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BEHIND THE SCENES OF THE 2021 HOLLYWOOD LABOR UNREST

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Cover Page Footnote

University of Washington School of Law, Class of 2023; Arizona State University, B.S. 2015. Thank you to Professor Christopher Casillas of the University of Washington School of Law for sharing your expertise in Labor Law and all your valuable feedback. Thank you to the Washington Journal of Law, Technology & Arts editing team for your time and feedback in editing this Article.

BEHIND THE SCENES OF THE 2021 HOLLYWOOD LABOR UNREST

Kimberly Shely¹

ABSTRACT

In 2021, the Hollywood guild International Alliance of Theatrical Stage Employees (IATSE) negotiated a new contract with Alliance of Motion Picture and Television Producers (AMPTP). IATSE had enjoyed a relatively peaceful labor existence in its 128 years.² However, after negotiations with AMPTP stalled in 2021, IATSE held a vote to strike.³ The IATSE voters authorized a strike if negotiations did not produce an agreement.⁴ If IATSE had initiated a strike, productions would have effectively shut down.⁵ If Hollywood productions shut down, the industry would suffer millions in lost profits, employees would risk an unpaid strike, and viewers would likely see a decrease in content produced.⁶ IATSE and AMPTP eventually came to an agreement and avoided a strike in November 2021.⁷ But even with a new agreement some IATSE members remain unhappy.⁸

This Article analyzes the underlying issues which contributed to the stalled negotiations and subsequent 2021 labor unrest between IATSE and AMPTP. The main root cause of the labor unrest was a breakdown in negotiations between AMPTP and IATSE. This breakdown stems from three core underlying issues: (1) the working conditions for IATSE members; (2) the impact COVID-19 had on productions and the subsequent backlog of projects; and (3) new media pressures on producing large quantities of content for viewers forced to stay home, along with the lower payments IATSE members received on new media projects compared to traditional

¹ University of Washington School of Law, Class of 2023; Arizona State University, B.S. 2015. Thank you to Professor Christopher Casillas of the University of Washington School of Law for sharing your expertise in Labor Law and all your valuable feedback. Thank you to the *Washington Journal of Law, Technology & Arts* editing team for your time and feedback in editing this Article.

² Christopher Palmeri, *Hollywood Union Authorizes Strike, Sets Stage for Shutdown (2)*, BLOOMBERG LAW (October 4, 2021, 2:30 PM), <https://news.bloomberglaw.com/daily-labor-report/hollywood-union-authorizes-strike-sets-stage-for-shutdown-1>.

³ *By a Nearly Unanimous Margin, IATSE Members in TV and Film Production Vote to Authorize a Nationwide Strike*, IATSE (Oct. 4, 2021), <https://iatse.net/by-a-nearly-unanimous-margin-iatse-members-in-tv-and-film-production-vote-to-authorize-a-nationwide-strike/>.

⁴ *Id.*

⁵ Brenden Gallagher, *If Hollywood Workers Strike, the Entertainment Industry Will Grind to a Halt*, JACOBIN (Sept. 24, 2021), <https://www.jacobinmag.com/2021/09/if-hollywood-workers-strike-the-entertainment-industry-will-grind-to-a-halt>.

⁶ Gallagher, *supra* note 5 (“Without ‘below the line’ workers, the films and shows you watch would never get made.”); *see also*, Beatrice Verhoeven, *23 TV Shows Most Affected by 2007-08 Writers’ Strike (Photos)*, THE WRAP (April 26, 2017, 3:16 PM), <https://www.thewrap.com/23-tv-shows-most-affected-by-2007-2008-writers-strike-photos/> (Popular shows such as *The Big Bang Theory*, *Bones*, *ER*, *Breaking Bad*, *Grey’s Anatomy* and others were either delayed or had episodes cut out due to the strike.).

⁷ *IATSE Members Ratify Contracts with Producers, Studios and Streaming Services*, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, (Nov. 15, 2021), https://de6167c5-9f06-4e54-81fb-73ab5a07b817.filesusr.com/ugd/d096d8_01cd279fa36040419edae5f1c85ac91.pdf.

⁸ Brian Eckhouse, *Hollywood Union Approves Deals With Studios in Close Vote (1)*, BLOOMBERG LAW (Nov. 15, 2021, 4:21 PM), <https://news.bloomberglaw.com/daily-labor-report/hollywood-union-approves-contracts-with-studios-in-close-vote>.

productions. Some of these issues existed independently from each other.⁹ However, this Article shows that these three underlying issues combined to create the labor unrest of 2021.¹⁰

⁹ See generally, *AMPTP Film and Television Negotiations Stalled, Union to Hold Nationwide Strike Authorization Vote*, IATSE (Sept. 21, 2021), <https://iatse.net/amptp-film-and-television-negotiations-stalled-union-to-hold-nationwide-strike-authorization-vote/> (IATSE lists their grievances with AMPTP which it believes stalled negotiations).

¹⁰ Brian Eckhouse, *Hollywood Union Sets Oct. 18 Strike Date, Pressuring Studios (1)*, BLOOMBERG LAW (Oct. 13, 2021, 9:12 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X1H6QBD0000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d3cuYmxvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcvc2VhcmNoL3Jlc3VsdHMvMjM2NWlxZWNIWU2MTBkMTIjYjNmNDIwYT14NGY1YTEiXV0--a8fc5c990b33f2b9cee53594ce0d0597a97423d6&bna_news_filter=bloomberg-law-news&criteria_id=2365b1ece1e610d19cb3f420a284f5a1&search32=Ly2CqOESHbTI7WIRdnwSzw%3D%3DNBZi6GLFu4wPoHq7xnUli-sKTLAys4EgS_7CrMR0Hh_sV9g1kBIa-FbHIJSk4mMwdU_Ug0qksALN_J6azXjxipLBPqmUXGM3tIwbm4wrhH5bxhs-cEcUCBTzcWCVvMCYu2M66zvowCvGTGXNNaSY6i_PUDKkRuswapDZDj9CyuqjL377-Ki0cyEOZVdYXYn (“‘However, the pace of bargaining doesn’t reflect any sense of urgency,’ IATSE President Matthew Loeb said in a statement. . . . ‘Our members deserve to have their basic needs addressed now.’”).

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INTRODUCTION

The International Alliance of Theatrical Stage Employees (“IATSE”) “is a labor union representing over 150,000 technicians, artisans, and craftspersons in the entertainment industry, including live theatre, motion picture and television production, broadcast, and trade shows in the United States and Canada.”¹¹ In 2021, IATSE negotiated new contractual terms with the Alliance of Motion Picture and Television Producers (“AMPTP”) on behalf of roughly 60,000 members.¹² AMPTP “negotiates 58 industry-wide collective bargaining agreements on behalf of hundreds of motion picture and television producers.”¹³ Essentially AMPTP represents the producers, including for large film and television production companies such as Netflix and Warner Bros., in these negotiations.¹⁴ AMPTP is the “the primary, multiemployer bargaining representative for studios, major networks, and production companies since 1982.”¹⁵ IATSE represents “almost everyone who works on a film set besides directors, writers, and actors.”¹⁶ The Hollywood industry refers to their unions as “guilds”, and “[d]espite the decline of the industrial unionized workforce in the United States, guilds have grown in membership, kept a strong foothold and influence on the industry, and continue to shape the business on a multidimensional level.”¹⁷

The guilds provide bargaining power to workers because “individual employees alone, especially those who are not considered ‘A-list’ talent, do not have enough bargaining power to raise their own wages, improve working conditions, and secure provisions for health and other benefit plans.”¹⁸ The protections that unions afford is not unique to the Hollywood industry, but it is unique that the industry’s union membership continues to grow.¹⁹

In 2021, viewers got a glimpse into the lives of these behind-the-scenes crews when an Instagram account, “I-A Stories,” went viral after detailing some of the less than glamorous conditions in which IATSE members worked.²⁰ The account detailed usual workplace grievances like low wages and long hours, but it also revealed hidden aspects of the Hollywood industry.²¹ Shocking anonymous claims began to appear on “I-A Stories” detailing “everything from production assistants being asked to break the law to camera operators being denied bathroom

¹¹ *AMPTP Film and Television Negotiations Stalled, Union to Hold Nationwide Strike Authorization Vote*, IATSE (Sept. 21, 2021) <https://iatse.net/amptp-film-and-television-negotiations-stalled-union-to-hold-nationwide-strike-authorization-vote/>.

