

# INDUSTRIAL TERRORISM AND THE UNMAKING OF NEW DEAL LABOR LAW

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## ABSTRACT

*The passage of the Wagner (National Labor Relations) Act of 1935 represented an unprecedented effort to guarantee American workers basic labor rights—the rights to organize unions, to provoke meaningful collective bargaining, and to strike. Previous attempts by workers and government administrators to realize these rights in the workplace met with extraordinary, often violent, resistance from powerful industrial employers, whose repressive measures were described by government officials as a system of “industrial terrorism.” Although labor scholars have acknowledged these practices and paid some attention to the way they initially frustrated labor rights and influenced the jurisprudence and politics of labor relations in the late 1930s and early 1940s, the literature has neither adequately described the extent and intensity of this phenomenon nor fully explored its effects. This Article remedies that shortcoming. Focusing on three industries where the practice of industrial terrorism was especially well developed and its influence especially pronounced, this Article shows how the practitioners of industrial terrorism and their allies in Congress were able to turn the legacy of violence and disorder, which they authored by their violent resistance to the Wagner Act, into the basis of an extraordinary counter-attack on labor rights. It shows how this attack culminated in 1947 with the enactment of the profoundly reactionary Taft-Hartley Act and remade the landscape of American labor relations.*

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## I. INTRODUCTION

The history of labor relations in America is a history of conflict and class struggle mediated by violence. The first major strike in American history, the "Great Railroad Uprising" of 1877, resulted in the deaths of scores, perhaps hundreds, of people.<sup>1</sup> Sixty years later, in the summer of 1937, at least sixteen workers were killed in the "Little Steel" strike—ten shot dead or mortally wounded on one afternoon near a Republic Steel mill in South Chicago. In the sixty years that spanned these events, labor disputes regularly exploded into bloody conflicts, turning obscure place-names like the Haymarket, Homestead, Ludlow, Centralia, and Mingo and Logan Counties into enduring symbols of class conflict. Although the numbers can only be roughly estimated, these episodes and others like them probably claimed several thousand lives and left countless others maimed and traumatized. They underscore the observation that "[t]he United States has had the bloodiest and most violent labor history of any industrial nation in the world."<sup>2</sup>

This remarkable history of violence entailed every kind of act imaginable: beatings or lynchings; chaotic riots and mob violence; arsons, bombings, and sabotage; assassinations; even military-style skirmishes between armed combatants. People died and were injured not only by the score or the hundreds in sensational events such as the Great Uprising, but also in countless smaller clashes that claimed lives and inflicted injuries by the handful. However diverse the ways labor violence unfolded, though, the underlying reasons for it have been consistent and straightforward.

<sup>1</sup> Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in *VIOLENCE IN AMERICA: HISTORICAL & COMPARATIVE PERSPECTIVES* 187, 190-91 (Hugh Davis Graham & Ted Robert Gurr eds., rev. ed. 1979).

<sup>2</sup> *Id.* at 187, 223.

Nearly every major outbreak of labor violence revolved around an attempt by workers to assert basic labor rights—the rights to organize, to provoke collective bargaining, and to strike. Often, employers used violence and the threat of violence directly to repress workers. In other instances, employers first provoked workers to violence by denying them basic labor rights and then used this pretense to justify attacks on them. Indeed, employers could regularly expect the state to abet their use of force against unionists, however contrived the pretext or culpable the employer. Governments at all levels lent their police and militias to the cause of intimidating, assaulting, and arresting strikers. Moreover, courts and prosecutors made free and creative use of doctrines like conspiracy, antitrust, and vagrancy, as well as more conventional crimes, to essentially criminalize labor rights and justify the use of force to deny such rights, even where the workers asserting them had engaged in no violence at all. Until at least the late 1930s, violence functioned in all these ways to the overwhelming benefit of employers, helping them to build a regime of labor relations largely bereft of basic labor rights.

The New Deal and the war that followed worked a dramatic structural transformation of American capitalism accompanied by a fundamentally new role for the state in labor relations. Out of this transformation arose for the first time in American history a regime of laws and administrative structures that significantly limited the prerogatives of business. At the center of this new, reformist political economy was the Wagner Act, the 1935 statute that for the first time broadly imposed on most employers an obligation to respect workers' basic labor rights.<sup>3</sup>

The goal of preempting the violence that had characterized American labor relations for decades before the New Deal was absolutely central to the drafters of the Wagner Act.<sup>4</sup> As such Congress dedicated the statute to the intertwined purposes of anchoring a new, Keynesian political economy as well as establishing a mechanism by which labor conflicts could be resolved in non-violent ways.<sup>5</sup> Not nearly so well appreciated, however, is the degree to which important episodes of labor violence, which persisted for years after the statute was enacted, also reshaped the aims and purposes of the new labor law. In the decade after its passage, violence became central in a crusade to purge the Wagner Act of its reformist tendencies and to accomplish a vigorous retrenchment of labor rights.

The architects of this campaign to use violence to remake the labor law were a class of powerful industrial capitalists whose own penchant for violence provided the very basis of this effort. Throughout the New Deal era, these employers embraced a system of organized opposition to basic labor rights. Although this system entailed various legal and political stratagems, it also featured well-armed and well-organized corps of private police, industrial spies and provocateurs, and corrupted public police, all of which threatened, assaulted, provoked, and even killed workers who attempted to form meaning-

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<sup>3</sup> See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 292-93 (1978).

<sup>4</sup> See generally 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949).

<sup>5</sup> 29 U.S.C. § 151 (2006).

ful labor unions or engage in strikes. This extraordinary program utterly defied the Wagner Act and persisted in many instances even after the U.S. Supreme Court's 1937 landmark decision in *NLRB v. Jones & Laughlin Steel* upheld the constitutionality of that legislation.<sup>6</sup>

Although partly a continuation of earlier traditions of labor repression, this program was also different. By the Second New Deal (1935-1941), the practice of anti-union repression at major industrial employers had become in some ways as rationalized and premeditated as conventional business operations. This is reflected, in part, in the extraordinary paraphernalia assembled for the purpose of anti-union repression. When the Little Steel Strike began, two of the companies involved, Republic Steel and Youngstown Sheet & Tube, maintained enormous arsenals, including nearly 2,000 firearms. And at the height of the strike, these firms controlled some 2,400 armed men and enjoyed the backing of thousands others. Similarly, on the eve of the famous sit-down strikes of 1936-1937, General Motors maintained a force of company police larger than that of nearly every city, county, and state in America, as well as hundreds of labor spies and provocateurs and hundreds of other men under contract with strikebreaking services. Ford Motor fought off determined attempts to unionize its plants for several years after *Jones & Laughlin* with a "service department" made up of several thousand thugs whose campaign to terrorize workers included "whipping grounds" where unionists were regularly assaulted. Such means were actually commonplace among industrial employers. They were typically used in a coordinated way with other kinds of labor repression, including not only company unions and the ubiquitous practice of discriminatory discharges, but, even more tellingly, elaborate techniques to convince the public and political elites alike that the violence produced by these measures reflected a danger that unions posed to the political and social order, and not the tyranny and greed of wealthy industrialists.<sup>7</sup>

In the 1930s and 1940s, both a prominent congressional committee and the National Labor Relations Board (NLRB, or Board) saw fit repeatedly to describe this organized resistance to labor rights as a system of industrial "terrorism."<sup>8</sup> And terrorism it surely was, perhaps even more fully than the authors of this term imagined. For just as contemporary terrorists use violence not only to inflict direct injuries on their adversaries, but also to elicit dysfunctional responses to their violent acts, so did industrial terrorists first use violence to resist the Wagner Act and deny their workers basic labor rights. They then used responses to that violence on the part of workers and the NLRB to promote a reconfiguration of the labor law along conservative lines more appropriate to their own interests. Although the first part of this stratagem seemed to fail, the second succeeded in extraordinary ways. Aided by allies in govern-

<sup>6</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 629-30 (1937).

<sup>7</sup> See *infra* Part III.D.

<sup>8</sup> See, e.g., *In re Goodyear Tire & Rubber Co.*, 21 N.L.R.B. 306, 306 (1940); *In re Ford Motor Co.*, 14 N.L.R.B. 346, 354-56 (1939); *In re Remington Rand, Inc.*, 2 N.L.R.B. 626, 626 (1937); *In re Brown Shoe Co.*, 1 N.L.R.B. 803, 813 (1936); *In re Jones & Laughlin Steel Corp.*, 1 N.L.R.B. 503, 516 (1936); S. REP. NO. 77-151, pt. 1 (1939) [hereinafter LITTLE STEEL]; S. REP. NO. 76-6, pt. 3, at 38 (1939) [hereinafter INDUSTRIAL MUNITIONS]; S. REP. NO. 76-6, pt. 2, at 57, 77-78 (1939) [hereinafter PRIVATE POLICE SYSTEMS].

ment and the media, these industrialists managed to cast themselves, the ultimate offenders in the field of labor violence, as the victims of malicious unions, biased NLRB staff, and, ultimately, a too-generous system of labor rights. The violence these employers provoked against themselves became the only relevant violence, overshadowing and subverting even the worst carnage inflicted by employers. And the prevention of violence, which the drafters of the Wagner Act had viewed as a salient justification for developing a robust regime of labor rights, evolved into a powerful and enduring reason to compromise those rights. This program culminated directly in the Taft-Hartley (Labor-Management Relations) Act of 1947, whose radically anti-labor agenda was shaped directly by this hypocritical counterattack on labor rights.<sup>9</sup>

Surprisingly, this remarkable history has not been adequately exposed. Most scholars have been content to assume that employer-sponsored violence simply failed, or even backfired, in the face of the efforts of audacious unionists and diligent NLRB staff.<sup>10</sup> So strong is this tendency that even the violence of the Little Steel Strike, which represents, perhaps, organized labor's most tragic defeat of the New Deal era, is repeatedly described as a pyrrhic victory for employers, who acquiesced to basic dictates of the Wagner Act within a few years.<sup>11</sup> Not all scholars have been blind to the ironies and contradictions of this history, however. Karl Klare and James Pope stand out among a very small group of scholars who have thrown light on how the courts used the litigation of the sit-down strikes to subordinate the Wagner Act's ostensible support for labor rights to the norms of labor peace, property, and authority.<sup>12</sup> Though immensely valuable, their work in this area has focused only on the sit-down strikes, which constitute one part of a broader story, and on the strikes' jurisprudential (as opposed to legislative) consequences. Likewise, James Gross's excellent institutional history of the NLRB very appropriately discusses how conservatives used the NLRB's attempts to enforce the law against virulently (and violently) anti-union employers to frame telling attacks on the agency and the Wagner Act.<sup>13</sup> However, in part because his focus is institutional and otherwise broad-ranging, Gross does not in the end offer a sustained account of the particular ways that employer repression reshaped the labor law.<sup>14</sup> Rather, along with that of Klare and Pope, Gross's work invites a more complete elaboration of this issue.

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<sup>9</sup> See *infra* Part III.C.

<sup>10</sup> Such is the tone, for example, of Irving Bernstein's influential and otherwise excellent study of labor relations in this period, *The Turbulent Years*. IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933-1940*, at 768-95 (Haymarket Books 2010) (1969).

<sup>11</sup> See, e.g., WALTER GALENSON, *THE CIO CHALLENGE TO THE AFL: A HISTORY OF THE AMERICAN LABOR MOVEMENT, 1935-1941*, at 101-02 (1960); JOSEPH G. RAYBACK, *A HISTORY OF AMERICAN LABOR* 343-45 (Free Press 1966) (1966); ROBERT H. ZIEGER, *THE CIO: 1935-1955*, at 62-65 (1995); Taft & Ross, *supra* note 1, at 224.

<sup>12</sup> See generally Klare, *supra* note 3; Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1958*, 24 *LAW & HIST. REV.* 45 (2006).

<sup>13</sup> See generally JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947* (1981).

<sup>14</sup> *Id.* at 260-67.

This retelling of the politics of industrial violence also offers a rejoinder to the notion that remains commonplace among labor scholars and in labor texts—that the retrenchment of labor rights culminating in the Taft-Hartley Act somehow represented a “backlash” against the excesses of labor and its supporters in government in the years following the passage of the Wagner Act. By this account, militant unionists and their supporters pressed too hard against entrenched employer interests as well as basic American values regarding property, class structure, and the workplace; and they advanced radical aims and embraced militant tactics, especially sit-down strikes and mass picketing, which ultimately justified and generated support for the retrenchment of labor rights.<sup>15</sup> This notion of backlash collapses when the origins of the attack on labor rights realized in Taft-Hartley are located in a pattern of violent resistance to basic labor rights that employers themselves embraced long before workers pushed back with sit-down strikes, mass pickets, and the like. The backlash begins to look more like a deviously executed fallback plan.

This Article draws on a number of sources, including court and administrative cases, newspaper records, and reports and transcripts from extensive congressional hearings to demonstrate the important role that industrial terrorism played in “unmaking” the Wagner Act. Especially useful are cases of the NLRB, as well as the records and reports of the so-called La Follette Committee of the U.S. Senate, which, over a course of several years in the late 1930s and early 1940s, conducted penetrating investigations of employers’ violent opposition to labor rights. Aside from attempting to reveal the ironic way that violence was used to alter the basic orientation of labor law and policy, this Article hopes to reveal how dominant and commonplace employer-sponsored violence actually was on the industrial landscape of New Deal America. With this, it offers a blunt rebuttal to anti-union ideologues who persist in suggesting that unionists were somehow both the main architects of industrial violence and its main beneficiaries, when in fact they were neither.

This Article unfolds its argument in three main parts. Part II offers a relatively brief review of the history of labor violence in the several decades leading up to 1935, when Congress passed the Wagner Act. It emphasizes the important role that violence played in the rise of the so-called “open shop”—a workplace purged of and defended against union representation—in major industries during this period.

Part III describes the practice of industrial terrorism as it prevailed in industrial America from the mid 1930s through the early 1940s. In so doing, this Part focuses on events in several industries and employers whose practices epitomized the dynamics of industrial terrorism and were central in shaping its legacy. It begins with the Remington Rand Company, a manufacturing firm whose well-publicized practices in a 1936 strike anticipated, and whose president actually theorized, the strategies used by other industrial employers to defeat labor rights. Next, it turns to the automobile industry, with a particular emphasis on the events surrounding efforts to organize General Motors and Chrysler, which culminated in the dramatic sit-down strikes of 1936 and 1937, as well as the more sustained struggle to organize Ford. Finally, this Part con-

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<sup>15</sup> See ROBERT SHOGAN, *BACKLASH: THE KILLING OF THE NEW DEAL* 180-86 (2006).

siders the steel industry and its efforts to resist Congress of Industrial Organizations' organizing efforts, particularly in 1936 and 1937, culminating in the brutal Little Steel Strike. Among the aims of Part II is to show how company-sponsored violence not only served to deny workers basic labor rights but also inspired important expressions of organized worker militancy, including sit-down strikes, mass picketing, and other violent or disorderly responses. These tactics and episodes would form the basis of the reactionary campaign against labor rights that would be the ultimate legacy of industrial terrorism.

Part IV shows how the violence of these clashes was distorted and rearticulated as evidence of the fundamental excesses of the entire regime of New Deal labor law. Recast in these terms, industrial terrorism played a leading role in framing a counterattack on Wagner Act in the courts and Congress that began in the late 1930s and came to full fruition in the enactment of Taft-Hartley. The final section is a conclusion that reflects briefly on the implications of this narrative for the way we understand class, violence, and labor rights in modern society.

## II. VIOLENCE AND LABOR REPRESSION IN THE PRE-WAGNER ACT PERIOD

In the course of its landmark investigation of industrial violence in the late 1930s, the La Follette Committee repeatedly acknowledged that many means of labor repression it brought to light had been in regular use for more than a half century prior to the Great Depression. In fact, as the committee also recognized, its own investigations followed a number of earlier investigations of violence in industrial America.<sup>16</sup> Together, these studies revealed how consistently industrial violence served the purposes of labor repression, even as the violence itself often seemed chaotic and anarchical.<sup>17</sup> As this Article shows, violence repeatedly took the form of a calculated effort, backed by a willingness to use and provoke violence, to deny workers the right to organize, bargain, or strike. The result was a deeply ironic process by which a mythic and contradictory ideology of workplace liberty—set upon the concepts of the “open-shop” and its adjunct, the “right to work”—was built on a foundation of force and coercion.

At Congress's direction, the Commission on Industrial Relations conducted the most important of these earlier investigations between 1912 and 1915.<sup>18</sup> The Commission determined that employers often intentionally engaged in or knowingly cultivated industrial violence, and the primary reason they did so was not to defend the peace or even some fundamentalist view of property rights, but rather to deny workers basic labor rights.<sup>19</sup> Strikes themselves typically originated from employers' refusal to recognize or bargain with

<sup>16</sup> LITTLE STEEL, *supra* note 8, at 35-36; INDUSTRIAL MUNITIONS, *supra* note 8, at 2-3; PRIVATE POLICE SYSTEMS, *supra* note 8, at 4-11; S. REP. NO. 76-6, pt. 1, at 5 (1939) [hereinafter STRIKEBREAKING SERVICES].

<sup>17</sup> INDUSTRIAL MUNITIONS, *supra* note 8, at 1-3; PRIVATE POLICE SYSTEMS, *supra* note 8, at 4-11; STRIKEBREAKING SERVICES, *supra* note 16, at 1-2.

<sup>18</sup> JOSEPH A. MCCARTIN, LABOR'S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912-1921, at 24 (1997).

<sup>19</sup> S. REP. NO. 64-415, at 96 (1916) [hereinafter INDUSTRIAL RELATIONS].

unions, or even accept their right to exist, and from their penchant to enforce these positions by repressive tactics, including spying, discharges and black-lists, and assaults. Once workers went on strike, they faced another array of repressive tactics, anchored by the practice of strikebreaking. For many employers, strikebreaking was not simply a means of keeping their businesses open while a strike was pending, or of protecting their property, but a strategy for drawing strikers into violent conflict.<sup>20</sup> Employers typically hired strikebreakers to provoke strikers to violence in order to give the employer license to break up the pickets with private police or compliant public police. The Commission determined that most union-sponsored violence could be explained in terms of this logic of provocation.<sup>21</sup>

Despite some instances of serious, unprovoked union violence and other instances when unionists grossly overacted, the pattern described by the Commission, whereby such violence was usually provoked in some way and of understandable proportion, largely held true through the New Deal era. Nor did employers always wait for unionists to strike or bother first to provoke them. On many occasions, employers locked out workers preemptively, as a prequel to greater provocation.<sup>22</sup> Others orchestrated blatant attacks on picket lines or other gatherings of workers or arranged to have union leaders and organizers assaulted or even assassinated. These methods functioned in concert with a broader program of holding the threat of violence over workers as a deterrent to the exercise of labor rights, and using violence in any case as a means of discrediting unionists and justifying their repression and exploitation.<sup>23</sup>

The conclusions of the Commission on Industrial Relations were affirmed by another major investigation of industrial violence several years later. The author of the study was the Interchurch World Movement (Interchurch), and its focus was the Great Steel Strike of 1919.<sup>24</sup> The Great Steel Strike was the largest strike up to that time, entailing a several-month walkout of 250,000 to 365,000 wage earners in the basic steel industry, and it provoked repression on a scale to match.<sup>25</sup> In the course of the strike, steel companies used tens of thousands of company guards, deputies, and public police forces under their direction to demolish picket lines, intimidate workers, and ultimately defeat a determined effort to establish union representation in the industry.<sup>26</sup> In the course of the strike, about twenty people, most of them workers, were killed; hundreds, maybe thousands, were injured; and countless others were arrested, threatened, and literally terrorized.<sup>27</sup> The Interchurch investigation attributed the cause of the strike to a desire by workers to redress oppressive and exploita-

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<sup>20</sup> *Id.* at 93-94.

<sup>21</sup> *Id.*

<sup>22</sup> See Taft & Ross, *supra* note 1, at 214.

<sup>23</sup> INDUSTRIAL RELATIONS, *supra* note 19, at 93, 153-54; SIDNEY LENS, THE LABOR WARS: FROM THE MOLLY MAGUIRES TO THE SITDOWNS 273-321(1973).

<sup>24</sup> See generally INTERCHURCH WORLD MOVEMENT OF N. AM., REPORT ON THE STEEL STRIKE OF 1919 (1920).

<sup>25</sup> DAVID BRODY, LABOR IN CRISIS: THE STEEL STRIKE OF 1919, at 113 (1965).

<sup>26</sup> See generally *id.*

<sup>27</sup> See WILLIAM Z. FOSTER, THE GREAT STEEL STRIKE AND ITS LESSONS 223 (Da Capo Press 1971) (1920); Taft & Ross, *supra* note 1, at 214.



tive conditions in the industry.<sup>28</sup> It attributed the strike's widespread violence to the concerted campaign by steel companies (under the leadership of U.S. Steel) and their allies in government to use force to break up pickets and to provoke and demoralize the strikers.<sup>29</sup>

An important theme in the Interchurch report was the way the steel companies and their allies used anti-radical propaganda, pregnant with allusions to the threat of worker-sponsored violence, against the strikers. By loudly accusing the strikers of being Communists and anarchists, they were able both to further provoke the strikers and to discredit them and justify physical attacks and other forms of repression.<sup>30</sup> Of course, such red-baiting tactics were not entirely new. For more than a decade, the Industrial Workers of the World (IWW) had been harassed, assaulted, and, on a few occasions, killed by company agents and police who routinely justified their actions by reference to the IWW's explicitly radical agenda.<sup>31</sup> What distinguished the use of anti-radical propaganda in the Great Steel Strike was that the steel strikers' aims were not radical; they sought only recognition of their union as well as modest improvements in employment conditions.<sup>32</sup> But the strike showed that charges of radicalism could be used effectively regardless.

Over the next few years, violence continued to define the limits of labor rights across the industrial landscape.<sup>33</sup> In addition to violence, threats of violence, and violence-related propaganda, employers also employed tactics that were softer and more pernicious. Among these were home mortgage and insurance programs, and other instruments of "welfare capitalism" that bound workers to their jobs and therefore muted their tendency to protest.<sup>34</sup> Another approach was the aggressive and increasingly skillful promotion of the "open shop" concept as the proper American ideology, in contrast to the supposedly foreign and radical concept of independent unionism.<sup>35</sup> In this role, the concept would have a particularly insidious function; for like its cousin, the right to work, the literal connotations of the open shop—free choice in whether to belong to a union—were distant from its actual meaning, which was employers' active opposition to labor rights. And yet these concepts proved remarkably resonant, particularly when also married to charges of union-sponsored violence.<sup>36</sup>

Employers of the period also continued to make use of a legal regime centered on the labor injunction and anti-trust laws that, although not entirely

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<sup>28</sup> INTERCHURCH WORLD MOVEMENT OF N. AM., *supra* note 24, at 11-16, 246-50.

<sup>29</sup> *Id.* at 11-16.

<sup>30</sup> *Id.* at 31-38.

<sup>31</sup> On the repression of the IWW, see MELVYN DUBOFSKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* (Joseph A. McCartin ed., 2000); Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917-1927*, 85 OR. L. REV. 649, 650 (2006).

<sup>32</sup> BRODY, *supra* note 25, at 114.

<sup>33</sup> IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933*, at 1-43 (Haymarket Books 2010) (1969); Taft & Ross, *supra* note 1, at 216-17.

<sup>34</sup> See, e.g., BERNSTEIN, *supra* note 33, at 90; ROBERT H. ZIEGER, *AMERICAN WORKERS, AMERICAN UNIONS, 1920-1985*, at 3-10 (1986).

<sup>35</sup> BERNSTEIN, *supra* note 33, at 147-49.

<sup>36</sup> *Id.* at 147-48, 153-56.

preclusive of basic labor rights, nevertheless subjected every attempt to strike or engage in meaningful collective bargaining to the risk of criminal prosecution and injunction.<sup>37</sup> The 1920s likewise featured a more explicit kind of legal repression: a focused campaign of legal persecution by which hundreds of radical unionists were systematically prosecuted and imprisoned for violating state “criminal syndicalism” law that barred advocacy of “industrial or political reform” by means of “sabotage, violence or other unlawful methods of terrorism.”<sup>38</sup>

The dominant labor organization of the period, the American Federation of Labor (AFL), did itself little credit in the face of these practices. Indeed, most AFL unions were hardly vibrant enough to justify employer repression, for during this period, organizing efforts of AFL unions were consistently derisory and often incompetent.<sup>39</sup> Moreover, as a rule, the federation stubbornly adhered to a program that excluded most blacks, foreigners, and women; it defended a system of craft unionism that excluded virtually the entire industrial workforce; and it failed to articulate a compelling critique of the conditions of labor in industrial America.<sup>40</sup>

In the 1920s, these factors combined to dramatically erode even the modest gains in membership and influence that organized labor had won in the preceding decades. Despite considerable growth in the overall size of the workforce, total union membership declined from just more than 5 million in 1920 to less than 3.5 million in 1929.<sup>41</sup> During this time, entire unions disappeared completely, and many others were reduced to shadows of their former selves.<sup>42</sup> The same factors—repression and the ineptitude of the AFL—dramatically diminished the ability of those unions that did retain reasonable membership to mount effective protests and engage in meaningful collective bargaining.<sup>43</sup> These effects were particularly pronounced in mass-production industries, as well as in transportation and mining. Following a pattern established in the steel industry, employers created and defended open-shop empires that extended across entire industries encompassing millions of workers, even as these workers continued to face intensely authoritarian and exploitative conditions that exposed the true implications of the open shop and the right to work.<sup>44</sup>

As unfavorable as organized labor’s situation already was at the close of the 1920s, its condition actually worsened significantly in the first years of the Great Depression. Initially, the erosive factors just listed were aggravated by unprecedented levels of unemployment, underemployment, and reductions in overall wages. As a result, union membership fell even further, as did organized labor’s overall influence.<sup>45</sup>

<sup>37</sup> *Id.* at 190-215; William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1148-95 (1989).

<sup>38</sup> White, *supra* note 31, at 706.

<sup>39</sup> BERNSTEIN, *supra* note 33, at 83-108.

<sup>40</sup> See ZIEGER, *supra* note 34, at 5.

<sup>41</sup> BERNSTEIN, *supra* note 33, at 84.

<sup>42</sup> *Id.* at 84-87.

<sup>43</sup> *Id.*

<sup>44</sup> See *id.* at 56-74, 84-90.

<sup>45</sup> See *id.* at 334-57.

At the same time, however, the first years of the 1930s also saw the emergence of other factors that would eventually position industrial workers to finally challenge employer hegemony. Principle among these was the Depression itself, which sowed such unprecedented social devastation that workers began to defy the normal tendency to retreat from activism during economic downturns.<sup>46</sup> There was also the effect of the New Deal—the First New Deal of 1933-1935—which featured several attempts to protect basic labor rights.<sup>47</sup> The most important of these was section 7(a) of the National Industrial Recovery Act (the NIRA, 1933), which specifically validated the right to organize and engage in collective bargaining, and gave birth to a sequence of administrative entities dedicated to enforcing these rights.<sup>48</sup> Although measures like section 7(a), which consistently lacked adequate structures for enforcement, proved ineffective as means of directly advancing labor rights, they were important in changing the climate of labor relations. By signaling some degree of government support for unionization, they emboldened workers and unions to press their organizing goals.<sup>49</sup> Likewise, they gave renewed credence to the idea, which had been for so long negated by anti-labor propaganda and decades of government-sponsored and government-aided repression, that labor rights could be realized by a program focused in part on political participation and activism.<sup>50</sup>

It would be a mistake, however, to focus unduly on the immediate effects of the Depression or the New Deal legal regime in explaining changing labor relations in the 1930s. Other factors indigenous to the working class were at least as important. Principle among these was a building movement from within the AFL to qualify the organization's commitment to craft unionism in an effort to organize the masses of (often low-skilled) industrial workers in the open shop industries.<sup>51</sup> Initially, this took form in a clumsy, but not entirely ineffective, attempt to charter "federal" labor unions with jurisdiction to organize in a semi-industrial fashion.<sup>52</sup> Such unions tended to flourish briefly before withering in the face of employer repression and intransigence, and renewed jurisdictional rivalries.<sup>53</sup> However, by 1935 a very tentative coalition was emerging that brought together the interest in genuine industrial unionism among mainstream unionists with that of radicals, including former IWW members, socialists, and most importantly, members and fellow travelers of the Communist Party.<sup>54</sup> Within the AFL, this impulse manifested itself in the emergence of a powerful insurgent movement, which by late 1935 had given rise to the Committee of Industrial Organizing (later, Congress of Industrial

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<sup>46</sup> BERNSTEIN, *supra* note 10, at 38-39.

