareholder wealth, a valid comparison is not possible since Huth & MacDonald used daily data, *id.* at 198 table 2, while Ruback & Zimmerman used monthly data. Ruback & Zimmerman, *supra* note 14, at 1146 table 3.

160. GERHARD P. VAN ARKEL, AN ANALYSIS OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 8 (PLI 1947).

161. *Id.*

162. *Id.*

163. 29 U.S.C. § 159(c)(1)(A)(ii) (1947) (current version at 29 U.S.C. § 159(c)(1)(A)(ii) (1988)).

164. See 52 NLRB ANN. REP. 221, Table 13 (1987); 53 NLRB ANN. REP. 219, Table 13 (1988); 54 NLRB ANN. REP. 221, Table 13 (1989); 55 NLRB ANN. REP. 167, Table 13 (1990); 56 NLRB ANN. REP. 188, Table 13 (1991).

ther, although the *NLRB Annual Reports* do not reveal how many employees unions no longer represented following these elections, the average number of employees included in units in which decertification elections were successful was 22,649.<sup>165</sup> Assuming unions lost the right to represent 72.08% of these employees (the same percentage as the union decertification rate), unions would have lost the right to represent 22,650 employees per year in NLRB decertification elections.

#### E. MISCELLANEOUS PROVISIONS THAT HINDERED UNIONS

The fifth set of provisions of the Taft-Hartley Act that hindered unions do not fit into any of the four preceding categories (or previous studies relating unionism to shareholder wealth).

##### 1. Section 14(b) — Right to Work Laws

As discussed in connection with types of contract clauses prohibited by the Taft-Hartley Act, Section 14(b) allows states to enact right to work ("RTW") laws — laws that prohibit unions and employers from negotiating union security agreements that are not, in and of themselves, prohibited by the Taft-Hartley Act.<sup>166</sup> When the Taft-Hartley Act was passed, a number of states were already more restrictive on union security clauses than the NLRA; when Section 14(b) was enacted, the consensus was that more states would enact RTW legislation.<sup>167</sup> Section 14(b) has generated a great deal of empirical work by researchers who have attempted to determine the impact of RTW laws on various union outcomes.<sup>168</sup> Many of these studies find that RTW laws have a negative effect on the level of unionization in the states possessing them; the studies also suggest that RTW laws negatively impact state wage levels.<sup>169</sup> These studies generally con-

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165. See *supra* note 164.

166. 29 U.S.C. § 164(b) (1988). RTW statutes were discussed in connection with the Taft-Hartley Act's ban on union security clauses. See *supra* notes 117-24 and accompanying text.

167. See Millis & Katz, *supra* note 120, at 290-94.

168. See William J. Moore & Robert J. Newman, *The Effects of Right-to-Work Laws: A Review of the Literature*, 38 INDUS. & LAB. REL. REV. 571 (1985) (discussing a survey of this research).

169. Thomas M. Carroll, *Right To Work Laws Do Matter*, 50 S. ECON. J. 494, 508 (1983); Gasper A. Garofalo & Devinder H. Malhotra, *An Integrated Model of the Economic Effects of Right-to-Work Laws*, 13 J. LAB. RES. 293, 303 (1992).

clude that the statistics cited demonstrate that RTW laws reduce unionization by increasing union organizing and maintenance costs given the existence of “free riders” in the bargaining unit, and/or decrease the bargaining power of unions — bargaining power being theoretically linked both to unanimity of support by organized employees and to the percent organized.<sup>170</sup> By allowing states to enact RTW laws, the Taft-Hartley Act hindered unions.<sup>171</sup>

## 2. Right to Sue a Union in Federal Court

Section 301 of the Taft-Hartley Act provides that lawsuits to recover damages from a union for breaching a collective bargaining agreement may be brought in federal court.<sup>172</sup> Before passage of the Taft-Hartley Act, various legal doctrines made it virtually impossible for unions to be sued.<sup>173</sup> As a result, even if an employer proved that a union had breached a collective bargaining agreement, the employer would have been unable to recover the damages from that breach.

## 3. Administration and Enforcement of the Collective Bargaining Agreement

Another way in which the Taft-Hartley Act hindered unions was by restricting them from being the *sole* representative of bargaining unit employees in their dealings with the employer.

Section 9(a) of the NLRA states that, “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining . . . .”<sup>174</sup> According to the NLRB’s interpretation of Section 9(a) under the Wagner Act, the

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170. Carroll, *supra* note 169, at 508; Garofalo & Malhotra, *supra* note 169, at 303. Not all researchers agree that RTW laws lead to negative outcomes for unions. The dissenting studies conclude that RTW law statistics largely reflect underlying hostile attitudes toward unionism and have little independent influence on labor organization or economic outcomes. See, e.g., Moore & Newman, *supra* note 168, at 583; Walter J. Wessels, *Economic Effects of Right To Work Laws*, 2 J. LAB. RES. 55, 68 (1981).