¹² *Id.*

¹³ *AMPTP*, <https://www.amptp.org> (last visited Feb. 12, 2022).

¹⁴ Anousha Sakoui, *The Last Time it was ‘Hollywood’s Bloody Friday.’ With no deal in sight, will crews strike again?*, Los Angeles Times (Sept. 11, 2021), <https://www.latimes.com/entertainment-arts/business/story/2021-09-10/the-last-time-it-involved-the-mob-and-warner-bros-could-iatse-strike-again>.

¹⁵ David P. White, *High Stakes*, 30-MAY L.A. LAW. 22, 24 (2007).

¹⁶ Gallagher, *supra* note 5.

¹⁷ Blaine Roth, *Tuning Into the On-Demand Streaming Culture--Hollywood Guilds’ Evolution Imperative in Today’s Media Landscape*, 27 UCLA ENT. L. REV. 141, 144 (2020).

¹⁸ *Id.* (citations omitted).

¹⁹ Roth, *supra* note 17, at 148; (“As union membership continues to decline nationwide, Hollywood remains a bastion of organized labor”) (citing David Ng, *Hollywood Guilds Flex Their Muscle as Union Influence Declines Nationwide*, L.A. TIMES (May 9, 2017, 3:00 AM), <http://www.latimes.com/business/hollywood/la-fi-ct-hollywood-unions-20170509-story.html> [<https://perma.cc/B3RV-AQGF>]).

²⁰ Alexi Horowitz-Ghazi, *Hollywood Production Crews May Strike Due to Unglamorously Low Wages and Long Hours*, NPR (Sept. 23, 2021, 4:40 PM), <https://www.npr.org/2021/09/23/1040227904/hollywood-production-crews-may-strike-due-to-unglamorously-low-wages-and-long-ho>.

²¹ *Id.*

breaks.”²² The public saw behind the curtain at what the reality was behind some of their favorite television shows and movies.

When members returned to the workplace following COVID-19 shutdowns, IATSE took the opportunity to leverage its position in negotiations and address some long-standing issues with the Alliance of Motion Picture and Television Producers (“AMPTP”).²³ IATSE claims that AMPTP did not adequately respond to its requests and forced negotiations to stall, so IATSE took steps to authorize a strike of the 60,000 members impacted by the stalled contract negotiations.²⁴ This vote to strike prompted AMPTP to return to the bargaining table for the first time in two months.²⁵ As a union, IATSE is protected under the National Labor Relations Act (“NLRA”), which allows unions to utilize a strike as an economic weapon in negotiations.²⁶ There has been significant debate about what forms of strikes are protected. The debate centers around whether an employer could or could not terminate striking employees, but that analysis as it relates to IATSE’s 2021 labor unrest is outside the scope of this Article.²⁷ Ultimately, before IATSE initiated the strike, IATSE and AMPTP did reach an agreement.²⁸

While IATSE has the right to strike under the NLRA, the decision to strike cannot be taken lightly. First, IATSE had never been on an authorized countrywide strike in its 128 years of existence.²⁹ If IATSE had gone on strike, Hollywood workers would have walked off set.³⁰ This number should alarm anyone with even a tangential connection to Hollywood. Meaning everyone who watches television or movies or who has a connection to a streaming platform like Netflix or Amazon Prime would be impacted. Even more significantly, it would impact everyone who depends on Hollywood productions for an income, whether indirectly or directly. Studio sets would be forced to shut down with such a large withdrawal of labor.³¹ The entertainment industry was still reeling from temporary COVID-19 closures,³² and if IATSE had gone on strike, it would have been one of the largest private sector strikes in over a decade.³³ Extended studio closures would reach nearly all TV and movie consumers.³⁴

Hollywood guilds have been relatively successful in their previous negotiations, although other guilds have been on strike before.³⁵ The consequences of IATSE’s strike would have been far reaching, beyond the immediate members of IATSE and AMPTP. The purpose of this Article is to identify the root issues which led to a breakdown in negotiations preceding the 2021 labor

²² Gallagher, *supra* note 5.

²³ Horowitz-Ghazi, *supra* note 20.

²⁴ Palmeri, *supra* note 2.

²⁵ *Id.*

²⁶ 29 U.S.C. § 163 (“Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impeded or diminish in any way the right to strike”); *See generally*, N.L.R.B. v. Insurance Agents Int’l Union, 361 U.S. 477, 488-89 (1960) (recognizing necessity of strikes in collective bargaining).

²⁷ *See e.g.*, N.L.R.B. v. Int’l Van Lines, 409 U.S. 48, 50-51 (1972) (discussing whether the strike was a protected or unprotected strike).

²⁸ Eckhouse, *Hollywood Union Approves Deals With Studios in Close Vote (1)*, *supra* note 8.

²⁹ *Id.*

³⁰ Gallagher, *supra* note 5.

³¹ *Id.*

³² Horowitz-Ghazi, *supra* note 20.

³³ Gallagher, *supra* note 5.

³⁴ *See, e.g.*, Beatrice Verhoeven, *23 TV Shows Most Affected by 2007-08 Writers’ Strike (Photos)*, THE WRAP (Apr. 26, 2017, 3:16 PM), <https://www.thewrap.com/23-tv-shows-most-affected-by-2007-2008-writers-strike-photos/> (popular shows were either delayed or had episodes cut out due to the WGA strike).

³⁵ Blaine Roth, *supra* note 17, at 147-148.

unrest. Understanding the underlying issues can explain why IATSE utilized a vote to strike to escalate negotiations. One of the core goals of the NLRA is to promote peace and labor stability and avoid disruptive labor unrest.³⁶ Ideally, understanding the motivation behind the labor unrest will fulfill the goals of the NLRA in maintaining future labor peace by identifying whether the issues have been resolved in the new collective bargaining agreement, or whether these issues will continue to arise in the future.

This Article proceeds as follows: Part I outlines the legal history of unions and the NLRA. It delves into the history and purpose of the NLRA, and specifically the history and legality of union strikes. Part I also discusses how the NLRA is applicable to IATSE and AMPTP. Then Part II describes the history of strikes in Hollywood and IATSE's formal demands that preceded its vote to strike. Part III of this Article analyzes what the underlying root causes of the labor unrest were and why it led to a vote to strike.

I. BACKGROUND OF UNIONS AND THE PROTECTIONS UNDER THE NLRA

A. The History of Unions and Purpose of the NLRA

A strike in the entertainment industry could leave viewers without their favorite content,³⁷ but strikes and attempts at unionization used to have much more sinister outcomes.³⁸ The earliest reported labor case in the United States was in 1806: *Commonwealth v. Pullis*, where a group of shoemakers “were indicted for striking for higher wages.”³⁹ Before common law evolved to accept unionization, the law considered unions to be criminal conspiracies.⁴⁰ However, following the Civil War and industrialization, the appeal of unions and collective bargaining grew and with that a push for better working conditions as factories expanded in response to the demands of industrialization.⁴¹

The unequal power dynamic between workers and employers made it difficult for an individual employee to have enough bargaining power to change their working conditions and founded labor law in the United States. We also cannot ignore that in the 18th and 19th centuries employers stole a significant amount of labor from enslaved workers.⁴² Another difference in the working dynamic from centuries ago was the “master-servant” law that came from England,⁴³ which is often compared to the laws regulating parents and children.⁴⁴ *Commonwealth v. Pullis* indicates that in the early 1800s, workers could not legally act together to try to improve working

³⁶ SETH HARRIS ET AL., MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS 42 (3d ed. 2021).