<sup>47</sup> On other attempts to legislate labor reforms during this period, see I JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW* 64-69 (1974); BERNSTEIN, *supra* note 10, at 192-97.

<sup>48</sup> ZIEGER, *supra* note 34, at 28-29.

<sup>49</sup> BERNSTEIN, *supra* note 10, at 172-73.

<sup>50</sup> *Id.* at 347-55; ZIEGER, *supra* note 34, at 28-29.

<sup>51</sup> BERNSTEIN, *supra* note 10, at 94-96.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 94-95, 354-91.

<sup>54</sup> *Id.* at 170; ROBERT S. McELVAINE, *THE GREAT DEPRESSION: AMERICA, 1929-1941*, at 203-04 (2009).

Organizations, or CIO).<sup>55</sup> Although never very prominent within either the AFL or CIO bureaucracies, radicals were peppered throughout the lower ranks of leaders and organizers, especially in the CIO.<sup>56</sup> There, they would play a pivotal role in an all-out effort by the CIO to challenge the open shop in transportation, extractive, and mass-production industries.<sup>57</sup>

In the meantime, the modest changes in the role of the state and the law in labor relations embodied in the NIRA did little to alter employers' contempt for labor rights, particularly in these open shop strongholds. Indeed, the reaction of most employers in these industries toward the section 7(a)—and the new labor boards hastily created to enforce it—was to ignore them, even to the point of contemptuously flouting their jurisdiction.<sup>58</sup> As events quickly proved, the same employers remained equally prepared to use violence to deny basic labor rights.

The 1930s had opened with an escalation of violence in eastern coal country as well as widespread attacks on agricultural workers and organizers in California and the South.<sup>59</sup> A large but unknown number of workers and organizers lost their lives in struggles to organize agriculture, which remained a redoubt of the open shop well beyond the New Deal period.<sup>60</sup> And there were also important clashes in industrial regions. In March 1932, about fifty workers and their supporters were shot and four killed by police and company guards at a protest against hunger and unemployment at the main gate of Ford's River Rouge mega-plant in Dearborn, Michigan.<sup>61</sup> The year 1934 alone featured a number of bloody labor battles, among them a massive waterfront strike in San Francisco, a general strike in Minneapolis, and a strike by workers at a Toledo automobile parts factory, which each left several people dead and scores injured.<sup>62</sup> Bloodier still was a massive textile strike that year, which extended through the entire Appalachian region and involved more than four hundred thousand workers; it resulted in the deaths of more than a dozen people.<sup>63</sup> Overall, labor violence in the early and middle years of the Depression probably claimed several hundred lives, most of them strikers and strike supporters.<sup>64</sup> At the same time that these tragic episodes underscored the strength of the open shop, they also gave dramatic testament to the fact that millions of

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<sup>55</sup> See BERNSTEIN, *supra* note 10, at 401; ZEIGER, *supra* note 34, at 30-34.

<sup>56</sup> FRASER M. OTTANELLI, *THE COMMUNIST PARTY OF THE UNITED STATES: FROM THE DEPRESSION TO WORLD WAR II* 140-53 (1991).

<sup>57</sup> On the rise of the CIO, see generally ZIEGER, *supra* note 11. On the role of Communists in organizing industrial labor, see OTTANELLI, *supra* note 56, at 144-153.

<sup>58</sup> GROSS, *supra* note 47, at 23-25, 42-43, 91-93.

<sup>59</sup> Taft & Ross, *supra* note 1, at 218-19.

<sup>60</sup> STUART MARSHALL JAMIESON, *LABOR UNIONISM IN AMERICAN AGRICULTURE* 290-312 (Arno Press 1976) (1946); CAREY McWILLIAMS, *FACTORIES IN THE FIELD: THE STORY OF MIGRATORY FARM LABOR IN CALIFORNIA* 211-29 (Archon Books 1969) (1939); Taft & Ross, *supra* note 1, at 219.

<sup>61</sup> OTTANELLI, *supra* note 56, at 33-34; BERNSTEIN, *supra* note 33, at 432-34.

<sup>62</sup> Taft & Ross, *supra* note 1, at 221-22; Rebecca E. Zietlow & James Gray Pope, *The Toledo Auto-Lite Strike of 1934 and the Fight Against "Wage Slavery,"* 38 U. TOL. L. REV. 839, 845-46 (2007).

<sup>63</sup> Taft & Ross, *supra* note 1, at 221.

<sup>64</sup> LENS, *supra* note 23, at 273; Taft & Ross, *supra* note 1, at 217-23.

unorganized workers were increasingly prepared to challenge the prevailing industrial order.

### III. THE THEORY AND PRACTICE OF INDUSTRIAL TERRORISM IN THE SECOND NEW DEAL PERIOD

On paper, the passage of the Wagner Act in June 1935 signaled a veritable revolution in the state of labor rights in America. More explicitly than any part of the NIRA or any other statute in the country's history, the new law unequivocally declared that workers enjoyed the right to form unions, engage in meaningful collective bargaining, and strike. Even more remarkably, other provisions of the Wagner Act established a system for protecting these rights against employer interference, with an independent administrative agency, the NLRB, established for this purpose.<sup>65</sup> The new law appeared to supplant more than fifty years of anti-labor laws and policies, as well as an equally entrenched tradition of extra-legal resistance to labor rights.

In reality, it remained unclear what, if any, effect the Wagner Act would have. Only a month before it was passed, the Supreme Court had declared the NIRA unconstitutional in terms that strongly suggested it might eventually visit the same fate on the Wagner Act.<sup>66</sup> Open shop employers were confident that the Court would eventually relieve them of any obligations under the new law.<sup>67</sup> Calculating that the statute's chances in the Court would be diminished further if it were already reduced to a dead letter in practice, these employers actually intensified repression in and around their plants and mills. In this context, many open shop employers came to view their struggle against the statute with an almost religious conviction, giving witness to how completely they embraced their own ideology.

As this section reveals, open shop employers stepped up the use of blacklists and other forms of open discrimination, sham company unions, espionage, and, of course, violence. To be sure, the Wagner Act and other conditions of the New Deal did change somewhat how violence was used to resist labor rights. Although the use of public police and militias against workers did not necessarily diminish, having more public officials responsive to the interests of organized labor meant that initiating the use of such forces, as by the time-tried provocation of union-sponsored violence, had to be accomplished more carefully.<sup>68</sup> And even as the ham-fisted use of public forces likely diminished, employers intensified the use of other tactics, especially company unions—even though these were manifestly unlawful under the Wagner Act. They also bolstered their own capacity to visit violence on their workers. These employers developed larger, better-organized, and better-armed corps of company police and spies, and they used these forces with greater planning and foresight.

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<sup>65</sup> 29 U.S.C. § 151 (2006).

<sup>66</sup> *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554-55 (1935).

<sup>67</sup> GROSS, *supra* note 47, at 149, 171-73.

<sup>68</sup> See ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: 1870 TO THE PRESENT* 209-11 (1978).

A. *Industrial Terrorism Fully Theorized: The "Mohawk Valley Formula"*

In the late spring of 1936, an AFL union representing about six thousand workers called a strike against Remington Rand, Inc. (Remington Rand), a manufacturer of office equipment headquartered in Buffalo and New York City and with plants in Upstate New York, Ohio, and western New England.<sup>69</sup> Within a few months, the company crushed the strike by means of a sophisticated array of manipulative and repressive tactics that the company's president, James Rand, would call the "Mohawk Valley Formula" after the location of one of the struck plants.<sup>70</sup> The nature of this formula and its effect on the strike are interesting for several reasons. First, the formula itself, and the fact that it was publicized as *a formula*, highlight the degree to which labor repression had become rationalized in the New Deal era. Second, the success with which Remington Rand used the formula shows how effective such repressive techniques could be. Third, the Mohawk Valley Formula was eventually presented as a guide to other employers in how to resist labor rights and, as we shall later see, may have actually served this purpose. Finally, the formula contemplated an underlying strategy for exploiting the provocation of union violence on a local level that directly anticipated how employers and their allies would later use the whole history of violence in this era to frame a far broader counterattack on labor rights.

The union involved in the Remington Rand dispute, the Joint Board of Office Equipment Workers, emerged like many others in the ferment created by section 7(a) of the NIRA.<sup>71</sup> It actually attempted unsuccessfully to vindicate its right to recognition and collective bargaining under the clumsy administrative machinery created to enforce that provision. This led the union to strike at several Remington Rand plants in May 1934.<sup>72</sup> Surprisingly, the strike ended in an agreement between the union and the company covering most of its manufacturing plants, which in turn led to a period of relatively quiet labor relations from late 1934 through most of 1935.<sup>73</sup> However, in the fall of 1935, the company undertook to reorganize its operations in a way that entailed the removal of production from unionized factories to a new, non-unionized facility.<sup>74</sup> This prompted the union to press company management for clarification of the company's plans and to explain how these plans were consistent with the existing union contract.<sup>75</sup> The dispute over this issue, which merged with a conflict over wages, became increasingly hostile, with the company refusing to answer the union's requests for information or even to meet with its representatives.<sup>76</sup>

Even before the 1936 strike commenced, Remington Rand had begun to execute its strikebreaking formula. Its tactics in the days leading to the strike included preemptive (and pretextual) lockouts at several of the affected plants, targeted firings of union leaders, changes in pay and benefits to penalize strik-

<sup>69</sup> *In re Remington Rand, Inc.*, 2 N.L.R.B. 626, 627-31 (1937).

<sup>70</sup> *Id.* at 659, 721.

<sup>71</sup> *Id.* at 632.

<sup>72</sup> *Id.* at 633.

<sup>73</sup> *Id.* at 633-34.

<sup>74</sup> *Id.* at 634-38.

<sup>75</sup> *Id.* at 637-38.

<sup>76</sup> *Id.* at 635-42.

ers, and deceptive and coercive polling designed to create a false impression that the union lacked the support of the rank and file.<sup>77</sup> The company also hired the services of four professional strikebreaking services notorious for their provocative and unlawful methods.<sup>78</sup> When the strike began on May 26, 1936, it substantially shut down the company's operations.<sup>79</sup> At that point, Rand, who said he would defy the strikers "at all costs," deployed his formula in full.<sup>80</sup>

The NLRB would eventually find evidence of a vast number of practices aimed at demoralizing and "terrorizing" the union, as well as undermining its support among the populations around the plants and the officials in charge of the communities. In fact, these findings merely proved the company to have done what James Rand had already admitted.<sup>81</sup> For example, on June 12, 1936, with the strike already showing some weakness, Rand gave a speech in Ilion, New York, in which he boasted how he invented the Mohawk Valley Formula and used it successfully to break the strike. Rand laid out the key elements of the formula and urged other employers to make use of it against unions organizing their workers.<sup>82</sup> The next day, a representative of the National Association of Manufacturers (NAM) arrived in Ilion to interview Rand. A week later, the NAM published a narrative summary of Rand's formula in its *Labor Relations Bulletin*.<sup>83</sup>

As dissected by the Board the formula devised by Rand consisted of nine major steps: First, conduct a propaganda campaign against the union centered on labeling its organizers "agitators" and fronted by a "citizens committee" of the employer's own creation.<sup>84</sup> Second, when the strike begins, charge that the strike poses a threat to law and order, regardless of whether it poses any such threat.<sup>85</sup> Third, hold a mass meeting under the aegis of the citizens committee designed to pressure local authorities and to initiate vigilante activities.<sup>86</sup> Fourth, constitute a "large armed police force to intimidate the strikers and to exert a psychological effect upon the citizens" as well as incite violence and disorder among the strikers and generally convince the strikers' that their cause is hopeless. The force would be composed of whatever array of local police and state police, vigilantes, and "special deputies," that might prove convenient.<sup>87</sup> Fifth, organize a "back to work" movement and represent it to the public and the strikers as proof of the strike's impending failure and its undemocratic character.<sup>88</sup> Sixth, prepare a staged reopening of the struck business, complete with an impressive show of armed guards, with the idea of fur-

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<sup>77</sup> *Id.* at 644-48.

<sup>78</sup> STRIKEBREAKING SERVICES, *supra* note 16, at 117-19.

<sup>79</sup> *In re Remington Rand*, 2 N.L.R.B. at 648; *Strike in 6 Plants of Remington Rand*, N.Y. TIMES, May 26, 1936, at 3.

<sup>80</sup> *Strike in 6 Plants of Remington Rand*, *supra* note 79.

<sup>81</sup> *In re Remington Rand*, 2 N.L.R.B. at 626.

<sup>82</sup> *Id.* at 659.

<sup>83</sup> *Id.* at 659-64.

<sup>84</sup> *Id.* at 664.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 665.

<sup>88</sup> *Id.*

ther demoralizing the strikers while also creating the impression with the public that they are only able to keep the business closed by force and intimidation.<sup>89</sup> Seventh, conduct the “reopening” with great spectacle, fanfare, and patriotic symbolism.<sup>90</sup> Eighth, increase the presence of the armed guards, if necessary turning the area “into a warlike camp” and creating “a state of emergency” designed to deter outside supporters from coming to the union’s aid and further emphasizing the futility of the union’s campaign.<sup>91</sup> Finally, announce that the strike has been broken—even if it had not been—and that any remaining resistance is the work of a minority hostile to the majority’s “right to work.”<sup>92</sup> The NLRB’s published opinion in its case against Remington Rand demonstrated how the company executed every one of these steps.<sup>93</sup>

For obvious reasons, at least as it was related by Rand and the NAM, the formula did not endorse the deliberate use of force against strikers. Not explicitly, at least—but the prospect of employer-sponsored violence was clearly contemplated by the central idea of assembling armed forces and using them aggressively to intimidate, provoke, and demoralize striking workers. It is easy to see how the eventuality of open violence would not only likely follow but, if it did, would actually vastly enhance the effectiveness of a program keyed toward building a climate of emergency and presenting this as the ultimate fault of irresponsible radicals and unwanted outsiders. In fact, the whole scheme would tend to work best if the implied threat of violence were used to dissuade workers from ever striking in the first place. This would follow not only for the obvious reason that some strikes would be prevented altogether, but also because the strikes that did occur notwithstanding such threat would likely be edgy, insecure affairs, especially quick to respond in one way or another to employer provocations.

In the course of the Remington Rand strike, the company’s application of the formula several times resulted in serious violent outbreaks. The strike-breaking firms hired by the company provided approximately five hundred armed guards distributed among the handful of towns where the strike was centered.<sup>94</sup> Together with hundreds more special deputies and armed vigilantes organized under the auspices of local citizens committees, the guards patrolled the towns, denying strikers and their supporters the right to picket or even pass

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<sup>89</sup> *Id.* at 665-66.

<sup>90</sup> *Id.* at 666.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 664-66. For more information on Rand’s tactics, see *Hiring 500 to End Syracuse Strike*, N.Y. TIMES, June 10, 1936, at 10; *Pickets Are Orderly at Remington Rand*, N.Y. TIMES, May 29, 1936, at 5; *Police Will Protect Remington Workers*, N.Y. TIMES, May 28, 1936, at 13; *Rand Is Optimistic on Strike Trends*, N.Y. TIMES, June 11, 1936, at 3; *Rand Pickets Curbed*, N.Y. TIMES, July 19, 1936, at 25; *Rand Strike Writ Upheld on Appeal*, N.Y. TIMES, Aug. 19, 1936, at 11; *Remington Fails to Win Strikers*, N.Y. TIMES, June 16, 1936, at 12; *Remington Rand Drops 3 Plants*, N.Y. TIMES, June 14, 1936, at 16; *Remington Rand Moves Machines*, N.Y. TIMES, June 5, 1936, at 35; *Six Rand Factories Guarded in Strike*, N.Y. TIMES, May 27, 1936, at 3.

<sup>94</sup> *In re Remington Rand*, 2 N.L.R.B. at 708; STRIKEBREAKING SERVICES, *supra* note 16, at 119-23.



freely on the streets.<sup>95</sup> Along with staged re-openings, these tactics provoked a number of clashes.<sup>96</sup> In early June, for example, a staged provocation at Tonawanda, New York, involving phony replacement workers and police resulted in a huge street fight with strikers and strike sympathizers.<sup>97</sup> In mid-August, guards employed by Remington Rand shot two strikers in Syracuse.<sup>98</sup> Later that month at the same Syracuse plant, professional strikebreakers led five hundred men armed with “guns, clubs, sticks, blackjacks, and other weapons” in an attack on a group of four union picketers and two hundred union bystanders.<sup>99</sup> Fortunately, no one was killed in these skirmishes. However, consistent with Rand’s scheme, they likely undermined strike support among the public and the unionists alike and gave impetus to the company’s efforts to secure police intervention and court injunctions against the picketers.<sup>100</sup>

A year after the strike was broken, the NLRB found Remington Rand guilty of a host of unfair labor practices and ordered the company to rehire the nearly four thousand strikers who had been replaced by scabs during the strike and not allowed to return to their positions afterward.<sup>101</sup> The Board also required the company to disestablish company-controlled unions set up during the strike and to recognize and bargain with the bona fide union.<sup>102</sup> But these remedies were enforced only after several more years of delay occasioned by the company’s very aggressive attempt first to enjoin the Board’s NLRB’s proceedings and later to simply deny its authority.<sup>103</sup> Even after the Supreme Court rejected its appeals, it still took a threat of contempt proceedings to get the company to comply with the Board’s orders.<sup>104</sup> Rand himself frustrated earlier attempts at mediation by U.S. Secretary of Labor Frances Perkins, as well as similar efforts by the governors of the affected states.<sup>105</sup> He and one of his strikebreaking agents would later be charged with (but acquitted on technical grounds) of violating a federal law prohibiting the use of interstate strikebreaking services to interfere with peaceful labor picketing.<sup>106</sup> The La Follette

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<sup>95</sup> *In re Remington Rand*, 2 N.L.R.B. at 654; STRIKEBREAKING SERVICES, *supra* note 16, at 119-23.

<sup>96</sup> On clashes during the strike, see STRIKEBREAKING SERVICES, *supra* note 16, at 120-23; 3 *Buses Wrecked by Rand Strikers*, N.Y. TIMES, July 8, 1936, at 2; *Bus Attacked in Strike*, N.Y. TIMES, June 1, 1936, at 9; *Workers Stoned in Ohio Rand Strike*, N.Y. TIMES, July 7, 1936, at 12.

<sup>97</sup> *In re Remington Rand*, 2 N.L.R.B. at 668.

<sup>98</sup> *2 Shot in Rand Strike; Troops May Be Asked*, N.Y. TIMES, Aug. 13, 1936, at 4.

<sup>99</sup> *In re Remington Rand*, 2 N.L.R.B. at 681.

<sup>100</sup> *Id.* at 730-37; STRIKEBREAKING SERVICES, *supra* note 16, at 119-23.

<sup>101</sup> *In re Remington Rand*, 2 N.L.R.B. at 737-39; *Remington Rand Defies U.S. Board*, N.Y. TIMES, Mar. 16, 1937, at 1.

<sup>102</sup> *In re Remington Rand*, 2 N.L.R.B. at 737-39.

<sup>103</sup> NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir. 1938), *cert. denied*, 304 U.S. 576 (1938); see also *Remington Rand Defies U.S. Board*, *supra* note 101.

<sup>104</sup> *Remington Rand, Inc., Bows to NLRB Order*, N.Y. TIMES, June 30, 1940, at 15.

<sup>105</sup> On Perkins’ efforts, see *Rand Peace Terms Signed in Capital*, N.Y. TIMES, Mar. 19, 1937, at 3; *Rand to Discuss Strike*, N.Y. TIMES, Mar. 13, 1937, at 8. On the governors’ efforts, see *Lehman Backs Cross in Rand Peace Move*, N.Y. TIMES, July 24, 1936, at 18; *New Violence Marks Strike in Rand Plants*, N.Y. TIMES, July 25, 1936, at 24.

<sup>106</sup> STRIKEBREAKING SERVICES, *supra* note 16, at 123-28.

Committee took the case as salient proof of the strikebreaking law's inadequacy.<sup>107</sup>

The Board and the La Follette Committee would later surmise that the Mohawk Valley Formula was studied and adopted by other employers' intent on breaking strikes, including the Little Steel companies whose tactics are described below.<sup>108</sup> The claim is certainly plausible, but for obvious reasons impossible to prove one way or the other. It is also at least somewhat debatable on its merits, in that it seems unlikely that the Little Steel companies actually needed much tutelage in the business of labor repression. What is not debatable is that the systematic nature of Rand's formula reflected an increasingly sophisticated approach to labor repression among powerful industrial employers in the Second New Deal era. If they were not genetically related to the Mohawk Valley Formula, these other programs at least gave proof to the concept of convergent evolution in this realm.

### *B. Organized Violence and Labor Repression in the Automobile Industry*

In 1936, automobile production was the largest industry in America by value of its product and twelfth largest by number of employees.<sup>109</sup> The industry was already dominated by the "Big Three." General Motors (GM) had by then attained the position it would occupy for much of the post-War period as the world's largest private enterprise.<sup>110</sup> In the mid-1930s, it employed more than two hundred thousand workers and produced nearly 40 percent of all cars and trucks in the world.<sup>111</sup> Though not so large as GM, Chrysler and Ford were formidable concerns: each employed roughly one hundred thousand workers and between them they produced around two million vehicles per year.<sup>112</sup> Ford was further distinguished by the fact that the entire business was still the personal property of Henry Ford, his wife, and his son.<sup>113</sup> All of these companies maintained extensive vertically integrated operations that included shipping and rail operations, raw materials sources and processing facilities, as well as assembly plants.<sup>114</sup>

#### *1. Violence and the Open Shop in the Automobile Industry*

Each of these companies—GM, Chrysler, and Ford—was also stridently committed to the open shop. In open defiance of their statutory obligations under NIRA and the Wagner Act, and of the authority of the boards created to enforce these laws, the companies defended their position with a machinery of repression that relied on espionage, propaganda, discriminatory discharges, and

<sup>107</sup> *Id.*

<sup>108</sup> BERNSTEIN, *supra* note 10, at 478.

<sup>109</sup> *In re Ford Motor Co.*, 4 N.L.R.B. 621, 625 (1937).

<sup>110</sup> BERNSTEIN, *supra* note 10, at 510-11.

<sup>111</sup> SIDNEY FINE, *SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936-1937*, at 20-23 (1969).

<sup>112</sup> ZIEGER, *supra* note 11, at 53; *In re Ford Motor*, 4 N.L.R.B. at 623-25; *In re Chrysler Corp.*, 13 N.L.R.B. 1303, 1307 (1939).

<sup>113</sup> BERNSTEIN, *supra* note 10, at 734-36; *In re Ford Motor*, 4 N.L.R.B. at 623 n.2.

<sup>114</sup> *In re Chrysler*, 13 N.L.R.B. at 1307; *In re Ford Motor*, 4 N.L.R.B. at 624; FINE, *supra* note 111, at 20-22.

company unions, as well as threats and brute force.<sup>115</sup> These practices were meticulously documented by both the NLRB and the La Follette Committee. Among the more salient determinations is the La Follette Committee's revelation that GM maintained at its plants a full-time staff of 1,400 well-armed and well-trained company police, backed by an indeterminate number of part-time police.<sup>116</sup> Moreover, GM fielded what the committee called an "amazing and terrifying" corps of spies charged with spying on, provoking, and generally frustrating workers trying to organize at its plants.<sup>117</sup> The company itself maintained a force of about two hundred spies, but like most other large manufacturers it also obtained espionage services by contract.<sup>118</sup> At one point in the mid-1930s, GM had more than a dozen such firms under contract.<sup>119</sup> GM and Chrysler were actually the largest clients of two of the most notorious labor "detective" agencies, Pinkerton and Corporations Auxiliary.<sup>120</sup> And this was not all. Such professional spies in turn invariably coerced and cultivated networks of informants called "hooked men."<sup>121</sup> Although these many layers of operatives made it difficult for investigators to say how many spies these companies actually used, the numbers were clearly enormous. Indeed, GM employed so many spies from so many sources that it was reduced to hiring spies to spy on its spies.<sup>122</sup>

By the 1930s, these assets were much in use at GM and the other automobile makers. After more than a decade of quiet and effective repression during which scattered attempts to organize the plants paid only defeat and personal tragedy, the Depression years witnessed a renewed militancy among the autoworkers.<sup>123</sup> With this came increasingly frequent and effective use by employers of repressive means to counter the assertion of labor rights. We have already mentioned the incident in 1932 in which Dearborn and Ford police killed four protesters at the River Rouge plant, but there were other expressions of labor militancy and violence around this time. In the summer of 1930, a Communist union with a titular presence in many of the plants led a strike at GM subsidiary, Fisher Body, in Flint, Michigan—in one of the plants that would host the great sit-down strike a few years later. After a few days, the strike was smashed by police who broke up pickets and arrested dozens of strikers. The company and its allies followed this up with a torrent of anti-radical propaganda.<sup>124</sup>

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<sup>115</sup> FINE, *supra* note 111, at 29-38, 98-99; ZIEGER, *supra* note 11, at 47-49; *see also* BERNSTEIN, *supra* note 10, at 516-19, 552-53, 738-40.

<sup>116</sup> *Violations of Free Speech and Rights of Labor: Hearings on S. Res. 266 Before the Subcomm. on Educ. & Labor, 75th Cong. 1998-2006, 2322 (1937).*

<sup>117</sup> S. REP. NO. 75-46, pt. 3, at 46-56 (1937) [hereinafter INDUSTRIAL ESPIONAGE].

<sup>118</sup> *Id.* at 23, 92-93.

<sup>119</sup> *Id.* at 92-93.

<sup>120</sup> *Id.* at 8, 18.

<sup>121</sup> *Id.* at 50.

<sup>122</sup> *Id.* at 47.

<sup>123</sup> BERNSTEIN, *supra* note 10, at 92, 94-97, 502-09.

<sup>124</sup> FINE, *supra* note 111, at 65-66; *Fisher Body Co.*, WALL ST. J., July 8, 1930, at 13; *Fisher Body Strikers Clash with Troopers*, N.Y. TIMES, July 4, 1930, at 2; *Flint Strikers Shun Reds*, N.Y. TIMES, July 6, 1930, at 17.

Although battles such as these failed to break the open shop, they reflected its increasing vulnerability, which the enactment of section 7(a) seemed only to enhance.<sup>125</sup> In 1933, there was a major strike at Ford suppliers, Briggs Manufacturing and Murray.<sup>126</sup> And, in 1934, a strike that began at a Fisher Body plant in Cleveland quickly spread to several other GM factories, although not much came of it.<sup>127</sup> Later that same year, a strike at a major parts producer in Toledo, Toledo Auto-Lite, led to a pitched battle between nearly one thousand picketers and supporters and more than one thousand National Guardsmen. In the clash, two protesters were shot dead and at least a score on both sides were injured.<sup>128</sup>

Despite their stridence, these campaigns still made few lasting inroads on the open shop, particularly at the Big Three.<sup>129</sup> Not least among the reasons for this was the unionists' failure to field an effective program of industrial union organizing that would actually mobilize the workers without also being ground down by the machinery of repression. In the latter regard, one problem was the ability of employers and their allies to break pickets by force, a capacity made painfully obvious in strikes of the early and mid-1930s just mentioned. Another was the more insidious control the employers were able to assert over workers within the plants. An attempt by the Federal Union of Automobile Workers to establish itself in GM's Flint plants foundered in large part because the company was able to place five spies on the union's thirteen-member executive board.<sup>130</sup> Its program laid open to management, the union's membership fell from 26,000 in 1934 to 120 in 1936.<sup>131</sup> Later, union organizers in Flint would report having to hold meetings in pitch-dark rooms, so great was the fear of company spies and so desperate their efforts to circumvent them.<sup>132</sup>

Nevertheless, the passage of the Wagner Act and the emergence of the CIO in late 1935 presaged a change in labor relations in the industry. The CIO was created with the immediate aim of launching a new and more determined drive to organize the automobile industry.<sup>133</sup> As it turned out, the AFL actually created the United Automobile Workers (UAW) a few months before the CIO. Ironically, though, the UAW only found its legs as an organizing force when it fell into the orbit of the CIO.<sup>134</sup> Although the CIO leadership would exercise some control over this campaign, the impeding effort would be shaped to a considerable degree by rank-and-file workers themselves as well as by the sig-

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<sup>125</sup> BERNSTEIN, *supra* note 10, at 92, 94-97.