171. See *supra* text accompanying notes 117-24 (discussing other benefits union security clauses have for unions).

172. Labor Management Relations Act, ch. 120, sec. 301, § 185, 61 Stat. 156 (1947) (current version at 29 U.S.C. § 185 (1988)).

173. See WOLLETT, *supra* note 35, at 119-20.

174. 29 U.S.C. § 159(a) (1988).



employer and the employee were prohibited from resolving an employee's grievance without the union's consent.<sup>175</sup> The Board interpreted that section as granting the union representing the employee's bargaining unit *exclusive* authority to negotiate the resolution (or disposition) of the employee's grievance.<sup>176</sup>

An amendment to that section, which was added by the Taft-Hartley Act, provides:

[Nothing in the NLRA precludes a member of a bargaining unit from having] grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given [the] opportunity to be present at such adjustment.<sup>177</sup>

The Taft-Hartley amendment to Section 9(a) was expressly intended to overrule the Board's interpretation of Section 9(a) under the Wagner Act and allow the employer and employee to settle the employee's grievance without the union's consent, so long as the settlement was not inconsistent with the collective bargaining agreement.<sup>178</sup> Several commentators who discussed the probable implications of the Taft-Hartley Act recognized the potential for employers to use this provision to undermine union strength.<sup>179</sup>

#### 4. Prohibition on Political Contributions by Unions

Although unions exist primarily to represent employees for collective bargaining, they often attempt to utilize political processes to their advantage.<sup>180</sup> Section 304 limited the political activity of unions by amending the Federal Corrupt Practices Act to prohibit labor unions from making political contributions or expenditures in federal elections.<sup>181</sup>

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175. MILLIS & BROWN, *supra* note 33, at 454.

176. MILLIS & BROWN, *supra* note 33, at 454 (citing Hughes Tool Co., 56 N.L.R.B. 981 (1944), *modified by* 147 F.2d 69 (5th Cir. 1945)).

177. 29 U.S.C. § 159(a) (1947) (current version at 29 U.S.C. § 159(a) (1988)).

178. S. REP. NO. 105, 80th Cong., 1st Sess. 24 (1947).

179. *See, e.g.*, MILLIS & BROWN, *supra* note 33, at 454; Cox II, *supra* note 107, at 299-303.

180. Marick F. Masters & John Thomas Delaney, *Union Political Activities: A Review of the Empirical Literature*, 40 INDUS. & LAB. REL. REV. 336 (1987).

181. Labor Management Relations Act, ch. 120, sec. 304, 61 Stat. 159 (1947) (codified at

## CONCLUSION

The preceding pages have explored the provisions of the Taft-Hartley Act that are most responsible for the negative outcomes currently being suffered by unions. Five sets of detrimental provisions were identified: (A) Provisions that made it less likely that a union would be elected to represent a firm's employees in an NLRB representation election; (B) Provisions that made it less likely for unions to obtain favorable collective bargaining agreements for the employees they represent; (C) Provisions that made it less likely that the employees represented by unions would strike; (D) Provisions that made it more likely that a union would be decertified in an NLRB decertification election; and (E) Miscellaneous provisions of the Taft-Hartley Act. Unlike other articles that discuss the Act and how it harmed unions, this article used existing literature to provide empirical support for the contentions made. Previous studies have established empirically each of the following: union victories in collective bargaining elections, collective bargaining agreements that benefit employees, and all strikes reduce profits (shareholder wealth). In addition, both concessionary collective bargaining agreements negotiated by unions and decertification elections in which the union is decertified increase profits. These studies lend empirical support to the conclusion that the specific sections of the Taft-Hartley Act, identified *supra*, harmed unions.

"On the Future of Worker/Management Relations" (the commission recently appointed by President Clinton) intends to evaluate the NLRA and may propose amending the Act in order to alter current trends in labor relations.<sup>182</sup> If the Commission wishes to amend the NLRA to improve the situation for unions, the sections identified herein would be a good place to start.

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18 U.S.C. § 610 (1947)), *repealed by* Act of May 11, 1976, Pub. L. No. 94-283, 90 Stat. 496 (1976), *substantially reenacted as* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, *as added*, Pub. L. No. 94-283, sec. 112(2), § 441b, 90 Stat. 490 (1976) (current version at 2 U.S.C. § 441b (1988)). *See also* MILLIS & BROWN, *supra* note 33, at 593-94.

182. Telephone Interview with Paula B. Voos, Professor of Economics and Industrial Relations at the University of Wisconsin-Madison (Mar. 23, 1994).