³⁷ Eckhouse, *supra* note 10.

³⁸ HARRIS ET AL., *supra* note 36, at 41.

³⁹ HARRIS ET AL., *supra* note 36, at 7.

⁴⁰ *Id.*

⁴¹ HARRIS ET AL., *supra* note 36, at 9.

⁴² HARRIS ET AL., *supra* note 36, at 7.

⁴³ *Id.* at 7.

⁴⁴ *Id.*

conditions without risking criminal conspiracy charges.⁴⁵ However, employers could still legally work in concert to lower wages, despite employees not having analogous protection.⁴⁶

By the mid 1800s, courts shifted away from criminalizing the mere organization of a union.⁴⁷ However, “criminal conspiracy prosecutions were increasingly replaced with civil conspiracy prosecutions.”⁴⁸ Even though unions could technically form, the law provided no clear guidance on what a union could do besides “setting internal rules for their members.”⁴⁹ Even without this guidance, unionization increased in the 19th century with the Industrial Revolution.⁵⁰ “[I]ndustrialization led to much more factory work. Such work was dangerous, and often involved very long hours.”⁵¹ Labor unions became more popular as workers attempted to bargain for better working conditions in industrial factories.

Legislators eventually took steps to legalize what unions could do, after decades of legal uncertainty. “The first federal statute giving rights to unions was the Railway Labor Act of 1926 (RLA).”⁵² Then Congress enacted the Norris-LaGuardia Act of 1932, largely due to increasing public and political sympathy for laborers and prevented “courts from using injunctions in most nonviolent labor disputes.”⁵³

The government took further action to stabilize labor relations and created the National Labor Relations Act (NLRA) of 1935. Congress has since amended the NLRA, but overall, it “is the main, current private-sector labor law statute.”⁵⁴ By the time the NLRA came around “the system of labor relations was in crisis. Law and reality were increasingly out of sync.”⁵⁵ Following centuries of violent strikes and power struggles between employers and unions, the purpose of the NLRA was to: (1) bring stability and labor peace; (2) “encourage unionization, collective bargaining, and even industrial democracy;” (3) “provide a fair but neutral playing field, allowing unions and employers to settle their own disputes, without the government setting terms; and (4) “bring the law into conformity with the reality of union organization.”⁵⁶ The economic disruptions that stemmed from the labor unrest were a key motivator for the NLRA. Each of these goals is important in its relation to both past labor relations and current tensions in the labor field. The NLRA represented a huge milestone for unions, but businesses “reacted furiously against the NLRA, claiming it was unconstitutional and refusing to comply with it.”⁵⁷

The Supreme Court ruled on the constitutionality of the NLRA in *N.L.R.B. v. Jones and Laughlin Steel Corp.*⁵⁸ In addition to the violence associated with strikes, Congress identified that employers injured commerce when they denied their employees the right to organize and when

⁴⁵ *Id.*

⁴⁶ HARRIS ET AL., *supra* note 36, at 8; *See, e.g.*, *People v. Melvin*, 2 Wheeler Crim. Cas. 262 (1810) (“finding a union attempting to raise wages to be an illegal conspiracy while rejecting the union’s defense that their employers had combined to depress wages.”).

⁴⁷ HARRIS ET AL., *supra* note 36, at 8; *See, e.g.*, *Commonwealth v. Hunt*, 45 Mass. (4 Metc.) 111, 130 (1842) (merely organizing a union was not a criminal conspiracy on its own).

⁴⁸ HARRIS ET AL., *supra* note 36, at 8.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 9.

⁵² HARRIS ET AL., *supra* note 36, at 39.

⁵³ HARRIS ET AL., *supra* note 36, at 39; *See generally*, 29 U.S.C. §§101—115.

⁵⁴ HARRIS ET AL., *supra* note 36, at 41.

⁵⁵ *Id.* at 41.

⁵⁶ HARRIS ET AL., *supra* note 36, at 41.

⁵⁷ *Id.* at 43.

⁵⁸ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615 (1937).

they refused to participate in the collective bargaining process.⁵⁹ The Court recognized that safeguarding “the right of employees to self-organize and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer . . . is a fundamental right.”⁶⁰

The ability of workers to organize into unions helps maintain industrial peace because an employer’s refusal to negotiate was a leading cause of strife.⁶¹ Additionally the NLRA does not interfere with an employer’s ability to maintain control over their business because “[t]he act does not compel agreements between employers and employees. It does not compel any agreement [whatsoever]. It does not prevent the employer ‘from refusing to make a collective contract and hiring individuals on whatever terms’ the employer ‘may by unilateral action determine.’”⁶² It just provides a safer avenue for employees to work together “to give laborers [an] opportunity to deal on an equality with their employer.”⁶³

B. The Protections that the NLRA Provides Unions

1. *The NLRA Applies to Private Employees and Employers*

The NLRA provides rights to employees in Section 7, which states that

[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities⁶⁴

The NLRA applies to IATSE members because the employers and employees meet the definitions provided in the Act. An “employee” under the NLRA is

any employee . . . unless this Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment⁶⁵

This very broad circular definition encompasses almost all employees, with the explicit exceptions of independent contractors; agricultural workers; an individual employed by their parent or spouse; NLRA defined supervisors; and individuals working in domestic service for their

⁵⁹ Jones & Laughlin Steel Corp., 301 U.S. at 22-23. *See generally*, 29 U.S.C. § 151.

⁶⁰ Jones & Laughlin Steel Corp., 301 U.S. at 33.

⁶¹ HARRIS ET AL., *supra* note 36, at 42.

⁶² HARRIS ET AL., *supra* note 36, at 45 (citing *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 57 S.Ct. 592, 600, 81 L.Ed 789, note 6 (1937)).

⁶³ HARRIS ET AL., *supra* note 36, at 33; *see also* *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209, 42 S.Ct. 72, 78 (1921).

⁶⁴ 29 U.S.C. § 157 (emphasis added).

⁶⁵ 29 U.S.C. § 152(3).

own family.⁶⁶ IATSE represents entertainment industry professionals “including stagehands, front of house workers, wardrobe attendants, hair and makeup artists, motion picture and television production technicians, broadcast technicians, scenic artists, designers, animators, audiovisual technicians, and more.”⁶⁷ This varied list of workers in IATSE would satisfy the employee definition of the NLRA, unless they are independent contractors.

The Hollywood production companies would be considered “employers” under the NLRA. “Employer” is a similarly broad definition and “includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States . . . or any labor organization”⁶⁸ So essentially a private employer would be one that is not a public employer, like federal or state jobs. Hollywood production companies are not government entities nor labor organization positions and would therefore meet the broad definition of employer under the NLRA.

Employers must be aware that § 8(a)(1) of the NLRA makes it “an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7.”⁶⁹ This provision in the NLRA is the mechanism that protects union member’s right to strike.⁷⁰ Section 8(d) also obligates employers to bargain with the employee’s representative “in good faith with respect to wages, hours, and other terms and conditions of employment”⁷¹ This bargaining requirement under the NLRA is why IATSE and AMPTP were negotiating together, they were obligated to negotiate a collective bargaining agreement in good faith. While the duty to bargain in good faith does not legally compel either party to accept any specific proposal, it does obligate both sides to consider various proposals openly and fairly with a sincere desire to try and reach an agreement.⁷²

2. *Concerted Activity is Protected Under the NLRA*

What constitutes protected concerted activity under Section 7 of the NLRA can be disputed. However, it is generally accepted that concerted activity includes:

talking with one or more co-workers about your wages and benefits or other working conditions, . . . participating in a concerted refusal to work in unsafe conditions, and joining with coworkers to talk directly to your employer, to a government agency, or to the media about your problems in your workplace.⁷³

Congress intended Section 7 to allow “employees to band together in confronting an employer regarding the terms and conditions of their employment.”⁷⁴

⁶⁶ 29 U.S.C. §152(3).

