

3-1-1992

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Recommended Citation

Jan Wilson, *Special Effects of Unions in Hollywood*, 12 Loy. L.A. Ent. L. Rev. 403 (1992).
Available at: <https://digitalcommons.lmu.edu/elr/vol12/iss2/6>

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SPECIAL EFFECTS OF UNIONS IN HOLLYWOOD

Jan Wilson†

I. INTRODUCTION

Labor relations in the entertainment industry have been overlooked as a valuable labor model. Although labor relations in Hollywood are unique in a number of ways, the successes that have been achieved can provide lessons for labor practitioners in general. Labor negotiations and collective bargaining agreements typically concern wages, hours, and working conditions. To that extent, labor issues in the entertainment industry are typical. Frequently, however, these basic labor principles are applied atypically in Hollywood to fit the peculiarities of the industry, and produce atypical results. This article evaluates some of the myriad labor issues in the entertainment industry, as well as the unique and successful application of fundamental labor principles in Hollywood.

A. Why Watch Hollywood Labor?

The juncture of labor relations and the entertainment industry is both distinctive and deserving of attention. The movie industry is not only unique, but it is also one of only three industries in the United States that contributes positively to the balance of trade. The movie industry in the United States accounts for an estimated three-billion-dollar surplus balance of trade each year,¹ making it the third-largest dollar contributor to the trade balance.² The United States leads all other countries in the number of films exported, the number of countries in which its films are distributed, and the number of countries whose primary source of films is the United States.³ The United States produces more than ten times the

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1. Jack Valenti, *Europe 1992—Issues for the United States*, Address on Law Day, Georgetown University Law Center (Apr. 7, 1990). Jack Valenti is the president of the Motion Picture Association of America.

2. The movie industry is surpassed only by the aerospace and computer industries in their positive contributions to the balance of trade. *Id.*

3. S. WILDMAN & S. SIWEK, *INTERNATIONAL TRADE IN FILMS AND TELEVISION PROGRAMS* 17, 35 (1988).

number of films produced by most other countries in the world.⁴ Domestic production of movies in other countries generally accounts for less than thirty percent of the movies shown in those countries.⁵ The United States is the primary supplier of the remaining seventy percent shown.

The success of American films and television productions in world markets is indicated both by industry trade balances and by comparisons with other film- and television-exporting nations The United States has historically exported more than three times the total television programming exports of the next three leading exporting nations combined.⁶

The importance of the film industry is obvious, given that the United States is far and away the leading global film exporter. The worldwide impact of the United States television industry is also significant. The number of homes around the world with televisions is constantly increasing, resulting in a much larger viewing audience. Between 1960 and 1983, Europe experienced a ten-fold increase in its estimated number of television receivers, and the increase in Africa was nearly ninety-fold.⁷ Hollywood is the primary supplier for the world's seemingly insatiable appetite for programming. The United States' television industry supplies seventy-five percent of the programming for Latin America, and forty-four percent of that for Western Europe.⁸ On the other hand, both television and film imports into the United States are minimal—approximately one to two percent.⁹

Historically, less revenues have entered the United States from television than from movies. However, improved technology and international relations indicate that increased penetration of television worldwide is likely. The latest technological advances now make television accessible to many parts of the world. In 1969, the International Telecommunications Satellite Organization ("INTELSAT") achieved global signal coverage when it began operating satellites over the Atlantic, Pacific and Indian Oceans. As a result of that development alone,

4. *Id.* at 14-17, 35. The United States produces approximately 300 films each year. A majority of the 92 countries in the United Nations (for whom there are available statistics) produce 20 or fewer films annually, and only one country had domestic production accounting for more than 30% of the films shown in that country. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 38. The estimated number of television receivers in Europe in 1960 was 20,973,000. In 1983, the total was approximately 261,744,000. In Africa, the increase during the same time period went from 122,400 to 9,825,700. *Id.*

8. *Id.* at 40.

9. *Id.*

television programming increased ten times by 1980. By 1985, the number of programming hours had increased to three times the 1980 figures.¹⁰ As technology continues to improve, each additional area that gains access to television becomes a market that demands new programming. Thus, Hollywood's future and its role in the national economy become increasingly important.

Recent policy changes in countries with substantial television markets have also been significant. Because a detailed discussion of this subject is beyond the scope of this article, it will be discussed only briefly. The changes in international relations in the last year alone have opened up new markets for television in Europe and the former Soviet Union. The integration of the entertainment industry into labor relations, national economics, and international trade warrants close attention.

The entertainment industry in the United States is important in an economic sense, but is it worthy of notice by labor experts? The answer is yes, because labor unions in Hollywood are very powerful and successful. Labor systems that work are useful models. Labor relations in the entertainment industry are worthy of study because of the unusual success of the labor system in the entertainment industry, as compared to the experience of labor unions nationwide.

B. Labor in General and a Preview of Its Influence in Hollywood

Unions are based on the premise that collective action of employees with common goals is the most efficient method to obtain a standardized agreement with an employer regarding terms and conditions of employment.¹¹ In an effort to equalize the bargaining power of employers and employees negotiating for such agreements, Congress enacted the National Labor Relations Act ("Act" or "NLRA").¹² Congress intended to thwart the ability of the more powerful employer to command standard wages by pitting employee against employee. The Act's legislative goal derived from the congressional finding that unequal power impedes commerce.¹³

The goal of Congress to equalize power has been attained by the

10. *Id.* at 52.

11. W. OBERER, CASES AND MATERIALS ON LABOR LAW; COLLECTIVE BARGAINING IN A FREE SOCIETY, 100-205 (3d ed. 1986).

12. The National Labor Relations Act is codified at 29 U.S.C. §§ 151-169 (1992).

13. Section 1 of the NLRA states, in part:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers . . . substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in

interaction of labor and the entertainment industry. The Hollywood model realizes the balance of power envisioned in the preamble of the Act. In achieving this result, the entertainment industry has adapted federal labor law to fit its particular needs. Use of the same laws by many other industries, however, has been less successful. This suggests a need to examine how the Hollywood system has evolved and how it works.

Labor negotiations in Hollywood are often emotion-filled because much is at stake for both sides. Because a balance of power exists, intense negotiations are guaranteed. The complexity of the issues exacerbates the difficulty in concluding an agreement. Both sides must attempt to foresee the future in order to write a contract that will be beneficial to both party's interests even if there are changes over the three-year term of the contract. International trade markets, developing communication and transmission technologies, and international copyright are only a few of the areas affecting the industry that should be considered.

An analysis of the evolution of labor relations in the entertainment industry provides valuable insights into the labor-management model in general, although some aspects are unique. For example, the pressure applied by the media and public are far greater in the entertainment industry than in a typical goods-producing industry. This visibility that accompanies the entertainment industry plays a major part in negotiations. The general public may pay little attention to strikes that occur around the country every day. When Hollywood strikes and reruns dominate television, however, most American households take notice. Although their interest may be purely personal, American viewers notice when their favorite show consists only of reruns. Thus, any degree of public attention is a factor in negotiations that both sides must consider. Public pressure translates into monetary consequences in the entertainment industry, an equation that parties to negotiations in Hollywood understand. Labor negotiators in other industries might well note Hollywood's negotiating strategies using the media and the impact of public reaction.¹⁴

industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce

29 U.S.C. § 151 (1992).

14. Alan S. Jaffe, *Performing Institutions and the Labor Unions*, 2 VOLUNTEER LAWYERS FOR THE ARTS 36 (1980). "Labor disputes in the public sector and in the performing arts impact upon non-participants to a far greater extent than labor disputes in the private sector. This situation usually triggers rapid press and governmental intervention—factors that would not be present in the typical commercial confrontation. Indeed, the presence of pressure ap-

Labor problems and negotiations in Hollywood involve many of the same issues as labor negotiations in any other industry. In the entertainment industry, the issues over which the parties differ are typically wages and hours. Usually, actors seek increased wages under a contract and management seeks wage rollbacks. When negotiations break down and a strike results, every business in Hollywood suffers repercussions, a phenomenon which occurs in any company town. The typicality of the Hollywood system ends there, however. Unlike any other industry, with the exception of sports, bargaining over wages in Hollywood means the setting of minimum pay scales in a Basic Agreement ("Agreement") rather than the setting of hourly wages. The Agreement is entered into with the specific understanding that it is only a point of departure for further negotiations on individual contracts.

II. THE HISTORY: NOSTALGIA TO NEGOTIATIONS

A. *It All Started with the "Rats"*

The labor movement in Hollywood began somewhat inauspiciously. Like the Disney empire, which had its beginning with a mouse, the labor movement in Hollywood began with the "Rats." In 1914, a group of actors calling themselves the "White Rats" united to take action against the unfair conditions suffered by stage actors in general. Their reasons for forming a union were identical to those of many workers who united during the early part of the century: long hours, unsafe conditions, few, if any, benefits, and lack of financial security.

At that time, acting was not a well-respected job, let alone a profession. Actors were an unlikely group of employees to form a union; however, "the barbarously unfair conditions of the theater at the turn of the century made change inevitable."¹⁵ Tired of rehearsing long weeks for no pay and of being abandoned penniless in an unfriendly town if a play closed on the road, actors began to talk of unions. In 1914, the actors who had formed the White Rats received a charter. Hollywood producers were hostile to their union, however, and refused to recognize them as a collective bargaining representative. "Finally, in 1919, the actors struck, darkening every theater on Broadway. The producers at last surrendered. For the first time in history, a performers' union was contractually recognized as a legitimate bargaining agent for the profession."¹⁶

plied by the media and public opinion has become an integral part of the collective bargaining process" *Id.*

15. THE MOVIE BUSINESS, AMERICAN FILM INDUSTRY PRACTICE 136 (A. William Bluen & Jason E. Squire eds., 1972).

16. *Id.*

The union became what is known as the Actor's Equity, which has jurisdiction over stage work throughout the United States.