**TABLE 1**  
**PROVISIONS OF THE TAFT-HARTLEY ACT**

Section	Effect on the NLRA	How it Hindered Unions
1	certain practices by unions stated to "impair the interest of the public"	sends public a signal that government no longer 100% behind unionism
2(3)	narrows definition of "employee"	reduces percentage of U.S. labor force entitled to protection of the NLRA
7	expressly states that employees have a right <u>not</u> to join unions	signal of government's change in policy (see also 8(b)(1)(A) below)
8(a)(3) 8(b)(2)	prohibit closed shop and limit union shop	reduced actual # of union members and made unions less able to be an effective voice in society
8(b)(1)(A)	ULP for unions to interfere with employees' Section 7 right not to join a union	restricts organizing tactics unions could use
8(b)(3)	ULP for unions to refuse to bargain	restricts negotiating tactics unions could use since 8(d) requires bargaining in "good faith"
8(b)(4)(A)	prohibits secondary pressure, strikes to compel industry-wide bargaining and strikes to force "self-employed" persons to join unions	limits unions ability to organize new employees and bargaining weapons. Also reduces number of strikes (effect of Section compounded by sections 10(1) and 303)
8(b)(4)(B)	prohibits strike in support of an attempt to require "other" employer to bargain (a type of secondary boycott)	limits unions ability to organize new employees. Also reduces number of strikes (effect of Section compounded by Sections 10(1) and 303)
8(b)(4)(C)	prohibits recognition strike by a union if another union is certified to represent a firm's employees	Reduces number of strikes (effect of Section compounded by Sections 10(1) and 303)

Section	Effect on the NLRA	How it Hindered Unions
8)b)(4)(D)	prohibits jurisdictional disputes	reduces number of strikes
8(b)(6)	prohibits causing employer to place "featherbedding" provisions in a collective bargaining agreement	reduces unions' ability to obtain provisions in contracts that would reduce shareholder wealth
8(c)	no violation of NLRA to express "views or opinions" as long as no threat — "free speech" provision	increases tactics employers could use in attempting to defeat union organizing attempts
8(d)	definition of collective bargaining; limits times unions can strike to modify agreement; loss of employee status for strikes in violation of the Section	limits unions' bargaining power by defining when they can strike; reduces number of strikes that would be held
9(a)	permits employees to have grievances resolved by employer without union being present or involved	could be used by employer to convince employees that a union is not needed
9(c)(1)	requires NLRB to use representation election to determine majority status (rather than card check or other devices)	reduces likelihood that a union will be chosen to represent a unit of employees
9(c)(1)(A)(ii)	provides for decertification elections	employees could now elect to abandon union status
9(c)(1)(B)	employers entitled to file representation petitions	allows employers to initiate election process before unions may be ready
9(c)(3)	<p>twelve months must elapse before a second election is held in a bargaining unit</p> <p>permanently replaced strikers ineligible to vote</p>	<p>Prevents election from being held when support for union might be greatest</p> <p>Prevents employees who are strongest union supporters from voting</p>

Section	Effect on the NLRA	How it Hindered Unions
9(c)(4)	prevents prehearing election without employer consent	Delays election from being held, decreasing unions' chance for victory
9(c)(5)	extent of organization not controlling in unit determinations	election may not be held in a unit where union has majority support
9(e)	requires election before union can get union shop clause	decreases number of union members and overall "power" of unions
9(f),(g),(h)	requires unions to file and maintain various information with government	reduces number of unions entitled to protection of NLRA and NLRB
10(1)	<u>requires</u> NLRB to petition for injunction if it believes union is violating 8(b)(4)	further increases the effects of 8(b)(4) on reducing union organizing and bargaining effectiveness
14(b)	allows states to enact right-to-work laws	reduces union membership in any state that has such a law, may decrease likelihood of unions winning representation elections in those states
206-210	provides for government intervention in "National Emergency" Disputes	reduces number of strikes, reduces union's bargaining power in cases where the government intervenes
301	suits against unions for breach of contract maintainable in federal court	monies recovered from unions in such lawsuits ultimately inures to shareholders (difficult to sue unions prior to Taft-Hartley Act)
302(c)(4)	prohibits payroll deduction for union dues without employee's authorization	makes unions' ability to collect dues more difficult

Section	Effect on the NLRA	How it Hindered Unions
302(c)(5)	complex rules over provisions for union health and welfare plans in collective bargaining agreements	makes plans that benefit employees and reduce shareholder wealth more difficult to obtain and therefore less likely
303	suits for violation of 8(b)(4)(B) maintainable in federal court	further increases the effects of 8(b)(4) on reducing union organizing and bargaining effectiveness and monies recovered from unions in such lawsuits ultimately inures to shareholders
304	restricts union political contributions	makes it more difficult for unions to be an effective force in labor relations