⁶⁷ *Join the Union Behind Entertainment*, IATSE <https://iatse.net/join/> (last visited Feb 6, 2022).

⁶⁸ 29 U.S.C. § 152(2).

⁶⁹ 29 U.S.C. § 158(a)(1)

⁷⁰ *What’s the Law?*, ABOUT NLRB <https://www.nlr.gov/about-nlr/rights-we-protect/whats-law> (last visited Feb 6, 2022).

⁷¹ 29 U.S.C. § 158(d).

⁷² *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 n.6 (1937).

⁷³ *What’s the Law?*, supra note 70; see generally, *N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822 (1984).

⁷⁴ *N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822, 835 (1984).

Union members can even engage in concerted activity when they are acting alone.⁷⁵ In *N.L.R.B. v. City Disposal Systems Inc.*, the Supreme Court determined that an employee who invokes a protection that is rooted in the “collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement.”⁷⁶ The Court held that the entire process of the union forming, negotiating a collective bargaining agreement, and enforcing the agreement is a single form of collective activity.⁷⁷ So when an individual employee invokes a right that is a part of that collective-bargaining agreement, such as speaking out about an unsafe working condition, the employee is exercising a protected right under Section 7.⁷⁸ The National Labor Relations Board has also included social media platforms as a legitimate venue for employees to engage in Section 7 concerted activity discussions about their hours, wages, or other working conditions.⁷⁹

3. *The NLRA Allows for Certain Protected Forms of Strikes*

One of the purposes of the NLRA is to alleviate the “strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce”⁸⁰ The NLRA simultaneously recognizes the right to lawfully strike, which does disrupt the flow of commerce when workers withhold their labor.⁸¹ Because the NLRA does not force parties to agree to contractual terms, both unions and employers can use “economic weapons to influence each other’s bargaining positions.”⁸² A strike is when “employees collectively withhold[] their labor from their employer [and] may be the quintessential concerted activity.”⁸³ Concerted activity is then protected under Section 7 of the NLRA.⁸⁴

IATSE did not end up striking, but if it had, the strikers’ potential for protection under Section 7 and Section 13 of the NLRA would have been different depending on the type of strike that occurred.⁸⁵ The workers would have had different reinstatement rights depending on the type of strike, and the form of strike is only determined once a strike occurs.⁸⁶ Section 7 also typically does not protect strikes where people engage in significant unlawful conduct, even if otherwise the

⁷⁵ *City Disposal Systems Inc.*, 465 U.S. at 831 (§ 7 does not narrow concerted activities to mean that two or more employees are working together).

⁷⁶ *Id.*

⁷⁷ *City Disposal Systems Inc.*, 465 U.S. at 831-832.

⁷⁸ *City Disposal Systems Inc.*, 465 U.S. at 832.

⁷⁹ *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (2012) (four co-workers discussing issues in the workplace on Facebook were discharged by their employer in violation of § 8(a)(1) since that was protected concerted activity); *see also*, *Three D, LLC v. N.L.R.B.*, 629 F. App’x 33 (2d Cir. 2015) (liking a post on social media can also be concerted activity).

⁸⁰ 29 U.S.C. § 151.

⁸¹ 29 U.S.C. § 163 (“Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impeded or diminish in any way the right to strike”); *See generally*, *N.L.R.B. v. Insurance Agents Int’l Union*, 361 U.S. 477, 488-89 (1960) (recognizing necessity of strikes in collective bargaining).

⁸² HARRIS ET AL., *supra* note 36, at 845.

⁸³ *Id.*

⁸⁴ 29 U.S.C. § 157.

⁸⁵ HARRIS ET AL., *supra* note 36, at 860 (Unfair labor practice (ULP) strikers are entitled to reinstatement, but economic strikers run the risk of being permanently replaced.).

⁸⁶ HARRIS ET AL., *supra* note 36, at 849 – 854 (courts analyze the conduct that occurred during the strike to determine whether the actions were protected).

employees would have had a right to be reinstated.⁸⁷ This includes strikes that are associated with violence or property destruction.⁸⁸

IATSE never initiated a strike, so there is no determination of whether it would have been a protected strike, but a vote to strike is still significant and should not be taken lightly. “Striking workers bear significant costs, including the wages lost during the strike, the emotional uncertainty of living in an unsettled environment without a predictable outcome, and in many strikes, the risk of losing their job to a permanent replacement worker.”⁸⁹ Employers also risk their productivity if their workers strike.⁹⁰ “[A] struck employer might be forced to stop operating, surrender production and/or sales for days or months . . . and, ultimately, sacrifice product market share.”⁹¹ Understanding the potential consequences of a strike for IATSE members is important to understand how significant the underlying labor unrest was, to the extent IATSE voted to strike and was willing to risk the associated economic uncertainty as a means of last resort in negotiations.⁹²

C. The Violent History of U.S. Labor Strikes

To understand the evolution of labor law into today’s NLRA and the significance of voting to strike, it is also important to recognize the violent history of unionization and specifically strikes.⁹³ “The U.S. has the bloodiest, most violent labor history of any industrial nation.”⁹⁴ In the years 1902-1904, about 200 people were killed during major strikes and close to 2,000 were injured.⁹⁵ The majority of people killed or wounded were striking employees and their supporters.⁹⁶ “Employers routinely used spies, vigilantes, and other means to attack—often physically—union supporters.”⁹⁷ Even workers’ families were not safe. In the “Ludlow Massacre” of 1913, there was a strike against the Colorado Fuel and Iron company.⁹⁸ When the workers were away, the “national guard and company agents attacked a miner’s camp . . . shooting and burning to death a number of the workers’ wives and children.”⁹⁹

Employers and unions had differing views of what freedom to work meant, which contributed to the rising tension.¹⁰⁰ Employers claimed that labor unions would infringe upon employer rights, and individual workers’ rights, in the freedom of contracting.¹⁰¹ The United States had a default “employment at will” legal status, which meant that employers could terminate an

⁸⁷ HARRIS ET AL., *supra* note 36, at 849. *See e.g.*, *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 38-49 (1942) (seamen were fired after violating federal criminal law by engaging in a mutiny).

⁸⁸ HARRIS ET AL., *supra* note 36, at 850.

⁸⁹ HARRIS ET AL., *supra* note 36, at 846.

⁹⁰ *Id.*

⁹¹ HARRIS ET AL., *supra* note 36, at 846.

⁹² *By a Nearly Unanimous Margin, IATSE Members in TV and Film Production Vote to Authorize a Nationwide Strike*, *supra* note 3.

⁹³ HARRIS ET AL., *supra* note 36, at 9.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ HARRIS ET AL., *supra* note 36, at 10 (“The concept of ‘freedom’ was always important in labor law, but advocates and opponents of unions have applied the term ‘freedom’ in very different ways.”).

¹⁰¹ *Id.*

employee at any time and employees could quit at any time.¹⁰² Employers believed that this employment at will status was essential to their freedom.¹⁰³ Unions, however, thought that freedom should include the “legally protected right for workers to join a union, and have their union take certain actions on their behalf: negotiate, boycott, strike, and picket.”¹⁰⁴ Union supporters believed that employees should have a freedom to associate together and that it would create a more democratic workplace.¹⁰⁵

It was important for workers to be able to form or join a union because “[i]n the later 19th and early 20th century . . . laws governing employers and employees gave employers almost total power.”¹⁰⁶ As evidenced by the United States’ violent labor history, individual workers feared retaliation if they attempted to ask for better working conditions. Despite the lack of legislation protecting unions, unions continued to form in an effort to provide better protection to workers as working conditions continued to deteriorate. “Labor law is predicated on the notion that workers generally have more power when bargaining collectively than when bargaining individually, and statistics bear this out.”¹⁰⁷ The NLRA provided an avenue for some protected strikes to alleviate the strife that came from early unprotected strikes.