What began as a few people uniting for a common goal in 1914 has grown to a powerful organization whose members impact the industry and audiences throughout the world on a daily basis. Most significantly, this first group led the way for many more organized unions that have since encompassed the entire entertainment industry. Today, the industry is unionized at every level of employment, from stagehands to writers, directors, and actors.

B. *Act One for the Screen Actors*

After the first Hollywood labor strike in 1919, the next major step in labor reform came with the formation of the Screen Actors Guild in 1933. Like many industries that spawned unions during that time, Hollywood's working conditions were somewhat dismal. In the early days of movies and television, being an employed actor was something of an oxymoron. Actors lucky enough to find employment worked under contract with one of the major studios.¹⁷ No unions or other protections existed, and the actors had little bargaining power. The Fair Labor Standards Act of 1938¹⁸ had not yet been enacted, and any protective federal statutes then in force did not apply to the entertainment industry.

Another obstacle to equal bargaining power for employees was the vertical integration of the production studios.¹⁹ The vertical integration of the studios meant that the studios made the movies, distributed them through one of their own branches, and showed them in their own theaters.²⁰ Therefore, if a studio decided to shut down its theaters, the obvious consequence was the termination of a significant amount of its production. This occurred in 1933 when Paramount Pictures and RKO General, Inc. declared their theatres bankrupt.²¹ Members of the only

17. Harry Bernstein, *Harry Bernstein/ Labor: Hollywood May Take the Drama out of Settlement Disputes*, L.A. TIMES, Apr. 11, 1989, part 4, at 1.

18. 29 U.S.C. §§ 201-217 (1992).

19. See generally *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960) (explanation of distribution agreements and product markets for movies and television). The court found a conspiracy to restrain and monopolize the distribution and exhibition of films through a comprehensive scheme which included price fixing, pooling agreements, formula deals and vertical acquisitions, as well as a number of other methods. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173-174 (1948).

20. For a discussion on the structure of the motion picture industry after *Paramount*, see generally Ralph Cassady, Jr., *Impact of the Paramount Decision on Motion Picture Distribution and Price Making*, 31 S. CAL. L. REV. 150, 150-153 (1958).

21. John Eisendrath, *The Making of the Hollywood Working Class: How the Writers' Strike Drove the Jaguar Owners to the Barricades*, WASH. MONTHLY, Nov. 1988, at 14.

existing Hollywood union were the only employees able to successfully fend off the ensuing twenty-five to fifty percent pay cuts.²²

In 1948, the United States Supreme Court found that the vertical integration of the studios violated the antitrust laws, and ordered divestiture.²³ Prior to that time, employers had complete power to make unilateral decisions impacting employees. The employers set a competitive salary of fifteen dollars for a day's work, but the work was not steady and the day often exceeded eight hours.²⁴ The length of the work day was unlimited, and compensation for overtime was not provided. Provision of benefits that are now mandated by law, such as overtime, days off, and pay for rehearsal or travel, had to be specifically contracted for by the actor. Few actors were in a position to command these terms.

Following the studios' decision in 1933 to implement a fifty percent pay cut,²⁵ the actors decided to form the Screen Actors Guild ("SAG" or "Guild"). The fifteen actors who attended the first meeting united in an attempt to withstand the trying times they faced. The Great Depression had seized the United States, and studio management across the country negotiated with billy clubs and pinkertons (private detectives).²⁶

The Guild probably succeeded because respected actors such as Spencer Tracy, Gary Cooper, James Cagney and Boris Karloff played key roles in the first meetings.²⁷

By allying themselves with a group dedicated, as the Guild remains to this day, not to the needs of the star but the requirements of the ordinary professional actor, these men demonstrated the basic justice of the actors' cause. Four years of harsh struggle lay ahead, but the end was clear. In the spring of 1937, in a Hollywood boxing arena, President Robert Montgomery read the scribbled message of agreement which averted the strike that many feared inevitable, and spelled success for the Guild. The studios, however reluctantly, capitulated, and soon reached agreements on the first of the basic contracts under which all actors work in American films.²⁸

From the initial group of fifteen actors, the SAG and the American Federation of Television and Radio Artists ("AFTRA"), which negotiate

22. *Id.*

23. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1988).

24. *THE MOVIE BUSINESS, AMERICAN FILM INDUSTRY PRACTICE*, *supra* note 15, at 136.

25. *Id.* at 137.

26. *Eisendrath*, *supra* note 21, at 14.

27. *THE MOVIE BUSINESS, AMERICAN FILM INDUSTRY PRACTICE*, *supra* note 15, at 138.

28. *Id.*

jointly, increased to a 1989 membership of approximately 105,000.²⁹ As the largest union in the entertainment industry, the Guild has become one of the most powerful and most visible unions. The Guild gained notoriety in 1980 when a United States President came from its ranks. With the 1960 election by his fellow union members, former President Ronald Reagan began his first "presidential" experience as president of the Screen Actors Guild.³⁰

Organizational efforts by writers followed those of the actors. In 1933, Hollywood writers began their battle with the studios by forming the Screen Writers Guild ("SWG"). However,

[t]he studio chiefs would have none of it [unionization]. They fired union writers on Wednesday before Thanksgiving and re-hired them Friday in order to save a day's pay. When the SWG persisted in its fight for higher wages and recognition in 1936, the executives, led by [Irving G.] Thalberg, created a company union. Writers who remained active in the SWG and refused to join the company union saw their names on a 'gray list' and found it more difficult to get work.³¹

He headed production at Metro-Goldwyn-Mayer during the 1920's and 1930's. Mr. Thalberg was not alone in resisting, however, as other studio heads also created problems for the new union.

Three years after the writers aligned with a single union pursuant to an order of the National Labor Relations Board ("NLRB" or "Board"), the writers' union gained recognition, in 1941, with its first contract with studio producers. Ironically, this recognition helped trigger McCarthyism, which was to ruin many writers' careers. As one commentator recalled,

In 1947, Jack Warner of Warner Brothers told Congress that 'communists injected 95 percent of their propaganda into films through the medium of writers.' Ten Hollywood writers were cited for contempt of Congress—and later blacklisted for refusing to name names. And while most people remember the

29. *Actors Unions Ratify Agreement with Motion Picture, TV Producers*, Daily Lab. Rep. (BNA) No. 83, at A-3 (May 2, 1989).

30. Reagan, a former president of the Screen Actors Guild and leader of this union in a successful strike, was the first head of the labor union to be elected president of the United States. He is proud both of his union membership and of his negotiating skills and used his union background in his campaigns to deflect accusations that he was anti-labor. But when 11,438 air traffic controllers walked off the job on August 3, 1981, Reagan fired them and broke their union.

Lou Cannon, *Reagan Leaving Legacy of Surprises; President Did the Unexpected on Soviet Union, Deficit, Hostages*, WASH. POST, Jan. 15, 1989, at A1.

31. Eisendrath, *supra* note 21, at 16.

question, 'Are you now or have you ever been a member of the Communist party?', few recall it was preceded by 'Are you now or have you ever been a member of the Writers Guild?'³²

This acrimonious relationship between the writers and producers set the stage for constructive negotiations between producers and the Writers Guild of America ("WGA") over the writers' 1988 contract.

III. UNIONS: HOLLYWOOD-STYLE

A. *Hollywood Extras: Increased Union Membership*

Comparison of the number of unionized workers today to the number in 1950, or to the number of workers in other countries, reveals the startling decline in union membership in the United States. Labor unions have lost an average of 10,000 members each week over the last decade.³³ The number of employees who are organized in unions each year is only about one-fourth of the number forty years ago. The number of workers who belong to unions is half of what it was in the 1950's.³⁴

Hollywood's entertainment industry unions have experienced a very different trend. The number of workers joining unions in this industry has increased significantly. Determining the size of the entertainment work force is difficult because many workers in Hollywood work part-time or in nontraditional employee-employer relationships. Even in absolute numbers, however, union membership is increasing. For example, the combined membership of AFTRA and SAG between 1986 and 1989, increased more than fourteen percent, from approximately 92,000 to approximately 105,000.³⁵ This significant increase was a trend antithetical to the trend in other industries throughout the rest of the country.³⁶ The labor movement in general can share this success, however, to the extent that the success is based on factors common to the labor unions in general.

The impact of unions in Hollywood is evident not only from the size of the unions, but also from the number of unions. Movie sets represent

32. *Id.*

33. Paul Goldberg, Address Before the Fifth Annual Illinois Public Sector Labor Relations Conference (Oct. 6, 1989), in *Daily Lab. Rep. (BNA)* No. 203, at A-3 (Oct. 23, 1989). Paul Goldberg is the Commissioner of the Minnesota Bureau of Mediation Services.

34. CHARLES C. HECKSCHER, *THE NEW UNIONISM* 1 (1989). "Today the unions' share of the private sector work force is below 16 percent—well under half its peak in 1954—and there is every indication that it will continue to shrink." *Id.*

35. *Two Actors Unions Authorize Strike Against Movie, Television Producers*, *Daily Lab. Rep. (BNA)* No. 146, at A-2 (July 30, 1986); *Actors Unions Ratify Agreement with Motion Picture, TV Producers*, *Daily Lab. Rep. (BNA)* No. 83 at A-3 (May 2, 1989).

36. HECKSCHER, *supra* note 34.

a microcosm of the industry—they are unionized from top to bottom, like many industrial plants. One commentator has noted that “[i]t is not unusual for members from as many as 22 unions to work on a movie set in a single day.”³⁷ Union actors, union directors, and union writers work together with union stagehands, union electricians and union engineers. Members of numerous unions working on one set is significant because unions build strength through solidarity in the industry as well as through solidarity of the members in any given union.

Hollywood employees and employers cannot easily avoid unionization.³⁸ While not totally dependent on union membership for work, workers have limited job possibilities in Hollywood without such membership. An employee may be denied union membership for a number of reasons, such as doing union work prior to attaining union membership, working during a strike, or working on a set that has nonunion employees. Additionally, the employer must determine which side it will take regarding union policies, because employment of nonunion personnel could result in a boycott by vital union employees.

