1

Taft-Hartley
A Fundamental Change in Labor Policy or Merely Adjustments to Eliminate Abuses?

Legislative Compromise Creates Statutory Confusion

In 1935 the Wagner Act established the most democratic procedure in U.S. labor history for the participation of workers in the determination of their wages, hours, and working conditions. The act was not neutral as between individual and collective bargaining; it intentionally favored collective bargaining.

For Senator Robert Wagner, collective bargaining was actually more than a method of negotiating wages, hours, and working conditions or a system of checks and balances based on countervailing power. Wagner believed that "the struggle for a voice in industry through the process of collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America" and that if people "know the dignity of freedom and self-expression in their daily lives . . . they will never bow to tyranny in any quarter of their national life."[1] He ,wanted management and labor to resolve their mutual problems through a system of self-government. He best expressed his beliefs in a speech delivered in 1937 shortly after the Supreme Court ruled that the Wagner Act was constitutional:

> The development of a partnership between industry and labor in the solution of national problems is the indispensable complement of political democracy. And that leads us to this all-important truth: there can be no more democratic self-government in industry without workers participating therein, than there could be democratic government in politics without workers having the right to vote . . . . That is why the right to bargain collectively is at the bottom of social justice for the worker, as well as the sensible conduct of business affairs. The denial or observance of this right means the difference between despotism and democracy.[2]

When Congress passed the Labor-Management Relations Act in 1947 (the Taft-Hartley Act), it was not immediately clear precisely how, if at all, lawmakers had changed the collective bargaining core of the Wagner Act national labor policy. Congressional intent, as expressed in the language of the new labor law, was ambiguous: some provisions of the new law were carried over intact from the Wagner Act, some new statutory language amended that act, and many new provisions were the result of legislative compromise and bargaining between the House and Senate.

The Taft-Hartley Act, for example, actually has two policy statements. First, Congress retained but added to the Findings and Policy section of the Wagner Act. It left intact the Wagner Act declaration that it was the policy of the United States to encourage the practice of collective bargaining:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

But Congress added a paragraph to this section asserting that some practices engaged in by unions were obstructing commerce:

> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce . . . through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

That insertion, as well as the addition of several union unfair labor practices (Section 8b) and a provision asserting employers' right of "free speech" (Section 8c), could be interpreted as reflecting a congressional intention to treat employers and labor alike; that is, the amended act (according to this construction) was meant to be a neutral guarantor of equal rights or, at least, of reasonably balanced rights—"reasonably balanced" to be defined by the National Labor Relations Board (NLRB).

Second, Congress placed a new Declaration of Policy immediately before the Findings and Policies section described above. Whereas the Findings and Policies section reaffirms that it is the policy of the United States to encourage

collective bargaining, the Declaration of Policy does not even mention collective bargaining but states that it is the purpose of the act to protect (among other things) the rights of individual employees. This declaration reads, in part:

> It is the purpose and policy of this Act . . . to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations . . . , to define and proscribe practices on the part of labor and management which . . . are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

The amended version of the Wagner Act Findings and Policies section originated in the Senate. The provisions contained in Senator Robert Taft's bill (S. 1126) were generally less harsh than those in Congressman Fred Hartley's House bill (H.R. 3020), which was a direct product of the hostile 1939-40 investigation of the NLRB led by anti-New Deal congressman Howard Smith. The Hartley bill was actually written in Smith's office using his unsuccessful 1940 labor bill as a model.[3]

Smith's bill, among other things, would have eliminated from the Wagner Act's preamble the statement that it was the declared policy of the United States to encourage the practice of collective bargaining.[4] The attempt to delete that statement was revived in the Hartley bill's "Short Title and Declaration of Policy" (which became the new Declaration of Policy section in the Taft-Hartley Act) as well as in Hartley's efforts to strike any favorable reference to collective bargaining from the Wagner Act's Findings and Policies section. The decision to compromise by including in Taft-Hartley both the Hartley Policy Declaration and the Senate-amended Findings and Policies section from the Wagner Act was made during closed-door conference committee bargaining between representatives of the House and Senate. No one debated or formally discussed the reasons for this decision on the House or Senate floor before the adoption of the act.