II. HISTORY OF HOLLYWOOD UNIONS AND STRIKES

A. IATSE Has Not Been on Strike in 128 Years¹⁰⁸

IATSE “has never actually struck all of its West Coast locals at once.”¹⁰⁹ It would have been “the biggest private sector strike in the United States in over a decade.”¹¹⁰ If IATSE had gone on strike, approximately 1 million jobs in the television and film industry would have been impacted.¹¹¹ IATSE union members have previously participated in local strikes. In 1945, IATSE members had a role in “Hollywood’s Bloody Friday” also known as ‘The War for Warner Bros.’¹¹² The War for Warner Bros. was a drama fit for Hollywood. It was born out of two of Hollywood’s craft unions, IATSE Local 37 and the Confederation of Studio Unions (“CSU”) which represented painters and carpenters along with other craftspeople.¹¹³ Dozens of set decorators broke from IATSE and attempted to form their own union before negotiating with producers with CSU as their representative.¹¹⁴ Producers allegedly stalled negotiations for nine months, until IATSE intervened

¹⁰² *Id.* at 10–11.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 11.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ HARRIS ET AL., *supra* note 36, at 25.

¹⁰⁸ Eckhouse, *Hollywood Union Approves Deals With Studios in Close Vote (1)*, *supra* note 8.

¹⁰⁹ Gallagher, *supra* note 5.

¹¹⁰ *Id.*

¹¹¹ Eckhouse, *supra* note 8.

¹¹² Sakoui, *supra* note 14.

¹¹³ *The War for Warner Brothers*, IATSE LOCAL 728, <https://www.iatse728.org/about-us/history/the-war-for-warner-brothers> (last visited April 23, 2022).

¹¹⁴ *Id.*

and claimed the set decorators as IATSE members.¹¹⁵ The subsequent jurisdictional dispute between IATSE and CSU stalled negotiations for another five months.¹¹⁶

In February 1945 an arbitrator appointed by the War Labor Board eventually determined that CSU had jurisdiction over the set decorators, but producers still refused to negotiate with them.¹¹⁷ In March of 1945, approximately 10,500 CSU workers went on strike.¹¹⁸ IATSE president Richard Walsh ordered IATSE members to cross the picket line and continue working, but thousands refused and stood in solidarity with CSU.¹¹⁹ Some members alleged that IATSE leaders colluded with producers (and a Chicago-based mafia) to attempt to replace CSU permanently.¹²⁰ The tension rose until October 5, 1945 when 300 strikers, including some from IATSE, gathered at Warner Brother's main gates.¹²¹ They were met by strikebreakers "armed with chains, bolts, hammers, six inch pipes, brass knuckles, wooden mallets and battery cables."¹²² Although the jurisdictional claims between CSU and IATSE would continue on, and even though IATSE had not formally joined the strike, the influence of individual IATSE members joining is significant.¹²³ However, since IATSE members acted individually, and not on authority from IATSE to strike, this is not a technical, formal, strike in IATSE's history.

B. Recent Strikes in Other Hollywood Unions

Since 1960, three other major Hollywood guilds, the Directors Guild of America (DGA); the Screen Actors Guild and the American Federation of Television and Radio Artists (SAG); and the Writers Guild of America (WGA), have initiated ten major member strikes.¹²⁴ WGA initiated six out of ten of those strikes.¹²⁵ In 2007, WGA led a strike that lasted approximately 100 days.¹²⁶ WGA fought for "the right to receive residuals for original new media content, like Netflix original series, as well as reuse of preexisting content on new media."¹²⁷ New media appeared to be an underlying cause of WGA's 2007 labor strike as writer's demanded better terms for residual payments on new media projects.

To understand whether new media had an impact on IATSE's 2021 labor unrest, it is important to understand how new media impacts Hollywood. New media is material that is broadcast over the Internet, including television programs and movies.¹²⁸ The rise of the internet changed the way Hollywood distributed content, as it sought to merge technology, entertainment,

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *The War for Warner Brothers*, *supra* note 113; see generally *Records of the National War Labor Board (RG 202), 1942-1947*, NATIONAL ARCHIVES, <https://www.archives.gov/chicago/finding-aids/nwlb> (last visited April 23, 2022) (purpose of the War Labor Board was to peacefully settle labor disputes).

¹¹⁸ *Id.*

¹¹⁹ *The War for Warner Brothers*, *supra* note 113; see generally, Sakoui, *supra* note 14.

¹²⁰ *The War for Warner Brothers*, *supra* note 113.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (some IATSE members that supported the strike were prevented from returning to work).

¹²⁴ Roth, *supra* note 17, at 147.

¹²⁵ *Id.*

¹²⁶ Roth, *supra* note 17, at 151.

¹²⁷ *Id.*

¹²⁸ Bernadette A. Safrath, *How Improvements in Technology Have Affected the Entertainment Industry: Writers and Actors Fight for Compensation*, 26 *Touro L. Rev.* 115, 117 (2010).

and this new media platform.¹²⁹ “Beginning with broadcast networks leading to cable networks and then to premium subscription-based content producers like HBO and Showtime, the landscape has broadened in terms of choice” for viewers.¹³⁰ Consumers have multiple different options for consuming content, including “traditional television sets, cell phones, laptops, tablets, and DVD players.”¹³¹ Then there are a multitude of different ways to obtain their “content, such as traditional theatrical exhibition, physical sales, free and pay TV exhibition, along with the internet-based electronic sell-through” such as Amazon, and video-on-demand (VOD) like Netflix or Hulu.¹³²

New media has complicated matters for producers and guilds attempting to draft agreements because new media has not replaced traditional forms of media, such as a theatrical release; it has just added new additional options.¹³³ “[T]he entertainment industry has been consistently impacted and disrupted by technological advancements.”¹³⁴ New media does not appear to be a temporary fad. In fact, “[r]esearch has shown that as generations have grown up with streaming, it has become their predominant means of obtaining content and shows no signs of slowing down.”¹³⁵

Netflix, in particular, can be traced to some of the changes in content release. “Netflix changed ‘the distribution model to on-demand TV and birth[ed] the concept of binge-watching,’ by releasing whole seasons on one date, versus the traditional episode-per-week model.”¹³⁶ Other media companies responded and grew to compete as new ways to watch content expanded.¹³⁷ The Hollywood guilds have attempted to update agreements and negotiate new contracts to cover these new types of production and distribution models.¹³⁸ A particular point of contention, which led to the 2007 WGA strike, was the impact to residual payments.¹³⁹ “Residuals are compensation paid for use of a work beyond its initial use.”¹⁴⁰ The introduction of streaming platforms made content much more accessible, which greatly impacted residuals. The 2007 WGA strike lasted about 100 days, and “cost the industry \$2 billion . . . and was felt beyond the industry by a range of businesses, from restaurants to tailors, that rely on production for business.”¹⁴¹ From a consumer’s standpoint, a strike could delay beloved shows and movies from being released or shorten show seasons.¹⁴²

¹²⁹ Roth, *supra* note 17, at 152.

¹³⁰ *Id.*

¹³¹ Roth, *supra* note 17, at 153.

¹³² *Id.*

¹³³ Roth, *supra* note 17, at 153.

¹³⁴ *Today in Guild History: The End of the 07-08 Strike*, WRITERS GUILD OF AMERICA WEST (Feb. 12, 2021), <https://www.wga.org/news-events/news/connect/2-12-21/today-in-guild-history-the-end-of-the-07-08-strike>.

¹³⁵ Roth, *supra* note 17, at 164 (citing Laura Albert, *Gen Z is All About Streaming*, CIVIC SCI (May 12, 2016), <https://civicscience.com/gen-z-streaming> [<https://perma.cc/QDU2-JT6M>]).