1. Hollywood Exclusive—“No Exclusivity?”

One of the basic principles of union strength is the principle of “exclusivity.”³⁹ Exclusivity mandates that an employer not deal directly with unionized employees in avoidance of the union, even if one or more employees initiate negotiations.⁴⁰ The bargaining unit is to serve as the exclusive representative, protecting its members in negotiations with the

37. Eisendrath, *supra* note 21, at 14.

38. “The entertainment industry . . . is highly unionized, with almost all personnel . . . members of one or more of the multitude of unions The inescapable fact remains that no organization can function very long or very successfully without confronting the reality of unionization.” Jaffe, *supra* note 14, at 36.

39. “Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining” National Labor Relations Act § 9, 29 U.S.C. § 159(a) (1992).

40. The Supreme Court has held that the nation’s labor policy does not protect concerted activity by minority employees to bargain with their employer over issues and thus bypassing their exclusive bargaining representative.

Protection of such an attempt to bargain would undermine the statutory system of bargaining through an exclusive, elected representative, impede elected unions’ efforts at bettering the working conditions of minority employees, ‘and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement.’

Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 58 (1975) (quoting the Board determination).

employer. The employer may bargain only with the employees through the union, and vice versa. Courts have consistently protected the position of the union as the exclusive bargaining representative⁴¹ by finding employers guilty of unfair labor practices, in violation of sections 8(a)(5) and 8(a)(1) of the Act,⁴² if they deal with an employee individually in an attempt to undermine the union. Courts do not allow separate bargaining with the employees because it is the antithesis of unionization and frustrates the efforts and power of the union. Engaging in concerted activity⁴³ is at the heart of actions protected by the Act, and interference with this right through discrimination, discipline or dismissal is prohibited.

An employee who attempts to circumvent the union by going directly to the employer not only loses his or her protection under the Act but may be dismissed without reprisal.⁴⁴ The quid pro quo for the union's status as exclusive representative is the union's duty to fairly represent the employees. Circumvention of the union by either employee or employer complicates this obligation.⁴⁵ In Hollywood, the obligations on both sides are further complicated by the way the "standard" union contract is treated.

2. What's Standard in Hollywood?

The general rules that aim toward the creation of a standard union contract apply in Hollywood. The courts generally do not preclude the union and the employer from setting minimum terms and conditions of employment. Therefore, the possibility of employees negotiating individual contracts is a viable option.⁴⁶ On the other hand, contracts that

41. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

42. Paragraphs (1) and (5) of section 8(a) of the National Labor Relations Act provide that: "(a) It shall be an unfair labor practice for an employer . . .

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a).

43. Section 7 of the National Labor Relations Act guarantees employees the right to engage in concerted activity for mutual aid or protection. To interfere with, or deny such right is a violation of the Act. 29 U.S.C. § 157.

44. *Emporium Capwell*, 420 U.S. at 71.

45. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); see generally *Emporium Capwell*, 420 U.S. at 64.

46. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates . . . to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages."

violate the Guild's Basic Agreement ("Basic Agreement" or "Agreement") by setting terms below the minimum terms set by the Agreement are generally prohibited.⁴⁷

In the union workforce, individual contracts with the rank-and-file workers are the exception rather than the rule—except, of course, in Hollywood. As stated earlier, nearly all entertainment industry workers in Hollywood belong to unions, from stagehands to actors, directors and writers. Although all of the employees work pursuant to union contracts, the contracts set only minimum scales and conditions. The Agreement is the point from which negotiations on the terms of individual "deals" for each production begin.

Workers unionize to form a legal monopoly⁴⁸ in order to gain power to bargain on equal footing with an employer. Federal labor legislation provided this means in order to end impediments to commerce that arose where employers generally more powerful than employees dictated sub-standard wages. This inequality in bargaining power commonly resulted in employees bidding against each other for jobs—each agreeing to work for less than the other to secure work. One objective of the original legislation was to establish a level playing field to prevent employers from coercing employees into underbidding for employment. Standardized working conditions and wages represented a means to achieve the goal. Hollywood workers unionized and received standard contracts that allowed each employee the freedom to negotiate individually. As a result of unionization, employees have successfully returned to one-on-one negotiations with employers for an individual contract.

3. Personally, What's the Minimum?

Section 5 of the SAG's Basic Agreement reads: "This Agreement sets forth minimum terms and conditions of employment. Nothing herein shall prevent the actor from negotiating more favorable terms and conditions."⁴⁹ This provision exists in contracts at every level of production, including those contracts covering grips, gaffers, makeup artists, electricians, and wardrobe supervisors, as well as those of writers, actors and directors. This standard is common, however, only in the entertainment and sports industries. As one expert explained,

J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944).

47. "[T]he employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement." *Id.* at 339.

48. Unions are exempted from the prohibitions in the antitrust laws. *See generally* *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

49. Screen Actors Guild Basic Agreement.

It is a concept that is unique to the business, one that simply does not exist elsewhere. In no other industry does a union enter into a collective bargaining agreement with an employer with the specific understanding that the employee can thereafter meet privately with the employer to seek better terms for himself than those negotiated by his union.⁵⁰

The minimums set by the Agreement do not affect all of the actors, directors or wardrobe supervisors on whose behalf the Agreement has been negotiated. Many of these union members can and do demand six times the minimum,⁵¹ yet each retains membership in the appropriate union or unions. Here, the concerns of the union extend beyond bread and butter issues, such as wages, to the basic goal of unity to improve the working conditions for all workers. A standardized contract is the traditional labor method for promoting the policy of balanced powers because it derives from the belief that individuals negotiating with their employer have insufficient bargaining power to conclude a fair agreement. Hollywood takes a different route to attain the traditional goals of labor unions. As a result, parties to ordinary negotiations in Hollywood enjoy equal bargaining power,⁵² as Congress intended them to.

B. Right-to-Work Statutes

1. Rights Are Complicated with "Right-to-Work"

Scholars of labor law should consider another troublesome issue in the entertainment industry: "right-to-work" statutes. A number of states have enacted "right-to-work" legislation which provides relief for employment discrimination based on membership or non-membership in a union. In these states, a contract that purports to set minimum scales for members of the union may be circumvented, allowing members to work at rates below the minimum scale provided in their contract.⁵³

50. Jaffe, *supra* note 14, at 38.

51. Once, the typical Hollywood writer was a full time employee of a studio, and union negotiations determined compensation. Today, most of the guild's 9,000 members are unestablished free-lance writers who sell a script every few years at best. At the other end of the economic spectrum are 'the hyphenates,' a few hundred immensely successful writers who also direct or produce series.

Neither of these groups is much affected by the minimum pay and royalties negotiated on their behalf.

Peter Passell, *The Striking Writers Miss the Big Picture*, L.A. DAILY J., July 6, 1988, at A6.

52. The "parties" here are the union and the producers, who represent management. There is no doubt that the power of any one member of the union is individualized.

53. Gregory B. Galloway, *Right to Work and the Entertainment Industry*, FLA. BAR J., June 1989, at 84, 86. "[U]nion members may obtain waivers to their agreements and accept substandard wages." *Id.* at 86.

Although the contract itself does not allow for its circumvention, the courts have interpreted the right-to-work statute as allowing these actions despite the contract. Consequently, the practice is commonplace in a number of states with significant film production, such as Florida. These "right-to-work" statutes regulate labor unions operating in the state, but only to the extent that the courts allow state regulation. Additionally, the statutes provide remedies for employees if an employer refuses to employ a person based on union membership.

The interpretation of these statutes by the courts, however, conflicts with union security provisions such as "agency shop" clauses, which are common throughout the entertainment industry. Typically, an agency shop clause requires every employee to pay an amount equal to the union's customary initiation fee and monthly dues, beginning a short time after employment by an employer, or agency shop.⁵⁴ By prohibiting collection of initiation fees and union dues associated with employment by agency shops in these states, right-to-work laws frustrate the union's ability to secure its status.⁵⁵ Production companies seeking to reduce production costs, of which labor constitutes the major component, are attracted to right-to-work states.⁵⁶ Union effectiveness is therefore undermined, and the purpose of the agreement is thwarted to the extent that production increases in these states. As a California court noted,

The very purpose of the Basic Agreement was to put a floor under . . . compensation and to prevent producers, with their obvious leverage, from requiring [members] who for one reason or another lacked individual leverage, to agree to work for less money in order to obtain employment. Failure to enforce the Basic Agreement by sanctioning individual contracts in contravention thereof would render it meaningless.⁵⁷

Hollywood is not the only place where movies are made, but the union stronghold lies there. The tendency of productions outside Hollywood to undermine this stronghold⁵⁸ is worrisome in light of recent increases in productions away from Hollywood. Fourteen years ago, portions of at least eighty percent of all movies produced were shot in Hollywood; by 1987, however, that figure had dropped to twenty per-

54. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

55. *International Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96 (1963).

56. Galloway, *supra* note 53, at 86.

57. *That Way Prod. Co. v. DGA*, 96 Cal. App. 3d 960, 967 (1979).

58. *Writers Guild Membership Approves Pact with Producers*, Daily Lab. Rep. (BNA) No. 153, at A-14 (Aug. 9, 1988). Herb Steinberg, spokesman for the Alliance, stated that the Alliance had no choice but to make movies elsewhere, following the breakdown of negotiations with the Writers Guild. *Id.*

cent.⁵⁹ Today, a number of independent producers have greater flexibility to film at locations away from Hollywood, and thereby avoid the higher labor costs associated with that venue.⁶⁰ The flight of production companies to nonunion sites will continue to diminish the strength of the unions. In light of the costs involved, the unions should take some action to counter this trend.