<sup>126</sup> *New Ford Due in Two Weeks*, WALL ST. J., Feb. 6, 1933, at 1.

<sup>127</sup> FINE, *supra* note 111, at 32-34; *General Strike in Auto Plants Is Threatened*, CHI. DAILY TRIB., May 12, 1934, at 8.

<sup>128</sup> Zietlow & Pope, *supra* note 62, at 839, 845.

<sup>129</sup> Sidney Fine, *The Origins of the United Automobile Workers, 1933-1935*, 28 J. OF ECON. HIST. 249, 260 (1958).

<sup>130</sup> FINE, *supra* note 111, at 41.

<sup>131</sup> INDUSTRIAL ESPIONAGE, *supra* note 117, at 70-71.

<sup>132</sup> FINE, *supra* note 111, at 115.

<sup>133</sup> BERNSTEIN, *supra* note 10, at 503.

<sup>134</sup> *Id.* at 509.

nificant presence of Communists and other radicals.<sup>135</sup> The organizers began their work in early 1936.<sup>136</sup>

## 2. *Industrial Terrorism Checked: The Sit-Down Strikes at General Motors and Chrysler*

Initially, UAW organizers appeared to make little headway in the factories. To a considerable degree, this reflected a dilemma that faced the union's organizers. The companies' terroristic practices made it impossible for the UAW to gain, let alone prove, majority support in the plants, even though the union perceived (and later events proved) extensive latent support among the workers. As the NLRB's investigations of the companies' labor practices would confirm, from the outset, organizers in and around the plants found themselves relentlessly shadowed, often threatened, and sometimes beaten by company police and spies. In fact, it found that most workers were absolutely terrified at the prospect of being seen with a known organizer, let alone found in possession of union literature or paraphernalia.<sup>137</sup> And discovery was a real risk. In its unceasing quest for espionage, GM went so far as to contract with Pinkerton to establish an office in the same building as the UAW.<sup>138</sup> In such a context, strike success ironically emerged as an absolute prerequisite to organizing success, as rank-and-file workers fearing for their jobs and safety awaited such a strike as proof that the union—or the law—could actually protect them.<sup>139</sup> But this only led back to the initial problem of finding a way to mount a successful strike without the solid, unfettered support of a majority of the company's employees.

The sit-down strike answered this dilemma. One obvious virtue of a successful sit-down strike is that it denied the employer the ability, so provocative and demoralizing to strikers, to continue production with replacement workers and crossovers. More fundamentally, such a strike could negate the capacity of a powerful employer like GM to frustrate more straightforward attempts at organizing. In an industry like automobile manufacturing, a few workers striking at a critical point could shut down not only an entire factory, but potentially a whole company.<sup>140</sup> Importantly, the tactic also protected strikers against assault, provocation, or arrest by police or company guards on a traditional picket line.<sup>141</sup> Beyond this, a sit-down forced the employer to take the initiative and risk great damage to its plant if it tried to end the strike by force.<sup>142</sup> Also in the tactic's favor is that the militancy inherent in the sit-down tactic probably had a special appeal to automobile workers, a youngish workforce whose ranks featured a spirit of insolence at its birth, and whose support for the

<sup>135</sup> *Id.* at 373-74, 508-09.

<sup>136</sup> *Id.* at 505.

<sup>137</sup> See generally *In re Ford Motor Co.*, 23 N.L.R.B. 548 (1940); *In re Ford Motor Co.*, 23 N.L.R.B. 342 (1940); *In re Ford Motor Co.*, 14 N.L.R.B. 346 (1939); *In re General Motors Co.*, 14 N.L.R.B. 113 (1939).

<sup>138</sup> INDUSTRIAL ESPIONAGE, *supra* note 117, at 1911-12.

<sup>139</sup> FINE, *supra* note 111, at 98-99; ZIEGER, *supra* note 11, at 43-45 (citing workers' apathy towards union membership and their initial reluctance to join and pay dues).

<sup>140</sup> FINE, *supra* note 111, at 122.

<sup>141</sup> *Id.* at 121.

<sup>142</sup> *Id.* at 121-22; see BERNSTEIN, *supra* note 10, at 499.

union was rooted as much in resentment of the capricious authority that pervaded the industry's factories as in the material privations of Depression-era industrial labor.<sup>143</sup> If properly managed, a sit-down strike would convert a visceral desire on the part of many workers to wreak a humiliating vengeance on the company into a productive organizing strategy.

A sit-down strike was not without risk, however. Workers and their allies would muster creative and not-implausible arguments that the tactic was consistent with a limited property right to their jobs or a kind of lien against the employer's unfulfilled obligations under the labor law.<sup>144</sup> Similarly, the NLRB along with some courts would embrace the view that, in view of the employer's own violations of the law, equitable principles at least mitigated the act.<sup>145</sup> Nevertheless, the dominant view was, and would remain, that the strikes violated basic principles of private property and subjected the strikers to forceful eviction and prosecution under color of law.<sup>146</sup> Furthermore, an ironic effect of the tactic's tendency to negate an employer's ability to break the strike by force is that if the employer was dissuaded or prevented from responding forcefully, it could seem to some observers that the union was not justified in using the tactic in the first place. And however difficult it was for the unionists to imagine at the time, there was also the risk that GM could eventually cast itself as a victim in the contest.

Although the history of sit-down strikes traces back into the nineteenth century, there had been only a few sit-down strikes in any industries through the First New Deal period.<sup>147</sup> In 1936 alone, however, there were forty-eight sit-down strikes of at least one day's duration.<sup>148</sup> Between 1936 and 1939, there would be almost six hundred major sit-down strikes, most conducted by CIO unionists.<sup>149</sup> In most cases, these strikes were used by workers to press organizational aims in the face of employers' use of illegal means to resist union recognition and, of course, maintain production.<sup>150</sup> This pattern became particularly pronounced in late 1936, just as the big automobile sit-downs were about to erupt.<sup>151</sup>

By the latter part of 1936, brief and spontaneous sit-downs were beginning to occur in GM and Ford plants.<sup>152</sup> Sensing momentum, UAW organizers intensified their efforts—they "harass[ed] supervisors," orchestrated numerous brief "quickie" sit-downs, and increased membership "tenfold," with organizers

<sup>143</sup> On the UAW's culture, see BERNSTEIN, *supra* note 10, at 500-01; FINE, *supra* note 111, at 54-63. On myriad worker grievances, see BERNSTEIN, *supra* note 10, at 502-03.

<sup>144</sup> Pope, *supra* note 12, at 71.

<sup>145</sup> *In re Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 949 (1938); *see also* Southern S.S. Co. v. NLRB, 120 F.2d 505, 511 (3d Cir. 1941).

<sup>146</sup> BERNSTEIN, *supra* note 10, at 500.

<sup>147</sup> Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 8-10 (2010).

<sup>148</sup> FINE, *supra* note 111, at 123. There were many more sit-down strikes of the short, quickie type as well. *See, e.g.*, Pope, *supra* note 12, at 54 (describing dozens of sit-down strikes in Goodyear's tire works in Akron, Ohio, in 1936 alone). There were also many more shipboard strikes, which were of their nature like sit-down strikes.

<sup>149</sup> Pope, *supra* note 12, at 46.

<sup>150</sup> FINE, *supra* note 111, at 123.

<sup>151</sup> Pope, *supra* note 12, at 55-56.

<sup>152</sup> FINE, *supra* note 111, at 126-42.

in Flint signing up some three thousand new members in December alone.<sup>153</sup> Although it was essentially a company town dominated by GM economically and politically, Flint was the central battleground in the effort to organize GM and the focal point of the sit-down campaign.<sup>154</sup> In fact, the union had considerable success organizing GM workers in Flint, in part a product of the particularly authoritarian disciplinary tactics that prevailed there.<sup>155</sup> Flint was a good place to mount a sit-down campaign for another reason, too—its plants constituted the closest thing to a central hub in GM's production system and, if shut down, promised to cripple the company's operations.<sup>156</sup> Such considerations aside, the immediate impetus of the strike in Flint was something quite a bit more mundane—a rumor that the company was about to preempt the strike by removing critical machinery to another facility.<sup>157</sup>

The strike began on December 30, 1936, when, consistent with the union's overall plans but in a spontaneous way, workers seized Fisher Body Plants Nos. 1 and 2.<sup>158</sup> The seizure was orderly. Strikers immediately ushered out foremen and managers and set about securing the sprawling facilities against attack and otherwise preparing for an occupation that would last an extraordinary forty-four days.<sup>159</sup> During this time, the strikers successfully repelled a major assault by the police—an ignominious rout that unionists tauntingly dubbed the "Battle of the Running Bulls."<sup>160</sup> The strikers also defied two court injunctions ordering them to evacuate the plants, in part by bringing to light the issuing judges' ownership of GM stock.<sup>161</sup> Indeed, several weeks into the standoff, the strikers actually enhanced their position by occupying another of GM's plants in Flint, one that produced vital engine components.<sup>162</sup> Through this all, the occupations were otherwise disciplined and well organized.<sup>163</sup> Most importantly, as the union had hoped, the shortages created by the strike bottlenecked production and crippled GM's operations nationwide. Indeed, the strike spread to around a dozen other GM facilities, eventually idling about 150,000 production workers.<sup>164</sup>

As the strike wore on, GM gradually ran out of options. After the defeat of the local police, the company was unable either to cajole or threaten Michigan's liberal governor, Frank Murphy, into using the National Guard to oust the strikers; it was also unable to convince President Roosevelt to back down the CIO leadership. In the meantime, the strike succeeded in negating GM's erstwhile capacity for labor repression: its hundreds of police and spies were ren-

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<sup>153</sup> ZIEGER, *supra* note 11, at 49-50.

<sup>154</sup> FINE, *supra* note 111, at 100-19.

<sup>155</sup> On shop-floor tyranny in the plants, see *id.* at 54-63.

<sup>156</sup> *Id.* at 136; see BERNSTEIN, *supra* note 10, at 519 (referring to Flint as the "heart" of General Motors).

<sup>157</sup> FINE, *supra* note 111, at 144-46.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 156-73.

<sup>160</sup> *Id.* at 1-13, 167-88.

<sup>161</sup> *Id.* at 193-98, 257-77.

<sup>162</sup> *Id.* at 267-71.

<sup>163</sup> Pope, *supra* note 12, at 56-60.

<sup>164</sup> GALENSON, *supra* note 11, at 136; ART PREIS, *LABOR'S GIANT STEP: THE FIRST TWENTY YEARS OF THE CIO: 1936-1955*, at 53 (Pathfinder 1994) (1964).

dered useless, and its capacity for propaganda was, for the time at least, trumped by the workers' sensational gambit. In fact, by succeeding with such an audacious strategy, the strikers electrified other GM workers with the possibility of overcoming the company's categorical opposition to labor rights.<sup>165</sup> GM was losing the strike and it was also losing its aura of absolute power. And then there were business considerations. The strike prevented the company from producing an estimated 280,000 cars, valued at \$270 million.<sup>166</sup> Against all the odds, the company was forced into a preliminary agreement that provided for the company's eventual recognition of the UAW as the exclusive agent of the company's production workers.<sup>167</sup>

The political significance of the strike extended beyond GM. Needless to say, the strike had been thrilling, front-page news nationwide.<sup>168</sup> Aside from the remarkable spectacle of impoverished workers defiantly holding the property of the world's largest company, the UAW victory was by far the single most significant victory over an open shop employer in American history. Few would have expected the UAW ever to prevail, given GM's vast resources and the strength of its opposition to unionism. Workers of all kinds drew inspiration from the strikers' victory.<sup>169</sup> Autoworkers, in particular, responded with a new confidence in industrial unions and in the sit-down strike as a means of achieving this.<sup>170</sup> In the weeks immediately following the end of the Flint strike, the UAW pulled at least eighteen sit-down strikes at other GM facilities before the company and the union finally agreed to a company-wide contract in mid-March 1937.<sup>171</sup>

Also in March, about six thousand UAW members occupied the nine plants that Chrysler maintained in the Detroit area and held them for seventeen days, during which time they also defied an injunction ordering them to evacuate.<sup>172</sup> Unlike their counterparts at GM, the Chrysler sit-down strikers left the plants prior to a final settlement, albeit with Governor Murphy's guarantee that he would prevent the company from using strikebreakers to resume production during the course of continuing negotiations.<sup>173</sup> In April, the company settled with the union, agreeing to the union's partial (members-only) representation of the company's employees.<sup>174</sup> As a result of the UAW's success at GM, Chrysler, and a number of smaller manufacturers, overall dues-paying membership in the UAW increased meteorically, from 88,000 in February 1937 to more

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<sup>165</sup> FINE, *supra* note 111, at 327-38.

<sup>166</sup> *Id.* at 305-06.

<sup>167</sup> ZIEGER, *supra* note 11, at 51-53.

<sup>168</sup> See, e.g., *General Motors Faces Shutdown in All Plants; Union Bars Local Deals*, N.Y. TIMES, Jan. 2, 1937, at 1; William O'Neal, *Motor Strikers Defy Court: 'Expect to Die Resisting,' Men Tell Governor*, CHI. DAILY TRIB., Feb. 3, 1937, at 1; *Ouster Edict Served on Auto Strikers: Ordered to Quit Flint Plant Today, One Group Threatens Resistance*, L.A. TIMES, Feb. 3, 1937, at 1.

<sup>169</sup> FINE, *supra* note 111, at 327.

<sup>170</sup> BERNSTEIN, *supra* note 10, at 550-51.

<sup>171</sup> FINE, *supra* note 111, at 322-23.

<sup>172</sup> BERNSTEIN, *supra* note 10, at 553-54; FINE, *supra* note 111, at 328.

<sup>173</sup> *Id.*; STEVE JEFFERYS, *MANAGEMENT AND MANAGED: FIFTY YEARS OF CRISIS AT CHRYSLER* 71-74 (1986); ZIEGER, *supra* note 11, at 52-53.

<sup>174</sup> BERNSTEIN, *supra* note 10, at 554.



than 350,000 in October of the same year.<sup>175</sup> By that time, of the major automobile manufacturers, only Ford remained unorganized.<sup>176</sup> Against the backdrop of years of bitter failure in the face of vicious opposition, the union's success in these few months was nothing short of phenomenal.

The strikes continued to reverberate well beyond the automobile industry. "Within days of the settlement of the General Motors strike . . . the sit down technique literally spread from coast to coast."<sup>177</sup> After only a handful of sit-downs in 1936, in 1937 there were 477 of at least one-day's duration, a figure that represented one in ten major strikes that year.<sup>178</sup> Sit-down strikes that year involved more than one hundred thousand active participants and affected at least three hundred thousand other workers.<sup>179</sup> Although concentrated at manufacturing firms, the strikes occurred in almost every conceivable line of work. Mostly launched against intransigent employers by CIO unions, the strikes were successful most of the time and were critical to the CIO's growing success in challenging the open shop.<sup>180</sup>

### 3. *The Struggle Against Ford and Its "Servicemen"*

In the late spring of 1937, with its victories over GM and Chrysler in hand, the UAW began in earnest to attempt to organize Ford.<sup>181</sup> Aware of the company's capacity for labor repression and Henry Ford's maniacal commitment to a vision of authoritarian paternalism centered on the open shop, the union had reason to believe that Ford would prove the most difficult of the Big Three to organize.<sup>182</sup> On the other hand, Ford's workers were generally not as well paid as GM's and Chrysler's and were anxious to remedy this inequity.<sup>183</sup> Moreover, the company's unrivaled tyranny over its workers led even conservative workers to see union representation as the route to freedom on the shop floors.<sup>184</sup>

Organizers and workers would have to reckon with Ford's service department, however, which "at its height consisted of 3,500 thugs, including former boxers, ex-cops, bouncers, football players and ex-FBI agents, many of whom were associated with the underworld."<sup>185</sup> The service department performed all manner of functions in Ford's plants, including espionage, police work, disseminating propaganda, and, of course, administering threats and beatings.<sup>186</sup>

<sup>175</sup> *Id.*; FINE, *supra* note 111, at 327.

<sup>176</sup> GALENSON, *supra* note 11, at 177.

<sup>177</sup> Carlos A. Schwantes, "We've Got 'Em on the Run, Brothers": *The 1937 Non-Automotive Sit Down Strikes in Detroit*, 56 MICH. HIST. 179, 180 (1972).

<sup>178</sup> FINE, *supra* note 111, at 331.

<sup>179</sup> *Id.* at 331.

<sup>180</sup> Over 80 percent were successful or partly successful, despite the fact that they tended to occur in industries with such strong histories of employer anti-unionism and correspondingly weak unions. *Id.* at 332.

<sup>181</sup> BERNSTEIN, *supra* note 10, at 570-71.

<sup>182</sup> *Id.* at 734-41.

<sup>183</sup> *Id.* at 738; GALENSON, *supra* note 11, at 180 (contrasting Ford's ninety-cent per hour wages to the industry average which was near one dollar at the time).

<sup>184</sup> BERNSTEIN, *supra* note 10, at 738-39.

<sup>185</sup> Robert P. Weiss, *Private Detective Agencies and Labour Discipline in the United States, 1855-1946*, 29 HIST. J. 87, 105 (1986).

<sup>186</sup> BERNSTEIN, *supra* note 10, at 740.

While preventing unionization was obviously a major concern, the “servicemen” also participated in a more mundane type of control—violently enforcing arbitrary company rules on dress and manners and habitually roughing up workers who for any reason were summoned to meet with management personnel.<sup>187</sup> The tyranny they enforced included a rule that denied even injured workers the right to sit down in the presence of management personnel.<sup>188</sup> Even more than most industrial employers, Ford’s commitment to the open shop was premised on the belief that CIO unionism was like a contagion from which workers could be protected—in their own interests, as the right to work ideology suggested.<sup>189</sup>

Events at the company’s Dallas assembly plant highlighted the messy and brutal way by which Ford’s scheme worked. There, the service department organized a large percentage of the company’s workers into “inside squads” and “outside squads”—and actually taxed the employees to pay the expenses incurred by these groups.<sup>190</sup> The NLRB described the squads’ functions in these terms: “For the most part methods of dealing with union organizers or members or sympathizers or with persons suspected of being in any of these classes were marked by extreme violence, merciless brutality, and banishment from Dallas by threats of immediate bodily harm.”<sup>191</sup> The Board found that in and about that plant, the squads committed a great number of beatings of organizers and employees suspected of union membership.<sup>192</sup> In fact, in obvious contradiction of the company’s own pestilential concept of labor organizing, the campaign to keep the union out reduced to a practice of requiring all employees to demonstrate their innocence of union involvement to escape beatings. Under the leadership of the professional servicemen, the squads roamed around, tracking down UAW suspects and beating them; on occasion even random people with no connection to the organizing campaign were caught and beaten by the squads.<sup>193</sup> One local man, although unconnected to the plant or the union, expressed his support for the CIO to a squad member and became the target of the outside squad. The squad threatened him and mistakenly beat his twin brother, who later died under suspicious circumstances.<sup>194</sup> The Dallas squads went so far as to establish three “whipping grounds” where suspected unionists were regularly taken and beaten with fists and switches. At one point, both squads joined in a riotous attack on a family gathering of unionists who had assembled to watch a labor film in a public park. The squads stole material and equipment and kidnapped, beat, and tarred and feathered the projectionist (after deeming the speaker too old and frail for this treatment). This brazen act was too much for the governor, who sent in Texas Rangers, which managed to deter only the most egregious acts of public violence.<sup>195</sup>

<sup>187</sup> GALENSON, *supra* note 11, at 178-79.

<sup>188</sup> BERNSTEIN, *supra* note 10, at 740.

<sup>189</sup> *See id.* at 735-36.

<sup>190</sup> *In re Ford Motor Co.*, 26 N.L.R.B. 322, 342-48 (1940).

<sup>191</sup> *Id.* at 348.

<sup>192</sup> *Id.* at 349-68.

<sup>193</sup> *Id.* at 353-54.

<sup>194</sup> *Id.* at 362 n.19.

<sup>195</sup> *Id.* at 367.

As revealing as the Dallas case is, it pales in comparison to what occurred in and around Ford's huge River Rouge plant, the center of its operations.<sup>196</sup> On May 26, 1937, Ford servicemen brutally attacked a group of fifty to seventy UAW organizers, most of them women, who were attempting to distribute handbills on public property adjacent to the plant's major gates.<sup>197</sup> The organizers were led by future UAW president Walter Reuther and UAW board member Richard Frankensteen and were accompanied by civic leaders, churchmen, and news reporters. The presence of such people did not deter the servicemen from administering what the Board called "terrific beatings" to Reuther and Frankensteen.<sup>198</sup> Indeed, the servicemen did not spare the women, churchmen, and reporters, all of whom were subjected to "savagely" assaults and had their property seized during the affray.<sup>199</sup> The Dearborn police stood by and watched the attacks.<sup>200</sup>

These cruel acts not only directly deterred organizing efforts, but also they announced to everyone the totalitarian control that Ford exercised within and about its plants. For several years, these dynamics prevented any rigorous organizing at Ford.<sup>201</sup> In 1940, with a number of victories over Ford in NLRB cases and with the manufacturing economy improving, the union renewed its efforts. Organizing was still risky, but the tide was turning on Ford. Not least, Ford's over-the-top anti-unionism was increasingly anachronistic and hypocritical in a manufacturing economy increasingly awash in government defense contracts. Ford faced the real possibility of being denied such contracts if it remained in violation of federal law.<sup>202</sup> By 1941, the UAW had enlisted significant support at Ford's plants, including the massive River Rouge complex.<sup>203</sup> When, on April 1 of that year, the company summarily discharged a group of known union members, the union was strong enough to endorse a strike that shut the River Rouge plant.<sup>204</sup>

The struggle at River Rouge was critical. There, the union outmaneuvered the service department by placing its picket lines at a distance from the main gates where Ford's men had planned to meet and rout them.<sup>205</sup> After huge street battles with mostly black strikebreakers threatened to reduce the strike to a politically disastrous race riot, the UAW mustered its black members and supporters who brought the black community in the Detroit area behind the strike and brought many of the strikebreakers and scabs over to the union's side.<sup>206</sup> The union's mass pickets around the plant kept it shut down.<sup>207</sup>

<sup>196</sup> BERNSTEIN, *supra* note 10, at 734.

<sup>197</sup> *In re Ford Motor Co.*, 14 N.L.R.B. 346, 355-56, 359 (1939).

<sup>198</sup> *Id.* at 355-56.

<sup>199</sup> *Id.* at 356-76.

<sup>200</sup> *Id.* at 360-68. Later that year, the union's office was bombed and in 1938 Reuther himself was assaulted and nearly kidnapped from his home. Walter P. Reuther, *The United Automobile Workers: Past, Present, and Future*, 50 VA. L. REV. 58, 62 (1964).

<sup>201</sup> ZIEGER, *supra* note 11, at 121-22.

<sup>202</sup> GALENSON, *supra* note 11, at 182.

<sup>203</sup> BERNSTEIN, *supra* note 10, at 742-44.

<sup>204</sup> GALENSON, *supra* note 11, at 181.

<sup>205</sup> BERNSTEIN, *supra* note 10, at 744.

<sup>206</sup> On the UAW's complicated position on race, see Lloyd H. Bailer, *The Negro Automobile Worker*, 51 J. POL'Y. ECON. 415, 422-28 (1943).

Within days, Ford folded, agreeing to Board-supervised elections that the UAW was certain to win.<sup>208</sup> Within months, the UAW had secured an agreement with Ford that was more favorable than its contracts with GM and Chrysler.<sup>209</sup>

With its contract with Ford secured, the UAW's victory over the automobile manufacturers seemed complete. In some senses, it was. However, the union and the labor movement more generally would soon have to pay a steep price for what workers and their allies had done, and had inspired many others to do, to overcome the employers' opposition to labor rights.

### C. *Industrial Terrorism Fully Realized: The Little Steel Strike of 1937*

The Little Steel Strike is one of most tragic episodes in American labor history. In the course of the strike, which raged during the summer of 1937, somewhere between sixteen and eighteen unionists were killed by public police, steel company police, National Guardsmen, and loyal employees; they died in a series of clashes at mills mainly scattered around the southern shores of Lake Michigan (the Calumet Region), in northeast Ohio, and in western Pennsylvania. Hundreds more, most of them strikers and strike supporters, were injured, thousands of people were arrested, and millions of dollars of damage to property occurred. Before the summer was over, the strike was decisively broken.

The Little Steel Strike's status as a signature event in American history follows not merely because of the bloodshed and destruction wrought, but also because of how the strike helped reshape labor law and policy. As in automobile manufacturing and other open shop industries, the steel workers eventually gained recognition and signed contracts. But, in steel especially, this success could not be attributed much to organizing success, let alone the broken strike. Rather, it had more to do with the steel companies' acquiescence to the political realities of an increasingly organized and militarized economy. Nevertheless, as the following discussion also shows, in spite of all of this, the violence the steel companies visited on the workers would also form the basis of a reactionary counterattack on labor rights.

#### 1. *The Open Shop and the Origins of the Little Steel Strike*

When the Wagner Act was signed into law, the steel industry already had a well-established reputation for violent conflicts over basic labor rights. The infamous 1892 struggle between unionists and Pinkertons at Homestead, Pennsylvania, which killed at least a half-dozen people, grew out of an attempt by Carnegie Steel to purge itself of union representation.<sup>210</sup> Before the Homestead dispute, about half of steel workers were organized, most of them by an AFL craft union.<sup>211</sup> Within ten years, the industry had achieved an open shop, largely by means of a concerted campaign of repression that featured the usual

<sup>207</sup> See BERNSTEIN, *supra* note 10, at 744.

<sup>208</sup> *Id.* at 745-46.

<sup>209</sup> *Id.* at 751; GALENSON, *supra* note 11, at 183.

<sup>210</sup> LITTLE STEEL, *supra* note 8, at 36; PAUL KRAUSE, *THE BATTLE FOR HOMESTEAD, 1880-1892*, 19-20, 22-25 (1992).

<sup>211</sup> DAVID BRODY, *STEELWORKERS IN AMERICA: THE NONUNION ERA* 51 (1960).

techniques: blacklists, espionage, and threats and violence, as well as various schemes for ensuring the companies' domination of civil authority in the communities surrounding their mills.<sup>212</sup> Only a few strikes occurred in steel in the early part of the 1900s and they were all quickly defeated.<sup>213</sup> And there were virtually no organizing efforts.

The pattern of steady decay and defeat continued through the 1910s and into the 1920s.<sup>214</sup> The major exception to this was the Great Steel Strike of 1919, which shocked the steel industrialists with its size and vigor before foundering in the face of craft parochialism, ethnic tensions, and other axes of chauvinism; economic exhaustion; and relentless and violent repression.<sup>215</sup> During the 1920s in particular, the companies added to their bulwarks against unions a smattering of paternalistic practices, including employee representation plans and very modest employee welfare programs.<sup>216</sup> In this context, union representation was confined to a few small, isolated, and thoroughly insignificant craft enclaves. Without meaningful representation, steel workers, like most wage workers, suffered through very difficult time in that decade.<sup>217</sup>

The "basic steel" industry of the 1930s was characterized by the supremacy of a few large firms. By far the dominant among them was U.S. Steel—"Big Steel"—even though it had lost market share to independent producers since it emerged in 1901 as the largest business concern in history.<sup>218</sup> These "little" independents consisted of a handful of large operators with many thousands of employees and extensive vertically integrated operations.<sup>219</sup> Such were the Little Steel companies: Bethlehem, Republic, Youngstown Sheet & Tube, Inland, American Rolling Mill Company (ARMCO), and National (including its largest constituent, Weirton). Although the Depression caused a definite contraction in steel production and employment, by the mid 1930s, the market for steel had improved and the companies were again earning profits and expanding operations.<sup>220</sup> By that time, the steel industry employed more workers than any other manufacturing industry.<sup>221</sup> The Little Steel companies

<sup>212</sup> LITTLE STEEL, *supra* note 8, at 39-41; BRODY, *supra* note 211, at 50-51.