¹³⁶ Roth, *supra* note 17, at 153-154 (quoting Ashley Rodriguez, *Ten Years Ago, Netflix Launched Streaming Video and Changed the Way We Watch Everything*, QUARTZ (Jan. 17, 2017), <https://qz.com/887010/netflix-nflxlaunched-streaming-video-10-years-ago-and-changed-the-way-we-watch-everything/>).

¹³⁷ Roth, *supra* note 17, at 156.

¹³⁸ Roth, *supra* note 17, at 162.

¹³⁹ Roth, *supra* note 17, at 163.

¹⁴⁰ Roth, *supra* note 17, at 150.

¹⁴¹ Palmeri, *supra* note 2.

¹⁴² Beatrice Verhoeven, *23 TV Shows Most Affected by 2007-08 Writers’ Strike (Photos)*, THE WRAP (April 26, 2017, 3:16 PM), <https://www.thewrap.com/23-tv-shows-most-affected-by-2007-2008-writers-strike-photos/> (Popular shows such as *The Big Bang Theory*, *Bones*, *ER*, *Breaking Bad*, *Grey’s Anatomy* and others were either delayed or had episodes cut out due to the strike.).

C. IATSE's 2021 Demands from AMPTP

Preceding the strike vote, IATSE and AMPTP negotiated a new three-year contract for months without success.¹⁴³ IATSE claimed that AMPTP refused to address their largest issues in the workplace.¹⁴⁴ AMPTP claimed to be committed to coming to an agreement, but IATSE felt their basic needs remained unmet and that AMPTP was not responding in a meaningful way.¹⁴⁵ The issues that IATSE claimed are discussed further below in the analysis of the root issues behind the labor unrest, but an IATSE press release alleged the main issues to be:

- Excessively unsafe and harmful working hours.
- Unlivable wages for the lowest paid crafts.
- Consistent failure to provide reasonable rest during meal breaks, between workdays, and on weekends.
- Workers on certain “new media” streaming projects get paid less, even on productions with budgets that rival or exceed those of traditionally released blockbusters.¹⁴⁶

On October 1, 2021, IATSE held a vote on whether it should authorize the union to call for a strike to try to move negotiations forward.¹⁴⁷ There was a particularly high voter turnout, with almost ninety percent of the members participating in the vote.¹⁴⁸ Of that ninety percent, more than ninety-eight percent of IATSE members voted to authorize the strike.¹⁴⁹ Ultimately AMPTP and IATSE were able to come to an agreement on a new labor agreement before the strike occurred.¹⁵⁰ Despite averting a strike, it is important to understand the underlying root issues, identified below, because of the potential impact a strike would have had on commerce, workers, and consumers.

The vote to strike is significant because of both the potential loss union members would have if they struck, and the impact to the industry.¹⁵¹ In a complex layering of rules, the NLRA both “defines a strike as a ‘form of industrial strife or unrest; that disrupts commerce’”,¹⁵² but then Section 7 of the NLRA “protects workers engaging in ‘concerted activities,’ which certainly includes strikes.”¹⁵³ It is important to note that protection is not guaranteed by the NLRA due to the contradictory language in the statute that strikes disrupt commerce and because there are a variety of allowed and disallowed strikes. Regardless of whether the potential strike would have been protected, the impact to consumers and the industry from any disruption would still be significant.

¹⁴³ Sakoui, *supra* note 14.

¹⁴⁴ *By a Nearly Unanimous Margin, IATSE Members in TV and Film Production Vote to Authorize a Nationwide Strike*, *supra* note 3.

¹⁴⁵ Palmeri, *supra* note 2.

¹⁴⁶ *AMPTP Film and Television Negotiations Stalled, Union to Hold Nationwide Strike Authorization Vote*, IATSE (Sept. 21, 2021) <https://iatse.net/amptp-film-and-television-negotiations-stalled-union-to-hold-nationwide-strike-authorization-vote/>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Brian Eckhouse, *Hollywood Studios Reach New Labor Agreement, Avoiding Strike (1)*, BLOOMBERG LAW (Oct. 16, 2021) <https://www.bloomberglaw.com/product/blaw/document/R13KD6T0G1KW>.

¹⁵¹ *See generally*, HARRIS ET AL., *supra* note 36, at 846 (potential for strikers to be permanently replaced and lose wages and employers potentially lose business).

¹⁵² HARRIS ET AL., *supra* note 36, at 846 (citing 29 U.S.C. § 151).

¹⁵³ HARRIS ET AL., *supra* note 36, at 846 (citing 29 U.S.C. § 157).

III. ROOT CAUSES BEHIND THE 2021 LABOR UNREST

On October 16, 2021, IATSE and AMPTP reached an agreement “two days prior to the announced strike date.”¹⁵⁴ Some of the highlights of the agreement include pension and health plan benefits; a ten-hour turnaround improvement; rest period guidelines for weekends and time frames between working; improvement of a \$25.00 missed meal penalty; streaming payment improvements; and diversity, equity, and inclusion initiatives.¹⁵⁵ It appears the three main root issues that led to the 2021 labor unrest are: (1) the overall working conditions; (2) combined with COVID-19 closures and subsequent push to catch up; (3) and the pressure new media releases put on the industry to produce new bingeable content. These three topics are detailed further below.

A. The Unglamorous Scenes Behind Hollywood

IATSE members, who usually are behind the scenes, had their own moments of notoriety when an Instagram account publishing anonymous stories of their working conditions went viral in 2021.¹⁵⁶ Ben Gottlieb created an Instagram account called “I-A Stories” to vent about workplace frustrations, and it gained traction.¹⁵⁷ In February 2022, the Instagram account had over 160,000 followers and over 1,200 posts; although it does not appear there has been a post since April 2022.¹⁵⁸ “I-A Stories” gained momentum and was an outlet for IATSE members to share similar frustration with “low wages, excessive hours, little sleep and less and less time off for lunch breaks and weekends.”¹⁵⁹ Despite the unconventional outlet, discussions on Instagram can be a valid platform for protected concerted activity.¹⁶⁰

The Instagram account “I-A Stories” provided the individual background stories that constituted IATSE’s demand for better working conditions and ultimately led to one of the underlying root causes of the labor unrest. “Workers say it’s an industry where 16 hour days are common, meal and bathroom breaks are often skipped, even when legally required, and the time between shifts is often too short to fit in a commute and more than a few hours of sleep.”¹⁶¹ IATSE

¹⁵⁴ *IATSE Members Ratify Contracts with Producers, Studios and Streaming Services*, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES (Nov. 15, 2021), https://de6167c5-9f06-4e54-81fb-73ab5a07b817.filesusr.com/ugd/d096d8_01cd279fa36040419edae5f1c85ac91.pdf.

¹⁵⁵ *Summary of Basic Agreement Negotiations 2021*, IATSE, https://www.basicagreement.iatse.net/_files/ugd/d096d8_0c574ebda28944c5bcfd1ee34bf65b7d.pdf (last visited February 26, 2022).

¹⁵⁶ Horowitz-Ghazi, *supra* note 20.

¹⁵⁷ *Id.*

¹⁵⁸ I-A Stories (@ia_stories), INSTAGRAM, https://instagram.com/ia_stories (last visited April 6, 2023).

¹⁵⁹ Horowitz-Ghazi, *supra* note 20.

¹⁶⁰ *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (2012) (posts on Facebook were protected concerted activity).