2. Working Without a "Right-to-Work"

Union members can be fined or disciplined, pursuant to their Agreement, for working on nonunion projects or for working below minimum scale. Unions generally must vigorously enforce rules forbidding these types of work in order to foster and protect behavior that lies at the heart of union philosophy. Some producers choose to have a nonunion project by hiring nonunion members. While this may raise the ire of unions, the practice is not rare. It is not uncommon in Hollywood for a project to employ union writers and actors to work next to stagehands or hairdressers who are not members of their respective unions. The combination of union employees working with nonunion employees causes tension that is normally resolved in other industries by segregating the workers. This segregation does not always happen in Hollywood although the courts have found in a situation analogous to a production set—a construction site—that integrating union and nonunion employees poses sufficient dangers to warrant the imposition of rules specific to that industry.⁶¹ The basis for the court's reasoning in these circumstances was not only to avoid a potentially dangerous situation for the workers, but also to preserve the union's ability to demand standard wages and working conditions. In the entertainment industry, unions often look the other way rather than try to discipline the workers and risk their alienation.⁶² To the extent the union ignores these infractions, the union loses power. Be-

59. Eisendrath, *supra* note 21, at 14.

60. Harry Bernstein, *Harry Bernstein Labor: Hollywood's Craft Workers Under Pressure to Take Cuts*, L.A. TIMES, Jan. 24, 1989, part 4, at 1. "In their seemingly unquenchable thirst for cheap labor, U.S. companies that make popular cartoon shows for kids and other animated films began sending a flood of work to Japan. Then, as Japanese costs rose, they began rushing off to South Korea, Taiwan and the Philippines." *Id.*

61. See generally *Markwell and Hartz, Inc. v. NLRB*, 387 F.2d 79 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968) (Board adopted special rules regarding picketing applying to the construction industry because such industry is unique—in much the same way Hollywood is. The courts noted that where a number of independent contractors, working for a common employer, come together at a common site, problems can be expected if the entire project is not union); *NLRB v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675 (1951).

62. Interview with Brenda Wilson, President of Boomtown Productions, Inc., in Los Angeles, Cal. (Apr. 8, 1990).

yond this, the unique relationship between labor and entertainment provides no basis for further predictions regarding the continued viability of the unions under circumstances involving union and nonunion workers.

C. Hyphenates

1. Then There's the Question Mark of Hyphenates

Recognition by the NLRB is basic to the formation of a union. The Board certifies a union as the recognized bargaining representative of a group of employees only if those employees constitute an appropriate bargaining unit.⁶³ Although the unit seeking certification does not have to be the *most* appropriate unit, the Board must find that the unit is "an appropriate" unit. Similarity or conflict of interests is a significant consideration in the Board's determination of this. For example, supervisors may belong to the union, but they may not have the right to organize and bargain collectively, as do their rank-and-file brethren.⁶⁴ Allowing supervisors to be members raises the issue of divided loyalty and the possibility of a divided unit. Supervisors may be required to represent the employer and take positions contrary to union concerns.⁶⁵

The entertainment industry's creation of many crossover positions from employee to supervisor has stirred a legal debate over how to classify an individual in this situation. In *American Broadcasting Companies v. Writers Guild of America, West, Inc.*, ("American Broadcasting"),⁶⁶ the United States Supreme Court held that executive producers, story editors, and directors who work for companies producing either motion picture or television films are "supervisors" within the meaning of the National Labor Relations Act.⁶⁷

63. National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1992).

64. National Labor Relations Act §§ 14(a), 7, 2(3). Section 14(a) provides that supervisors are not prohibited from becoming members of the union; however, coverage of the Act is limited to "employees." Section 2(3) specifically excludes supervisors from the definition of employee. The rights of such employees are based on section 7. See generally Lee Modjeska, *The Reagan NLRB, Phase I*, 46 OHIO ST. L.J. 95, 106 (1985).

65. Comment, *Section 8(b)(1)(B) of the National Labor Relations Act and Union Discipline of Supervisor-Members After Writers Guild: Equipose of Imbalance?*, 1978 S. ILL. U. L.J. 453, 456; Andrew M. Calamari, *Union Discipline of Supervisor-Members Working in Nonunion Shops*, 52 FORDHAM L. REV. 1158 (1984).

66. 437 U.S. 411 (1978).

67. National Labor Relations Act § 2(11) states:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Executive producers have primary responsibility for the production of a film and are involved in the decision-making process from the initial idea through postproduction. The Court in *American Broadcasting* found that these duties are typical of those of supervisors. When shooting a production on-location, producers are also responsible for bargaining with the many labor organizations involved on the set and for adjusting employee grievances. The Court determined that individuals in these roles are supervisors even if they are members of a guild.

Story editors may also act as supervisors. They have supervisory responsibilities, including principally assisting producers in dealing with scripts and writers. Problems arise when these producers and editors are also writers or directors who belong to a union in that capacity. Based on their supervisory duties, the Court in *American Broadcasting* concluded that story editors are supervisors.

The courts are not alone in their struggle to sort out the roles of employees in Hollywood. The Board has encountered this problem a number of times in ruling on whether a unit is an appropriate unit for purposes of collective bargaining. In making one of its decisions, the Board visited the set of *I Love Lucy* at Desilu Television Productions to determine if a union was qualified to represent certain employees.⁶⁸ The Board ruled that the head writer, who was also involved in the production of the show, could not be a member of the bargaining unit. Head writers have control over the story line of each script and edit the final draft before submission for production. This role gives the head writer the power and authority to determine the number of casual actors required for the production and to coordinate the work of the other writers.⁶⁹ The Board determined that including the head writer in the bargaining unit disqualified the union from representing the employees of the Desilu production company.

While the classification of individuals as employees or supervisors may be difficult in other industries, in Hollywood the presence of many individuals who play both roles makes it impossible. The use of "hyphenates" in the industry allows employees to fit into categories of both employee and supervisor. Examples of this trade jargon are "writer-producer" and "writer-director," which respectively describe producers and directors who are also writers and thus members of the Writers Guild. When these employees are involved in a labor dispute, animosity and

68. Desilu Productions, Inc., 106 N.L.R.B. 179 (1953).

69. *Id.* at 181.

legal action are the natural by-products and can lead to interesting dilemmas.

During strikes, the Writers Guild of America coordinates strike efforts by establishing rules which the members must adhere to during the strike, including rules requiring members to honor picket lines. The picket lines impact producers and studios that are being struck when employee writers refuse to cross the lines to work for them. During a strike, the loyalty of writer-producers in their dual roles is greatly tested. While the WGA may question the proper status of hyphenates, the court decisions discussed below provide some explanation of the issue.

2. Writers' Guild Questions Hyphenates: *American Broadcasting*

a. 1973 Strike

In 1973, the WGA called a strike against the Alliance of Motion Picture Television Producers ("Alliance"). The complexity of the negotiations and tactics used during the strike necessitated eventual resolution by the United States Supreme Court in *American Broadcasting*. In its decision, the Court delineated permissible union discipline and highlighted the difficulties arising from allowing supervisors to remain members of the union.⁷⁰ During the strike, the WGA, as the representative of its members, issued strike rules setting forth required as well as forbidden conduct. Rule 1 forbade any act that was prejudicial to the welfare of the union, including any conduct tending to defeat a strike or weaken its effectiveness. Rules 12 and 13 prohibited all members from crossing picket lines set up at the premises of producers being struck. If any employees wished to enter these premises for a purpose not forbidden by the strike rules, they had to first notify the WGA of the entry.⁷¹ The WGA rules specifically applied to hyphenate members of the union, regardless of the capacity in which they were working during the strike.⁷²

The hyphenates were primarily involved as producers, and thus as

70. *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411 (1978).

71. The strike rules included Rule 13, which reads, in part:

Members are prohibited from entering the premises of any struck producer for the purpose of discussion of the sale of material or contract of employment, regardless of the time it is to take effect. Members are also prohibited from entering the premises of any struck producer for the purpose of viewing any film . . . [S]hould a member find it necessary to visit the premises of a struck producer for any reason apart from the foregoing he should inform the Guild in advance of the nature of the such prospective visit.

Id. at 417 n.3.

72. *Id.* at 416. Rule 24 provided: "All members, regardless of the capacity in which they are working, are bound by all strike rules and regulations in the same manner and to the same extent as members who confine their efforts to writing." *Id.*

supervisors. Their duties included the selection and direction of writers and could include the adjustment of grievances. Any writing duties of the hyphenates were attributed to their employment as producers rather than as writers, and any writing that resulted from this role was not specifically covered by their contract with the WGA.

The WGA made certain that the hyphenates felt more than the usual pressure incident to a strike. One strike rule looked suspiciously like a threat to blacklist a hyphenate forever for working during the strike. The rule prohibited union members from working with any member, hyphenates specifically included, who violated the rules. In a further limitation on the hyphenates' options, the WGA rules prohibited members from resigning during a strike, thereby eliminating the possibility of resignation by the hyphenates in order to continue working as producers. The hyphenates were in a no-win situation. After the strike, the WGA disciplined hyphenate members who violated the strike rules. Sanctions imposed on thirty members included expulsion from the union, suspension from the union for two years and fines up to \$50,000.

Following the strike, members of the Alliance filed a lawsuit against the WGA, not on behalf of the hyphenates, but to challenge the Guild's alleged unfair labor practices against the producers as members of the Alliance.⁷³ As supervisors, the hyphenates were responsible for adjusting grievances that arose against the producer. The producers alleged that the WGA's actions prohibiting hyphenates from working prevented the producers from selecting the hyphenates as their representatives to adjust grievances, in violation of the Act.⁷⁴ The case was heard by an Administrative Law Judge ("ALJ"), who held in favor of the producers. On the WGA's appeal to the National Labor Relations Board, the Board adopted the findings and conclusions of the ALJ. The Board enjoined the WGA's disciplinary proceedings against the hyphenates, finding that the Guild had committed an unfair labor practice.⁷⁵ The Court of Appeals for the Second Circuit, in a two-paragraph decision, denied enforcement of the injunctive order and set the stage for the appeal to the Supreme Court.⁷⁶ The Supreme Court found the Guild had violated the Act, but in doing so, they left some interesting questions unanswered.

73. 437 U.S. 411 (1978).

74. "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." National Labor Relations Act § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1992).

75. *Writers Guild of America, West, Inc.*, 217 N.L.R.B. 957 (1975).