<sup>213</sup> See LITTLE STEEL, *supra* note 8, at 38-43; BRODY, *supra* note 211, at *passim*; see also Robert Hessen, *The Bethlehem Steel Strike of 1910*, 15 LAB. HIST. 3 (1974).

<sup>214</sup> Lesser exceptions to this include a 1910 strike at Bethlehem in South Bethlehem, Pennsylvania, and a strike against Sheet & Tube and Republic in Youngstown, which left several people dead. See HORACE BANCROFT DAVIS, *LABOR AND STEEL* 238-40 (1933); *3 Killed, 19 Shot, Town Set Afire, Ohio Militia Out*, N.Y. TIMES, Jan. 8, 1916, at 1; *250 Arrested in Riots*, WASH. POST, Jan. 10, 1916, at 2; *Troops Quell Riots in East Youngstown*, N.Y. TIMES, Jan. 9, 1916, at 7.

<sup>215</sup> On the higher estimate of participants and the estimate of 20 killed, see FOSTER, *supra* note 27, at 100-01, 223. On the lower estimate of participants, see BRODY, *supra* note 25, at 113.

<sup>216</sup> DAVIS, *supra* note 214, at 145-48.

<sup>217</sup> See, e.g., BERNSTEIN, *supra* note 10, at *passim*; ZIEGER, *supra* note 34, at 9.

<sup>218</sup> Thomas K. McCraw & Forest Reinhardt, *Losing to Win: U.S. Steel's Pricing, Investment Decisions, and Market Share, 1901-1938*, 49 J. ECON. HIST. 593, 593 (1989).

<sup>219</sup> For a history of the Little Steel Companies, see 2 WILLIAM T. HOGAN, *ECONOMIC HISTORY OF THE IRON AND STEEL INDUSTRY IN THE UNITED STATES passim* (1971).

<sup>220</sup> LITTLE STEEL, *supra* note 8, at 17; 3 HOGAN, *supra* note 219, at 1119.

<sup>221</sup> U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE U.S.*: 1940, at 826 tbl.830 (1941).

accounted for about 186,000 workers: 80,000 at Bethlehem; 46,000 at Republic; 23,000 at Sheet & Tube; and 14,000 at Inland.<sup>222</sup> The two other Little Steel firms, which would not be involved directly in the strike, ARMCO and National, employed 12,000 and 11,000, respectively.<sup>223</sup> Although never formally constituted as a consortium or trade group, by the 1930s the companies were entwined by extensive professional, personal, and economic ties, and by a common opposition to union organizing efforts.<sup>224</sup>

The Great Depression wrecked havoc on steel workers, bringing mass unemployment, wage cuts, and general insecurity.<sup>225</sup> But here, too, the Depression era would eventually see a dramatic escalation in union organizing. Partly, this reflected the energizing effect of section 7(a).<sup>226</sup> Another effect of section 7(a) was to further encourage employers to form company unions in steel with the result that more than 90 percent of workers were at least nominally covered by these organizations.<sup>227</sup> Interestingly, these bogus unions would actually exercise some independence and facilitate covert organizing by genuine unionists.<sup>228</sup> As in other industries, though, the push to organize the steel industry ultimately originated in the working class itself. At its inception, the CIO viewed organizing steel as a priority on par with automobiles.<sup>229</sup> In the summer of 1936, it created the Steel Workers Organizing Committee (SWOC) and sent more than two hundred SWOC organizers to the mills.<sup>230</sup> Of these, perhaps sixty were Communists.<sup>231</sup> However, ultimate control of the drive remained firmly with the CIO and its main sponsor, the United Mining Workers (UMW), which also provided the majority of organizers and dominated the SWOC's leadership.<sup>232</sup>

The overall program of the SWOC organizers, whose number would eventually increase to more than four hundred,<sup>233</sup> comprised three main strategies: (1) to try to subvert the racial and ethnic conflicts among workers that had long impeded the organization of steel workers, (2) to invoke the authority of the federal government as well as whatever practical influence the newly created

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<sup>222</sup> 3 HOGAN, *supra* note 219, at 1178-79.

<sup>223</sup> *Id.*

<sup>224</sup> *Violations of Free Speech and Rights of Labor: Hearings on S. Res. 266 Before the Subcomm. on Educ. & Labor, 75th Cong. exhibits 5200-06, at 13893-97 (1938)* [hereinafter *La Follette Committee Hearings*]; LITTLE STEEL, *supra* note 8, at 14-32, 57, 70-71; ZIEGER, *supra* note 11, at 14-15.

<sup>225</sup> 3 HOGAN, *supra* note 219, at 1167; ZIEGER, *supra* note 11, at 13. Between 1929 and 1933, total employment in steel production fell by more than 100,000. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S.: 1937, at 742 tbl.780 (1938).

<sup>226</sup> BERNSTEIN, *supra* note 10, at 455; ZIEGER, *supra* note 11, at 16-17.

<sup>227</sup> BERNSTEIN, *supra* note 10, at 455; 3 HOGAN, *supra* note 219, at 1167.

<sup>228</sup> BERNSTEIN, *supra* note 10, at 455-57; Max Gordon, *The Communists and the Drive to Organize Steel*, 23 LAB. HIST. 254, 258 (1982).

<sup>229</sup> BERNSTEIN, *supra* note 10, at 434-35.

<sup>230</sup> GALENSON, *supra* note 11, at 84, 86.

<sup>231</sup> WILLIAM Z. FOSTER, HISTORY OF THE COMMUNIST PARTY OF THE UNITED STATES 349 (1952); Gordon, *supra* note 228, at 258.

<sup>232</sup> GALENSON, *supra* note 11, at 110; ZIEGER, *supra* note 11, at 37; Gordon, *supra* note 228, at 254, 257-58.

<sup>233</sup> BERNSTEIN, *supra* note 10, at 452.

NLRB might have, and (3) to infiltrate the company unions.<sup>234</sup> The union's effort to execute this program met determined opposition at all the major steel companies. In fact, the entire industry made clear that it would vigorously defend the open shop.<sup>235</sup> From the outset, the companies hounded the organizers, spied on them, tried to drive them from the mills, and generally sought to intimidate the rank and file against supporting the SWOC.<sup>236</sup> The records of the La Follette Committee and the NLRB, along with other sources, document the extraordinary frequency with which organizers were beaten, threatened, and even kidnapped by company police and other operatives.<sup>237</sup> Like UAW unionists, organizers were reduced to meeting in the dark, in some instances at night in deserted fields.<sup>238</sup>

In a remarkable testament to the perseverance of the organizers and the steel workers, by the fall of 1936, the SWOC controlled the company unions of its main target, U.S. Steel.<sup>239</sup> SWOC organizers also enrolled many members into their own independent unions. They claimed no more than 16,000 members when the drive began, but grew to 86,000 members in November 1936, and to 125,000 members by early the next year.<sup>240</sup> In the first part of 1937, of course, the GM sit-down strike was underway. If the sit-down strike bolstered the morale of the workers, for at least some steel executives, it was a portent of what might be required to defend the open shop.<sup>241</sup> The threat of a sit-down strike appears to have been one of several factors that influenced U.S. Steel's chairman, Myron Taylor, to conclude that unions were an unavoidable reality in the future of steel production and that continued resistance would only delay

<sup>234</sup> *Id.* at 454-55; see also *Negroes Urged to Join Steel Union Drive*, STEEL LAB., Oct. 20, 1936, at 7; *Prominent Negroes Push Steel Drive*, STEEL LAB., Feb. 20, 1937, at 5; *The Steel Drive Gets Going*, STEEL LAB., Aug. 1, 1936, at 2.

<sup>235</sup> This position was clearly articulated in a series of articles and statements in the industry's trade journal. *Royalist Lewis Adds Fabricators to His Prospective Empire*, IRON AGE, July 30, 1936, at 45, 45-46; L.W. Moffett, *Washington*, IRON AGE, July 9, 1936, at 72, 75-76; *Steel Companies Meet Unionization Drive with Statement of Position*, IRON AGE, July 9, 1936, at 88, 88; *Steel Industry States Attitude Toward Unionization Drive Now Under Way*, IRON AGE, July 2, 1936, at 55, 55-56; see also 3 HOGAN, *supra* note 219, at 1172.

<sup>236</sup> Early in the drive, the steel companies spent \$114,000 on newspaper ads denouncing the SWOC. Donald Gene Sofchalk, *The Little Steel Strike of 1937*, at 9-10 (1961) (unpublished Ph.D. Dissertation, Ohio State University), available at [http://etd.ohiolink.edu/view.cgi?acc\\_num=osu1283265534](http://etd.ohiolink.edu/view.cgi?acc_num=osu1283265534).

<sup>237</sup> *La Follette Committee Hearings*, *supra* note 224, at 11043, 11051-57, 11072-73; LITTLE STEEL, *supra* note 8, at 96-98; PRIVATE POLICE SYSTEMS, *supra* note 8, at 187-94.

<sup>238</sup> LITTLE STEEL, *supra* note 8, at 229.

<sup>239</sup> BERNSTEIN, *supra* note 10, at 462-66; GALENSON, *supra* note 11, at 87. On the SWOC's remarkable bid to take control of the company unions at U.S. Steel and elsewhere, see *50 More Representatives Bolt to SWOC*, STEEL LAB., Feb. 6, 1937, at 3; *Company Union Representatives Join Steel Union Movement*, STEEL LAB., Aug. 1, 1936, at 6; *Company Union Representatives Press Hard for Wage Increase as S.W.O.C. Lends Inspiration and Authority to the Movement*, STEEL LAB., Sept. 25, 1936, at 1; *Steel Union Men Win in Mill Election*, STEEL LAB., Apr. 10, 1937, at 3; *S.W.O.C. Encourages Company Unions to Make Wage Demands*, STEEL LAB., Sept. 1, 1936, at 2; *Two Men Win at Bethlehem Steel: Company Union Picks SWOC Men to Meet Bosses*, STEEL LAB., Jan. 23, 1937, at 5; *U.S. Steel's Ben Fairless Suffers Another Set-back*, STEEL LAB., Sept. 25, 1936, at 3.

<sup>240</sup> GALENSON, *supra* note 11, at 86; *Steel Union Passes 125,000; Start Plans for Convention*, STEEL LAB., Jan. 9, 1937, at 1.

<sup>241</sup> GALENSON, *supra* note 11, at 95.

the inevitable.<sup>242</sup> To the surprise of nearly everyone, in March 1937, the SWOC and U.S. Steel signed a members-only collective bargaining agreement.<sup>243</sup>

The SWOC's next major target was Jones & Laughlin, a large independent comparable in size to the Little Steel firms.<sup>244</sup> From the outset of the organizing drive, Jones & Laughlin's resistance was fierce; its spies and company police relentlessly harassed, arrested, and assaulted SWOC organizers.<sup>245</sup> However, the signing of the contract with U.S. Steel, combined with the factors that led U.S. Steel to the same conclusion, as well as Jones & Laughlin's somewhat tenuous financial condition, appears to have led the company's management to reconsider its absolute opposition to unionization and propose terms to SWOC.<sup>246</sup> Sensing the company's vulnerability and its own momentum, on May 12, 1937, the SWOC ignored the company's offer and launched a massive and violence-ridden strike at the company's mills at Pittsburgh and Aliquippa, Pennsylvania.<sup>247</sup> The strike at Aliquippa was especially audacious, as the SWOC confronted a formidable system of labor repression so woven into the fabric of this company town that the place was called "Little Siberia" in labor circles.<sup>248</sup> Workers described frequent savage beatings both inside the mill and in town, along with unremitting surveillance, malicious arrests, and summary punishment by company police.<sup>249</sup> Undaunted, the unionists turned the tables on the company. They besieged the gates of the Aliquippa plant with a massive cordon, attacking crossovers and fighting the police, and forcing the plant to close for about two days.<sup>250</sup> Unlike the other major producers, Jones & Laughlin had remained unprofitable since the beginning of the Depression.<sup>251</sup> Fearing the strike might destroy its viability, the company agreed to grant the SWOC exclusive representation if it prevailed in an NLRB-sponsored election. Only a week later, the union achieved just that.<sup>252</sup>

<sup>242</sup> BERNSTEIN, *supra* note 10, at 467-70; FINE, *supra* note 111, at 329-30; ZIEGER, *supra* note 11, at 58-59.

<sup>243</sup> BERNSTEIN, *supra* note 10, at 472-73; GALENSON, *supra* note 11, at 93; 3 HOGAN, *supra* note 219, at 1173-77; *U.S. Steel Corporation Signs Union Contract*, STEEL LAB., Mar. 6, 1937, at 1.

<sup>244</sup> BERNSTEIN, *supra* note 10, at 453; GALENSON, *supra* note 11, at 99.

<sup>245</sup> *In re Jones & Laughlin Steel Corp.*, 1 N.L.R.B. 503, 510 (1936); BERNSTEIN, *supra* note 10, at 475-77.

<sup>246</sup> BERNSTEIN, *supra* note 10, at 474, 476-77.

<sup>247</sup> *25,000 J & L Men Strike for Signed Contract*, STEEL LAB., May 15, 1937, at 1.

<sup>248</sup> BERNSTEIN, *supra* note 10, at 474-75; *see also* ZIEGER, *supra* note 11, at 60.

<sup>249</sup> *National Labor Relations Act and Proposed Amendments: Hearings on S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, S. 2123 Before the S. Comm. on Educ. and Labor*, 76th Cong. 4177-80 (1939) [hereinafter *Thomas Committee Hearings*].

<sup>250</sup> BERNSTEIN, *supra* note 10, at 477-78; ROBERT R. R. BROOKS, *AS STEEL GOES, . . . UNIONISM: IN A BASIC INDUSTRY* 123-27 (1940); ZIEGER, *supra* note 11, at 60-61; *see also* *C.I.O. Spreads Steel Strike; Seeks to Stir 200,000 Men to Join Walkout*, CHI. DAILY TRIB., May 14, 1937, at 1; *C.I.O. Steel Strike Shuts Two Plants of Jones-Laughlin: 27,000 Men Are Idle*, N.Y. TIMES, May 13, 1937, at 1; Louis Stark, *Peace Plan Drawn in Big Steel Strike; More Plants Close*, N.Y. TIMES, May 14, 1937, at 1.

<sup>251</sup> 3 HOGAN, *supra* note 219, at 1254-55.

<sup>252</sup> BERNSTEIN, *supra* note 10, at 478; ZIEGER, *supra* note 11, at 60-61; *SWOC Wins by 10,000 at J-L; Sharon Steel Vote May 25*, STEEL LAB., May 24, 1937, at 1.



The SWOC's victory over Big Steel and Jones & Laughlin encouraged many of the smaller steel fabricating companies targeted by the drive to grant the SWOC representation or agree to elections.<sup>253</sup> But a showdown loomed at the Little Steel companies, which stood fast in their opposition to the union. Despite the companies' resistance, the SWOC had managed to organize a sizable number of workers at Inland and Sheet & Tube; lesser, but still significant, numbers at Republic; and possibly only a "small fraction" at Bethlehem.<sup>254</sup> The union had made little progress at National and ARMCO, however, where beatings by "special watchmen," orchestrated vigilantism, aggressive company unions, and other measures successfully foiled organizing efforts.<sup>255</sup> These companies would not be part of the coming strike.

## 2. *Little Steel's Machinery of Industrial Terrorism*

A grim indication of what awaited the SWOC at the Little Steel firms took place two years before the 1937 strike, when Republic Steel crushed a strike at one of its smaller subsidiaries, Berger Manufacturing in Canton, Ohio. The union, an AFL affiliate, launched the strike on May 27, 1935, after fruitless requests for recognition.<sup>256</sup> Well in advance of the strike, Republic augmented Berger's arsenal of firearms and armored cars by purchasing thousands of dollars worth of "gas munitions"; it also sent dozens of men to Canton to reinforce Berger's police force and to work as strikebreakers.<sup>257</sup> Soon after the union set up pickets, company police launched a "planned attack" on hundreds of strikers and sympathizers.<sup>258</sup> Over a dozen union people were hurt, some shot, in the ensuing riot.<sup>259</sup> A few days later, forty company police drove through workers' neighborhoods, gassing, beating, and shooting at everyone they encountered. As the La Follette Committee put it, "Innocent bystanders, school children, and women who happened to be in the path of the private police were mercilessly beaten and shot."<sup>260</sup> Again, over a dozen people were seriously injured and hospitalized and one man probably killed.<sup>261</sup> This and other "raids" to follow

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<sup>253</sup> 3 HOGAN, *supra* note 219, at 1178. On the SWOC's success reaching contracts, see *The Union Mills*, STEEL LAB., June 5, 1937, at 2; *The Union Mills*, STEEL LAB., May 15, 1937, at 2; *Wheeling Steel, Timken Roller, 86 Others Sign*, STEEL LAB., May 1, 1937, at 1.

<sup>254</sup> BERNSTEIN, *supra* note 10, at 479-80.

<sup>255</sup> On practices at these companies, see *In re Weirton Steel Co.*, 32 N.L.R.B. 1145, 1163-65 (1941) (a National Steel subsidiary); Benjamin Stolberg, *Big Steel, Little Steel, and C.I.O.*, NATION, July 31, 1937, at 119, available at <http://newdeal.feri.org/nation/na37145p119.htm>.

<sup>256</sup> LITTLE STEEL, *supra* note 8, at 88. The union's efforts included an effort to litigate the matter before the labor board created to enforce § 7(a). Its case before the labor board was first enjoined by a lower court and then mooted entirely when, just days before the strike, the Supreme Court declared the NIRA unconstitutional. *Id.*

<sup>257</sup> *Id.* at 88-89; PRIVATE POLICE SYSTEMS, *supra* note 8, at 127-28.

<sup>258</sup> PRIVATE POLICE SYSTEMS, *supra* note 8, at 133.

<sup>259</sup> *Id.* at 129-30.

<sup>260</sup> LITTLE STEEL, *supra* note 8, at 89.

<sup>261</sup> *La Follette Committee Hearings*, *supra* note 224, at 10040-43, exhibits 4349, 4350, at 10186-87; LITTLE STEEL, *supra* note 8, at 90; PRIVATE POLICE SYSTEMS, *supra* note 8, at 130, 136-44.

“plunged [Canton] into a state of terror and disorder” that lasted until the strike was broken.<sup>262</sup>

The violence of the Berger strikers was the culmination of a potent system of labor repression that also featured espionage, the use of professional strike-breaking services, the mobilization of “citizens groups,” and the use of propaganda.<sup>263</sup> As the La Follette Committee found, the same things lay in store for the SWOC. The committee’s investigations at Republic and Sheet & Tube in particular, revealed aggressive efforts, beginning at the outset of the SWOC’s organizing drive and escalating as the strike approached, to penetrate the union with spies and then to use these men as well as company police and hired strikebreakers in a coordinated campaign to assault and otherwise harass SWOC organizers.<sup>264</sup> At these companies, and to a lesser extent at Bethlehem, the committee also uncovered ramped up reliance on company unions and publicity and propaganda services, as well as efforts to cultivate opposition to the union among churches and community groups.<sup>265</sup> The companies expended considerable effort trying to either maintain their company unions or build up new ones to replace those infiltrated by the SWOC.<sup>266</sup>

In early 1936, Republic maintained a permanent police force of about 270 men spread among its plants; in response to the SWOC’s organizing, the company expanded this force to about 350 in early 1937 and nearly 400 by the time the strike wound down in August.<sup>267</sup> But, like the number of GM’s on-staff spies, these figures tell only part of the story. Like other industrial employers, during past strikes, including the one at Berger, Republic had augmented its armed forces by hiring men or contracting with strikebreaking firms.<sup>268</sup> As was also the case in earlier strikes, Republic and the other steel companies could reasonably expect the support of local public police and possibly Guardsmen, particularly if the strike became violent.<sup>269</sup> By these means, during the strike in Ohio alone, Republic and Sheet & Tube would field 2,400 armed men under its direct control.<sup>270</sup> Across the strike zone, they would be backed by 7,000 “guards, patrolmen, deputy sheriffs, National Guardsmen, city police, and company police.”<sup>271</sup>

The forces organized by the companies did not want for weapons. Sheet & Tube’s arsenal included 1,020 firearms (369 rifles, 453 handguns, and 190 shotguns), more than 76,000 rounds of firearm ammunition, and 109 gas guns

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<sup>262</sup> INDUSTRIAL MUNITIONS, *supra* note 8, at 111-12.

<sup>263</sup> LITTLE STEEL, *supra* note 8, at 88-91. *See generally* PRIVATE POLICE SYSTEMS, *supra* note 8, at 126-52.

<sup>264</sup> *See* LITTLE STEEL, *supra* note 8, at 93-99.

<sup>265</sup> *Id.* at 89-90, 109-15, 130-31.

<sup>266</sup> *In re* Republic Steel Corp., 9 N.L.R.B. 219, 221 (1937); *In re* Inland Steel Co., 10 N.L.R.B. 783, 804-06 (1938); *see also* Republic Employees Organize New Union, YOUNGSTOWN VINDICATOR, May 20, 1937, at 1.

<sup>267</sup> PRIVATE POLICE SYSTEMS, *supra* note 8, at 116, 186.

<sup>268</sup> *Id.* at 186

<sup>269</sup> LITTLE STEEL, *supra* note 8, at 128-29, 171-76.

<sup>270</sup> La Follette Committee Hearings, *supra* note 224, at 11499. Bethlehem also substantially increased its police force during the lead up to the strike. Sofchalk, *supra* note 236, at 33.

<sup>271</sup> La Follette Committee Hearings, *supra* note 224, at 11497.

of all types, for which it possessed more than 3,000 rounds of ammunition.<sup>272</sup> Republic's stock was equally impressive: 861 firearms (64 rifles, 552 handguns, and 245 shotguns), more than 77,000 rounds of ammunition, and 204 gas guns of all types, for which it had more than 6,000 rounds of ammunition.<sup>273</sup> Sheet & Tube also had eight military-style machine guns.<sup>274</sup> In fact, many of the firearms stocked at both companies (beside the machine guns) were military in character, and much of the gas was potent to the point of being potentially lethal.<sup>275</sup> In addition to all of this, the companies also maintained extensive stores of blunt-force weapons, flares, bandoliers, and other military- and police-type accessories.<sup>276</sup> Although Republic and Sheet & Tube were the focus of the investigation and probably had the largest arsenals, the committee uncovered considerable evidence of similar "munitioning" at all the basic steel companies.<sup>277</sup> For that matter, the committee's investigations revealed that the accumulation of such weapons was widespread in the open shop industries.<sup>278</sup>

The committee found that time and again, when threatened by a strike, the steel companies augmented and restocked their weapons inventories.<sup>279</sup> The lead-up to the Little Steel Strike was no different—Republic spent \$50,000 on armaments (mainly gas) in the month before the strike.<sup>280</sup> When considered along with the size and nature of the stockpiles, and the way the armaments were marketed, purchased, and stored, this tendency for purchases to precede strikes undermined the companies' claims that the weapons served mundane or otherwise defensive purposes.<sup>281</sup> It should be mentioned in this connection that the companies made no effort to conceal the existence of these stockpiles from the strikers—indeed, they flaunted the fact.<sup>282</sup>

The La Follette Committee also uncovered evidence confirming that the Little Steel companies used their stockpiles to arm public police forces that allied with them.<sup>283</sup> In fact, it seems in some cases gifts of weapons were used to cultivate alliances with the police.<sup>284</sup> The committee also gathered extensive evidence that the companies used their influence in the mill communities to

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<sup>272</sup> INDUSTRIAL MUNITIONS, *supra* note 8, at 43, 45, app. E, at 219.

<sup>273</sup> *Id.* at 41, app. C, at 217, app. D, at 218.

<sup>274</sup> *Id.* at 45.

<sup>275</sup> *Id.* at 19-28 (citing multiple incidents of injury and one incident where one patient who inhaled the gas sank into a comma and died in the hospital after the fourth day).

<sup>276</sup> *Id.* at 19, app. F, at 221.

<sup>277</sup> *Id.* at *passim*.

<sup>278</sup> *Id.* 61-65 (noting gas munition stockpiling by numerous companies).

<sup>279</sup> *Id.* at 59 ("companies purchased munitions only immediately before or during strikes").

<sup>280</sup> LITTLE STEEL, *supra* note 8, at 125-28.

<sup>281</sup> INDUSTRIAL MUNITIONS, *supra* note 8, at 69-105.

<sup>282</sup> See *Always Had Guns on Hand, Girdler Says*, CLEVELAND PLAIN DEALER, June 2, 1937, at 1; *NLRB Will Investigate Steel Workers' Charge of Shooting, 'Arsenals,'* WASH. POST, June 19, 1937, at 1; *Shoot-to-Kill Order Laid to Republic Boss*, STEEL LAB., June 5, 1937, at 5. The SWOC instituted court proceedings aimed at having the companies' weapons seized. *Asks Republic Show Records: Court Orders Firm to Give Data on Guns, Arms*, YOUNGSTOWN VINDICATOR, June 16, 1937, at 1.

<sup>283</sup> INDUSTRIAL MUNITIONS, *supra* note 8, at 131.

<sup>284</sup> *Id.* at 131 (noting that gifts of policing equipment, at the very least, "arouse suspicion" that the weapons will be used by the public administration to carry out the donees' private ends).

maintain revolving doors of employment between company police and local, public police.<sup>285</sup> Two-thirds of the nearly three hundred “special police” hired during the strike by city and county authorities in and around Youngstown, Ohio, were actually employees of Sheet & Tube or Republic.<sup>286</sup> Likewise, during the strike, local police often deputized company men and then made little effort to actually exercise any control over their subsequent actions.<sup>287</sup> By such means, the steel companies built relationships with some local police forces that were so intimate and cooperative that they verged on de facto company control.

### 3. *Breaking the Little Steel Strike*

In late March 1937, the SWOC asked the Little Steel companies to enter a collective bargaining agreement similar to the one agreed by U.S. Steel.<sup>288</sup> Although the companies subsequently met with the representatives of the union, their purpose was only to affirm their adherence to the open shop.<sup>289</sup> The companies cynically couched their position in a refusal to sign *written* agreements, which they claimed the law did not require.<sup>290</sup> This was a pretext designed to conceal a categorical opposition to recognizing or bargaining with the SWOC and frustrate NLRB proceedings against them.<sup>291</sup> Under the leadership of Republic’s president, Tom Girdler, a tough and thoroughly reactionary character, the Little Steel companies were really angling to destroy the union on the picket lines.<sup>292</sup>

It did not take long for the conflict to escalate. In early May, Republic effected mass discharges of union supporters followed by lockouts at its Canton, Ohio, mills, and then on May 20 at its plants in Massillon, Ohio.<sup>293</sup> The

<sup>285</sup> LITTLE STEEL, *supra* note 8, at 128-29, 171-76.

<sup>286</sup> *La Follette Committee Hearings*, *supra* note 224, exhibit 4777, at 12136-38. It seems that the SWOC was well aware of these efforts even before the strike began. *See, e.g., SWOC Demands Deputy Records*, YOUNGSTOWN VINDICATOR, May 21, 1937, at 1.

<sup>287</sup> *La Follette Committee Hearings*, *supra* note 224, exhibits 4739, 4741, 4742(a)-(c), at 12066-69, 12070-78; STRIKEBREAKING SERVICES, *supra* note 16, at 110-11.

<sup>288</sup> LITTLE STEEL, *supra* note 8, at 116.

<sup>289</sup> *Id.* at 118-19; *Terms Given by Republic Are Rejected*, STEEL LAB., May 24, 1937, at 2.

<sup>290</sup> GALENSON, *supra* note 11, at 98-100. On the bad faith of these companies in the negotiations preceding the strike, see *In re Inland Steel Co.*, 9 N.L.R.B. 783, 795-97 (1938); *In re Republic Steel Corp.*, 9 N.L.R.B. 219, 250-51, 323-34, 379-82 (1938); LITTLE STEEL, *supra* note 8, at 117-131; Sofchalk, *supra* note 236, at 62-63, 70-72; *see also Independent Steel Companies Refuse to Sign Contracts with CIO, but Continue Talks on Labor Problems with SWOC Groups*, WALL ST. J., May 6, 1937, at 1.