Taft had printed in the *Congressional Record* a summary of the principal differences between the conference agreement and the bill that the Senate had previously passed.[5] The summary, which Taft did not read or discuss in the Senate, simply stated that the House bill "contained an over-all declaration of policy covering all of the various matters dealt with in the bill," acknowledged that "there was no corresponding over-all declaration of policy" in the Senate bill, and informed the Senate that the conference committee agreement "contains the declaration of policy of the House bill."[6]

Taft and his supporters in the Senate argued that the conference committee bill left undisturbed the act's essential theory that (in Taft's words) "the solution of the labor problem in the United States is free, collective bargaining."[7] Whatever the merits of Taft's claim, Smith, Hartley, and the majority of the House certainly did not intend to promote collective bargaining as the solution to labor problems. Their statement of policy, not only in its omission of any reference to collective bargaining but also in its historical context, was intended at least to weaken, and possibly to eliminate, collective bargaining.[8] The 1947 Declaration of Policy, coupled with a passage added in 1947 to Section 7 that affirms workers' right to refrain from engaging in collective bargaining, could be interpreted to mean that free choice and individual rights are at least as important as the right to collective bargaining.

In addition to changes in the policy and purposes sections of the Wagner Act, the Taft-Hartley Act, passed on June 23, 1947, over President Harry Truman's veto (331-83 in the House and 68-25 in the Senate), contained other provisions that, at least on their face, weakened organized labor's control over its members and reduced its bargaining power. There was, for example, a new section of prohibited union unfair labor practices, an expansion of employer "free speech" rights, prohibition of the closed shop, a denial of bargaining rights and all access to the NLRB to unions that refused to file noncommunist affidavits with the Board, and provisions requiring the Board to petition for an injunction in secondary boycott cases (10[1]),as well as other provisions for the use of injunctions against strikes that imperiled the national health or safety. Other provisions permitted employers as well as employees to file petitions for representation elections and employees to file for decertification elections, allowed union shop provisions in collective bargaining agreements only if a majority of employees eligible to vote authorized such inclusions in NLRB-conducted elections, eliminated the NLRB's Review Section and Economic Analysis function (4[a]), and separated the NLRB's judicial and prosecutory functions by the creation of an independent office of General Counsel (3[d]).[9] Proponents of Taft-Hartley maintained, however, that these provisions did not alter the essential collective bargaining theme of the Wagner Act labor policy but were merely adjustments needed to eliminate certain abuses of union power and to rebalance, or "equalize," the labor-management relationship.

Truman, Organized Labor, and Taft-Hartley: Perspective and Strategy

Harry Truman had become president only weeks before the end of World War II (Franklin Roosevelt had died on April 12, 1945). He was plunged almost

immediately into the turmoil of the reconversion period and confronted with the growing problem of how to deal with the Soviet Union in postwar Eastern Europe as well as the threat of depression, shortages of housing and consumer goods, and inflation on the home front.[10]

After V-J Day in August 1945 the Truman administration had tried to modify its wartime wage and price controls without causing unemployment or inflation by encouraging wage increases that did not require compensating price increases and asking labor and management to renew their wartime no-strike and no-lockout pledges.[11] Union leaders, however, refused to renew their no-strike pledge and maintained that wage increases could readily be absorbed out of profits without the need for subsequent price increases.

As a consequence, 1946 set a record for number of strikes, number of workers involved in strikes, and man-days idle as a percentage of working time.[12] Fearing mass unemployment, inflation, and lower real wages, unions conducted a series of major strikes in basic industries such as coal, steel, automobiles, and railroads, causing public opinion, ironically, to place the blame for higher prices on organized labor's demand for higher wages. No longer considered the underdog in the public's mind, "too powerful" became the most used adjective for labor unions, which were criticized for irresponsible strikes, bad-faith bargaining, undemocratic internal practices, excessive initiation fees, apparently irrational jurisdictional disputes, race discrimination, secondary boycotts, corruption, violence, and, in some cases, communist domination.[13]