76. *American Broadcasting Cos. v. Writers Guild*, 547 F.2d 159 (2d Cir. 1976).

A typical notice of charges against the hyphenates contained a notice that stated:

Specifically, you are charged with: (1) having crossed the Guild's picket lines . . . during the months of March, April, May and June 1973, without having informed the Guild in advance of the nature of your business with said company and without having obtained a Guild pass to enter said premises; (2) having during the months of March, April, May and June 1973, rendered services for . . . a company against whom the Guild was at such times on strike; and (3) refusing to perform picket duties during the strike after having been requested to do so by representatives of the Guild.⁷⁷

The WGA's position was that merely crossing the picket line warranted discipline, regardless of whether or not struck work was performed.

The WGA used the widespread interest in the strike and its ability to make news to pressure its members. The WGA publicized its rules and its intent to prosecute any member who violated them. Additionally, it made clear that membership in the WGA constituted a binding contract with legal consequences. The WGA made public its determinations of all breaches by members, threatening consequences that included the term "blacklisted."

During the strike, the WGA issued a press release announcing actions taken against several named writer-producers. The widely publicized release stated that the charges were based on the members' crossing picket lines. These members were to be fined and their names listed on a "Roll of Dishonor" in various Guild publications "in perpetuity so that Guild members for years to come will never forget . . . [the] pariahs who have betrayed their colleagues."⁷⁸ These statements left little doubt that the WGA intended strictly to enforce their strike rules.

After the suit was filed, the WGA tried to temper its actions by sending letters to its members stating that it would not threaten illegal action—"a matter of anathema to this Guild." Expulsion remained a possible consequence of any rule violation, however, as evidence by the WGA's explanation that "there is obviously a stigma attached to expulsion which might cause individual members of the Guild to refrain from working for such a person."⁷⁹ As might be expected, neither the court nor the Board missed the none-too-veiled attempt to threaten "blacklisting."

77. *American Broadcasting*, 437 U.S. at 417 n.5.

78. 217 N.L.R.B. 957, 963-964 (1975).

79. *Id.*

The impact of any form of blacklisting is significant. Here, the threatened individuals included writers who were working in roles as producers or directors, where they were dependent on writers. The WGA's rule that no member could work with these producers or directors not only took away their ability to function as writers, but also deprived them of their ability to function as producers. Producers cannot work without interacting with writers. No writer could approach any member who had been disciplined by the WGA with an idea for a production, let alone work with them on a production. Thus, this rule affected producers beyond their role as a writer or a member of the WGA.

During the strike, the hyphenates also experienced pressure to perform the supervisory duties for which they were employed. Employers sent letters to the hyphenates stating these expectations and setting forth the legal action that would result from any breach by the hyphenates.⁸⁰ The employers offered, however, to pay for the hyphenates' defense in any WGA action against him or her, and to pay any fine levied.⁸¹

The trouble was that they wore many hats. In addition to the producers, other groups were pressuring the writers. Most belonged to other unions, who demanded loyalty from them and threatened action for contract violations. For example, the Directors Guild of America ("DGA") had informed its members that, for violating contracts, "they would be subject to suits for large damages and other penalties."⁸² While the hyphenates technically played a dual role, they felt pressure from more than just two sides.

The hyphenates tried to juggle cooperating with the WGA and functioning in other roles. They submitted scripts of current projects, offer-

80. *Id.*

81. *Id.* at 964. The Board reported that the letters typically stated, in pertinent part:

We intend to continue our operations and meet our contractual and moral obligations to supply theatrical and television motion pictures to our customers and the public.

If you are a member of the Writers Guild you may have received . . . a set of rules We also understand that the Guild may have threatened you with fines and blacklisting in the event it calls a strike and you render services for us in any capacity or you fail to report for picket duty. Any attempt of the Guild to interfere with your services for us in a capacity other than as a writer is unlawful and the Guild's threat of fines, censure, expulsion and blacklisting is unenforceable.

We expect you to fulfill your contractual obligations to us as a supervisor We trust that you understand that we will have no alternative but to resort to our legal rights and remedies in the event of a failure on your part to do so. Should the Guild attempt to fine or otherwise discipline you for meeting such obligations to us, you will be provided with a defense to any such proceeding, without cost to you, and you will be indemnified against any fine which might be imposed and which is legally sustained.

Id.

82. *Id.*

ing to submit the script as-shot to prove that no writing had occurred during the term of the strike. At the WGA's disciplinary hearing, the employers provided evidence that the hyphenates had not performed struck work, but the Guild was not interested. The WGA pursued the matter based strictly on the fact that the members had crossed the picket lines.

b. Judicial Conclusions

The ALJ and the Supreme Court both noted that the WGA had professed little or no interest in what kind of work the members had actually performed during the strike and made no attempt to present evidence of their doing struck work. The actual evidence indicated that the hyphenates had performed only ordinary, non-writing functions for which they were otherwise employed—those of directors, producers or story editors, but not those of writers.

While somewhat sympathetic to the hyphenates' no-win situation, the ALJ hearing the case was unsympathetic to the fact that they had, in fact, crossed picket lines and waited until it was too late to resign from their positions, thereby taking no mitigating action.⁸³ The ALJ found, however, that the Guild had committed unfair labor practices. The judge ordered the WGA to cease and desist from further restraining employers from using the services of their employees, and from citing or charging its members with violations of the strike rules. The ALJ also ordered affirmative action, which included a requirement that the Guild send notice of the ALJ's determination to all of its members. Although the WGA had nominally retracted its blacklisting rule, the ALJ found that it had nevertheless made "suggestions" of blacklisting to its members and that it would be impossible to "disentangle the consequences flowing"⁸⁴ from its use of the hyphenates as examples in highly publicized press releases.

The record indicated that the WGA had mailed strike rules, orders and other instructions to all of its members, even serving some personally. The WGA's diligent efforts in supplying press releases to local and trade papers also aided their publicity efforts. The Court in *American Broadcasting* found that the ALJ would have been justified in ordering an equal amount of publicity for its notice of determination, although the ALJ had stopped short of doing so. As part of its decision, the Court ordered the WGA to send a notice to every member, to publish the no-

83. *Id.*

84. *Id.*

tice in two local trade papers for six consecutive issues, and to post it in their meeting halls and offices. The notice advised that the fines and actions against the members had been rescinded and any such record had been expunged from their records. It further stated that the Guild would cease to coerce or restrain employers in their choice of employees, and that the WGA would cease to threaten members.

The split (five-to-four) decision in *American Broadcasting* evidenced the Court's struggle in deciding a divisive issue in labor/management relations. The four dissenting Justices argued that the majority had misconstrued the National Labor Relations Act, thereby striking down weapons that were at the heart of union survival.⁸⁵

The Court's holding deprived the WGA of the use of legal strike weaponry based on the finding that disciplining the hyphenates might infringe on the employer's right to have those members perform the non-essential service of adjusting grievances if they arise. Section 8(b)(1)(B) of the Act⁸⁶ forbids unions from pressuring an employer in its choice of employees for the adjustment of grievances. The Guild did not apply any such pressure; instead, the evidence shows that the Guild was uninterested in what kind of work the member had been hired to do. The Guild's only concern was whether a member had broken the unified front critical to the union's survival by crossing the picket line. In the dissent's words, the "[WGA's] sole purpose was to enforce the traditional kinds of rules that every union relies on to maintain its organization and solidarity in the face of the potential hardship of a strike."⁸⁷ Adjusting grievances is incidental to the hyphenates and the employer in their employment agreement. The impact of the Court's decision on the union, however, is severe in comparison. As the dissent points out, the majority's holding renders the enforcement of a strike effort more difficult for any union with supervisory members.⁸⁸ The decision allows the employer to demand loyalty from its hyphenate employees rather than to give unions the opportunity to win their allegiance during a strike.

The magnitude of the WGA's risk in permitting supervisors to join the union became obvious only after the Court rendered its decision. If an employer felt that the loyalty of hyphenate employees was questionable, and that they were unacceptable risks because they might be involved in the adjustment of grievances, the employer had the option to restrict their union membership. As supervisors, these members cannot

85. *American Broadcasting*, 437 U.S. at 441 (Stewart J., dissenting).

86. 29 U.S.C. § 158(b)(1)(B).

87. *American Broadcasting*, 437 U.S. at 440 (Stewart, J., dissenting).

88. *Id.* at 441.

seek the protection afforded to rank-and-file employees by joining or assisting labor organizations.⁸⁹ Supervisors are not prohibited from joining these groups, but membership means that the employer has the option not to consider them as employees for collective bargaining purposes.⁹⁰ The employer's alternative is to negotiate this option at the collective bargaining table.

In *American Broadcasting*, the Court noted that the WGA had reason to believe that their actions were legal. In 1974, the Court had refused to enforce a Board order, ruling that the disciplinary action taken against supervisory members of a union violated the Act. In *Florida Power & Light Co. v. IBEW*, another five-to-four decision, the Court had concluded that in enacting section 8(b)(1)(B) of the Act, Congress had intended to protect employers only where the union's conduct coerced or restrained the employer "in choosing its representative for collective bargaining or for grievance adjustment."⁹¹ The Court's interpretation in *Florida Power* of this section, when combined with sections of the Act allowing employers to refuse to consider supervisors as part of the union for collective bargaining purposes, left an equal balance of power between employer and employee.⁹² Conversely, with respect to the WGA, the *American Broadcasting* decision tilts the balance dramatically in favor of the employer.⁹³

Matters of concern to the parties to a collective bargaining agreement are best left to the collective bargaining process. The Supreme Court's tortured search for standards has distorted the labor/management relationship and its bargaining process. By following their decision in the *Florida Power* case, the Court in *American Broadcasting* could have allowed the parties to resolve the matter at the bargaining table. Although it determined that the WGA's actions were egregious, the Court should have found that they were an improper basis for the unfair labor practice claim. That is not to say that the facts do not warrant the

89. "Section 7 no longer bestows upon supervisory employees the rights to engage in self-organization, collective bargaining and other concerted activity under the umbrella (protection) of section 8 of the Act." Lee Modjeska, *The Reagan NLRB, Phase I*, 46 OHIO ST. L.J. 95, 104 (1985).