¹⁶¹ Josh Eidelson, ‘Suicide Shifts,’ *7-Day Weeks Fuel Rare Flare-Up in U.S. Strikes*, *Bloomberg Law* (Oct. 25, 2021, 8:00 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberglaw-news/XECTQ95000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d3cuYmxvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcv2VhcmNoL3Jlc3VsdHMvYTA5MmU5MTYzOGE3OTRmMjVkd0kzMzljNjQ4YzQxN2QiXV0--a986e48f6465bb8860305467d15deda1dd052087&bna_news_filter=bloomberglaw-news&criteria_id=a092e91638a794f25d89039c648c417d&search32=D-NCRixjkpa6r03A13LyBA%3D%3DNQeXykhDLxvMKx2b6aK1RfUIKbpYi9XIuVdk2tgELIUWIMeR_ORzci41gfoQeEafAcW0UqQsopoi0Bc6mF4GNLb-JJWBu51_BPF7LEcIZhLJw5Ya2MfSXIn2rbVEDoWzfHL6WXfyvUDlFhEEkTISw%3D%3D.

members share stories detailing car accidents after eighteen hour shifts, workers being asked to break the law, and members being denied bathroom breaks to the point it caused medical issues.¹⁶²

In a February 2022 interview, actor Tom Holland revealed that his mother called producers to insist he get more restroom breaks.¹⁶³ Holland had told his mother that he was unable to take bathroom breaks throughout his eleven-hour workday due to his *Spider-Man* costume.¹⁶⁴ Holland would not be a part of IATSE as he is an actor, but this seemingly endearing anecdote actually confirms some of the deeper issues within the entertainment industry. Holland is a well-known actor, and this story shows the inherent power he has as a famous actor because it had an immediate result.¹⁶⁵ But individual Hollywood workers, such as those in IATSE who are not celebrities, “do not have enough bargaining power to raise their own wages, improve working conditions, and secure provisions for health and other benefit plans.”¹⁶⁶ This discrepancy in bargaining power shows the exact reason why IATSE members banded together to express concerns over the working conditions.

The overall working conditions of IATSE members seem to be a large contributing factor to the vote to strike. Members complained that even terms that were supposedly mandatory, like a turnaround time (the time workers get between days or work) would often not be honored. Many of the complaints leading up to the vote to strike were issues that had been previously addressed, but IATSE believed “that the penalties for overtime were not enough to deter producers from pushing crews to the brink.”¹⁶⁷ This willingness for producers to disregard the collective bargaining agreement (CBA) and the potential legal consequences of violating a CBA, was a key factor behind the 2021 labor unrest.

B. The Return From COVID-19 Shutdowns Exacerbated Poor Working Conditions

1. COVID-19 Had a Direct Impact on the Entertainment Industry

In March of 2020, Los Angeles County issued an order to shut down all non-essential businesses and limit gatherings of more than ten individuals to control the spread of the COVID-19 Coronavirus (“COVID-19”).¹⁶⁸ The order required Hollywood Studios to temporarily shut down for months.¹⁶⁹ The shutdowns caused production to lose approximately \$500 million from the annual pilot seasons, and “TV companies lost an estimated \$3 billion in advertising they had

¹⁶² Gallagher, *supra* note 5.

¹⁶³ Olivia Jakiel, *Tom Holland’s Mom Once Called Spider-Man Producers Because He Wasn’t Getting Enough ‘Toilet Breaks’*, PEOPLE (Feb. 18, 2022, 7:51 PM), <https://people.com/movies/tom-holland-mom-once-called-spider-man-producers-because-he-wasnt-getting-enough-toilet-breaks/>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (two days after Holland’s mom called producers, they came up to him on set to inquire about his health).

¹⁶⁶ Roth, *supra* note 17, at 144.

¹⁶⁷ *Id.*

¹⁶⁸ County of L.A. *Public Health, Safer at Home at Home Order for Control of COVID-19* (March 19, 2020), http://file.lacounty.gov/SDSInter/lac/1070029_COVID-19_SaferAtHome_HealthOfficerOrder_20200319_Signed.pdf.

¹⁶⁹ Brad Adgate, *The Impact COVID-19 Had On The Entertainment Industry in 2020*, FORBES (April 13, 2021, 11:45 AM), <https://www.forbes.com/sites/bradadgate/2021/04/13/the-impact-covid-19-had-on-the-entertainment-industry-in-2020/?sh=44567f43250f>.

been expecting.”¹⁷⁰ Individual studios suffered losses, such as Walt Disney Company, a production company that dominated before the pandemic, and was hit by a \$7.4 billion blow to its operating income.¹⁷¹ Production resumed in the late summer of 2020.¹⁷² However, new COVID-19 safety protocols actually meant that “shoots [took] longer and [were] more expensive due to the costs of testing and sanitation, as well as the costs of a shutdown because of positive tests on set.”¹⁷³ COVID-19 turned out to be a risk to both public health, and the health of the entertainment industry.¹⁷⁴ An estimated 284,000 individuals lost their jobs in the digital media and arts institutions, fashion and entertainment.¹⁷⁵

The economic impact on Hollywood from the COVID-19 closures directly related to the working conditions IATSE members faced upon return. “[M]any of today’s gripes over work conditions . . . are the result of wearying schedules imposed on workers by studios trying [to] catch up” after the temporary shutdowns in 2020.¹⁷⁶ IATSE members complained that “the grueling schedule that had defined [] pre-pandemic working life had come back even worse” in an attempt to catch up production after a six-month shutdown.¹⁷⁷ IATSE and AMPTP at least agreed that the industry was still recovering from the COVID-19 shutdowns, and AMPTP claimed it had offered IATSE better funding, wages, and longer rest periods.¹⁷⁸ IATSE disagreed with AMPTP’s assertion that their offer would improve working conditions and saw the return from pandemic shutdowns as an opportunity to deploy a strike as an economic weapon in negotiations.¹⁷⁹

2. COVID-19 Influenced Union Activity Nationwide

Looking at union activity nationwide is further evidence that the COVID-19 pandemic influenced the 2021 IATSE labor unrest. “In the wake of the COVID-19 pandemic, unions are finding they suddenly have the upper hand—or at least, more solid footing—when it comes to negotiating wages and benefits”¹⁸⁰ Almost twice as many workplaces went on strike between August 2021 – October 2021 than in the previous year.¹⁸¹ Many employees across the nation felt their companies did not take the steps “necessary to keep them safe or reward their sacrifices.”¹⁸² IATSE members who were sent home during shutdowns also adjusted to being home with their families, so when production started back up they were not quite as willing to work the eighty hour work weeks they had before COVID-19.¹⁸³

¹⁷⁰ Ryan Faughnder, et. al., *Shaken Studios. Empty Theaters. What Hollywood Lost During the Pandemic*, LA TIMES (Dec. 9, 2020, 10:00 AM), <https://www.latimes.com/entertainment-arts/business/story/2020-12-09/everything-hollywood-lost-during-the-pandemic>.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Brian Eckhouse, *Hollywood’s Powerful IATSE Unions Says Long Hours Must Stop (1)*, BLOOMBERG LAW (Oct. 16, 2021, 12:47) <https://www.bloomberglaw.com/product/blaw/document/R12X62T0AFB7>.

¹⁷⁷ Horowitz-Ghazi, *supra* note 20.

¹⁷⁸ Horowitz-Ghazi, *supra* note 20.

¹⁷⁹ *Id.* See generally, *N.L.R.B. v. Ins. Agents’ Int’l Union*, AFL-CIO, 361 U.S. 477, 489 (1960) (the presence and use of economic weapons is a part of negotiations under federal labor law).

¹⁸⁰ Ian Kullgren, et. al., *U.S. Labor Unions Are Having a Moment*, BLOOMBERG LAW (Oct. 17, 2021, 9:55AM) <https://www.bloomberglaw.com/document/R14K1AT0G1KX>.

¹⁸¹ Kullgren, *supra* note 180.

¹⁸² Kullgren, *supra* note 180.

¹⁸³ Kullgren, *supra* note 180; see also, Eidelson, *supra* note 161.