Truman himself, addressing a joint session of Congress on May 24, 1946, threatened to draft railroad workers who struck government-seized plants (a penalty far more drastic than anything the Taft-Hartley Act would impose) and warned the country that a handful of men now had the power "to cripple the entire economy of the Nation."[14] Only a few hours after Truman's address the Senate passed the Case bill, which among other things authorized stringent penalties for violent or extortionate interference with interstate commerce, damage suits against unions for breach of contract, a prohibition of secondary boycotts, and deprivation of Wagner Act rights for employees involved in wildcat strikes.[15]

Although Truman vetoed the Case bill on June 11, 1946 (a veto that survived override by only five votes), its passage by the Senate, which had been the bulwark against antilabor legislation since the Wagner Act was passed in 1935, demonstrated the strength of anti-union feeling around the country. In great part because of that feeling the 1946 congressional campaign was the most successful for the Republicans since the 1920s. Republicans swept governorships and Senate and House contests. In the House the Republican delegation rose from 190 to 245 and Democratic representation dropped from 248 to 188. In the Senate the Republicans gained thirteen seats (from 38 to 51) and the

Democrats lost twelve (from 57 to 45). For the first time since 1935, the opponents of the Wagner Act had sufficient congressional and public support to change the nation's labor policy.

Truman had reason not to be sympathetic to those labor leaders who beseeched him to veto the Taft-Hartley bill. Although pressed repeatedly to make some proposals to deal with what many considered the evils of jurisdictional disputes, secondary boycotts, and nationwide strikes, the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO) took a defensive stand against amendments to the Wagner Act and offered no reasonable alternatives around which friends of labor, particularly in Congress, could rally.[16] Even after the House passed the Hartley bill, the AFL, for example, chose not to try to soften Taft's Senate bill by amendments but merely to oppose the bill in letters to all senators (the same tactic that had already failed to defeat the Hartley bill), motorcades to Washington, D.C., and an intensive radio campaign.[17]

Liberal Republican senator Irving Ives of New York, who with Senator Wayne Morse of Oregon introduced much more temperate labor legislation but was attacked by the AFL as a traitor to labor for finally voting for the Taft-Hartley bill, blamed union inaction in great part for the ultimate outcome:

> I, for one, had hoped that no legislation would be required. But the course of the hearings of the Senate Labor Committee indicated that there is abuse, and there is inequity, and that these abuses must be corrected and these inequities eliminated. No one could have listened to the hearings without knowing that something was wrong. But those immediately connected with the labor unions refused to agree to any type of legislation. We received no help whatever from the representatives of organized labor. Even the legislation that I myself proposed, mild as it was, met with vigorous objection.[18]

After the enactment of Taft-Hartley, AFL president William Green, apparently not appreciating the irony, lamented the ineffectiveness of the Federation's appeals to members of Congress: "I can truthfully say that we never met with men who were so adamant, so uncompromising, evidently determined that they were going to pass this legislation in spite of our protests, and they did." Green maintained that the Taft-Hartley Act "sabotaged" the entire Wagner Act labor policy.[19] The Federation promised to challenge the constitutionality of certain provisions of the new law, to concentrate its efforts to prevent the reelection of every member of Congress who voted for it, and to work unrelentingly for its repeal.[20]

The AFL's most memorable and most criticized overview of Taft-Hartley was that it was a "slave labor law."[21] Underlying this defensive strategy was the

conviction that the White House was labor's only hope of defeating this legislation, particularly by a presidential veto that might be sustained in the Senate but not the House.[22] President Truman was not as friendly to labor, however, as many labor leaders would have liked him to be.[23] Truman expressed his opinion frankly in a confidential letter to Senator Joseph Ball of Minnesota, a strong proponent of Taft-Hartley:

> The only thing I am interested in is to get a program which will keep our industrial plants operating and which will in the long run cause a better understanding between industrial management and these all too powerful labor organizations.
>
> My experience since I have been in this Executive position has not been a happy one so far as either management or labor is concerned. Neither one of them has shown an honest effort to cooperate and to reach agreements.
>
> You are familiar with the difficulties I had with the railroads due entirely to the contrariness of two railroad labor leaders, who were hunting publicity and of course, you are familiar with the long history of John L. Lewis—a play actor and a demagogue of the worst type.[24]

Truman definitely had not taken a stand-pat position on the issue of revisions in the Wagner Act. In his State of the Union address on January 6, 1947, for example, he proposed a four-point program to reduce industrial conflict, including enactment of legislative changes to "prevent certain unjustifiable practices." Truman referred specifically to "indefensible" jurisdictional strikes (especially where "minority unions strike to compel employers to deal with them despite a legal duty to bargain with the majority union"), secondary boycotts used in pursuance of "unjust objectives" such as to further jurisdictional disputes or to compel employers to violate the National Labor Relations Act (NLRA), and the use of economic force by labor or management to decide issues arising out of the interpretation or application of an existing collective bargaining agreement. Truman also proposed increasing Department of Labor efforts to assist collective bargaining, broadening social legislation—social security, housing, a national health program, minimum wage—and the appointment of a temporary joint congressional committee to study labor-management relations, particularly "nation-wide strikes in vital industries affecting the public interest" and the causes of labor-management disputes.[25]

Truman vetoed the Taft-Hartley bill, but that decision was so immersed in politics that it is difficult to be certain about his opinion of its specific provisions. Although Truman knew that the bill would be passed over his veto,[26] he also understood that signing the bill into law would have seriously jeopardized organized labor's support of the Democratic Party in the 1948 presidential election and risked driving much of that support into a growing third-party move-

ment led by Henry Wallace. Powerful Democratic leaders such as David Lawrence of Pennsylvania and Frank Hague of New Jersey, for example, warned Truman that "a vote against labor will alienate thousands of them who . . .will then augment Wallace's drive, which up to now has only attracted the most radical."[27] This third party had no serious chance of winning a presidential election but could siphon off enough votes to cost the Democratic Party such states as California, New York, Pennsylvania, and New Jersey, which most observers believed had to be carried to win the election.[28]

Foreign relations were also an important consideration in Truman's decision to veto the bill. NLRB member James Reynolds recalled a private conversation with Truman in which the president asserted that the Marshall Plan and the containment of communism in Europe meant much more to him than the Taft-Hartley Act issue and that the Marshall Plan would be defeated if he was not reelected. Truman also told Reynolds that, although he was pro-labor, "they've gone too far in many ways." According to Reynolds, Truman said that his strategy was to veto the Taft-Hartley bill in order to hold labor's support in the upcoming election but still end up with a "pretty good" labor law (because he knew the bill would be passed over his veto), reelection as president, and the Marshall Plan operating in Europe.[29] Because Truman also wanted some solution to the problem of major strikes, Interior Secretary Julius Krug's opinion that the bill's provisions dealing with national emergency strikes could not halt and might even precipitate an impending major coal strike, leaving the president "just about as powerless to settle a major strike as he would be in the absence of any legislation,"[30] was considered by some political analysts the "real clincher" in the president's decision to veto the bill.[31] It was with mixed motivations, therefore, that Truman asserted in his veto message that the Taft-Hartley bill "taken as a whole would reverse the basic direction of our national labor policy," particularly by unduly weakening unions and converting the NLRA "from an instrument with the major purpose of protecting the right of workers to organize and bargain collectively into a maze of pitfalls and complex procedures [and] costly, time-consuming litigation inevitably embittering both parties."[32]

The Taft-Hartley Labor Policy: Some Expert Analyses

In the days immediately preceding the veto several respected professors and labor relations practitioners gave Truman their perceptive and, in certain important respects, prophetic analyses of the Taft-Hartley bill. They unanimously rejected both the charge that it was a slave labor law and the claim that the bill

merely restored equality or balance between unions and employers at the bargaining table and under the law. Moreover, they agreed, as Sumner Stichter of Harvard University put it, that the "bill attempts to deal with many matters which cry for action." Such action had to be taken because, although many union leaders had been outspoken in deploring various abuses—jurisdictional strikes; strikes, picketing, and boycotting to compel violations of the NLRA; raiding to force workers to leave one union and join another; the combination of closed unions with closed shops; the exclusion of black workers from union membership; high initiation fees; and arbitrary denial of good standing to union members—unions had done little to prevent these abuses.[33]