90. S. REP. No. 105, 80th Cong., 1st Sess., 5 (1947).

91. *Florida Power & Light Co. v. IBEW*, Local 641, 417 U.S. 790 (1974).

92. Section 14(a) of the National Labor Relations Act provides:

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

93. See Comment, *supra* note 65.

Court's finding of an unfair labor practice in violation of the Act. Ample evidence existed to support this conclusion, but the Court should have based it on a different clause of the Act allowing claims by union members, not employers.⁹⁴

To the relief of the unions, the impact of the *American Broadcasting* decision was short-lived. In 1987, the Court retreated from its majority stance and held that an employer may not charge an unfair labor practice under section 8(b)(1)(B) of the Act unless the employer is currently engaged in a collective bargaining relationship with the union.⁹⁵ The Court's holding thus prohibited the filing of unfair labor practice charges when the representative status of the employee is merely prospective. Although the Court did not dispute that supervisors are the prime choice for collective bargaining representatives, the Court abolished the use of this "reservoir doctrine." This long-standing doctrine recognized that present union conduct could effectively coerce an employer's future selection of its bargaining representative.⁹⁶ The Court disavowed the *American Broadcasting* standard, finding that the impact of union discipline on an employer's prospective choice of a bargaining representative was "minimal."⁹⁷

D. Other Issues Affecting Hollywood Unions

1. Oh, Those Union Blues

The rocky history of the Writers Guild has not been the result of external pressures. From its formation in 1939, the WGA has had difficulties with the basic goal of unity. The "Union Blues," an appropriately named splinter group, was formed in opposition to the writers' 1973 strike. In the writers' strike of 1988, another group called the "Writers Coalition" formed, attempting to split the union ranks and achieve a return to work.⁹⁸ Neither effort succeeded, and the WGA remains a viable union today. Animosity continued after the strike, however, when the WGA sought to discipline some of the opposition members.

Dissatisfaction and discontent with the union were not restricted to the splinter groups. Many members who remained in the union during

94. National Labor Relations Act § 8(b)(1)(A).

95. *NLRB v. IBEW, Local 340*, 481 U.S. 373 (1987).

96. Patricia Cramer Jenkins, Note, *NLRB v. International Brotherhood of Electrical Workers, Local 340: Abolition of the Reservoir Doctrine in Union Unfair Labor Practice Cases*, 66 N.C. L. REV. 602 (1988).

97. *IBEW*, 481 U.S. at 592-93.

98. *Striking Writers Guild Approves New Interim Pact with Independent Producers*, Daily Lab. Rep. (BNA) No. 132, at A-18 (July 11, 1988).

the strike did not do so happily. Screenwriter Walter Bernstein compared the 1988 writers' strike to the blacklisting that occurred in Hollywood of the 1950's.⁹⁹ Recalling the 1950's, he remarked, "At least then I was able to write under different names. I wasn't happy, but I worked."¹⁰⁰ During the later strikes, however, performing struck work was prohibited. This meant that WGA members could not solicit writing projects related to movie or television, or develop projects in conjunction with producers.

2. Lights, Camera . . . Strike

Hollywood's share of public attention is arguably rivaled only by events in sports and politics. The unions in the entertainment industry are successful in obtaining media and public attention. This power to attract attention is a phenomenon that must be factored into an examination of Hollywood unions and their negotiations with producers.

Strikes occur around the country every day, but their impact is restricted primarily to the specific industry and immediate geographic area. People outside these areas rarely notice. Few people seemed to notice the bitter workers' strike of Eastern Airlines in March, 1988. When Hollywood writers struck the producers (Alliance) two months later, however, not only did brethren unions manning the broadcast booths inform the world, but every household watching television in the country was alerted as reruns aired in place of new programming.

Television and movies provide a prime source of entertainment for a majority of the country. Nearly every household in the United States turns on its television set during any given day. When a change occurs in the provision of that entertainment, the result impacts viewers personally and noticeably. Through its viewership, the general public puts pressure on the striking parties to resolve their disputes. Viewership is evaluated in terms of ratings for each particular program. As consumers of the programming who manifest their viewing preferences and dislikes, the public directly influences the behavior of the parties to the strike. Each rating point is worth approximately ninety million dollars per season in national advertising.¹⁰¹ During the 1988 strike, sponsors chose to delay expenditures for advertising to avoid spending their advertising dollars

99. Glenn Collins, *The Ways Writers Are Weathering the Strike*, N.Y. TIMES, May 23, 1988, at C18.

100. *Id.*

101. Mark Dawidziak, *Cable TV Won Pot in Strike Gamble*, CHI. TRIB., Mar. 9, 1989, at C18.

during reruns of a program with lower viewership.¹⁰² Cutting off the flow of money to networks and producers is an effective method of applying pressure that both sides recognize.

In the entertainment industry, the labor model works as it was designed to work. In general, equal balance of power appears to be a given, with the high stakes ensuring that each side resists making costly concessions. When the cost of the disagreement surpasses the cost of the compromise, the parties settle. This description over-simplifies the economic, social and political factors involved in most negotiations, but it is generally accurate from an economic standpoint. Often, the damage occurs between the points of disagreement and settlement. Although most harmful consequences are foreseeable, damages to tangential industries may occur that are not immediately obvious. Mentioning the 1988 writers' strike, for example, still elicits stories from proprietors of dry cleaners and restaurateurs who blame the strike for their failed businesses.¹⁰³ Most writers would not have imagined that the strike would cause these consequences.

Hollywood is basically a company town; its labor strife is analogous to disputes in mill towns in the Mid-West regions and East Coast. When strikes occur in company towns, their impact intensifies with a greater number of workers in the area dependent on the striking industry. In Hollywood, jobs that are directly related to the production of films and television are the first to be affected. In the 1988 strike, however, the reverberations went much further. Talent agencies were forced to turn away clients and many closed. Film editors and developers engaged in price wars vying for the little business that existed.¹⁰⁴ The WGA strike, for example, "clobbered more than 200,000 members of the real working class—dry cleaners, technicians, restaurant workers and others."¹⁰⁵ In effect, the 9000 members of the WGA closed the companies of movie producers and shut down the company town of Hollywood.¹⁰⁶

102. Robert Goldrich, *Producers Access Spot Climate After WGA Strike*, BACK STAGE, Aug. 12, 1988, at 1; Darcy Eikenberg, *An Insider's Guide to What Really Happened During the Summer of 1988; Television Commercial Industry*, BACK STAGE, Sept. 2, 1988, at 1.

103. Peter Carbonara, *Negotiating Peace with Honor in Hollywood*, AM. LAW., Jan./Feb. 1989, at 43; Eisendrath, *supra* note 21.

104. Goldrich, *supra* note 104, at 2.

105. Eisendrath, *supra* note 21, at 19.

106. Carbonara, *supra* note 103. "When 9,000 members of the Writers Guild of America went on strike . . . they didn't just shut down all the major television and film studios; they shut down the city. Power restaurants like Spago and Le Dome sat empty as meetings went untaken. The dry cleaning business fell off as writers throughout Hollywood decided to wait that extra week. Some typing and messenger services closed altogether . . . 'the veterinary business went down fifty percent . . .'" *Id.*

As in many other company towns, tension exists in Hollywood between labor and management, especially during strikes. During the 1988 writers' strike, both sides strove to bypass the other by using outside services. Producers took production out of Hollywood to keep the cameras rolling through the employment of nonunion workers.¹⁰⁷ Lorimar Telepictures sent executives "to England to look into hiring British writers for its television shows."¹⁰⁸ The WGA, for its part, endeavored to sign agreements with both Alliance and non-Alliance producers. Although the WGA succeeded in these efforts, it failed to split the Alliance.¹⁰⁹

When the 1988 strike settled, neither management nor labor actually won. Rather, cable and independent producers succeeded in taking over a large share of the market,¹¹⁰ maintaining significantly increased levels in the ratings.¹¹¹ Ironically, competition from independent producers and cable stations was one of the fears that had led to the strike in the first place. As a result of the five-month writers' strike, both networks and studios suffered significant losses. The networks lost an irretrievable part of their already shrinking audience to cable and independent stations.¹¹² The studios lost approximately six million dollars in direct fees and residuals.¹¹³

3. The Federal Law Is in What State?

The WGA actions regarding unfair labor practices which were at issue in the *American Broadcasting* case also led to a suit by an individual who was affected by the Guild's "threats."¹¹⁴ Although not actually disciplined by the WGA, writer-producer Steven Bochco brought an action in state court on behalf of himself and eleven other individuals. They alleged that the WGA's constitution and bylaws did not permit its ac-

107. *Writers Guild Membership Approves Pact with Producers*, Daily Lab. Rep. (BNA) No. 153, at A-14 (Aug. 9, 1988).

108. Aljean Harmetz, *Dissident Writers Aim for Forced Vote*, N.Y. TIMES, Aug. 2, 1988, at C20.

109. *Writers Reach Tentative Agreement with Film and Television Producers*, Daily Lab. Rep. (BNA) No. 151, at A-10 (Aug. 5, 1988).

110. Michael Stremfel, *Writers Strike Rates Well with Independent Stations*, L.A. BUS. J., July 11, 1988, § 1, at 5; *Striking Writers Guild Approves New Interim Pact with Independent Producers*, Daily Lab. Rep. (BNA) No. 132, at A-18 (July 11, 1988).

111. Dawidziak, *supra* note 101. "The best cards were dealt to basic cable, pay cable and independent stations, which walked away from the table with a huge ratings boost . . ." *Id.*

112. Jeremy Gerard, *The Media Business: Hollywood Still Feels Writers' Walkout*, N.Y. TIMES, Sept. 4, 1989, at A38.

113. *Id.*

114. *Writers Guild v. Superior Court*, 126 Cal. Rptr. 498 (1975).

tions during the strike because the WGA had no authority to regulate the behavior of individuals in roles other than as writers. The WGA's attempts to prohibit hyphenates from performing their primary jobs as supervisors interfered with their contracts and business relationships. In essence, the Bochco complaint alleged that WGA members were denied rights guaranteed to them by section 7 of the National Labor Relations Act when the Guild coerced them into engaging in strike activities.¹¹⁵ Section 7 guarantees union members the right to choose not to join the strike and prohibits unions from forcing members to forgo this right.