<sup>291</sup> Sofchalk, *supra* note 236, at 62-63, 70-72.

<sup>292</sup> *In re Republic Steel*, 9 N.L.R.B. at 249-50, 322-23; BERNSTEIN, *supra* note 10, at 480-81 (noting Girdler’s antiunion sentiment and philosophy that he would rather “shut down and raise apples and potatoes” than deal with a union); Stolberg, *supra* note 255, at 119.

<sup>293</sup> *In re Republic Steel*, 9 N.L.R.B. at 249-51 (citing Republic Steel’s shut down of mills at the Massillon, Ohio plant); *see also* LITTLE STEEL, *supra* note 8, at 229-30 (citing the same); BERNSTEIN, *supra* note 10, at 483 (citing the May 20, Massillon mill shut down); *CIO Rejects Conference with Republic*, YOUNGSTOWN VINDICATOR, May 6, 1937, at 1; *Republic Men Approve Strike*, YOUNGSTOWN VINDICATOR, May 8, 1937, at 1; *Strike Is On at Canton Steel Mill*, CLEVELAND PLAIN DEALER, May 26, 1937, at 1; *Steel Workers and Producers Seem Adamant*, YOUNGSTOWN VINDICATOR, May 9, 1937, at 1; *Strike ‘Inevitable’ at Inland Steel*, *Says CIO Leader*, WALL ST. J., May 26, 1937, at 1; *Strike Hinging on Conference*,

SWOC locals responded with a smattering of spontaneous or nearly spontaneous strikes,<sup>294</sup> followed by the leadership's announcement of a deadline for recognition, and finally, on May 26—the same day Ford's servicemen were beating UAW activists in Dearborn—by an official strike call at all Republic plants as well as those of Sheet & Tube and Inland.<sup>295</sup> Pickets and mass walkouts quickly closed operations at all Sheet & Tube and Inland mills and most Republic plants.<sup>296</sup> Although the strike call did not initially extend to Bethlehem, a strike by railway workers at its Cambria Works in Johnstown, Pennsylvania, provoked a sympathy walkout on June 11 that effectively brought that large plant into the strike.<sup>297</sup> The strike affected scores of mills across the Great Lakes region. But it was centered in two places: the Calumet Region and northeast Ohio, particularly in and around the cities of Cleveland, Youngstown, Niles, Warren, and Canton. It probably entailed a total of one hundred thousand workers, including as many as twenty thousand miners, rubber workers, and others who struck in sympathy.

The strike was soon awash in violence. The most notorious and deadly incident occurred only days into the strike—on Memorial Day, at Republic's plant in South Chicago. Ten strikers and supporters were mortally wounded and approximately one hundred injured when city police, some of whom were billeted at the plant and armed by Republic, fired point-blank into a somewhat rowdy but unthreatening crowd of protesters that had marched to one of the plant's gates to demand the right to establish a mass picket.<sup>298</sup> The claim by the police and Republic that the demonstrators had planned to rout the police and capture the plant was thoroughly refuted, in part by the La Follette Committee's discovery of a Paramount Pictures newsreel.<sup>299</sup> The newsreel, which Paramount had kept secret, and which captured much of the affray, including savage assaults on wounded demonstrators, contradicted the claim that the

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YOUNGSTOWN VINDICATOR, May 12, 1937, at 1; "We'll Close," *Local Plants Warn Steel Union*, YOUNGSTOWN VINDICATOR, May 18, 1937, at 1; *Youngstown Steel Heads Unshaken by SWOC Victory*, WALL ST. J., May 22, 1937, at 1.

<sup>294</sup> *Local Lodges Delay Action*, YOUNGSTOWN VINDICATOR, May 13, 1937, at 1; *Strike at 5 Mills of Republic Steel*, N.Y. TIMES, May 26, 1937, at 1.

<sup>295</sup> See BERNSTEIN, *supra* note 10, at 483; 3 HOGAN, *supra* note 219, at 1179; see also *Power Voted for Strike Call*, CLEVELAND PLAIN DEALER, May 16, 1937, at 1; *Republic, S-T Next for SWOC*, YOUNGSTOWN VINDICATOR, May 24, 1937, at 1; *Steel Strike Seen Imminent*, YOUNGSTOWN VINDICATOR, May 23, 1937, at 1.

<sup>296</sup> *Strike Hits Steel Mills in 5 States*, CLEVELAND PLAIN DEALER, May 27, 1937, at 1; see also *13,000 Idle in Canton Republic Strike*, YOUNGSTOWN VINDICATOR, May 26, 1937, at 1; Louis Stark, *27 Big Steel Mills Darkened by Strike*, N.Y. TIMES, May 27, 1937, at 1; *Steel Labor Situation*, WALL ST. J., May 24, 1937, at 3; *Thousands Jobless in Steel Strikes*, YOUNGSTOWN VINDICATOR, May 27, 1937, at 1.

<sup>297</sup> 3 HOGAN, *supra* note 219, at 1179 (referencing the Johnstown strike); see also *In re Bethlehem Steel Corp.*, 14 N.L.R.B. 539, 612-13 (1939); *Cambria Mill Hit by Railway Strike*, N.Y. TIMES, June 11, 1937, at 5; *Cambria Mill of Bethlehem Goes on Strike*, STEEL LAB., June 21, 1937, at 1. Production at the Cambria plant was curtailed, but not stopped, by the strike. *Bethlehem Operating Johnstown Plant Despite Strike; Coal Walkout Ordered*, IRON AGE, June 17, 1937, at 91, 91.

<sup>298</sup> INDUSTRIAL MUNITIONS, *supra* note 8, at 147; S. REP. NO. 75-46, pt. 2, at 2 (1937) [hereinafter MEMORIAL DAY INCIDENT].

<sup>299</sup> MEMORIAL DAY INCIDENT, *supra* note 298, at 2, 13, 16, 28, 31.

demonstrators were the aggressors on the field that day—but not before this view was endorsed by major media outlets.<sup>300</sup>

On June 10, in Monroe, Michigan, a black organizer was nearly lynched by a mob of company loyalists as the police apparently stood by.<sup>301</sup> Later that same day the company, a Republic subsidiary, used a contingent of two hundred “special police” sworn in by the city but armed by Republic to smash the union’s picket line.<sup>302</sup> The attack commenced with the police firing gas munitions donated by Republic.<sup>303</sup> The picketers were beaten and chased before a crowd of perhaps several thousand spectators.<sup>304</sup> Police and vigilantes then arrested a number of the strikers, burned their picket-line installations, and overturned their cars into a nearby river.<sup>305</sup> For days afterward, hundreds of special police roamed the city warding off would-be picketers before forces sent by Governor Murphy restored limited picketing.<sup>306</sup>

In Youngstown, Ohio, where both Republic and Sheet & Tube maintained large plants, the county sheriff’s office added 152 special police, of whom 94 were loyal Republic and Sheet & Tube employees, and the city police added 144, of whom 59 were steel company employees.<sup>307</sup> On June 19, amid a company-directed “back-to-work” campaign, city police launched a largely unprovoked gas attack on a Republic picket line staffed by women, which the company claimed was occupying company property adjacent to the street.<sup>308</sup> A riot ensued, followed by several hours of fighting in which strikers traded gunfire with public and company police under the occasional glare of parachute flares.<sup>309</sup> By early morning, two strikers had been shot dead (probably by company police) and approximately forty-two people, mainly strikers and sympathizers, were wounded.<sup>310</sup> Police later arrested dozens of strikers, many of them picked up in pretextual raids on their homes.<sup>311</sup>

On the night of July 11, a force of Massillon, Ohio city police and special police under the command of a company agent used firearms and gas to attack a festive gathering of several hundred unarmed and peaceful picketers near the

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<sup>300</sup> *Id.* at 16, 28, 31; Chesly Manly, *Senators View Film of Chicago Strike Rioting*, CHI. DAILY TRIB., July 3, 1937, at 2. On media claims that the police were attacked, see, for example, *4 Dead, 90 Hurt in Steel Riot*, CHI. DAILY TRIB., May 31, 1937, at 1; *Chicagoans Led in Steel Strike by Outsiders*, CHI. TRIB., June 1, 1937, at 2.

<sup>301</sup> LITTLE STEEL, *supra* note 8, at 142, 151-55.

<sup>302</sup> *Id.* at 159.

<sup>303</sup> INDUSTRIAL MUNITIONS, *supra* note 8, at 153.

<sup>304</sup> F. Raymond Daniell, *Conflict Is Brief*, N.Y. TIMES, June 11, 1937, at 1.

<sup>305</sup> LITTLE STEEL, *supra* note 8, at 160-61; INDUSTRIAL MUNITIONS, *supra* note 8, at 154; see also Joseph M. Turrini, *The Newton Steel Strike: A Watershed in the CIO’s Failure to Organize “Little Steel,”* 38 LAB. HIST. 229, 259 (1997).

<sup>306</sup> LITTLE STEEL, *supra* note 8, at 161; F. Raymond Daniell, *Monroe Picketing Restored by Pact*, N.Y. TIMES, June 16, 1937, at 7; F. Raymond Daniell, *To Isolate Crowd*, N.Y. TIMES, June 13, 1937, at 1; *Vigilantes Guard Lone Road to Mill*, N.Y. TIMES, June 14, 1937, at 3.

<sup>307</sup> GALENSON, *supra* note 11, at 103.

<sup>308</sup> LITTLE STEEL, *supra* note 8, at 188-89.

<sup>309</sup> *Id.* at 190-91; Sofchalk, *supra* note 236, at 320-22.

<sup>310</sup> LITTLE STEEL, *supra* note 8, at 190-91; Sofchalk, *supra* note 236, at 322; see also *Pitched Battle in Youngstown Follows Gassing of C.I.O. Women*, N.Y. TIMES, June 20, 1937, at 1.

<sup>311</sup> LITTLE STEEL, *supra* note 8, at 196-97.

union's headquarters.<sup>312</sup> Two, possibly three, strikers were killed and an "undetermined" number of people were injured in the attack and the melee that followed.<sup>313</sup> Police later ransacked the union headquarters and nearby homes and, without warrants, arrested every unionist they could find in the area (about 165) and held them "for several days, for the crime, apparently, of belonging to the Union."<sup>314</sup> The NLRB later found that the police involved in this affair lied when they claimed the violence was provoked by serious threats from the union, and that the police actually had either seized on a very minor provocation or simply initiated the clash.<sup>315</sup> The Board found that the whole episode was the culmination of a concerted effort by Republic's management to visit violence on the strikers under the cover of public authority.<sup>316</sup>

By the time the strike ground to an end in July, at least two (and likely three) more people had also been killed. A disabled union man selling tickets to a union dance was killed on June 29 in Beaver Falls, Pennsylvania, when he was struck in the head by a Guardsman's tear gas projectile as the authorities forced picketers away from a Republic plant.<sup>317</sup> On June 30, a striker died apparently after being clubbed by a Guardsman in Canton—authorities said the man in his late thirties had a heart attack.<sup>318</sup> And in late July, a striker was fatally run over by a strikebreaker's car speeding through the picket line at a Republic mill in Cleveland, hours before picketers there were routed by a rampaging army of loyal employees wielding pipes and clubs.<sup>319</sup> In all, the La Follette Committee, documented 323 strike-related injuries, including 40 gunshot wounds (of which all but 3 were inflicted on strikers and strike sympathizers) as well as 10 permanently disabling injuries.<sup>320</sup> Almost certainly, this was an underestimation.

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<sup>312</sup> *In re Republic Steel Corp.*, 9 N.L.R.B. 219, 273, 280 (1938).

<sup>313</sup> *Id.* at 273; LITTLE STEEL, *supra* note 8, at 237.

<sup>314</sup> *In re Republic Steel*, 9 N.L.R.B. at 317; *see also* LITTLE STEEL, *supra* note 8, at 250-52; 2 *Die, 15 Hurt at Reopening of Republic Plant*, WASH. POST, July 13, 1937, at 3.

<sup>315</sup> *In re Republic Steel*, 9 N.L.R.B. at 307-08.

<sup>316</sup> *Id.* at 267, 318.

<sup>317</sup> *La Follette Committee Hearings*, *supra* note 224, exhibit 5250, at 13968-69. At least sixteen were killed in the strike; the number rises to eighteen if the death at Canton is added and if a third death, possibly caused by the delayed effects of tear gas exposure, is counted at Massillon. *In re Republic Steel*, 9 N.L.R.B. at 273; *see also* *Convention Honors Martyrs of Union*, STEEL LAB., Dec. 31, 1937, at 3; *Republic Gave Guns to Massillon Cops*, STEEL LAB., Aug. 6, 1937, at 5; *Stone 8 Despite Troops at Steel Mills in Canton*, CHI. DAILY TRIB., July 1, 1937, at 13; *Troops Mobilized as 2 Mills Prepare to Reopen in Indiana*, WASH. POST, July 1, 1937, at 1.

<sup>318</sup> 8 *Hurt, 75 Seized in Riot at Canton*, N.Y. TIMES, July 1, 1937, at 3; *Reporters See Guardsmen Beat Strikers*, STEEL LAB., July 7, 1937, at 3; *Troops Mobilized as 2 Mills Prepare to Reopen in Indiana*, *supra* note 317; *Trouble Flares Again at Canton*, CLEVELAND PLAIN DEALER, July 1, 1937, at 1.

<sup>319</sup> 40 *Hurt in New Strike Riot*, CHI. DAILY TRIB., July 27, 1937, at 1; 60 *Hurt in Night Steel Strike Clash*, CLEVELAND PLAIN DEALER, July 27, 1937, at 1; *Cleveland Police Bar Steel Pickets*, N.Y. TIMES, July 28, 1937, at 9; *Night Clashes Follow Killing in Steel Strike*, WASH. POST, July 27, 1937, at 1; *Rain Routs C.I.O. Throng at Square*, CLEVELAND PLAIN DEALER, July 30, 1937, at 1; John M. Storm, *Steel Union Fight Turns to Courts*, N.Y. TIMES, Aug. 1, 1937, at 58.

<sup>320</sup> *La Follette Committee Hearings*, *supra* note 224, exhibit 5250, at 13968.

Hundreds of strikers were arrested during the strike, often while picketing plant gates and often in large numbers.<sup>321</sup> For example, during the June 30 clash in Canton that claimed the man's life, 75 picketers were arrested, and a number of people injured, by Guardsmen forcing aside pickets at Republic's complex.<sup>322</sup> The La Follette Committee deemed the Guardsmen "guilty of intemperate application of the law."<sup>323</sup> On other occasions, unionists were arrested in more preemptive fashion—as, for example, on June 22 in Youngstown, when police arrested 150 union supporters just as they arrived in town, and claimed to have warded off another 3,000 supporters.<sup>324</sup> SWOC organizers were often singled out for arrest.<sup>325</sup> Overall, according to CIO lawyer Lee Pressman, more than 2,000 unionists were arrested during the strike, of which more than nine hundred were charged with "offenses of one kind or another, ranging from disorderly conduct to kidnapping."<sup>326</sup> Even the survivors of the "Memorial Day Massacre" (including some men on their deathbeds) were charged with felony conspiracy before revelations of police culpability led to the charges being reduced.<sup>327</sup> Throughout the strike zone, only a fraction of those arrested would be prosecuted; however, Pressman asserted that there would have many more prosecutions had the union not acceded to a practice by which local authorities ransomed arrested strikers back to the union for set fees.<sup>328</sup> A few unionists did face serious felony charges, including sabotage and unlawful use of explosives, mostly related to an intense struggle by unionists (led by future Communist Party leader Gus Hall) to deter strikebreaking

<sup>321</sup> See, e.g., 8 *Hurt, 75 Seized in Riot at Canton*, *supra* note 319; *Stone 8 Despite Troops at Steel Mills in Canton*, *supra* note 317; *14 Jailed, 3 Hurt in Mill Gate Clash*, *YOUNGSTOWN VINDICATOR*, June 10, 1937, at 1; *Trouble Flares Again at Canton*, *supra* note 319.

<sup>322</sup> 8 *Hurt, 75 Seized in Riot at Canton*, *supra* note 319; *Stone 8 Despite Troops at Steel Mills in Canton*, *supra* note 317; *Trouble Flares Again at Canton*, *supra* note 319.

<sup>323</sup> *LITTLE STEEL*, *supra* note 8, at 325.

<sup>324</sup> Russell B. Porter, *Invaders Seized, 3,000 Turned Back*, *N.Y. TIMES*, June 23, 1937, at 1; *Troops Arriving: 5,000 Due; Troops Repel CIO Invasion*, *YOUNGSTOWN VINDICATOR*, June 22, 1937, at 1.

<sup>325</sup> For example, on July 26, in Cumberland, Maryland, police arrested several high-ranking CIO organizers outside a Republic subsidiary under a newly enacted ordinance limiting pickets to six and requiring that they be employees of the place picketed. *C.I.O. Heads Arrested at Cumberland, Md.*, *N.Y. TIMES*, July 27, 1937, at 11. Similarly, Robert Burke, the SWOC's chief organizer at the Republic's Youngstown Plant—a young man who had recently been expelled from Columbia University for leading anti-Nazi protests—was arrested on charges that included disturbing the peace, shooting a man in the leg, and criminal syndicalism. *La Follette Committee Hearings*, *supra* note 224, exhibit 4985, at 12923-24. On the dubious nature of the charges and their subsequent disposition, see *Burke Is Held to Grand Jury*, *YOUNGSTOWN VINDICATOR*, June 11, 1937, at 1; *Burke of C.I.O. Is Fined*, *N.Y. TIMES*, Oct. 21, 1937, at 16; F. Raymond Daniell, *Youngstown Girds for Strike Fights*, *N.Y. TIMES*, June 12, 1937, at 1; Russell B. Porter, *Act in Youngstown*, *N.Y. TIMES*, June 11, 1937, at 1.

<sup>326</sup> *Thomas Committee Hearings*, *supra* note 249, at 4200.

<sup>327</sup> F. Raymond Daniell, *900 Chicago Police Guard Strike Area as Riots Are Hinted*, *N.Y. TIMES*, June 2, 1937, at 1. Eventually around sixty were convicted of unlawful assembly and assessed nominal fines. *61 Memorial Day Rioters Guilty; Fines Are Small*, *CHI. DAILY TRIB.*, Dec. 21, 1937, at 2; *Memorial Day Rioters Draw Fines in Chicago*, *WASH. POST*, Dec. 21, 1937, at 28.

<sup>328</sup> *Thomas Committee Hearings*, *supra* note 249, at 4200-02; *In re Republic Steel Corp.*, 9 N.L.R.B. 219, 390 (1938).



and halt production in northeast Ohio.<sup>329</sup> Not surprisingly, nowhere were felony charges pressed against police and company agents.<sup>330</sup>

The immediate causes of violence in the strike varied. Violence often erupted as picketers tried to prevent strikebreakers and supplies from entering the mills. Throughout the strike zone, workers engaged in often-chaotic struggles to close off the plants: they sought to set up barricades and check-points on roads and at plant gates, they tried to block railroad access, they set up “flying squadrons” of picketers to dispatch to weak points on the lines and respond to other emergencies, and they tried by numbers alone to block entry to the plants.<sup>331</sup> These efforts led to countless skirmishes with loyal employees, company guards, and police.<sup>332</sup> In other instances, the cause of violence lay even more directly with the companies and their agents, who mounted premeditated attacks on strikers, including some instances of sniping or mob attacks, infiltrating pickets with provocateurs in the hopes of creating cause to attack the strikers, and, underscored in the deadly clashes, simply seizing on minor incidents as excuses to apply great force.<sup>333</sup>

Immediate causes aside, though, as the NLRB and the La Follette Committee understood, the violence was ultimately rooted in the steel companies’ absolute opposition to basic labor rights and their readiness to back this posi-

<sup>329</sup> On sabotage cases, see *8 Hurt, 75 Seized in Riot at Canton*, *supra* note 319; *C.I.O. Men Arrested as Warren Bombers; Strike Chief Declared Named in Confessions*, N.Y. TIMES, June 29, 1937, at 4; see also *Hall in Jail, Bond \$50,000*, YOUNGSTOWN VINDICATOR, July 1, 1937, at 1; *Judge Lowers Bond for Hall*, YOUNGSTOWN VINDICATOR, July 4, 1937, at 1. Other SWOC members and supporters were convicted of obstructing the mails (to prevent the delivery of food to workers in the plants) and several were sentenced to jail terms. *In re Republic Steel*, 9 N.L.R.B. at 389; see also *Blocking Mail Charged*, N.Y. TIMES, June 30, 1937, at 2; Walker S. Buel, *Halting of Mail To Be Punished*, CLEV. PLAIN DEALER, June 19, 1937, at 4; *Seek CIO Heads on Mail Charges*, YOUNGSTOWN VINDICATOR, July 15, 1937, at 1; Wayne Thomis, *Arrest 6 C.I.O. Mail Censors, U.S. Commands*, CHI. DAILY TRIB., June 24, 1937, at 9.

<sup>330</sup> Republic did eventually pay \$350,000 in settlement of civil claims involving death and injury of strikers and strike supporters. GALENSON, *supra* note 11, at 109.

<sup>331</sup> On the union’s attempt to close street access to the plants, see, for example, *Autos Crash Picket Lines*, YOUNGSTOWN VINDICATOR, June 7, 1937, at 1; *Speeding Car Injures 3 Pickets*, YOUNGSTOWN VINDICATOR, June 12, 1937, at 1. On the union’s blockage of railroad access, see, for example, *Cut Rails After S. & T. Gets Food*, YOUNGSTOWN VINDICATOR, June 5, 1937, at 1; *Pickets Pass Lumber Cars*, YOUNGSTOWN VINDICATOR, June 13, 1937, at 1; *Rail Men Ask Davey End ‘State of Riot,’* YOUNGSTOWN VINDICATOR, June 7, 1937, at 1; *Railroads Sue to Bar Pickets*, YOUNGSTOWN VINDICATOR, June 2, 1937, at 1; *Warren Fight Threat Passes: Pickets, Republic Men Line Up, but Train Stops Outside Gate*, YOUNGSTOWN VINDICATOR, June 4, 1937, at 1.

<sup>332</sup> *La Follette Committee Hearings*, *supra* note 224, exhibits 5195-5197, at 13634-743.

<sup>333</sup> For example, in Canton, Ohio, company agents repeatedly shot at, rushed en masse, or threw missiles at strikers. *La Follette Committee Hearings*, *supra* note 224, at 13035, exhibits 5056F-5056G, at 13139-40; LITTLE STEEL, *supra* note 8, at 218; *Strike Leaders Anticipate Early Timken Settlement; U.S. Studies Violence Data*, CANTON REPOSITORY, June 7, 1937, at 1. In other instances, strikers discovered company agents in their ranks, who attempted to provoke the strikers to engage in violence. See, e.g., Interview by C. F. Traynor with John S. Johns, former Vice-President, United Steelworkers of Am. 8 (1970) (transcript available at USWA and Labor Oral History Collection, Penn State University Special Collections Archive); Interview by C. F. Traynor with John S. Johns, former Vice-President, United Steelworkers of Am. 20 (Mar. 3, 1978) (transcript available at USWA and Labor Oral History Collection, Penn State University Special Collections Archive).

tion by force. If they had abided their workers' rights under the Wagner Act, there would have been no strike; and if they had not armed themselves and local police with lethal weapons and engaged in countless provocations, the strike would not have resulted in so many deaths and injuries.<sup>334</sup>

But, as James Rand recognized in his Mohawk Valley Formula, regardless of the cause, violence played directly to the advantage of the steel companies. Toward the end of June, episodes of violence and the fervor surrounding them, combined with the threat of even greater unrest, led the governors of two key states to intervene in the strike. Martin Davey of Ohio called up the Ohio National Guard, and Pennsylvania's George Earle mobilized the state police.<sup>335</sup> In both instances, these forces were initially ordered to maintain a "status quo" that kept the plants closed, but they were also instructed to dramatically curtail picketing and, within days, to oversee the companies' reopening of the mills.<sup>336</sup> Clearly, the violence of the strike contributed to a steep erosion in support for the strikers among the public as well as the political elite, which helps account for the actions of Davey and Earle.<sup>337</sup>

Actually, the strike may have descended into violence even if the strikers had not been provoked by unlawful means. For even at this early date it was becoming clear that the steel companies enjoyed the right under the Wagner Act to run or reopen their mills during the strike, which they all did, if only at first to demoralize and anger the strikers. And some of the violence was certainly attributable to union efforts to counter this. But in the end, the companies did not leave it to this dynamic to provoke a level of violence that would lead to favorable government intervention. Consistent with Rand's formula, they disseminated pamphlets, letters, and statements to employees that charged the SWOC with domination by Communists, recent immigrants, and blacks; claimed it harbored a penchant for violence and aimed to exploit the steel workers economically; and suggested that "outside" unionization threatened the continued viability of local plants.<sup>338</sup> They also used prominent advertisement firms to coordinate a national campaign against the union.<sup>339</sup> Also consistent with Rand's formula, in virtually every town affected by the strike, the companies expended considerable effort organizing back-to-work movements and cit-

<sup>334</sup> See generally *In re Republic Steel Corp.*, 9 N.L.R.B. 217 (1938); LITTLE STEEL, *supra* note 8, at 330-31.

<sup>335</sup> LITTLE STEEL, *supra* note 8, at 196-97, 212, 227, 275.

<sup>336</sup> *Id.* at 195; GALENSON, *supra* note 11, at 104-06.

<sup>337</sup> Sofchalk, *supra* note 236, at 120-36. On declining support for the union among the public, see *Sympathy of U.S. Voters for Unions Shows Decline Since Big Strikes Began*, CLEVELAND PLAIN DEALER, July 4, 1937, at 1. On criticism of the strikers by prominent New Deal opponents, see Walter Lippman, *The Reaction Against the CIO*, YOUNGSTOWN VINDICATOR, July 1, 1937, at 12; cf. Spencer Fullerton, *On the Labor Front: Wagner Act Brings Disappointments. . . Public Opinion Shifty. . . Labor Prepares to Vote*, CLEVELAND PLAIN DEALER, July 18, 1937, at 5. On criticisms of the strikers by Wagner Act supporters, see *NLRB 'Another Way to Spell C.I.O.,' Says Holt*, WASH. POST, Aug. 16, 1937, at 2 (West Virginia Senator, and New Deal opponent, Rush Holt); *Nye Attacks NLRB as Showing Bias for Lewis Union*, WALL ST. J., July 23, 1937, at 4 (North Dakota Senator and Wagner Act supporter, Gerald Nye).

<sup>338</sup> See, e.g., *In re Union Drawn Steel Co.*, 10 N.L.R.B. 868, 875, 879-82 (1938); *In re Republic Steel*, 9 N.L.R.B. at 238-39, 245-49.

<sup>339</sup> LITTLE STEEL, *supra* note 8, at 91-93, 320-21.

izens committees with which they threatened the strikers and offered the steel workers and the public alike a distorted view of the level of strike support.<sup>340</sup> The NLRB would later find that the companies coerced subscription to these organizations, using methods that included physical threats and intimidating visits to workers' homes.<sup>341</sup>

The immediate impetus in the decision of the governors of Ohio and Pennsylvania to intervene in the strike was the threat by the various citizens' groups and other vigilante organizations to undertake large-scale, coordinated assaults on the picket lines.<sup>342</sup> Once the governors ordered the mills reopened, the strike was lost. With great drama, uniformed police and Guardsmen quite literally forced aside the pickets to allow the mills to reopen with scab labor.<sup>343</sup> They either barred picketing or imposed significant limits on the number of pickets allowed.<sup>344</sup> But by the time the second week of July had passed, the last mills had reopened, the steel companies were resuming pre-strike production levels, and it was clear that the strike had been completely broken.<sup>345</sup> Indeed, by August the SWOC had formally called off the strike at all the companies except Republic, where at some mills the pickets lingered on into the next year, and Republic President Tom Girdler was gloating about how he and "his men" had won the strike.<sup>346</sup>

<sup>340</sup> *Id.* at 183-88, 191-96, 209-11, 261-69; *In re Bethlehem Steel Corp.*, 14 N.L.R.B. 539, 613-25 (1939); *La Follette Committee Hearings*, *supra* note 224, exhibits 4789-A-K to 4791, at 12152-86, 13064-118, exhibits 5074-A to 5087-E, at 13168-86; BERNSTEIN, *supra* note 10, at 491-94; *see also Citizens' Group Hit at Steel Hearing*, N.Y. TIMES, Sept. 11, 1937, at 4; *Residents Arm at Johnstown; Ambridge Riot*, CHI. DAILY TRIB., June 16, 1937, at 3; *Vigilantes Rise Up in Strike Areas*, CLEVELAND PLAIN DEALER, June 16, 1937, at 1.