Douglas Brown of Princeton found the bill on balance favorable to wage earners but unfavorable to union organization, "pro-employer," and, "far more important, 'pro-public.'"[34] He feared that, if the federal government did not intervene to prevent the spread of "paralyzing strikes in public service industries," public acceptance of collective bargaining would be seriously undermined and the labor movement would face an antagonism far more dangerous to its interests than the legislative restrictions proposed.[35] (Ironically, former NLRB member William Leiserson opposed the bill primarily because of the way it dealt with strikes, emphasizing the futility of prohibiting concerted action of employees while ignoring the problems that incited that action.)[36]

George Taylor of the University of Pennsylvania found some provisions desirable but most undesirable. He objected to Taft-Hartley mainly because it made a "fundamental change in our national labor policy" by replacing the Wagner Act system of collective bargaining without government interference with a "system of government-managed collective bargaining." Taylor predicted accurately that this approach would force "labor relations questions more and more into the political area and into the hands of lawyers and the courts" in an unwise extension of government control over private affairs.[37]

Despite their diverse reasons for supporting or opposing the bill, all these experts anticipated, with varying degrees of apprehension, the likelihood that employers would use the law to weaken unionization and avoid collective bargaining. Brown was concerned that "short-sighted" managements might take advantage of weaker and less secure unions but mistakenly dismissed such possible attempts as "foolish," because, in his opinion, workers were more likely to support a union that management was trying to undermine.[38]

Stichter feared the growing and "dangerous bitterness" in industrial relations that would be aggravated if the problems covered by the bill were not resolved.[39] Leiserson was convinced that the Taft-Hartley bill was designed to promote individual bargaining and to undermine collective bargaining "while the country is led to believe that collective bargaining [remained] the primary policy of the

Government." Leisel's on believed that this deception could lead only to increased work stoppages and other labor-management confiict.[40]

Although the bill respected individual employee rights, Taylor pointed out that its provisions for union decertification elections and employer petitions for representation elections meant that a union would never have more than a tenuous status. He warned that the "interests of neither management nor the public would be served by a positive program to develop union insecurity." A conscious legislative effort to weaken unions and promote their insecurity would widen and intensify industrial conflict and encourage employers to reject unionism and collective bargaining:

> No one outside of certain union ranks wants to prevent employees from having the union they desire. The provisions under discussion, however, are not devoted to protection of the free choice of employees. They are a "natural" for tactical maneuvers by employers or rival unions designed to weaken the union previously selected by a majority of the employees. This part of the Act foments union jurisdictional disputes *and encourages employers to take up battle again over the question of whether or not their employees should be represented by unions.*[41]

As Harry Millis and Emily Brown put it in their comprehensive and contemporary study of the Taft-Hartley Act, *From the Wagner Act to Taft-Hartley*, "in spite of the impressive over-all figures indicating union strength, the disparities are very great, with the balance on this side here, and the other side there. No indiscriminate weakening of the power of unions could be expected to do justice or promote equality."[42] In their opinion much of the "equalize the Wagner Act" theme had little basis in fact and was merely an appealing and effective sales pitch. The legislative revisions that resulted, therefore, went far beyond those changes needed to eliminate abuses and maintain collective bargaining as essential to a democratic society.[43] Millis and Brown concluded:

> On the assumption that unions and collective bargaining are essential for a free and democratic society, and that their contribution to democratic and responsible government in industry must be strengthened, not weakened by law, we conclude that the 1947 amendments to the Wagner Act failed to meet the problems posed. Taft-Hartley, with its confusion and division of purposes, its weakening of all unions rather than carefully directed restraint of specific abuses, its weakening of restraints upon employers who still seek to avoid a democratic system of labor relations, its interference with collective bargaining, its encouragement of litigation rather than of solving problems at the bargaining table, its administrative hodgepodge, was a bungling attempt to deal with difficult problems.[44]