The claim would have been valid under the *American Broadcasting* decision, if Bochco had filed suit in the proper court. The federal law—the National Labor Relations Act, preempted the state court from deciding the facts. Thus, the court instead analyzed the relationship between the Act and the Labor Management Reporting and Disclosure Act of 1959¹¹⁶ (“LMRDA”). Although the NLRA preempts state law, the LMRDA does not. Therefore, state court remedies are available for members of labor organizations with union constitutions and bylaws for conduct violating the LMRDA.¹¹⁷ The Court found that the WGA's coercive actions were arguably an unfair labor practice within the jurisdiction of the National Labor Relations Board, and thus the state court's jurisdiction was preempted.¹¹⁸ Under the Court's decision, if it may be reasonably asserted that the conduct called into question is subject to the Board's jurisdiction, a state court's power to decide the case is preempted. Although a basis for relief from unfair labor practices was available to the plaintiffs, the parties were in the wrong forum. Consequently, the Court granted the Guild's writ of prohibition, dismissing the claim.

4. Post-Strike Litigation Finds WGA Rules Unlawful

Subsequent strikes brought more litigation after 1988. The *American Broadcasting* case was brought by producers alleging that they had been subjected to unfair labor practices. A related issue, concerning the validity of the WGA's resignation rules, was conspicuously absent in *American Broadcasting*. If the issue had been raised, the strike rules which limited the employee's power to resign from the union would have

115. 29 U.S.C. § 157 (1992). Section 7 of the Act states, in part: “Employees shall have the right to self-organization . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . and shall also have the right to refrain from any or all of such activities . . .” *Id.*

116. 29 U.S.C. §§ 401-531 (1992).

117. 29 U.S.C. § 472.

118. *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

been held invalid under a 1985 Supreme Court case, *Pattern Makers League v. NLRB* ("Pattern Makers").¹¹⁹

A union is free to enforce its rules regarding resignations from the union, provided that the rules meet certain criteria. First, the rules must be reasonably enforced¹²⁰ and take into consideration legitimate union interests. Second, the rules must be properly adopted and, under the decision of *Pattern Makers*, are valid only if they allow members to escape the union's reach by resignation.¹²¹ The Court in *Pattern Makers* held that the union could not fine non-members for resignation or prohibit members from resigning even if the resignation was to avoid sanctions by the union.

In a similar lawsuit, the National Labor Relations Board examined the constitution and bylaws of the WGA to determine whether it had imposed unlawful restrictions on the rights of members to resign or allowed unlawful disciplinary actions subsequent to any resignation.¹²² Of the twenty-two union members who brought this action, none had attempted to resign or been subjected to discipline. In its ruling, the Board noted that all of them had been advised by counsel that the WGA rules were unlawful. The Board found, however, that the members had not worked within the system of the WGA to change the rules prior to instituting their action.

In an earlier case, the Board had had little trouble in determining that the actions of the WGA were unlawful.¹²³ Applying a *per se* rule requiring all members to have an unqualified right to resign from a union, the Board concluded that any restriction on a member's right to resign was unlawful. Several WGA rules proved offensive. These rules forbade resignations during negotiations or strikes and provided that only members in good standing with the union could tender their resignations. The rules further provided that even a proper resignation by a member in good standing did not always end the relationship. If a strike ensued within twenty-one days of the attempt to resign, the member remained bound by all of the strike rules and subject to the disciplinary provisions set forth in the WGA's constitution.¹²⁴

119. 473 U.S. 95 (1985).

120. *Scofield v. NLRB*, 394 U.S. 423 (1969).

121. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).

122. *Writers Guild of America, West, Inc.*, 132 L.R.R.M. 1291, 297 NLRB No. 12, (Oct. 12, 1989).

123. *International Ass'n of Machinists & Aerospace Workers Local Lodge 1414*, 270 N.L.R.B. 1330 (1984).

124. Article IV, section 8, governing resignations provides in part:

By accepting membership in the Guild members agree that the continuation of mem-

The Board found that the WGA had violated section 8(b)(1)(A) of the Act, which guarantees employees the right to refrain from collective action. The WGA was ordered to expunge these rules from its constitution and bylaws, and post a notice in its office and meeting halls, stating that the Board had found these provisions violative of the Act and had mandated their deletion from the constitution.

5. Tensions in and out of the Union

Hollywood's 1988 breakdown in labor negotiations and subsequent strike by the Writers Guild of America was distinctive due to the tensions within the union and animosity toward the Alliance of Motion Picture and Television Producers. The Alliance represents some two-hundred producers, including all of the major studios and networks. On behalf of those producers, the Alliance negotiates individually with each of the different unions in the industry. They have seized this opportunity to practice "pattern bargaining."¹²⁵ Pattern bargaining is the strategy of using a concession extracted from one union as leverage to get the same concession from another union in a subsequent negotiation.

In the 1950's and 1960's, pattern bargaining became the norm in several goods-producing industries.¹²⁶ Although the practice was prevalent until the 1980's, it is rarely practiced in labor negotiations today. The Alliance, however, has defied the trend by commencing the use of pattern bargaining in the 1980's—to the dismay of the writers.¹²⁷ It is not well-received by the unions, and has added to the acrimony between

bership status and the applicability of discipline to all members, especially during times of negotiation with employers or during strikes by the Guild is essential to their welfare and necessary for solidarity and to achieve the objectives of the Guild . . .

a. Only members who are in good standing . . . may tender their resignation

. . .

c. If . . . a member tenders his/her resignation during a strike in the industry . . . his/her resignation shall not relieve the member of his/her obligation to observe the Guild strike rules . . . for the duration of such and related strikes, and such member shall remain subject to Article X (Discipline) for the duration of such and related strikes.

Writers Guild Basic Agreement.

125. Glenn Collins, *The Ways Writers Are Weathering the Strike*, N.Y. TIMES, May 23, 1988, at C18.

126. *New Theories on Negotiations and Disputes Resolution, and the Changing Role of Mediation*, Daily Lab. Rep. (BNA) No. 11, at F-1 (Jan. 17, 1990).

"The experience of some U.S. industries with the disintegration of pattern bargaining is not isolated but rather shared by most Western European nations." *Despite Obstacles, Collective Bargaining Worldwide "Remarkably" Healthy*, IMF Told, Daily Lab. Rep. (BNA) No. 243, at A-5 (Dec. 18, 1986).

127. Anne Thompson, *No End Seems in Sight for Film Writers' Strike*, CHI. TRIB., Apr. 7, 1988, at D15. "The writers [did] not believe in 'pattern bargaining,' that what is good for the directors should be good enough for them." *Id.*

the two sides.¹²⁸

In 1988, the Alliance went to the negotiating table with concessions from the Directors Guild of America as part of its first proposal to the writers.¹²⁹ The directors (and actors) had agreed to accept the Alliance's reduced formulas despite the fact that they viewed them as wage roll-backs; the Alliance asked for the same concessions from the writers. The writers refused to approve what had been acceptable to the directors.¹³⁰ Their refusal strained relations with the other unions, and resulted in a strike. To those outside the labor system, a strike symbolizes a breakdown of the system. Strikes, however, are intended to operate as an integral part of the labor model. The strike, the negotiations, and the agreement were all indicators of the healthy operation of the system in Hollywood.

As stated previously, the purpose of the federal labor legislation was to equalize power where the parties exhibited unequal bargaining strengths. Congress found that the existing inequality created a situation that impeded commerce, and sought a model structure to equalize the positions of the parties. At present, it appears that the powers in Hollywood have been equalized. The Alliance is a powerful unit, but the WGA is a formidable opponent. In 1988, the WGA was able to maintain its strike with regard to certain issues on the bargaining table, and the Alliance was strong enough to let them walk out and virtually shut down the industry. Eventually, the parties returned to the bargaining table, however, feeling the pressure brought on by their actions. As a testament to the system, their negotiations produced a contract acceptable to both sides. The strike's impact was felt by both parties and left neither side eager for a repeat breakdown.

In the year following the writers' strike, both the SAG and AFTRA reached individual agreements with the Alliance months before their contracts expired. Interestingly, the craft unions such as the International Alliance of Theatrical Stage Employees offered contract proposals that included voluntary concessions mirroring the concessions that the Alliance had obtained from the writers and directors in previous negotiations.¹³¹ The voluntary offering of concessions prior to the beginning of formal negotiations is most often seen during times of severe financial

128. Carbonara, *supra* note 103, at 43. "The antagonism between labor and management in Hollywood has deeper roots. The producers have long taken a scorched-earth policy with regard to unions. A favorite tactic is 'pattern bargaining,' dealing with each talent or craft guild individually and trying to play them one off the other." *Id.*

129. Carbonara, *supra* note 103, at 43.

130. Thompson, *supra* note 128.

131. Bernstein, *supra* note 17.

problems in an industry. For example, the impending bankruptcy of Chrysler Corporation in 1979 created concession negotiations where pattern bargaining had been the norm. Concession negotiations were prevalent in the early 1980's, but by the mid-1980's the unions were making up for their losses.¹³²

It is interesting to contrast the entertainment industry to the steel or automobile industries and the union problems they have endured. Bargaining in both latter industries intensified because of poor economic conditions. Unions in the rust belt made concessions with the understanding that to do otherwise would destroy the industry and all of the jobs. The impetus for concessions in Hollywood, however, was not a desire to save the industry from financial destruction but the belief that Hollywood was flush with cash.¹³³ All parties were jockeying to insure their part of the growing financial pie by taking all necessary measures to avoid the possibility of another strike. SAG members suffering from the fallout of the writers' strike were trying to avoid another, similar blow to their union, the film industry, and the city.¹³⁴

6. The Guild Pauses to Look at Commas

The grievance arbitration process that operates in the entertainment industry is another aspect of labor relations uniquely applied in Hollywood. Grievance arbitrations in all industries traditionally center around disputes regarding conditions of employment, the rights and obligations of management, and the rights and responsibilities of the union. The WGA's agreement is typical in its provisions governing the handling of these grievances. What is unique are the WGA's rules providing for the routine determination of credits for film or television productions through the arbitration process. This process is best illustrated by examining an actual arbitration involving the designation of writing credits on a television show.