<sup>341</sup> *In re Republic Steel*, 9 N.L.R.B. at 233-35, 252.

<sup>342</sup> LITTLE STEEL, *supra* note 8, at 192-93, 227, 263, 275.

<sup>343</sup> *3,000 More Return to Steel Mill Jobs*, N.Y. TIMES, July 7, 1937, at 7; *Troops Arrive to Take Over 'Danger Zones; 3 Mills Open Today*, CLEVELAND PLAIN DEALER, July 6, 1937, at 1; *Troops Repulse Hostile Crowds as Workers Leave Warren Plant*, YOUNGSTOWN VINDICATOR, June 23, 1937, at 1; *La Follette Committee Hearings*, *supra* note 224, at 13380-420.

<sup>344</sup> *La Follette Committee Hearings*, *supra* note 224, at 13380-420.

<sup>345</sup> *3,000 More Return to Mill Jobs*, *supra* note 343; *Cleveland and Youngstown Steel Plants Rapidly Approaching Normal Operation; Second Strike Call a Complete Failure*, IRON AGE, July 15, 1937, at 92; *Hot Mills Go on at Warren*, YOUNGSTOWN VINDICATOR, July 6, 1937, at 1; *Mills Operate at 76 Per Cent*, YOUNGSTOWN VINDICATOR, July 7, 1937, at 1; *More Republic Plants to Re-Open*, YOUNGSTOWN VINDICATOR, July 6, 1937, at 1; *Republic Reopens Last Struck Unit*, N.Y. TIMES, July 9, 1937, at 2; *Sheet & Tube Opens Strike-Bound Mill at East Chicago, Ind.*, IRON AGE, July 15, 1937, at 91; *Sheet & Tube to Open in Indiana*, CLEVELAND PLAIN DEALER, July 11, 1937, at 15.

<sup>346</sup> On the overall sequence of re-openings, see BROOKS, *supra* note 250, at 144-46, 148-49. On the persistence of the strike at Republic, see *Is Republic Steel 'Headed for the Rocks?'* STEEL LAB., Sept. 10, 1937, at 3; *Strikebreakers, Cheated by Republic Steel, Quit Plants and Return to Homes in the South*, STEEL LAB., Oct. 15, 1937, at 1; *Thousands Continue Republic Strike*, STEEL LAB., Mar. 18, 1938, at 6. On Girdler's gloating, see, for example, *Girdler Gives Employees Credit for Opening Mills*, YOUNGSTOWN VINDICATOR, July 12, 1937, at 1; *Strike-Winning Girdler Wonders "Why the Fuss,"* YOUNGSTOWN VINDICATOR, July 11, 1937, at 1. In the last days of July, the SWOC was still hoping that a settlement might be negotiated with Republic by the mayors of the major mill towns. Nothing came of that effort. *See Republic Rejects C.I.O. Peace Offer*, CLEVELAND PLAIN DEALER, July 30, 1937, at 2.

There were surely reasons for the strike's failure beside the interplay of repression and violence. These included the sudden onset of another sharp economic downturn that reduced demand for steel, employment needs, and striker morale.<sup>347</sup> The timing of the strike was also poor in that it coincided with a seasonal slack in demand for steel.<sup>348</sup> Ironically, the strike was also arguably both too broad and too narrow: too broad in that focusing on one company, as the union had with Jones & Laughlin, might have put that company at a crippling competitive disadvantage; too narrow in that, had the strike been industry-wide, it might have constrained the steel supply and brought pressure from large consumers of steel. (In any case, an industry-wide strike was not feasible, as U.S. Steel, Jones & Laughlin, and other producers were under contract with the SWOC.) The SWOC may likewise have been handicapped in some places by uncertain support from anti-CIO craft unionists among the steel workers as well as in the local labor councils.<sup>349</sup> Moreover, in the heady days after its victories over U.S. Steel and Jones & Laughlin, the union probably underestimated the basic level of resistance to unionization among the Little Steel firms.<sup>350</sup>

Clearly, too, the union initially misread the intention behind and likely effect of the governors' mobilization of Guards and state police,<sup>351</sup> and it probably held out too much hope that the Roosevelt administration might intervene on the strikers' behalf.<sup>352</sup> In fact, there were some desultory efforts by the federal government to settle the strike. At one point in June 1937, while the strike was still raging, Secretary of Labor Frances Perkins asked Davey to push Girdler and the leaders at the other companies for a compromise settlement, but Davey refused to do so.<sup>353</sup> By June 24, mediation efforts sponsored by the Labor Department had largely collapsed even though an ad hoc committee put in charge of this effort squarely blamed the steel companies for the strike.<sup>354</sup> CIO efforts to get President Roosevelt to back up earlier statements in support

<sup>347</sup> GALENSON, *supra* note 11, at 100; *Vigilantes' Guard Streets of Johnstown*, WASH. POST, June 16, 1937, at 1.

<sup>348</sup> *Steel Users in Chicago Area Not Yet Affected by Strikes at Mills; Expect Little Difficulty*, WALL ST. J., June 14, 1937, at 2; *see also Steel Operations Placed at 84.3% of Capacity*, WALL ST. J., July 27, 1937, at 2.

<sup>349</sup> GALENSON, *supra* note 11, at 101.

<sup>350</sup> Sofchalk, *supra* note 236, at 13-14.

<sup>351</sup> Even as late as July, the SWOC's newspaper continued to speak favorably of such intervention. *Gov. Earle Pledges Aid to Bethlehem Strikers*, STEEL LAB., July 7, 1937, at 1.

<sup>352</sup> On Perkins' efforts, see GALENSON, *supra* note 11, at 107-08. On Roosevelt's stance, see BERNSTEIN, *supra* note 10, at 713-14; *President Quotes*, N.Y. TIMES, June 30, 1937, at 1. On the other attempts to mediate the dispute, see *Davey Works on New Steel Peace Course*, CLEVELAND PLAIN DEALER, June 17, 1937, at 1.

<sup>353</sup> *Executive Keeps Troops at Plants*, WASH. POST, June 27, 1937, at 1; *Girdler, Purnell "Kidnap" Plan Laid to Miss Perkins*, YOUNGSTOWN VINDICATOR, June 27, 1937, at 1.

<sup>354</sup> LITTLE STEEL, *supra* note 8, at 322; GALENSON, *supra* note 11, at 107-08; *Davey Tells Guard: Let Mills Open: Republic, Tube Reject Board's Final Plea to Meet Chiefs of C.I.O.*, CLEVELAND PLAIN DEALER, June 25, 1937, at 1. Well into early July, the union continued to press Secretary Perkins to convene a conference to settle the strike, but without success. *Perkins Asked to Call "Strike" Governors*, YOUNGSTOWN VINDICATOR, July 7, 1937, at 15. On the work of the Board, see *Davey Faces Tough Choice if Strike Mediators Fail*, CLEVELAND PLAIN DEALER, June 24, 1937, at 1; *Taft Calls Strike Board Tomorrow: Mediators to Meet Here on Steel Tie-up*, CLEVELAND PLAIN DEALER, June 18, 1937, at 1. On the other

of the strikers by direct intervention also failed.<sup>355</sup> The President abandoned the strikers to their fate.<sup>356</sup>

In light of all these factors, it is not clear that the union could have won the strike even had the companies not opposed the strike in such an aggressive and violent way, especially considering that the Wagner Act actually did (and does) so little to diminish the enormous advantage in economic power that employers enjoy over workers.<sup>357</sup> There is a real possibility that the strike might have been broken simply by a convergence of the factors just mentioned with the companies' economic lasting power and their eventual use of replacement workers. Of course, the companies had no intention of being tested in this way, and they were not.

#### D. Violence Elsewhere in the Defense of the Open Shop

The strikes at Remington Rand and in the automobile and steel industries are among the most vivid examples of organized industrial violence in this period and they had the greatest influence on labor policy in the years that followed, but these were not the only industries or firms to rely on such methods. Other cases from the period, abundantly documented in NLRB and La Follette Committee records, illustrate how widespread these practices actually were. Although there is not space here to review all examples even briefly, several bear mention both as illustrations and for their relative importance to the effort that followed to reshape the labor law.

For example, in 1935, Eagle-Picher Mining & Smelting, a company with lead and zinc mining and smelting plants in Oklahoma, Missouri, and Kansas, responded aggressively to an organizing drive by the leftist International Mine, Mill, and Smelter Workers (MM). MM's program was aimed at challenging hazardous working conditions and relentless racial segregation at Eagle-

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attempts to mediate the dispute, see *Davey Works on New Steel Peace Course*, *supra* note 352.

<sup>355</sup> *Federal Board of 3 Appointed to Speed Steel Strike Peace; Both Sides Will 'Co-operate.'* WASH. POST, June 18, 1937, at 1; *National Affairs: Strike*, WASH. POST, June 27, 1937, at 25; *U.S. Opens Hearings to End Steel Strike: President Roosevelt Says Steel Companies Should Sign Contracts*, STEEL LAB., June 21, 1937, at 1. On Roosevelt's earlier hints at supporting the union, see also *'Sign,' Is Roosevelt's Hint to Steel Firms*, CLEVELAND PLAIN DEALER, June 16, 1937, at 1.

<sup>356</sup> BERNSTEIN, *supra* note 10, at 713; *President Quotes*, *supra* note 352.

<sup>357</sup> From the outset, the regime enacted by the Wagner Act was saddled by inadequate remedies. Most notably, the statute never included any provision for the actual punishment of employers for their violations of the labor law, no matter how egregious; rather, its remedies were (and remain) limited to "making whole" the victims of employers' violations and preventing future violations. In effect, the only real cost for an employer of denying workers their rights under the statute is the prospect of having to pay unlawfully fired workers back-pay (subject to a mitigation requirement) and to offer such workers reinstatement. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940). Very early on the statute was also construed to allow employers to run their businesses during a strike with either temporary (if the strike is caused by the employers' violations of the labor law) or permanent replacement (if the strike is caused by anything else) workers. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 346-47 (1938). The statute did not require employers to close during a strike, no matter the cause, and it offered workers no other material support during the course of a strike.

Picher's operations.<sup>358</sup> When the union launched a strike in May 1935, the company announced its absolute intention not to deal with the union and then launched a back-to-work movement of the sort contemplated by the Mohawk Valley Formula. It also used its company union to stage huge "pick-handle" parades and other mass demonstrations of company force.<sup>359</sup> The company organization also led violent attacks on union people. Numerous union members were brutally beaten by company agents, including one whose face was nearly torn off.<sup>360</sup> The tactics broke the organizing drive.<sup>361</sup>

Similar methods were used by Goodyear in Gadsden, Alabama, to defeat an organizing drive by the United Rubber Workers of America. Among the company's tactics, which the NLRB called a "series of acts of terrorism," were systematic beatings of organizers and union supporters, on some occasions by mobs under company control, and forcible eviction of organizers from company property and eventually from the town. The company also successfully pressuring the town to enact ordinances giving police the right to enter homes and arrest people without warrants and prohibiting boycotting, picketing, or "preaching" violations of the principles of the ordinances.<sup>362</sup> In fact, the company was able to install a number of personnel of its own choosing on the police force. Goodyear's campaign against the union culminated on June 25, 1936, when a mob of several hundred "loyal" employees left the plant and, variously armed, marched on the union headquarters, sacked it, and beat organizers after they refused to leave town, all while police stood by passively.<sup>363</sup> A renewed effort by the union to organize in 1937 brought similar acts of intimidation.<sup>364</sup>

NLRB records and La Follette Committee investigations confirm that terroristic tactics extended across the industrial landscape of the mid- and late-1930s, including the coal mining and firebrick industries of central Appalachia, the industrial agricultural regions of inland California and the Pacific Northwest, the sharecropping areas of the South and Southern Plains, and in many other manufacturing industries. In all these places, powerful employers systematically used violence and threats of violence to ensure their workers would not enjoy meaningful labor rights.<sup>365</sup> Occasionally, determined efforts overcame such methods, as in the automobile industry; in other instances, however, as in Little Steel, employers only came to abide their obligations under the labor law when compelled by other factors, including conditions placed on lucrative wartime contracts.<sup>366</sup>

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<sup>358</sup> The organization created by the company to oppose the MM explicitly excluded black workers. *In re Eagle-Picher Mining & Smelting Co.*, 16 N.L.R.B. 727, 735 (1939).

<sup>359</sup> *Id.* at 744-46, 757-62.

<sup>360</sup> *Id.* at 762-63.

<sup>361</sup> *See id.* at 765.

<sup>362</sup> *In re Goodyear Tire & Rubber Co.*, 21 N.L.R.B. 306, 308, 329, 331, 339 (1940).

<sup>363</sup> *Id.* at 344-60.

<sup>364</sup> *Id.* at 321.

<sup>365</sup> Taft & Ross, *supra* note 1, at 221-24.

<sup>366</sup> JAMES B. ATLESON, *LABOR AND THE WARTIME STATE: LABOR RELATIONS AND LAW DURING WORLD WAR II* 59-60 (1998); *see also* NELSON LICHTENSTEIN, *LABOR'S WAR AT HOME: THE CIO IN WORLD WAR II* 47 (1982).

#### IV. OFFENDERS AS VICTIMS: INDUSTRIAL TERRORISM AND THE UNMAKING OF NEW DEAL LABOR LAW

The violence and disorder associated with employers' use of terroristic tactics became in the late 1930s and 1940s the central theme in an aggressive counterattack on labor rights. In the courts and in Congress, violence and disorder were presented as proof of the irresponsibility of unions and of the NLRB's overprotection of labor rights, and thus as evidence of the need to judicially re-conceptualize labor rights, reform the NLRB, and eventually radically redraft the labor law. The authors of this effort—conservative business leaders, congressmen, and judges—never refuted the central findings of the NLRB and La Follette Committee that employers were responsible for more serious violence, that the violence they committed was aimed at subverting the law, and that these actions together consistently provoked the violence and disorder charged to unionist and the aggressive enforcement of the law by the NLRB. Rather, the strategy was simply to recast the offenders as victims and let the violence they authored speak in their favor.

##### A. *A Jurisprudential Framework for Retrenching Labor Rights: Sit-Down Strikes in the Courts*

The Supreme Court did not begin to reckon with the legal implications of the sit-down strikes until 1939, a couple of years after their height. Conspicuously, the cases in which the court did so were in many ways conveniently peripheral to the traditions of employer-sponsored violence that actually inspired many of the sit-down strikes. The main case, *NLRB v. Fansteel Metallurgical*, involved a small rare-metals manufacturer; the other, *Southern Steamship v. NLRB*, involved a small ocean-shipping company.<sup>367</sup> Although clearly guilty of gross violations of the Wagner Act, neither company had committed the kind of violence that was common elsewhere, including at other firms in the metals and maritime trades. At the same time, the strikes involved in these cases were not nearly as sensational as the great automobile sit-down strikes at GM and Chrysler. Nevertheless, the Court used these cases to develop a jurisprudence that subordinated the reformist tendencies of Wagner Act to a conservative ideology of property and authority.

The factual circumstances of *Fansteel* and *Southern Steamship*, as well as their reactionary jurisprudential legacies, have been described elsewhere and need only be reviewed briefly. *Fansteel* arose out of the same organizing drive that resulted in the Little Steel Strike. In mid-February 1937, just as the GM sit-down was ending in victory for the UAW, ninety-five workers at a small suburban Chicago metals plant seized two buildings in the company's production complex in a final act of protest against the company's repeated violations of their rights under the Wagner Act.<sup>368</sup> Led by a SWOC organizer, the strikers held the plant for ten days, defying orders to leave the plant, ignoring an

<sup>367</sup> *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 31 (1942); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 247 (1939).

<sup>368</sup> *Fansteel Metallurgical Corp. v. NLRB*, 98 F.2d 375, 377 (7th Cir. 1938); *In re Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 939-43 (1938); Transcript of Record at 1878-80, *Fansteel Metallurgical*, 306 U.S. 240 (No. 436).

injunction and an arrest warrant, as well as a threat of permanent discharge, and repelling an attempt by a large group of deputy sheriffs to evict them.<sup>369</sup> For its part, the company rebuffed state and federal attempts at mediation.<sup>370</sup> Finally, on February 26, a larger force of police overcame the strikers in “pitched battle” and arrested most of them.<sup>371</sup> Several months later, thirty-seven strikers were tried and convicted of criminal contempt in local court and sentenced to fines and jail time, with their leaders receiving fairly substantial penalties.<sup>372</sup> After the strike, the organizers amended the unfair labor practices charges they had earlier filed against the company to include claims about the company’s conduct during and after the sit-down strike.<sup>373</sup> The union also continued a conventional strike against Fansteel.<sup>374</sup> Nevertheless, Fansteel resumed operations after the sit-down strike with crossovers and replacement workers and set in place a full-fledged company union.<sup>375</sup>

The NLRB formally charged Fansteel with a number of violations of the Wagner Act, including unlawfully refusing to recognize and bargain with the union, spying on the union, endeavoring to form a company union, discharging the sit-down strikers and several who aided them for union activity, and discriminatorily rehiring workers who renounced the union.<sup>376</sup> The company claimed its conduct was justified by the illegal and violent nature of the strike.<sup>377</sup> Despite this, the Board eventually found Fansteel culpable of all these charges and ordered it to undertake various remedial actions, including reinstatement of most of the strikers.<sup>378</sup> The agency invoked the company’s lack of “clean hands” and its own violations of the law to overcome the company’s arguments that the strike was illegal.<sup>379</sup> The Board also reasoned that its prerogative to fashion remedies to advance the aims of the law clearly trumped Fansteel’s *post hoc* rationalizations.<sup>380</sup> The Board in fact went a step further, stressing that it did not automatically discount strikers’ criminal behavior in deciding whether to order their reinstatement and citing several cases involving serious felonies in which it had rejected that remedy.<sup>381</sup>

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<sup>369</sup> *In re Fansteel Metallurgical*, 5 N.L.R.B. at 942-43; Transcript of Record, *supra* note 368, at 1880.

<sup>370</sup> *In re Fansteel Metallurgical*, 5 N.L.R.B. at 943; Transcript of Record, *supra* note 368, at 1880.

<sup>371</sup> *In re Fansteel Metallurgical*, 5 N.L.R.B. at 943.

<sup>372</sup> Transcript of Record, *supra* note 368, at 1733-37; Brief of Respondent at 8, *Fansteel Metallurgical*, 306 U.S. 240 (No. 436); 3 *in Fansteel Sitdown Strike End Jail Terms*, CHI. DAILY TRIB., Sept. 5, 1939, at 13.

<sup>373</sup> Transcript of Record, *supra* note 368, at 23, 32-33; *see also* *Fansteel Metallurgical Corp. v. Lodge 66*, 14 N.E.2d 991, 993 (Ill. App. Ct. 1938).

<sup>374</sup> *In re Fansteel Metallurgical*, 5 N.L.R.B. at 943-44; Transcript of Record, *supra* note 368, at 1882.

<sup>375</sup> *In re Fansteel Metallurgical*, 5 N.L.R.B. at 943-44, 946-47; Transcript of Record, *supra* note 368, at 1897-1900.

<sup>376</sup> Transcript of Record, *supra* note 368, at 26-30.

<sup>377</sup> *In re Fansteel Metallurgical*, 5 N.L.R.B. at 949.

<sup>378</sup> *Id.* at 950.

<sup>379</sup> *Id.* at 949-50.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*



The Board's decision was overturned by the Seventh Circuit Court of Appeals on nearly every issue.<sup>382</sup> This set the stage for the Supreme Court to decide the case. For Chief Justice Charles Evans Hughes, who wrote the majority opinion, the case hinged on one issue—whether the Board had the lawful authority to order the strikers reinstated.<sup>383</sup> Hughes concluded it did not; he deemed the discharges totally justified by the nature of the strike: “[I]t was a high-handed proceeding without shadow of legal right” that gave “good cause” for the strikers’ discharge unless this was otherwise prevented by the Wagner Act.<sup>384</sup> While conceding that Fansteel had violated the labor law, he held “there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property.”<sup>385</sup> In Hughes’s view, this fact left intact Fansteel’s “normal rights of redress,” including the right to fire the strikers.<sup>386</sup> He rejected the Board’s argument that the strikers might nonetheless remain employees under the Wagner Act, and were thus entitled to benefit from the Board’s remedial powers.<sup>387</sup> And he rejected the related claim that the Board could nonetheless reinstate the strikers in the interest of advancing the broader aims of the Act.<sup>388</sup> In response to the Board’s conclusion that Fansteel had discriminatorily rehired those who renounced the union, Hughes merely appealed to an employer’s inherent right to decide whom it employs.<sup>389</sup> Citing the discharges as evidence that the union must have lost support, Hughes also rejected the Board’s order that Fansteel recognize and bargain with it.<sup>390</sup>

*Fansteel* established that sit-down strikers are beyond the protections of labor law. Somewhat more broadly, the decision endorsed traditional notions of social order and workplace authority and offered a startling affirmation that the New Deal had not fundamentally altered the relationship between labor and capital. As James Pope has put it, *Fansteel* verified that “the employer could violate the workers’ statutory rights without sacrificing its property rights, while the workers could not violate the employer’s property rights without sacrificing their statutory rights—a return to the hierarchy of values that predated the Wagner Act.”<sup>391</sup> Similarly apt is Karl Klare’s judgment that *Fansteel* embodies a formalistic and retrograde rejection of the textured realities on labor relations on which might be based a reformist jurisprudence of labor

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<sup>382</sup> *Fansteel Metallurgical Corp. v. NLRB*, 98 F.2d 375, 382 (7th Cir. 1938).

<sup>383</sup> *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 247, 252-53 (1939). Hughes did not challenge the Board’s findings regarding various unfair labor practices that preceded the sit-down strike.

<sup>384</sup> *Id.* at 252.

<sup>385</sup> *Id.* at 253.

<sup>386</sup> *Id.* at 254.

<sup>387</sup> *Id.* at 255-57.

<sup>388</sup> *Id.* at 257-58.

<sup>389</sup> *Id.* at 260.

<sup>390</sup> *Id.* at 261-62. Justices Stanley Reed and Hugo Black dissented on the main question of reinstatement in an opinion written by Reed that stressed the importance of deferring to the Board. Justice Harlan Fiske Stone concurred with Hughes on most points. *Id.* at 263-68.

<sup>391</sup> Pope, *supra* note 12, at 106.

rights in favor of one that simply valorizes conventional notions of property and authority.<sup>392</sup>

*Fansteel* had immediate and destructive consequences for unionists. In its wake, employers fired hundreds of workers whom they accused of engaging in sit-down strikes.<sup>393</sup> They also charged workers with sit-down strikes as a means of defending themselves against Board orders of reinstatement.<sup>394</sup> Often, these strategies worked; the Board acceded to *Fansteel* and declined jurisdiction or denied reinstatement.<sup>395</sup> But in other cases, the Board properly rejected such claims as pretexts or mischaracterizations of strike activity.<sup>396</sup> In a few cases, the Board continued to reinstate strikers who left peacefully when ordered by the police or were denied reinstatement in discriminatory fashion.<sup>397</sup> The lower courts for the most part took a more conservative approach, occasionally declining to uphold Board orders in such cases.<sup>398</sup>

In late 1939, the Third Circuit Court of Appeals issued a ruling that seemed indirectly to support the Board's quest for a nuanced approach to sit-down strikes, union violence, and disorder, more generally. In *Republic Steel v. NLRB*, the court upheld a Board decision ordering Republic Steel to reinstate Ohio Little Steel strikers implicated in crimes.<sup>399</sup> In its decision, the Board had refused simply to defer to allegations of criminality or violence where such charges were not backed by guilty pleas or convictions.<sup>400</sup> Rather, it ordered reinstatement for all strikers except those who had actually been adjudged guilty of serious felonies, basing this decision in part on Republic's role in provoking the strike and the fact that it had engaged in acts of violence more serious than those of the strikers.<sup>401</sup> Although the Third Circuit denied the Board the authority to reinstate those guilty of serious misdemeanors, the

<sup>392</sup> Klare, *supra* note 3, at 323-24.

<sup>393</sup> Most notably, two New Jersey companies, Archer Daniels Midland and Mergott, retroactively fired several hundred employees for their participation in sit-downs. *50 More Lose Jobs on Sit-Down Rule*, N.Y. TIMES, Mar. 3, 1939, at 18.

<sup>394</sup> See, e.g., *In re Ohio Fuel Gas Co.*, 35 N.L.R.B. 1128, 1132 (1941); *In re Ford Motor Co.*, 31 N.L.R.B. 994, 999 (1941); *In re United Dredging Co.*, 30 N.L.R.B. 739, 787 (1941); *In re Ford Motor Co.*, 29 N.L.R.B. 873, 914 (1941); *In re Cudahy Packing Co.*, 29 N.L.R.B. 837, 866-67 (1941); *In re Metal Hose & Tubing Co.*, 23 N.L.R.B. 1121, 1138 (1940); *In re Condenser Corp. of Am.*, 22 N.L.R.B. 347, 431 (1940).

<sup>395</sup> See, e.g., *In re Ore S.S. Corp.*, 29 N.L.R.B. 954, 964 (1941); *In re Aladdin Indus., Inc.*, 22 N.L.R.B. 1195, 1216 (1940), *enforced as modified*, 125 F.2d 377 (7th Cir. 1942); *In re Beckerman Shoe Corp.*, 21 N.L.R.B. 1222, 1237 (1940); *In re Swift & Co.*, 21 N.L.R.B. 1169, 1188 (1940); *In re Reading Batteries, Inc.*, 19 N.L.R.B. 249, 259 (1940).

<sup>396</sup> See, e.g., *In re Ohio Fuel Gas*, 35 N.L.R.B. at 1136-37; *In re Ford Motor*, 31 N.L.R.B. at 1026-27; *In re United Dredging*, 30 N.L.R.B. at 787; *In re Ford Motor*, 29 N.L.R.B. at 914; *In re Cudahy Packing*, 29 N.L.R.B. at 867-68; *In re Metal Hose & Tubing*, 23 N.L.R.B. at 1138; *In re Condenser Corp.*, 22 N.L.R.B. at 431. On this critical tendency by the Board, see also *NLRB v. Bradford Dyeing Ass'n*, 310 U.S. 318, 340-42 (1940).

<sup>397</sup> See, e.g., *In re Stewart Die Casting Corp.*, 14 N.L.R.B. 872, 896-900 (1939), *enforced as modified*, 114 F.2d 849 (7th Cir. 1940); *In re Universal Film Exch., Inc.*, 13 N.L.R.B. 484, 489-90 (1939).

<sup>398</sup> See, e.g., *McNeely & Price Co.*, 6 N.L.R.B. 800 (1938), *enforcement denied*, 106 F.2d 878 (3d Cir. 1939).

<sup>399</sup> *Republic Steel Corp. v. NLRB*, 107 F.2d 472, 480 (3d Cir. 1939).

<sup>400</sup> *In re Republic Steel Corp.*, 9 N.L.R.B. 219, 387-88 (1938).

<sup>401</sup> *Id.* at 391.

court's decision upheld the Board's decision with respect to all the other strikers.<sup>402</sup> The Third Circuit's *Republic Steel* decision was in definite tension with *Fansteel*, for it seemed, unlike *Fansteel*, to endorse a contextual approach to strike violence. This tension would be relieved when a broader and more reactionary reading of *Fansteel* came to govern cases like *Republic Steel* and *Republic Steel* itself emerged as evidence of the need to reform the law.