If the calls for equality and balance merely masked an attack on the Wagner Act intended to reduce the bargaining power of unions, then the process leading to Taft-Hartley was, as Millis and Brown claimed, predominantly a struggle over industrial and political power.[45] But even if the insistence on equality and balance by Taft-Hartley's proponents is taken at face value (and in view of the twelve-million-member increase in organized labor from the depression to 1947 and the development over those years of powerful unions such as the Teamsters, Steelworkers, Automobile Workers, Mine Workers—and the always powerful building trades and railway workers), labor had not achieved anything remotely constituting equality of power with regard to the distribution of the nation's income or business profits and had not come close to reaching Senator Wagner's goal of full participation by workers in a system of industrial self-government.[46]

The National Labor Relations Board's Analysis of Taft-Hartley

The administrative agency that would have the responsibility of interpreting and applying this new labor law, the NLRB, had taken an active role in opposing its passage during White House amid congressional deliberations.[47] The Board did not share the labor leaders' position that Taft-Hartley was unqualifiedly bad or a slave labor bill. Although NLRB chairman Paul Herzog acknowledged the need for some legislative changes,[48] he told Truman that the cumulative impact of the Taft-Hartley bill's provisions not only weakened the Wagner Act "as a shield for workingmen but converted it into a sword to be used to combat their collective action"—and also made it difficult for the NLRB to administer the law.[49]

Senator James Murray of Montana, a strong opponent of Taft-Hartley, managed to get the NLRB's detailed analysis of the bill into the congressional debates without identifying the Board as the author of the document.[50] In private memoranda to President Truman, moreover, Chairman Herzog, on behalf of the, Board, gave fuller explanations of the Board's objections to certain provisions.[51]

The Board strongly objected to the creation of a separate general counsel, who would be "virtually a 'labor czar.'" Policy differences between the Board and its general counsel, Herzog warned, could prevent effective enforcement of the act.[52] As William Leiserson put it prophetically, "the possibilities of conflict of authority between them are many; and these will be conducive neither to good labor relations nor good administration of the law."[53]

The Board also complained that the bill would prohibit it from hiring "economic analysts" just when such experts were most needed: the bill required the

NLRB to deal with difficult matters such as jurisdictional disputes, featherbedding practices, boycotts, and the appropriateness of union fees.[54] As the NLRB argued, moreover, such expert knowledge was one of the main reasons for establishing an administrative agency.[55] George Taylor saw this aspect of Taft-Hartley as part of a deliberate transfer of authority from the NLRB to lawyers and judges, which he called "a sweeping change in the prevailing concept that the industrial relations experts on the Board are better equipped than a judge to decide questions of fact. A tremendous shift in power is implicit in such provisions."[56]

Given the agency's tremendous backlog of unfair labor practice and representation cases, the NLRB warned that the additional responsibility of conducting probably thousands of union shop authorization elections would be a serious administrative burden likely to interfere with the Board's implementation of the law.[57] The Board also argued that the prohibited boycott activities in Section 8(b)(4) were not defined precisely and that the language of that section was "so broad as to represent an indiscriminate attack on forms of peaceful action by labor unions without regard to whether the objective of the action is the promoting of legitimate interests in wages, hours, and working conditions or the furtherance of such illegitimate objectives as jurisdictional disputes."[58] In a related complaint the Board objected to the differential treatment that favored employers: for example, the requirements that the Board give secondary boycott charges priority over all other cases, including "flagrant cases of unfair labor practices by employers or elections that require expedition," and seek temporary injunctions from district courts whenever there was reason to believe a secondary boycott was in operation.[59] The Board also protested the disparate penalties in the bill. Employees were subject to discharge and unions to damage suits, injunctions, or complete denial of access to NLRB procedures, whereas employers, even those who violated the law repeatedly, were not denied any rights under the act and were subject to only mild remedial provisions such as cease-and-desist orders and the reinstatement of unjustly discharged employees with back pay.[60]