In *In re Lorimar-Telepictures Productions, Inc. and the Writers Guild of America, West, Inc.*,¹³⁵ ("Lorimar") the proper designation of

132. DONALD P. ROTHSCHILD ET AL., *COLLECTIVE BARGAINING AND LABOR ARBITRATION*, 41-52 (2d ed. 1979).

133. Matthew Heller, *Hollywood Hit by Rash of Labor Showdowns*, REUTERS BUS. REP., Mar. 15, 1988. In 1987, "a record \$4.2 billion was spent at the theatrical box office, and new secondary markets for T.V. and film products such as home video and cable are expanding all the time." *Id.*

134. Martin Kasindorf, *NEWSDAY*, Mar. 19, 1989, Part II, at 2. One SAG member summed up the SAG stance by saying, "This town can't stand another strike like last summer." *Id.*

135. 90 Lab. Arb. 1115 (1988) (Christopher, Arb.).

credits for a television show was arbitrated. The dispute involved the use of commas, the conjunction "and" and the ampersand ("&") in the credits for an episode of "Max Headroom."¹³⁶ While this type of disagreement may not be debated often by labor arbitrators across the country, its outcome is hardly inconsequential to Hollywood.

The WGA's operation with regard to television credits is unlike any other system in a union. Its role begins when the producer of a television show submits a "Notice of Tentative Writing Credits" to the WGA. In its case, Lorimar submitted proposed credits consisting of the names of four writers, in teams of twos, for an episode of a weekly series. The WGA determined that the writing credits were correct as proposed. It notified Lorimar that it could broadcast the credits exactly in the form Lorimar had set forth: "Written by Martin Pasko & Rebecca Parr and Steve Roberts & Michael Cassutt."¹³⁷

Further, the WGA notice stipulated that on-screen placement was to be governed by its Basic Agreement, and emphasized the distinction between the ampersand and the conjunction "and." The WGA Agreement provides that the ampersand is to designate a writing team, while "and" designates writers working separately. In the initial broadcast of the show, the company presented the writing credits as follows: "Written by Martin Pasko, Rebecca Parr, Steve Roberts, Michael Cassutt." The company used commas instead of the ampersand and conjunction "and," as the WGA had mandated.¹³⁸ The WGA brought the action to correct and enforce the proper listing of credits.

Lorimar did not endear itself to the WGA or the arbitrator by arguing that what had occurred was a "hypertechnical violation."¹³⁹ When writers work together simultaneously on a production and create material that is not separable, the writers are a team, designated with the ampersand. Writers working independently are listed in the credits with "and" between their names. Although two separate teams worked on the *Lorimar* production, the broadcast did not indicate this. *Lorimar's* failure to clarify the manner in which the writers worked caused the writers to receive improper credit for their work.

The WGA's complaints reflected its primary concern: to protect the integrity of its unique role in the industry and in the area of labor law in general. The WGA argued that allowing *Lorimar* to ignore the WGA

136. *Max Headroom* is an episodic television production which aired for a short period on ABC. *Id.*

137. 90 Lab. Arb. 1115 (1988).

138. *Id.*

139. *Id.*

standards in its Agreement denied the WGA the benefit of its bargain. Pursuant to the Agreement, the WGA is obligated to determine proper writing credits. Lorimar, as a signatory to the contract, agreed to abide by the WGA's final determinations.

The WGA rules also provide for an expedited procedure for hearing objections to credit listings.¹⁴⁰ In this case, the Lorimar producer did not object to the improper listing, but broadcast the credits incorrectly. Lorimar's decision not to adhere to the WGA precise designation of the credits violated the Agreement. The use of "and" and the ampersand to designate the way in which writers work is an accepted custom in the industry. The arbitrator noted that this practice had resulted in the grammatical formula becoming part of the contract.¹⁴¹ People in the industry rely on and understand the system, and allowing a violation of the rule harms the WGA as well as the credited individuals involved. The broadcasting of credits has an economic impact that cannot be overlooked, and the WGA seeks to assure parties the benefit of their bargain. The majority of the people in the industry work as independents on one contract at a time. Proper credit designations are vitally important because they become part of their ongoing portfolio or resume.

The Minimum Basic Agreement allowed the WGA to recover damages on its own behalf, with the basis of the damage award being injury to the WGA's institutional role in arbitration. The parties to the WGA Agreement fashioned the arbitrations system because of "the Guild's unique role, as a union, in [the] industry."¹⁴² WGA's arbitration determinations and efforts contribute to the productions from which the employer or production materially benefits.¹⁴³ That benefit contrasts with the loss in power suffered by the WGA as an institution in enforcing the provisions over which it has been vested with authority. Offering an arbitration service naturally incurs costs, and seeking enforcement of its decisions is also costly.

Despite these considerations, the arbitrator found that the WGA had failed to show a monetary loss. The arbitrator concluded, however, that the fact that damages could not be quantified in dollars did not deny a basis for compensation. The arbitrator granted the WGA's request for

140. Article V of the Guild Basic Agreement deals with "Grievance and Arbitration Rules and Procedures." Part E of this article deals with "Arbitration of Disputes Concerning Credit Provisions" and provides for an expedited arbitration proceeding.

141. 90 Lab. Arb. at 1119.

142. *Id.*

143. *Id.* at 1120.

two thousand dollars in damages. More importantly, the ruling established a significant precedent.

IV. CONCLUSION: WHY DO WE WATCH STEEL AND AUTOMOBILES BUT NOT HOLLYWOOD?

Labor law scholars contemplate different negotiating strategies, patterns in bargaining processes, and the changes in an industry that alter negotiations.¹⁴⁴ During the early 1980's, the automobile and steel industries shifted from pattern bargaining to concession bargaining because of the economic problems troubling those industries. The shift in bargaining patterns resulted in the publication of studies, books, and articles.¹⁴⁵ When the same unions tried to regain ground and offset their past concessions, questions about the future of concession bargaining appeared.¹⁴⁶ These industries draw academic scrutiny because they are bastions for labor, vital to the economy of the country, and powerful. Because the entertainment industry unions exhibit all three of these aspects, it is a prime area for study as well.

The steel and automobile industries have received considerable scholarly attention that has resulted in knowledgeable works on labor law. Hollywood has spawned unionization at every level of the industry, beginning in 1919 with the "White Rats"—the first actors' union and first union in the movie industry.¹⁴⁷ The differences between the entertainment industry and the rust belt industries of the country are obvious. However, the factors warranting study of the rust belt industries, such as the impact of the industry on the economy and the role of labor in the industry, are found in the entertainment industry and provide strong reasons for exploring their labor relations.

144. Harry N. Scheiber, *State Law and "Industrial Policy" in American Development, 1790-1987*, 75 CAL. L. REV. 1516 (1987); Thomas J. Schoenbaum, *International Law: Trade Friction with Japan and the American Policy Response*, 82 MICH. L. REV. 1647, 1652 (1984).

145. R. MACDONALD, *COLLECTIVE BARGAINING IN THE AUTOMOBILE INDUSTRY*, 219-220 (1964); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW*, (3d ed. 1986); MORGAN REYNOLDS, *POWER AND PRIVILEGE: LABOR UNIONS IN AMERICA 56-74* (1984); Charles B. Craver, *The Impact of Financial Crises upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 478 (1988); William Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111, 1135, 1232 (1989); Arthur S. Leonard, *Specific Performance of Collective Bargaining Agreements*, 52 FORDHAM L. REV. 193, 198 (1983).

146. Douglas A. Fraser, *Era of Breakthroughs in Job Security and Worker Participation*, 14 U. TOL. L. REV. 255 (1983); Thomas Miner, *Concession Bargaining*, 50 CHI.-KENT L. REV. 981 (1983); Lacombe & Conley, *Collective Bargaining Calendar Crowded Again in 1984*, MONTHLY LAB. REV., Jan. 1984, at 29.

147. THE MOVIE BUSINESS, AMERICAN FILM INDUSTRY PRACTICE, *supra* note 15. In memory of my sister Linda. Her belief in me and excitement that I wanted to be a lawyer remain my inspiration. She shares in a joy she didn't live to see.

Hollywood does not operate in a vacuum in labor law any more than it does in any other area. A number of factors peculiar to the industry have added to the success of the system. A few of these factors include the high visibility of the industry and the employees in it, and the impact of public interest on the labor process in Hollywood. To attribute the success of the system to these factors alone is to oversimplify the analysis, but to deny that they affect the participants, both at and away from the negotiating table is foolhardy. The collective bargaining agreements that are reached and used in the entertainment industry are unique, but effective. Negotiations, strikes, and agreements are all part of the labor system. In the entertainment industry in Hollywood, the system functions as it was intended to, which seems a rarity in itself. Although unionization in this country is declining, union activity is healthy and viable in Hollywood. This indicates that the National Labor Relations Act can successfully encourage growth of unions, while simultaneously allowing management to maintain sufficient and equal bargaining power.

The industry has prospered to the point of being an asset to the country and a positive addition to the balance of trade. A significant amount was learned from the study of labor relations in the automobile industry, both before and since the Japanese markets have threatened the industry. The entertainment industry is facing a number of global issues and competition similar to those faced by the automobile industry. As a large component of the entertainment industry, labor has a vital role in determining the outcome of the industry.*

* In memory of my sister Linda. Her belief in me and excitement that I wanted to be a lawyer remain my inspiration. She shares in a joy she didn't live to see.