The *Southern Steamship* case also emerged out of continuing conflict about the extent of labor rights under the Wagner Act, and, like *Fansteel*, it also involved a small company in an industry dominated by large firms. At the time, Southern Steamship operated seven cargo vessels, mainly along the eastern seaboard.<sup>403</sup> In early 1938, a CIO affiliate, the National Maritime Union (NMU), representing "unlicensed seamen," won an NLRB-sponsored election at that company and approximately fifty other shipping lines.<sup>404</sup> However, like many other employers, even after the Supreme Court upheld the Wagner Act in *NLRB v. Jones & Laughlin*, Southern Steamship refused to recognize and bargain with the union.<sup>405</sup> It filed specious objections with the Board contesting the results of the election and rejected union requests to confer on a contract.<sup>406</sup> Finally in mid-July 1938, thirteen NMU members on the freighter *City of Fort Worth* gathered on deck and refused to perform their duties until the company agreed to bargain with the union.<sup>407</sup> The captain read them their shipping articles (traditional individual contracts for shipboard service), declared the strike illegal under the terms of those documents, and ordered them back to work, but the strikers remained steadfast and responded by insisting that the law—the Wagner Act—was actually on their side.<sup>408</sup> The standoff lasted until that evening, when lawyers for the company and the union agreed that the strikers would resume their duties and the company in turn would commence collective bargaining and refrain from disciplining the strikers.<sup>409</sup> The ship sailed that night and reached its destination at Philadelphia without further problems, and, in fact, the strikers' conduct during the voyage was "exemplary."<sup>410</sup> Nevertheless, when the ship made port, the captain fired five of the strikers.<sup>411</sup> This led to a conventional strike by the remaining seamen who had participated in the Houston strike, and who were themselves then discharged.<sup>412</sup>

The NLRB eventually charged the company with refusing to recognize and bargain with the union, interfering with the seamen's rights of self-organization and collective bargaining, and discharging and refusing to reinstate the

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<sup>402</sup> *In re Republic Steel*, 107 F.2d at 480.

<sup>403</sup> Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB. L. 275, 318 (2004).

<sup>404</sup> *Id.* at 315, 318-19; *In re Southern S.S. Co.*, 23 N.L.R.B. 26, 29 (1940).

<sup>405</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31 (1937).

<sup>406</sup> *In re Southern S.S.*, 23 N.L.R.B. at 29-31; Transcript of Record at 705-06, *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942) (No. 320).

<sup>407</sup> Transcript of Record, *supra* note 406, at 708-10.

<sup>408</sup> *In re Southern S.S.*, 23 N.L.R.B. at 33.

<sup>409</sup> *Id.* at 34; Transcript of Record, *supra* note 406, at 709.

<sup>410</sup> Transcript of Record, *supra* note 406, at 710-11.

<sup>411</sup> *In re Southern S.S.*, 23 N.L.R.B. at 35; Transcript of Record, *supra* note 406, at 711.

<sup>412</sup> *In re Southern S.S.*, 23 N.L.R.B. at 35.

strikers.<sup>413</sup> The Board's decision confronted Southern Steamship's claim that the strike was illegal under *Fansteel*.<sup>414</sup> On the one hand, the strike did occur on the property of the employer and was at least in violation of the strikers' shipping articles, if not an act of criminal mutiny, which could also not be dismissed out of hand.<sup>415</sup> On the other hand, there were facts in favor of the seamen: the strike was entirely peaceful; it was never in defiance of an order to evacuate the ship; the Wagner Act was enacted one hundred years after the mutiny law and, under it, individual contracts could not negate basic labor rights; and because the strike took place dockside, it never put the ship or its crew in any danger.<sup>416</sup> There was also the fact that the strike could hardly be considered trespass to the company's property, as the ship was the strikers' part-time home.<sup>417</sup> Citing all these concerns, the Board rejected the company's claim that it had valid grounds to discharge the strikers and ordered the reinstatement of the discharged seamen.<sup>418</sup>

By the time the Supreme Court heard arguments in *Southern Steamship*, the United States was fully involved in the Second World War.<sup>419</sup> In the interim, the Third Circuit Court of Appeals had largely validated the Board's decision and its underlying reasoning.<sup>420</sup> At the center of Southern Steamship's argument to the High Court was the claim that its ship's officers held an inviolate authority, codified in the law of mutiny, to control workers aboard its vessels, and that this authority had been illegally flouted by the strikers and violated by the Board's order that they be reinstated.<sup>421</sup> These arguments would carry the day. Writing for a 5-4 majority, James Byrnes agreed that the strikers were in fact a dependent class of workers and had indeed committed mutiny by striking.<sup>422</sup> Having established this, Byrnes then declared categorically, and with little but his own judgment to back this, that the Board could not "accommodate" the mutiny law to the labor law, even if this were necessary to preserve for seamen a meaningful right to strike. The right to strike had to yield.<sup>423</sup>

Notwithstanding its unique maritime context, *Southern Steamship* portended, in two ways, a broad erosion of the right to strike. First, *Southern Steamship* effectively extended the *Fansteel* prohibition of sit-down strikes to strikes that do not feature outright seizure of property, violence, defiance of legal process, or actual prosecution. Byrnes's opinion made clear that workers who engage in such strikes forfeit any right to benefit from Board remedies, regardless of their actual conduct during the protest. Second, *Southern Steamship* expanded the principle in *Fansteel* that the illegality of a strike necessarily precludes reinstatement of workers involved in the strike. In part because the

<sup>413</sup> Transcript of Record, *supra* note 406, at 60-63.

<sup>414</sup> *In re Southern S.S.*, 23 N.L.R.B. at 28, 37-38.

<sup>415</sup> *Id.* at 37-38.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 38.

<sup>418</sup> *Id.* at 47-48; Transcript of Record, *supra* note 406, at 710.

<sup>419</sup> *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942).

<sup>420</sup> *Southern S.S. Co. v. NLRB*, 120 F.2d 505, 511 (3d Cir. 1941).

<sup>421</sup> Brief of Petitioner at 9, 12-13, *Southern S.S. Co.*, 316 U.S. 31 (No. 320).

<sup>422</sup> See *Southern S.S. Co.*, 316 U.S. at 32, 41.

<sup>423</sup> *Id.* at 46-49.

Board had deemed the discharge of the seamen unlawful in itself, *Southern Steamship* more clearly than *Fansteel* established that workers who engage in an illegal strike are subject to discharge without this constituting a violation of the labor law.

Since these cases were decided, the courts have regularly called on *Fansteel* and *Southern Steamship* to justify further limits that circumscribe the boundaries of the right to strike, particularly where the Board has attempted to reinstate strikers implicated in violence, disorder, or affronts to private property.<sup>424</sup> The most notorious example of this is a case decided by the Seventh Circuit Court of Appeals, *NLRB v. Perfect Circle*.<sup>425</sup> Although the case was decided before Taft-Hartley gave some statutory license to such a ruling, the court held that *Fansteel* required that it overturn the Board's reinstatement of four strikers who, in perhaps only the slightest conceivable way, had impeded a plant manager's access to company property.<sup>426</sup> In cases since Taft-Hartley, the courts have called on *Fansteel* and *Southern Steamship* to bar reinstatement in all kinds of cases involving worker "misconduct" that otherwise bear little resemblance to sit-down strikes. The types of cases include those where workers impugned the value of their employer's services;<sup>427</sup> where they were implicated in trivial acts of picket-line violence;<sup>428</sup> where they were provoked to violent or disorderly acts;<sup>429</sup> and where they struck in a fashion timed to threaten damage to the employer's plant, even where the employer appeared to condone the behavior.<sup>430</sup>

Although typically cited in these cases as a kind of exclamation point to *Fansteel*, *Southern Steamship* has also left its own peculiar legacy in labor law. The most important example of this is the 2002 Supreme Court decision *Hoffman Plastic Compounds v. NLRB*, in which the Court explicitly invoked *Southern Steamship* (and, more generally, *Fansteel*) for the proposition that the Board is without authority under any circumstances to order reinstatement or back-pay remedies to the benefit of undocumented workers.<sup>431</sup> The Court reasoned that any other approach would necessarily undermine the enforcement of the immigration laws.<sup>432</sup> More recently, the authority of *Southern Steamship* was used by the Board in a different way, more in keeping with its original subject. In 2006, the Board cited the cases to justify declining to reinstate twenty-three fish processors who had been fired for engaging in a strike aboard

<sup>424</sup> For cases where the courts have tied their use of *Fansteel* or *Southern Steamship* directly to the construction of section 8(b)(1)(A), section 10(c), or section 13, see, for example, *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1004 (8th Cir. 1965).

<sup>425</sup> *NLRB v. Perfect Circle Co.*, 162 F.2d 566 (7th Cir. 1947).

<sup>426</sup> *Id.* at 572.

<sup>427</sup> *Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 516-17 (2d Cir. 1980).

<sup>428</sup> *Schreiber Mfg., Inc. v. NLRB*, 725 F.2d 413, 414-15 (6th Cir. 1984). *But see In re Schreiber Mfg. Co.*, 262 N.L.R.B. 1196, 1197 (1982). *See also NLRB v. Longview Furniture Co.*, 206 F.2d 274, 274 (4th Cir. 1953).

<sup>429</sup> *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 844-46 (8th Cir. 1964).

<sup>430</sup> *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 413 (5th Cir. 1955); *see also NLRB v. Clearfield Cheese Co.*, 213 F.2d 70, 75 (3d Cir. 1954).

<sup>431</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002).

<sup>432</sup> *Id.* at 142-49; *see, e.g., Christopher David Ruiz Cameron, Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 9 (2003).

ship—workers whose only resemblance to the seamen involved in *Southern Steamship* lay in the fact that they worked aboard a ship.<sup>433</sup>

*B. Sit-Down Strikes, Strike Violence, and the Congressional Attack on the Wagner Act and the NLRB*

By 1938, the Board was vigorously prosecuting cases against the most prominent practitioners of industrial terrorism, including the Little Steel companies, Ford, and Remington Rand.<sup>434</sup> As historian James Gross has shown, the Board's efforts in all these cases were about as heroic as legal practice ever has been, as Board personnel negotiated threats to witnesses and themselves, numerous dilatory tactics (including attempts of the kind already mentioned to enjoin their jurisdiction), and pretextual arguments (such as Little Steel's claim that it was not obliged to reduce collective bargaining agreements to written contracts) in order to hold the companies to account.<sup>435</sup> Increasingly, these companies were being held to some account, although only after they had asserted every conceivable opportunity to appeal the Board's rulings.<sup>436</sup> For example, the Board would eventually order the Little Steel companies to reinstate at least five thousand, and as many as seven thousand, workers and pay hundreds of thousands of dollars in back-pay.<sup>437</sup>

For a powerful coalition of open shop industrialists, congressional conservatives, anti-CIO unionists, and editorialists in the largely anti-CIO mainstream press, the Board's aggressive handling of these cases was the most salient—and perhaps vulnerable—expression of an intolerable challenge to the prerogatives on which these employers had built their open shops.<sup>438</sup> Initially, these forces mounted a political campaign against the Board, accusing it of indulging violence and promoting labor rights at the expense of those of business.<sup>439</sup> However, although it did weaken the Board's position politically, this campaign had little apparent effect on its approach to these cases.<sup>440</sup> And so the agenda expanded to encompass either repealing or substantially amending the statute.

The strategy that emerged to accomplish this was premised on vigorous investigation of the Board's handling of these cases in order to turn up material with which to impugn the agency and the labor law. At the center of this effort were lawyers with the Little Steel companies.<sup>441</sup> The overall plan has its impetus in the rightward shift of Congress in the 1938 election. By 1939, Congress had authorized two investigations of the Board and the Wagner Act—one by the Senate Committee on Education and Labor, chaired by Elbert Thomas of Utah (the Thomas Committee), and the other by a Special Committee of the

<sup>433</sup> *In re Phx. Processor L.P.*, 348 N.L.R.B. 28, 28 (2006).

<sup>434</sup> GROSS, *supra* note 13, at 16-17.

<sup>435</sup> *See generally id.* at 10-19.

<sup>436</sup> *Id.* at 34-39.

<sup>437</sup> Transcript of Record at 797-98, *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (No. 14); BERNSTEIN, *supra* note 10, at 727-28.

<sup>438</sup> GROSS, *supra* note 13, at 108.

<sup>439</sup> *Id.* at 39.

<sup>440</sup> *Id.*

<sup>441</sup> *Id.* at 75.

House of Representatives charged with investigating the NLRB and chaired by Howard K. Smith of Virginia (the Smith Committee).<sup>442</sup>

A major focus for both committees was the Board's handling of the sit-down strike cases. The Thomas Committee challenged the Board's general counsel, Charles Fahey, to defend the Board's policy of applying *Fansteel*, and likewise to explain its policy on shipboard strikes—the issue that would eventually arise in *Southern Steamship*.<sup>443</sup> The committee put similar questions to Board members and other personnel.<sup>444</sup> Board personnel defended these charges by oral testimony and by submitting to the committee a detailed report in which the agency attempted to show (1) that sit-down strikes were actually becoming less common and (2) that even before *Fansteel*, the Board had consistently treated sit-down strikers as it had others implicated in violence—that is, as subject to forfeiture of reinstatement rights if their actions were sufficiently egregious or not counterweighted by other important equities.<sup>445</sup> Furthermore, in an effort to defend Board decisions ordering reinstatement of strikers guilty of minor acts of criminality and violence, the report also sought to distinguish the agency's approach to conventional strike cases like *Republic Steel* from *Fansteel*.<sup>446</sup>

For every witness who testified in defense of the Board and the Act there were others permitted to give contrary, damaging testimony. AFL leaders contended before the Thomas Committee that the Board's supposed tolerance of sit-down strikes was part of program of favoring CIO unions.<sup>447</sup> Counsel for *Fansteel* itself appeared and argued that the Board's case against the company was somehow contrived.<sup>448</sup> The Thomas Committee also heard from the head lawyer with the NAM and the secretary of the Automobile Manufacturers Association, both of whom presented their constituent employers as innocent victims of the Board's sufferance of sit-down strikes.<sup>449</sup> Various elected officials, including Representative Claire Hoffman of Michigan, were also allowed to make similar claims.<sup>450</sup>

Such charges of Board indulgence of sit-down strikes were interwoven with a broader attempt to charge the Board with tolerating and encouraging other kinds of union-sponsored violence. Among the witnesses allowed to press this claim was Walter Tower, a representative of the American Iron and Steel Institute—the body the La Follette Committee rightly accused of working with the NAM to coordinate the steel companies' actions in the Little Steel Strike.<sup>451</sup> In testimony to the Thomas Committee, Tower not only completely mischaracterized his industry's opposition to the Wagner Act as somehow an

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<sup>442</sup> *Id.* at 103-05.

<sup>443</sup> *Thomas Committee Hearings*, *supra* note 249, at 425, 2343-46.

<sup>444</sup> *Id.* at 1600.

<sup>445</sup> *Id.* at 467, 482, 523-24.

<sup>446</sup> *Id.* at 523-25.

<sup>447</sup> *Id.* at 1074.

<sup>448</sup> *Id.* at 1927-57, 4517-44.

<sup>449</sup> *Id.* at 2132-33, 2139, 2474, 7455-72.

<sup>450</sup> *Id.* at 63.

<sup>451</sup> *Thomas Committee Hearings*, *supra* note 249, at 1627-28; *LITTLE STEEL*, *supra* note 8, at 54-56.

occasion of principled and lawful disagreement,<sup>452</sup> but also explicitly appropriated the issue of violence to the industry's cause. Tower held the industry out as protector of employees vulnerable to and victimized by CIO violence on the picket lines, and Tower described the industry as pushing for changes to the Wagner Act to protect "employees in the exercise of the rights guaranteed by the act."<sup>453</sup> Wrapped up in this was an appeal to the "right to work" as well as to the "free speech" of employees and employers.<sup>454</sup> (However, when challenged by Allen Ellender of Louisiana on the industry's massive expenditure on propaganda and strikebreaking services during Little Steel Strike—again, an assertion well documented by the La Follette Committee—Tower could say little).<sup>455</sup> The NAM's lawyer contended that the Wagner Act was flawed by the lack of a provision dealing with criminality, and that local criminal laws were inadequate to deal with the issue because they did not apply to the union itself.<sup>456</sup> The same witness argued that the statute needed to be amended to deny the right to reinstatement—and with this, an effective right to strike—to those guilty of "violence and intimidation," as in the *Republic Steel* case.<sup>457</sup> None other than Senator Robert Taft of Ohio, future author of the Taft-Hartley Act, joined the NAM's lawyer in this attempt to depict *Republic Steel* as an abuse of agency authority.<sup>458</sup>

Board personnel and CIO officials attempted to rebut these charges. In so doing, they faced a rather fraught challenge, if not a trap. On the one hand, it would obviously play into their adversaries' hands to deny that such violence had occurred—there *had been* considerable union-sponsored violence in these cases, particularly those emanating from the Little Steel Strike, in which there were not only the sabotage cases but also hundreds, maybe thousands, of run-of-the-mill assaults on company loyalists.<sup>459</sup> On the other hand, although confessing that violence had occurred and trying to explain why the Board was right to reject the view that such violence did not necessarily put workers beyond the protections of the labor law made for a plausible argument, elaborating such a position could easily give ground to a destructive narrative about out-of-control unions and an overly indulgent Board.

Nevertheless, Board chairman J. Warren Madden, a contracts professor and old-style conservative who nonetheless oversaw the zealous enforcement of the Wagner Act, earnestly denied any undue tolerance for violence or criminality on the agency's part.<sup>460</sup> So too did the Board's written report to the Thomas Committee, which attempted to defend the equity of its position in *Republic Steel* against attempts to use the case to justify amending the statute to expressly bar reinstatement of just about anyone implicated in any strike-related violence.<sup>461</sup> CIO counsel Lee Pressman made similar arguments

<sup>452</sup> *Thomas Committee Hearings*, *supra* note 249, at 1628-29.

<sup>453</sup> *Id.* at 1634.

<sup>454</sup> *Id.* at 1631-35, 1638-39.

<sup>455</sup> *Id.* at 1641-70.

<sup>456</sup> *Id.* at 2124.

<sup>457</sup> *Id.* at 2124, 2128.

<sup>458</sup> *Id.* at 178-79, 219-22, 247, 273.

<sup>459</sup> *La Follette Committee Hearings*, *supra* note 224, exhibits 5195-197, at 13645-754.

<sup>460</sup> *Thomas Committee Hearings*, *supra* note 249, at 295-96.

<sup>461</sup> *Id.* at 467, 489, 520, 523.



against amending the statute, warning that amending the law to limit violence would threaten to eviscerate the law's central commitment to protecting basic labor rights.<sup>462</sup> Equally pertinent was the testimony of Byrl Whitney, of the Brotherhood of Railroad Trainmen, who was among a number of witnesses to suggest that depriving workers of their rights would actually foment more acts of industrial violence.<sup>463</sup> Even more to the point, Whitney charged that no one was proposing to broadly divest employers of their rights because of crimes or violence attributable to a few of them.<sup>464</sup>

The Thomas Committee heard from numerous witnesses who accused the Board of impinging on employers' free speech rights, with particular reference to how the agency had used statements by the companies to develop cases against Remington Rand and Ford.<sup>465</sup> It also entertained charges that the agency had behaved in a biased and procedurally improper manner in prosecuting its cases against the Little Steel companies, Ford, and Goodyear. In particular, the Board was accused of improperly filing and re-filing charges against Ford, allowing overly aggressive and biased staffers to press cases against the Little Steel firms, contriving the signed-contract requirement in its Little Steel cases, and of general bias against Goodyear.<sup>466</sup>

Yet again, the Board and its defenders attempted to rebut these charges without playing into the hands of conservatives. In its report to the Thomas Committee, the Board elaborated its argument (eventually endorsed by the Supreme Court) that the willingness to sign a collective bargaining agreement was relevant to showing good faith in bargaining, even if the statute did not ultimately require a contract to be reached, let alone signed, and did not empower the Board to dictate terms to the parties.<sup>467</sup> In a similar vein, the Board's report also argued that although the Board did not seek to limit employer speech as such, it was obliged to assess employer speech as part of its larger evaluation of whether the employer unlawfully interfered with workers' rights under the Wagner Act.<sup>468</sup> Likewise, Pressman, the CIO lawyer, offered the committee a statement in which he stressed the "economic background" of employer "free speech,"—that employer speech could not be properly evaluated when separated from the enormous power that employers wielded over workers.<sup>469</sup> Pressman focused on the Board's cases against Ford and Remington Rand, stressing in both cases that Board's order was directed only at speech in the context of union election campaigns and did not constitute as much of a blanket prohibition as the Board's enemies had implied.<sup>470</sup>

The Thomas Committee's investigation was actually somewhat measured in tone compared to that of the Smith Committee. The chair, Elbert Thomas, served on the La Follette Committee and was generally a defender of the Board

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<sup>462</sup> *Id.* at 4320-23.

<sup>463</sup> *Id.* at 2652-53.

<sup>464</sup> *Id.*

<sup>465</sup> *Id.* at 72-77, 2084-86.

<sup>466</sup> *Id.* at 66-67, 1663-1760, 1819-61, 1952-53.

<sup>467</sup> *Id.* at 467, 508.

<sup>468</sup> *Id.* at 467, 496.

<sup>469</sup> *Id.* at 4234.

<sup>470</sup> *Id.* at 4234-35, 4238-40.

and the Wagner Act. Thomas and other committee members conducted themselves in a fairly detached fashion, and Thomas for the most part allowed witnesses on both sides to fully explain their charges or countercharges. The same could not be said about the Smith Committee, whose membership included a number of ardent conservatives beside Smith himself.<sup>471</sup> The Smith Committee actively manipulated testimony and cultivated charges against the Board and the Wagner Act. Its investigation of the Board was actually extremely broad-ranging and involved a meticulous review of Board records, as well as literally thousands of polls and interviews of people with dealings before the Board—a classic fishing expedition, abetted by employers and AFL unionists who resented the way the Board had treated them.<sup>472</sup> Again, though, it was the industrial terrorism cases that provided the committee with the most useful fodder.

The Smith Committee attacked the Board for the way it fashioned remedies in these cases. For example, the committee charged the Board with improperly reinstating arrestees in cases against Ford as well as in the Little Steel cases.<sup>473</sup> One major complaint was that the Board's effort to cause the Little Steel companies to reimburse the Works Progress Administration for relief wages paid to unlawfully discharged strikers was excessive and punitive.<sup>474</sup> Clearly, though, the committee's antipathy went beyond this deceptively important concern. Showing remarkable sympathy for a company so thoroughly implicated in terrible acts of violence and an extraordinary litany of violations of the labor law, the committee painted the Board's "staggering penalty" against Republic as a "reprehensible" "invention" and went on to suggest, with little actual evidence, that the Board improperly conspired with the CIO in formulating it.<sup>475</sup> No word was paid to the staggering toll that the steel companies had taken on the strikers—or, for that matter, to the fact that even the back-pay awards imposed on Republic, which were by far the largest of those imposed on the steel companies, were rather small in comparison to that company's revenues and profits.<sup>476</sup>

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<sup>471</sup> Gross, *supra* note 13, at 91-93, 151-55, 210-11.

<sup>472</sup> *Id.* at 156-57.

<sup>473</sup> *National Labor Relations Act: Hearings on H. Res. 258 Before the H. Spec. Comm. to Investigate the National Labor Relations Board*, 76th Cong. 1592 (1939-1940) [hereinafter *Smith Committee Hearings*].

<sup>474</sup> *Id.* at 675, 710, 4981. The Board's effort was far from implausible, even though it was eventually rejected by a divided Supreme Court as beyond the Agency's discretion under the statute. David J. Farber, *Reversion to Individualism: The Back-Pay Doctrines of the NLRB*, 7 INDUS. & LAB. REL. REV. 262, 263-64 (1954).

<sup>475</sup> H.R. REP. NO. 76-3109, at 89-90 (1941) [hereinafter FINAL REPORT OF THE SMITH COMMITTEE]; see also *Smith Committee Hearings*, *supra* note 473, at 675-76, 710, 4981.

<sup>476</sup> Although the Board's back-pay and reinstatement orders against Republic stand even today as among the largest ever enforced under the labor law, they represent only a small fraction of the company's revenue and profit for the year of the strike (\$252 million and \$9 million respectively) or for the year in which most of the awards were tendered (in 1942, \$521 million and \$17 million respectively). 3 HOGAN, *supra* note 219, at 1239; ANNUAL REPORT OF REPUBLIC STEEL CORPORATION: FOR FISCAL YEAR ENDING DECEMBER 31, 1937, at 7 (1938); ANNUAL REPORT OF REPUBLIC STEEL CORPORATION: FOR FISCAL YEAR ENDING DECEMBER 31, 1942, at 7 (1943).

Even more pointedly than the Thomas Committee, the Smith Committee accused a number of Board personnel of bias in their handling of these cases. The charge was levied at several people, including General Counsel Fahey, who was accused of being an agent of the SWOC.<sup>477</sup> Also accused of bias was a regional director, whose bias was supposedly evident in angry and exasperated communications between him and officials at troublesome companies, as well as from a letter in which he recommended the agency take a more aggressive approach that would make “Little Steel realize that we are just a bit bigger than they are.”<sup>478</sup> Other personnel, including trial examiners, were also charged with bias.<sup>479</sup> However, the main target was the Board’s secretary (and later general counsel), Nathan Witt. The committee charged Witt with communicating with CIO and SWOC personnel in order to contrive Board cases against Inland and Sheet & Tube.<sup>480</sup> In fact, it seems that Witt actually had taken extraordinary, ethically suspect steps to expedite cases against the Little Steel companies, although, as he pointed out, he did so in June as that violent and chaotic struggle was making a mockery of the Wagner Act’s pretense to rein in such violence.<sup>481</sup>

The Smith Committee also accused the Board of improperly investigating the Eagle-Picher Company prior to charges having been filed by a private party, notwithstanding the fact that an earlier NIRA labor board had already started investigating the company when the current NLRB was created.<sup>482</sup> The committee likewise accused the Board of having a general bias against the company,<sup>483</sup> and it accused the Board of improperly formulating the remedy in the case, which apportioned a lump sum back-pay award among victims of discrimination.<sup>484</sup> Even more remarkable was the committee’s charge that the Board improperly boycotted Remington Rand’s office equipment during its litigation with the company because of the company’s contempt for labor law, and had also acted improperly in inquiring with the same motivation about the company’s entitlement to government contracts, generally.<sup>485</sup> Numerous Board personnel, including Chairman Madden, were interrogated about these issues.<sup>486</sup> Similarly, Board member Edwin S. Smith was charged with public display of bias against Remington Rand for a speech in which he condemned the Mohawk Valley Formula.<sup>487</sup>

The Smith Committee afforded the Board and its defenders less opportunity to rebut the charges levied against the agency and the Wagner Act than did the Thomas Committee. Nevertheless, a number of important rejoinders were

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<sup>477</sup> *Smith Committee Hearings*, *supra* note 473, at 3188-89.

<sup>478</sup> *Id.* exhibit 526, at 1920.

<sup>479</sup> FINAL REPORT OF THE SMITH COMMITTEE, *supra* note 475, at 94-95; H.R. REP. NO. 76-1902, at 41 (1940) [hereinafter INTERMEDIATE REPORT OF THE SPECIAL COMMITTEE]; *see also Smith Committee Hearings*, *supra* note 473, at 1891-92 & 2501-02.

<sup>480</sup> GROSS, *supra* note 13, at 176-78.

<sup>481</sup> *See id.* at 177-79.

<sup>482</sup> *See* FINAL REPORT OF THE SMITH COMMITTEE, *supra* note 475, at 34.

<sup>483</sup> *See Smith Committee Hearings*, *supra* note 473, at 1853-87, 1985-89, 2038, 2501-13.

<sup>484</sup> *Id.* at 2513-17.

<sup>485</sup> *Id.* at 3361, 3403-04, 4127-28.