Other provisions, the Board told Truman, undermined employee rights and collective bargaining, particularly the one concerning employer free speech. This provision went beyond the protection of an admitted constitutional right and seriously circumscribed the NLRB's prevention of employer unfair labor practices by granting that such employer statements were not to be considered evidence of an unfair labor practice.[61] Herzog also cited the section forbidding the Board to use the extent to which employees had already organized as the controlling factor in determining an appropriate unit for collective bargaining, because in many industries "organization can proceed only piecemeal and

to deny collective bargaining in those areas in which organization has been achieved is to deny it entirely."[62]

Conflicting Statutory Purposes: NLRB Power and Political Consequences

Chairman Herzog made a most important and perceptive observation comparing the Wagner Act and the Taft-Hartley bill, especially those Taft-Hartley provisions allegedly equalizing the law. In enumerating the "little things" throughout the bill "all calculated to destroy the philosophy of the Wagner Act that collective bargaining should be encouraged," Herzog emphasized that Section 7 of the bill "treats protection of the right to 'refrain from' joining a union as one just as worthy of the attention of Congress as the right to join one free from employer interference." He reasoned, "Such [equalizing] provisions do not belong in an Act [the Wagner Act] which was intended to equalize bargaining *power* by encouraging the self-organization of workers, and not to equalize all *rights* as between members of the community."[63]

Interweaving assumptions of employee free choice (the right to refrain) and equality of rights between labor and management, for example, can lead to conclusions that are unfavorable to the encouragement of collective bargaining, as a contemporary scholar has pointed out with respect to the assumption "that the employer is legitimately entitled to play the same role in a representation campaign against the union as the Republican Party plays against the Democrats."[64] As law professor and future secretary of labor Willard Wirtz wrote in the mid-1950s:

> The cliché thinking about "equality" has caused perhaps the greatest difficulty here. The tongue is quicker than the mind, and the phrase than the thought. There is so much appeal in the warm language about treating employers and employees alike, letting them both say whatever they want to in their own promises, serving up a common sauce for goose and gander. It is hard, on the other hand, to persuade by the more intricate logic that the equal treatment of unequals produces only inequality. Denial that the rich and the poor take equal advantage either from the right to beg or from tax exemptions on oil wells invariably invites more suspicion than understanding.[65]

In August 1947, when the Taft-Hartley Act went into effect, the question was whether the new law would leave undisturbed the Wagner Act's encouragement of collective bargaining as the core of the national labor policy (as Senator Taft claimed) or whether it would become, in the name of concern for the

individual worker, a justification and a mechanism for the rejection of collective bargaining.[66] Certainly, the concept of government as a *neutral* guarantor of some equal or reasonably balanced rights of labor and management and as a *neutral* guarantor of employee free choice between individual and collective action is inconsistent with the Wagner Act's concept of a government *partial* to the practice of collective bargaining; yet the Taft-Hartley Act contained language supporting both conceptions of government.

In applying this new law, the NLRB would have to give specific meaning to the general designs of the statute, interpret where neither statutory language nor congressional intent was clear, and even fill gaps in the legislation, gaps ranging from small intervals to large expanses. As Clyde Summers put it years later, "the Board, in exercising its functions of interpreting and elaborating the skeletal words of the statute, is compelled to mold and develop a body of law. It cannot act as a mechanical brain but must choose between competing considerations."[67]

Because there were potentially conflicting statutory purposes in the Taft-Hartley Act, the new five-member NLRB was in the unique position of choosing between different labor policies and, over time and political administrations, of swinging labor policy from one purpose to its direct opposite. These swings would directly determine whether the scope of bargaining would expand or contract, would alter the relative bargaining power of the parties, and would affect the ability of unions to organize and managements to resist organization.

The NLRB always had influence over the vital interests of labor and management. After Taft-Hartley it had the authority to determine the underlying direction of U.S. labor policy. It was a power guaranteed to subject the Board to attack and manipulation.