The U.S. saw a nationwide labor shortage, which combined with more political support from Washington D.C., and gave unions more confidence to strike without fear of replacement workers being brought in.¹⁸⁴ We saw a similar shift in union support during the harsh realities of industrialization and the dangerous factory work of the early twentieth century when public support helped sway Congress to adopt legislation to protect laborers.¹⁸⁵ The public's sympathy for workers is important to the likelihood of a successful strike. The prior public support in the 1930s led to the implementation of labor legislation.¹⁸⁶ This is directly comparable to the public's sympathy for workers that returned to the workplace and risked exposure to the COVID-19 coronavirus in 2020 and 2021. Having the public's support would have bolstered IATSE's resolve to strike.

Overall, Hollywood suffered economic setbacks because of COVID-19 shutdowns, which spurred a push to create new content to catch up. Although this was not unique to this industry, IATSE members found themselves in a unique bargaining position upon return.¹⁸⁷ Initially, the already poor working conditions were exacerbated by the studios' push to make up their economic shortfalls. However, the public's exposure to studio working conditions through the "I-A Stories" Instagram account garnered IATSE public support. This led to IATSE's timely use of a vote to strike as an economic weapon in their negotiations with AMPTP.¹⁸⁸ Thus, the COVID-19 economic impact on studios led to working conditions worsening to make up lost profits, but ultimately spurred IATSE into labor action as workers gained the upper hand in negotiations.

C. The Push to Create New Media Content While Viewers Stayed Home

Before the COVID-19 pandemic forced many people to stay at home for their viewing entertainment, new media was already a lucrative, but contentious, aspect of the entertainment industry.¹⁸⁹ Some of the initial negotiations surrounding new media and the Hollywood guilds was the right to receive residuals, such as when Netflix created original content and reused pre-existing content.¹⁹⁰ Before COVID-19 forced theaters to shut down, new media was already starting to change the way that movies were released.¹⁹¹ Netflix released "most films directly on its platform, continuing to impact the status quo of the industry," as opposed to the traditional film release in theaters.¹⁹²

Additionally, LA County was not alone when it issued stay at home orders to slow the spread of COVID-19. Across the nation, approximately 5,477 movie theaters had to temporarily close because of stay-at-home orders.¹⁹³ As a result, Hollywood studios shifted their focus to release content over streaming platforms to obtain viewers that were forced home due to pandemic closures. "Industry-rattling trends that were expected to play out over multiple years – including

¹⁸⁴ Kullgren, *supra* note 180; *see generally*, N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345-346 (1938) (economic strikers can be permanently replaced).

¹⁸⁵ HARRIS ET AL., *supra* note 36, at 39 (increase in public sympathy towards labor led to Norris-LaGuardia Act of 1932 (29 U.S.C. §§ 106-115) a precursor to the NLRA).

¹⁸⁶ *Id.*

¹⁸⁷ Horowitz-Ghazi, *supra* note 20.

¹⁸⁸ N.L.R.B. v. Ins. Agents' Intern. Union, 361 U.S. at 489 (the use of economic pressure and the necessity of good faith bargaining go hand in hand under NLRA).

¹⁸⁹ Roth, *supra* note 17, at 151 (WGA struck from dispute over residual payments).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 154.

¹⁹² *Id.*

¹⁹³ Faughnder, *supra* note 170.

the shift of movies from theaters to streaming services – have instead happened over the course of a few months.”¹⁹⁴ Disney+, Netflix, Apple TV+, and Amazon Prime Video are a few of the streaming platforms that benefited from this streaming shift.¹⁹⁵

Despite many of these companies being represented by AMPTP (Walt Disney Co., Netflix, and Amazon.com Inc.) they are market competitors vying for viewers in a takeaway business.¹⁹⁶ There are only so many consumers, so for companies to increase viewership they must entice viewers to their networks and away from competitors. Viewers stuck at home from COVID-19 closures spurred demand for new media content, both from consumers and producers, which directly impacted IATSE members as producers pushed to create new streaming content to stay competitive.¹⁹⁷ Following studio closures from the LA County order, and the surge in demand for new media content from viewers at home, the push for new content worsened already difficult working conditions.¹⁹⁸

The sudden closures from COVID-19 expedited the demand for new media releases. Payments to workers on new media content was a longer standing issue. IATSE claimed that workers on new media projects were paid less, even if the overall budget was similar to traditionally large blockbuster releases.¹⁹⁹ Hollywood has drastically changed as technology has advanced, requiring Hollywood guild contracts to adapt to the changes in the types of products and distribution models.²⁰⁰ A 2009 agreement outlined that platforms with less than 20 million subscribers can pay lower rates for new media projects than a traditional film or television series.²⁰¹ Budgets for these streaming projects have expanded, which increased demand for labor without an apparent increase in compensation for IATSE workers.²⁰² In the 2021 negotiations, IATSE proposed an increase that would make salaries more comparable to those in traditional productions.²⁰³

New media contributed to IATSE’s 2021 labor unrest in several ways. First, when theaters shut down, viewers turned to at home streaming. This increased the demand of content that studios were expected to release and forced a shift in the type of content studios produced. However, Hollywood had suffered its own setbacks from COVID-19. This increase in demand combined with a nearly six-month delay from COVID-19 closures strained already difficult working conditions. This combination led to much greater pressure on employees to produce content, which employees claim worsened their working conditions. The impact from COVID-19 aside, workers felt the existing compensation on new media projects was outdated, especially considering the increase in production’s budgets. These factors all contributed to IATSE’s vote to strike in October 2021.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Eckhouse, *supra* note 176 (studios competed for streaming subscriptions).

¹⁹⁷ *Id.*

¹⁹⁸ Horowitz-Ghazi, *supra* note 20.

¹⁹⁹ *AMPTP Film and Television Negotiations Stalled, Union to Hold Nationwide Strike Authorization Vote*, IATSE (Sept. 21, 2021), <https://iatse.net/amptp-film-and-television-negotiations-stalled-union-to-hold-nationwide-strike-authorization-vote/>.

²⁰⁰ Roth, *supra* note 17, at 162.

²⁰¹ Dan Reilly, *What You Need to Know About a Possible Hollywood Strike*, FORTUNE (Oct. 4, 2021, 4:30 PM), <https://fortune.com/2021/10/04/hollywood-strike-union-film-tv-production/>.

²⁰² *Id.*

²⁰³ *Id.*

CONCLUSION

IATSE provides the backbone to a successful Hollywood production. If IATSE had gone on strike, there would have been a staggering impact to the entertainment industry and economy. We have seen the impact a Hollywood shutdown has as studios were just barely recovering from the temporary 2020 shutdown due to COVID-19 when IATSE voted to strike. That shutdown cost the industry millions of dollars, and it extended to neighboring industries like surrounding tailors and restaurants who relied on Hollywood business. Consumers can look at the 2007 WGA strike to see the impact to viewers from a Hollywood shutdown. Multiple television shows had to cut a portion of their television season due to the strike. It is safe to say that an extended IATSE strike would impact nearly every viewer who subscribes to a streaming platform, and it would have a massively detrimental effect on the entertainment industry.

One of the core goals of the NLRA is to promote labor peace and stability in negotiations. If the new collective bargaining agreement did not satisfy underlying issues, we can expect to see continued tension in future negotiations. The three main underlying issues were: (1) poor working conditions; (2) COVID-19 impacts; and (3) the influence of new media. Aside from COVID-19, the other two issues preceded the pandemic. This indicates that the combined effects of these factors triggered the threat of strike, and one alone was not the cause.

Understanding how these three root issues combined is important because it is beneficial for employers and unions alike to have peaceful contract negotiations. An outside influence, such as the COVID-19 pandemic, can impact preexisting points of contention. These root issues identified can help predict potential future discord between AMPTP and IATSE. There are some IATSE members that feel even though AMPTP and IATSE reached an agreement, many issues remained unaddressed.²⁰⁴ Employers and unions should be mindful that these issues, especially the working conditions and new media compensation, are likely to reemerge in future negotiations.

²⁰⁴ Eckhouse, *supra* note 8 (quoting Briana Rose Lee, a local union official: “[t]he main reasons we were ready to strike were not addressed in this contract.”).