<sup>486</sup> *Id.*

<sup>487</sup> *Id.* at 7098.

placed in the record. The most effective of these were probably offered by General Counsel Fahey and Chairman Madden, who repeatedly elaborated the overarching theme that the agency and its personnel had acted correctly (though not always perfectly) to enforce the law in the face of concerted, often flagrantly illegal, efforts by very powerful employers to flout the law.<sup>488</sup> Likewise, the Board's special investigator, Heber Blankenhorn, aggressively defended the agency's conduct of the case against Ford in Dallas, even interrupting the congressmen to point out how outrageous some of their accusations were in light of Ford's own behavior in that case.<sup>489</sup> Of course, it was obvious that Smith and a majority of his colleagues were clearly uninterested in any such reasonable explanations of the agency's practices. As Gross puts it, the Smith Committee was less interested in functional reforms than it was in reversing a shift in "the balance of power in the American economy"—a shift that the Wagner Act explicitly sought to accomplish.<sup>490</sup> The attacks on the Board and the CIO and the fulminations about corruption and infidelity to the law were merely a means to this end.

In some ways, the most notable achievement of the Smith and Thomas Committee investigations was the enormous negative publicity they were able to direct toward the Board, the Wagner Act, and the CIO unions. Not only did the investigations generate a proliferation of adverse editorials, but there is also evidence, from Gallup Polling, that they underlay a very significant increase in support for changing the Wagner Act.<sup>491</sup> What is most remarkable about this campaign is that it was premised on a stunning inversion of the true equities that characterized these cases and this period of labor relations. Only a few years earlier, the legislative debate surrounding the enactment of the Wagner Act had been preoccupied with demonstrating how employers' opposition to labor rights was to blame for industrial violence. So too, of course, was the La Follette Committee's investigation, which by this time was struggling to sustain interest in and support for its work.<sup>492</sup> Smith and his colleagues had managed to reframe the agenda completely, making the erstwhile offenders in this conflict—including some of the very worst practitioners of industrial terrorism—out to be its victims. Never mind these companies' armies of spies and private militias, the countless physical assaults on unionists, or even their flagrant, often outrageous (and seldom rebutted) violations of the Wagner Act—the investigations gave the official sanction of Congress to the view that these employers were the tragic victims of a conspiracy by corrupt Board personnel and militant unionists that took advantage of an ill-designed statute to visit on the companies intolerable affronts to their basic rights as capitalists and property owners.

This political coup was all the more extraordinary because it could more plausibly have been said, in light of the cases examined, that the opposite was actually true—that the NLRB had been revealed to possess to little authority

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<sup>488</sup> See generally *id.* at 2575-2713.

<sup>489</sup> *Id.* at 4267-68.

<sup>490</sup> GROSS, *supra* note 13, at 108.

<sup>491</sup> *Id.* at 187.

<sup>492</sup> See JEROLD S. AUERBACH, LABOR AND LIBERTY: THE LA FOLLETTE COMMITTEE AND THE NEW DEAL 148-50 (1966).

and that the Wagner Act too weakly protected labor rights. The CIO's Philip Murray was among several witnesses who made exactly this point when, in a statement to the Thomas Committee, he described how delays in administering the law benefited the Little Steel companies and how, in the end, the NLRB had proved nearly useless to vindicating workers' rights during the actual course of that contest.<sup>493</sup> The NLRB and labor law were helpless to prevent, and unable to effectively and in a timely way remedy, a strike that was provoked by the steel companies' violations of the labor law, that was characterized by extraordinary violations of workers' rights, and that was crushed without any concession to the strikers. The same point could have been made about the struggle at Remington Rand, Ford, and many other companies where workers, often hurt and killed at company hands, waited years for paltry back-pay awards.<sup>494</sup> A more-trenchant question could have been raised about the viability of the Wagner Act's basic scheme, which envisaged that workers would use an effective right to strike to defend and realize the rights to self-organization and collective bargaining, and ultimately anchor the statute's most basic aspiration to redress the fundamental inequality in power in the workplace.<sup>495</sup> If nothing else, the conflicts of the industrial terrorism period proved how easily a meaningful right to strike could be frustrated if not emasculated entirely.

A second important consequence of the hearings was their contribution to a dramatic transformation of Board membership and staff verging on an outright purge of progressives and radicals.<sup>496</sup> This change in personnel was, in fact, recommended in the Smith Committee's final report, which charged "a large group" at the agency with a conception of the "employer-employee relationship based upon class conflict rather than cooperative enterprise" and purported to document extensive infiltration of the NLRB by "alien and subversive doctrines."<sup>497</sup> As documented in James Gross's history of the Board, this transformation in personnel immediately diminished the assertiveness with which the agency enforced the law and put an end to the Board's efforts, which were well displayed in many of its early cases, to use aggressive enforcement to make up for some of the fundamental shortcomings in the Wagner Act itself.<sup>498</sup> The change in personnel also accompanied what Gross rightly calls "drastic

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<sup>493</sup> *Thomas Committee Hearings*, *supra* note 249, at 4643, 4646.

<sup>494</sup> For example, the Board's lead case against Republic Steel was actually appealed to the Supreme Court and reheard by the Board before the Board made its final ruling in the case. After this the company then appealed once again up to the Supreme Court. The end result of all of this was that the Board's cases against the steel companies for violating the labor law before and during the strike were not legally resolved until late 1940 and 1941, and the cases not finally closed until 1942—a full five years after the Little Steel Strike. *See generally* Republic Steel Corp. v. NLRB 311 U.S. 7 (1940); NLRB v. Republic Steel, 126 F.2d 471 (8th Cir. 1942); *In re* Republic Steel Corp., 9 N.L.R.B. 219, 223-24 (1938).

<sup>495</sup> *See, e.g.*, 78 CONG. REC. 3678 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 20 (1949). The courts would later affirm it. *See, e.g.*, NLRB v. Brown, 380 U.S. 278, 280 (1965); NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 500 (1960).

<sup>496</sup> GROSS, *supra* note 13, at 201-02.

<sup>497</sup> FINAL REPORT OF THE SMITH COMMITTEE, *supra* note 475, at 3-4.

<sup>498</sup> *See generally* GROSS, *supra* note 13.

and long-lasting changes in American labor policy and in the administration of that policy by the NLRB.”<sup>499</sup>

A third effect of the investigations is that they generated legislation directed at radically transforming the Wagner Act. Although these bills were never signed into law, the lead House bill, the Smith Bill, would survive as a template for Taft-Hartley.<sup>500</sup> Among this legislation’s notable features are several provisions that can be traced directly back to the Board’s industrial terrorism cases. For example, the Smith Bill would have amended the law to explicitly bar the reinstatement of “any employee who a preponderance of the testimony taken shows has willfully engaged in violence or unlawful destruction or seizure of property” in the course of a labor dispute.<sup>501</sup> The same legislation would have radically transformed the structure of the Board, imposing a rigorous separation of powers in unfair labor practice cases, making unions liable for “coercion, intimidation, discrimination, or threats” against employees, and weakening the concept of the duty to bargain in good faith, on which the Board had based its argument about signed contracts in the Little Steel cases.<sup>502</sup> The Smith Bill passed the House in June 1940, but died in the Senate.<sup>503</sup> For its part, the Senate also generated several bills to reform the Wagner Act, which in key respects, including issues associated with the Little Steel Strike, roughly tracked the Smith Bill.<sup>504</sup> But this legislation did not advance. Altogether, nearly two hundred bills were introduced between 1940 and 1947 to amend the Wagner Act, all of which failed to overcome opposition from Roosevelt and loyal New Dealers in Congress, amid the distractions of the war. In important respects, however, the die had been cast in the form of the Smith Bill and the records that accompanied it.

### C. *Industrial Terrorism and the Shaping of the Taft-Hartley Act*

The forces that led to the enactment of the Taft-Hartley Act in the summer of 1947 have been well documented and need not be discussed here.<sup>505</sup> Suffice it to say, this radical retrenchment of the system of labor rights established with the Wagner Act represented the successful culmination of a decade-long effort backed by a very broad coalition of business interests and conservative politi-

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<sup>499</sup> *Id.* at 225.

<sup>500</sup> *Id.* at 253-54.

<sup>501</sup> FINAL REPORT OF THE SMITH COMMITTEE, *supra* note 475, at 157-58; INTERMEDIATE REPORT OF THE SPECIAL COMMITTEE, *supra* note 479, at 102 (1940).

<sup>502</sup> FINAL REPORT OF THE SMITH COMMITTEE, *supra* note 475, at 159; INTERMEDIATE REPORT OF THE SPECIAL COMMITTEE, *supra* note 479, at 101-05; *see also* GROSS, *supra* note 13, at 196.

<sup>503</sup> GROSS, *supra* note 13, at 210, 225.

<sup>504</sup> For a detailed annotation of the Senate bills, see NLRB, REPORT TO THE SENATE COMMITTEE ON EDUCATION AND LABOR ON S. 1000, S. 1264, S. 1392, S. 1550, AND S. 1580, *reprinted in Thomas Committee Hearings*, *supra* note 249, at 467. For its summaries of issues relative to the Little Steel Strike, *see Thomas Committee Hearings*, *supra* note 249, at 489-90, 508, 520, 523-24.

<sup>505</sup> *See* HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 271-362 (1950).

cians.<sup>506</sup> However, the literature has not adequately emphasized the important and ironic role that the industrial terrorism cases of the late 1930s played in framing the legislation and aiding its passage.

There are several linkages between these cases and the Taft-Hartley Act. As we have seen, the cases were used by the earlier Thomas and Smith Committees to transform the terms of the debate about labor violence, to establish that unions were too powerful and too violent, and to legitimate the idea that a retrenchment of labor rights was a legitimate response to these concerns. A more direct linkage can be found in the little-known fact that the Taft-Hartley Act was substantially based on Howard K. Smith's 1940 bill and the reports and hearing records generated in support of it.<sup>507</sup> Smith himself not only promoted his old bill as a model for Taft-Hartley, but he also aggressively promoted the idea that the new legislation should feature a more express prohibition of sit-down strikes with a broader limit on the reinstatement of workers implicated in violence.<sup>508</sup> In fact, Smith was plowing fertile ground; from the outset, the House hearings on the Taft-Hartley legislation were constructed around a supposedly pressing need to redraft the labor law to restrain labor violence, meaning violence that could be attributed to workers in the course of exercising labor rights.<sup>509</sup> As with earlier congressional attacks on the Wagner Act, the House hearings invited lengthy and sensational testimony from business people and industry lawyers about a supposed epidemic of union-sponsored violence.<sup>510</sup> However, neither these witnesses nor the bill's champions in the House limited themselves to attacking sit-down strikes or cases involving actual violence; they extended the line through these supposed problems to include, as well, more legally and morally ambiguous practices such as mass picketing.<sup>511</sup> In other words, the Board's supposed indulgence of sit-down strikes and serious criminality was again subtly transformed into a broader attack on the right to strike.

Although more tempered in tone than the proceedings in the House, the debate and hearings on the legislation in the Senate represented more systematic and effective explorations of the same themes. Witnesses there condemned the Wagner Act not only for failing to restrain union-sponsored violence, but also for supposedly precluding other, ostensibly reasonable means of dealing with the problem.<sup>512</sup> And more pointedly than in the House, witnesses in the Senate pressed the idea of broadly limiting the right to strike.<sup>513</sup> Among the staunchest proponents of the view were Charles E. Wilson, the president of

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<sup>506</sup> See generally, e.g., Steven E. Abraham, *How the Taft-Hartley Act Hindered Unions*, 12 HOFSTRA LAB. L.J. 1 (1994); Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763 (1998).

<sup>507</sup> GROSS, *supra* note 13, at 253.

<sup>508</sup> *Amendments to the National Labor Relations Act: Hearings on H.R. 8, H.R. 725, H.R. 880, H.R. 1095, and H.R. 1096 Before the H. Comm. on Educ. and Labor*, 80th Cong. 109 (1947) [hereinafter *House Taft-Hartley Hearings*].

<sup>509</sup> *Id.* at 4-6.

<sup>510</sup> *Id.* at *passim*.

<sup>511</sup> *Id.* at 2705.

<sup>512</sup> *Labor Relations Program: Hearings on S. 55 and S. J. Res. 22 Before the S. Comm. on Labor and Pub. Welfare*, 80th Cong. 927, 945-46, 966-67 (1947).

<sup>513</sup> *Id.* at 444-50, 874, 890.

General Motors, and Ira Mosher, chair of the executive committee of the NAM.<sup>514</sup>

The bitter irony of what was playing out—that sit-down strikes and picket line violence that employers had provoked through their own outrageous and unlawful behavior were being used to ground a broad attack on labor rights—was not lost on representatives of the labor movement or on Board personnel. Walter Reuther, who had been viciously beaten by Ford's servicemen and threatened with death by that company's operatives, attempted to remind the senators that the sit-down strikes were caused by a "reign of terror" at GM, characterized by the use of "underworld thugs and gangsters," and that the strikes were desperate means of trying to overcome unqualified opposition to the Wagner Act on the part of GM and other industrial employers.<sup>515</sup> Said Reuther: "I just suggest that you take time to read the hearings before the La Follette [C]ommittee and find out who was the aggressor on the industrial front in America in those days."<sup>516</sup> Reuther pointedly accused Congress of cynically using overblown and de-contextualized assertions of labor violence and lawlessness to justify dismantling the Wagner Act.<sup>517</sup> Other union leaders made similar arguments, including Hoyt Haddock, executive secretary of the CIO's maritime committee, and R. J. Thomas, vice president of the United Automobile, Aircraft, and Agricultural Implement Workers of America.<sup>518</sup>

Paul Herzog, at that time chairman of the NLRB and a relative conservative on labor rights with very cautious political instincts, argued (correctly) that the Board had already developed stringent rules for dealing with violence and lawlessness, and that the bills proposed were not only unnecessary in this sense, but also threatened to undermine basic labor rights.<sup>519</sup> Herzog was particularly concerned that the legislation threatened to emasculate the right to strike.<sup>520</sup> Herzog had given similar testimony in the House hearings, where he pointedly rejected the accusation, which surfaced repeatedly in both houses notwithstanding its obvious falsity, that the agency was still ignoring the holdings of *Fansteel* and *Southern Steamship*.<sup>521</sup> Just like when it faced earlier charges of this kind, the Board actually assembled a detailed statement by which it sought to counter these claims by tracking its own jurisprudence in cases involving union violence.<sup>522</sup>

Although overwhelmingly true, these attempts at rebuttal did little to stem a campaign that was a decade in the making and backed by essentially all the industrial interests in the country. The House Report on the legislation simply reiterated the claim that the Board was not abiding the Supreme Court's instructions in *Fansteel* and *Southern Steamship*, in particular by failing to interpret these cases as instructions to deny basic labor rights to workers impli-

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<sup>514</sup> *Id.* at 437, 444-50, 927, 945-46, 966-67.

<sup>515</sup> *Id.* at 1276-77.

<sup>516</sup> *Id.* at 1277.

<sup>517</sup> *Id.* at 1276-77, 1286-88, 1296-98.

<sup>518</sup> *Id.* at 1373-75, 2359, 2361-67.

<sup>519</sup> *Id.* at 1901, 1910-11, 1918-25.

<sup>520</sup> *Id.* at 1910-11, 1918-25.

<sup>521</sup> *House Taft-Hartley Hearings*, *supra* note 508, at 3108-09.

<sup>522</sup> *Id.* at 3180-86.



cated even the least bit in violence.<sup>523</sup> With obvious reference to the *Republic Steel* case, the report also claimed, inaccurately, that:

In cases involving violence in strikes, the Board has seemed reluctant to follow the decisions of the court. It is inclined to reinstate, with back pay, strikers whom employers discharge for what the Board seems to regard as minor crimes, such as interfering with the United States mail, obstructing railroad rights-of-way, discharging firearms, rioting, carrying concealed weapons, malicious destruction of property, and assault and battery.<sup>524</sup>

The Taft-Hartley Act was passed over Harry Truman's veto on June 23, 1947.<sup>525</sup> As our review of the statute's legislative history makes clear, a number of provisions in the law were strongly influenced by the effort to turn workers' responses to industrial terrorism back against them. The clearest example of this is the provision eventually enacted as section 8(b)(1)(A) of the current statute, which deemed it an unfair labor practice for a union or its agents to "restrain or coerce employees in their exercise of the right" (accorded by amendments to section 7) to refrain from union membership, as well as limits imposed by amendments to section 10(c) on the Board's power to reinstate or grant back-pay awards to workers fired "for cause."<sup>526</sup> Although not as explicit or as extreme as the provisions on unlawful concerted activity originally proposed in the House Bill, the section 8(b)(1)(A) and section 10(c) provisions were also clearly intended to work together to redress the Board's supposed infidelity to the Supreme Court's rulings on sit-down strikers.

The legislation's proponents made this orientation clear. Section 8(b)(1)(A)'s ambiguous restrictions on coercion and restraint were fully intended to prohibit a wide range of conduct, including not only sit-downs strikes, but also mass picketing and picket-line violence more broadly.<sup>527</sup> And although the final version of Taft-Hartley did not *explicitly* call for a violation of section 8(b)(1)(A) to be punished by disqualifying the responsible worker or workers from reinstatement and only imposed liability on unions and their agents, the bill's authors made clear their intention that section 10(c) be read together with section 8(b)(1)(A) to have precisely the same effect.<sup>528</sup> At the same time, the amended section 10(c)'s limitations on reinstatement and back-pay were not confined to conduct constituting unfair labor practices; instead, the provision was intended more broadly to bar such remedies in any case involving sit-down strikes, strikes featuring violence or criminality, or mass picketing.<sup>529</sup> Whatever the mechanism, the proponents of these changes candidly anticipated that the thrust of these limits on Board remedies would be to deny the offending workers the basic rights otherwise accorded them in section

<sup>523</sup> H.R. REP. NO. 80-245, at 318-19 (1947) [hereinafter HOUSE MAJORITY REPORT ON TAFT-HARTLEY].

<sup>524</sup> *Id.* at 318.

<sup>525</sup> GROSS, *supra* note 13, at 251, 254-55.

<sup>526</sup> HOUSE MAJORITY REPORT ON TAFT-HARTLEY, *supra* note 523, at 319, 333, 344, 349.

<sup>527</sup> MILLIS & BROWN, *supra* note 505, at 445-47.

<sup>528</sup> H.R. REP. NO. 80-510, at 546 (1947) (Conf. Rep.) [hereinafter HOUSE CONFERENCE REPORT ON TAFT-HARTLEY]; S. REP. NO. 80-105, at 505 (1947) [hereinafter SENATE REPORT ON THE FEDERAL LABOR RELATIONS ACT OF 1947].

<sup>529</sup> See HOUSE CONFERENCE REPORT ON TAFT-HARTLEY, *supra* note 528, at 542, 559; HOUSE MAJORITY REPORT ON TAFT-HARTLEY, *supra* note 523, at 333.

7 and section 13. In fact, for good measure, the drafters subtly transformed the right to strike language in section 13, qualifying the right as granted by the Wagner Act with the term “except as specifically provided for herein.”<sup>530</sup>

The broad intent behind section 8(b)(1)(A) was to prohibit (and prohibit reinstatement in cases involving) mass picketing, sit-down strikes, and picket-line disorder generally.<sup>531</sup> It has functioned together with section 10(c), to achieve exactly this purpose. To be sure, the Board has occasionally given some consideration to the inherently confrontational and often tumultuous nature of picket lines as well as the role of employers’ own misconduct.<sup>532</sup> However, about twenty-five years ago, in a decision called *Clear Pine Mouldings*, the Board indicated that it would no longer focus on balancing the severity of the employer’s violations of the statute against the striker’s misconduct, and that in deference to the spirit of *Fansteel* and the legislative history of section 8(b)(1), it would deny reinstatement whenever striker misconduct “reasonably tend[s] to coerce or intimidate employees [including replacement workers or crossover] in the exercise of rights protected under the Act.”<sup>533</sup> In *Clear Pine Mouldings*, the Board also suggested that even mere words, unaccompanied by threatening conduct, could disqualify a worker from reinstatement and, further, that the question of whether other workers were coerced in the exercise of their right to oppose the union—again, the key question under section 8(b)(1)—should be addressed at least in part objectively (that is, without exclusive regard to such a worker’s subjective experience of the “coercion”).<sup>534</sup> Although the Board later seemed to retreat from the most reactionary implications of this decision, it continues to deny reinstatement to violent or disorderly strikers, and it all but categorically bans mass picketing, even if unaccompanied by much in the way of actual disorder.<sup>535</sup>

These are not the only important changes in law and policy entailed by Taft-Hartley the origins of which trace, in part, to industrial terrorism and the struggle against it. For example, the drafters of Taft-Hartley inserted a provision, section 8(c) of the final statute, limiting the Board’s authority to premise

<sup>530</sup> 29 U.S.C. § 163 (2006).

<sup>531</sup> HOUSE CONFERENCE REPORT ON TAFT-HARTLEY, *supra* note 528, at 1, 38–39, 42; MILLIS & BROWN, *supra* note 505, at 445–47; *see also* SENATE REPORT ON THE FEDERAL LABOR RELATIONS ACT OF 1947, *supra* note 528, at 50.

<sup>532</sup> This flexibility is embodied in the so-called “Thayer Doctrine,” which contemplates reinstatement, notwithstanding employee misconduct, where the employer has committed serious violations of the labor law and the reinstatement would advance the purposes of the statute. *NLRB v. Thayer Co.*, 213 F.2d 748, 752–55 (1st Cir. 1954).

<sup>533</sup> *In re Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 1046 (1984) (quoting *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977)).

<sup>534</sup> *Id.*

<sup>535</sup> *See, e.g., In re Detroit Newspaper Agency*, 340 N.L.R.B. 1019, 1024–25 (2003); *In re Briar Crest Nursing Home*, 333 N.L.R.B. 935, 938 (2001); *In re Mohawk Liqueur Co.*, 300 N.L.R.B. 1075, 1075–76 (1990); *In re Chesapeake Plywood, Inc.*, 294 N.L.R.B. 201, 202 (1989). On the law of mass picketing, *see, for example, In re United Steelworkers*, 137 N.L.R.B. 95, 96–97 (1962); *In re Local Union No. 5895*, 132 N.L.R.B. 127, 128–30 (1961); *In re Local No. 1150*, 84 N.L.R.B. 972, 973–79 (1949). The Board is apparently constrained in this regard by the Supreme Court. *See, e.g., Int’l Union v. Russell*, 356 U.S. 634, 640 (1958).

unfair labor practices on employer propaganda,<sup>536</sup> as it had done in several of the cases featuring industrial terrorism.<sup>537</sup> Even more important were dramatic changes to section 3 and section 10, which radically restructured the Board itself,<sup>538</sup> supposedly with the purpose of preventing “abuses” of the kind that allegedly characterized the agency’s strident attempts to prosecute the companies. Although the precise effect on labor rights stemming from these changes in Board structure is incalculable, it is clear that they codified a transformation in the agency’s overall political orientation—investing it with crippling “neutrality” that belies the reality of labor disputes. The changes in the structure of the NLRB also made it less able to negotiate exactly the kinds of dilatory tactics and fraught and contentious circumstances that defined its prosecutions of powerful companies like Republic Steel and Ford in the first place. To make this point differently, it is actually difficult to imagine that the post-Taft-Hartley NLRB could ever have brought these employers to any account. Taft-Hartley also added a prohibition on secondary boycotts, section 8(b)(4) of the current statute,<sup>539</sup> which conspicuously foreclosed the kind of broad-based solidarity that repeatedly featured in unionists’ struggle against industrial terrorism—not least in the Little Steel Strike. Finally, section 9(h) of the Taft-Hartley Act essentially barred unions from allowing members of the Communist Party to hold union office, effectively barring Communists from prominent positions within the labor movement.<sup>540</sup>

It should go without saying that the industrial terrorism cases were not the only impetus for the enactment of Taft-Hartley, and it is similarly apparent that legislation broadly resembling it may well have been enacted even if these particular cases had not evolved in the way they did and then been used in the fashion they later were. However, the history of the legislation makes even clearer the central role that these cases played in shaping the legislation and helping promote its passage, and thus reshaping the legal landscape of American labor relations. And although it is difficult to attribute broad changes in labor relations to particular changes in the law (not least because of the need to account for the effect of social and political factors beside the law and because the law itself is inevitably both a cause and effect in this dynamic), it seems certain that the legal changes brought about by Taft-Hartley have played a significant role in undermining the strength and vitality of organized labor in post-World-War-II America.<sup>541</sup> In this light, it seems particularly fitting to note that

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<sup>536</sup> Labor Management Relations (Taft-Hartley) Act § 8(c), Pub. L. No. 80-101, 61 Stat. 136, 142 (codified as amended at 29 U.S.C. § 158(c) (2006)).

<sup>537</sup> The main examples of supposed abuses by the Board in regulating employer speech were its cases against Ford Motor and office equipment maker Remington Rand. *Thomas Committee Hearings*, *supra* note 249, at 72-77, 2084-86; SENATE REPORT ON THE FEDERAL LABOR RELATIONS ACT OF 1947, *supra* note 528, at 429; HOUSE MAJORITY REPORT ON TAFT-HARTLEY, *supra* note 523, at 299, 324; FINAL REPORT OF THE SMITH COMMITTEE, *supra* note 475, at 90-92.

<sup>538</sup> Labor Management Relations (Taft-Hartley) Act §§ 3, 10, 61 Stat. at 139, 146-50 (codified as amended at 29 U.S.C. §§ 153, 160).

<sup>539</sup> *Id.* § 8(b)(4), 61 Stat. at 141-42 (codified as amended at 29 U.S.C. § 158(b)(4)).

<sup>540</sup> *Id.* § 9(h), 61 Stat. at 146 (repealed 1959).

<sup>541</sup> On this characterization of Taft-Hartley (and the debate surrounding it), see Lichtenstein, *supra* note 506, at 766.

when Senator Taft visited Youngstown, a scene of violence and bitter struggle in the Little Steel Strike, soon after the passage of Taft-Hartley, crowds of steel workers greeted him with vulgar invectives.<sup>542</sup>

V. CONCLUSION: THE PREROGATIVES OF CLASS VIOLENCE IN  
MODERN AMERICA

Writing in 1928, labor historian Selig Perlman famously attributed to industrial capitalists the prerogative of “a class with an ‘effective will to power’” in the industrial context—a prerogative, he said, which those who held it arrogantly justified as something ultimately essential to the public welfare.<sup>543</sup> The history of industrial terrorism shows just how complete and how enduring that prerogative and its justifications actually were. Even as the Wagner Act, the New Deal, and the rise of the CIO altered and in some ways diminished the power of this class, it was able with its allies in government and elsewhere to turn its own penchant for unlawful, sometimes outrageous violence, to its enduring political and legal advantage. What stronger testament could there be to the prerogatives that this class has retained, notwithstanding the New Deal?

The capitalists’ will to power is embodied today in a softer and more pernicious kind of domination of the workplace built much more around professional management practices, the endowments of the so-called free market, and the administration of the law. The kind of over-the-top terroristic methods of control that were so prominent in the New Deal era have been banished for the most part to the developing world. This has left labor law, with its many strictures on labor violence, to preside over a domain of labor relations that is largely peaceful.

But peace does not mean a robust system of labor rights, let alone justice. Over the past several decades, unionization rates have fallen below their level at the time of *Fansteel* and the Little Steel Strike, major strikes are almost unheard of, labor standards have retrenched, and capitalists have regained a level of political and economic power not seen since the New Deal. This is the reality of labor peace and the specter that CIO lawyer Lee Pressman had in mind when, testifying before the Thomas Committee, he angrily challenged the idea that labor law and the NLRB were overindulgent of labor, in part by questioning the adequacy of the remedies available to redress the outrageous actions of the Little Steel companies during the 1937 strike.<sup>544</sup> Pressman offered the senators what may be the single most trenchant summary of this issue underpinning the whole question of labor rights in modern America:

It was not the sole purpose of the Wagner Act to diminish the immediate causes of industrial unrest. There are worse things than industrial conflict, and one of them is industrial serfdom, and the poverty, and ignorance, and oppression which have been the lot of more American workers than we would like to think in recent years.<sup>545</sup>

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<sup>542</sup> ROBERT BRUNO, *STEELWORKER ALLEY: HOW CLASS WORKS IN YOUNGSTOWN* 137 (1999).

<sup>543</sup> SELIG PERLMAN, *A THEORY OF THE LABOR MOVEMENT* 4-5 (1928).

<sup>544</sup> *Thomas Committee Hearings*, *supra* note 249, at 4199, 4203.

<sup>545</sup> *Id.* at 4125.