Articles and Comments

Industrial Relations in Transition: The Paper Industry Example

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I. INTRODUCTION

The United States is in the process of adjusting its industrial relations system to a more competitive, knowledge-based, global economy. The success

with which the nation makes this adjustment will have serious implications for both personal and national economic welfare.

This Article examines recent events in the unionized paper industry to highlight some of the legal and industrial relations factors that may retard the transition between the old and new industrial relations systems. In particular, this Article suggests that labor law and industrial relations policy reinforce management's growing bargaining advantage over labor, thereby frustrating the labor-management cooperation that is needed to promote high performance and competitiveness in the new knowledge-based economy.

Legal structures may either facilitate or hamper the development of cooperative labor relations systems. We argue that the National Labor Relations Act (NLRA), as currently interpreted, hinders American industry from effectuating cooperative, high performance policies. A strong and independent labor movement is crucial to achieving high performance because such strength and independence allow labor to cooperate fully with management. Such labor-management cooperation (generally referred to herein as "jointness")¹ assumes an expanded role for unions in reducing the differences between labor and management. Yet the law as currently interpreted insists upon a limited role for unions and a sharp division between labor and management. Moreover, current law makes it easy for employers to resist unions and it invites some employers to use the process of collective bargaining either to eliminate incumbent unions or to render them ineffective. Finally, the law dealing with collective bargaining, from which joint labor-management efforts generally develop, is, as applied, overly technical and biased against unions. This bias is rarely expressed directly, but it manifests itself regularly in the Board and the courts' unthinking acceptance of the proposition that increasing management discretion will also increase economic efficiency.²

We suggest specific changes in the NLRA and recommend a study looking to major statutory reform. Many of the changes in the law that we suggest could be achieved by reconsidering questionable decisions interpreting the NLRA. However, the problems to which we allude have become so ingrained in the Act, and are so supported by precedent, that we believe that only an

1. According to Donald Ephlin, former Vice-President of the United Auto Workers (UAW) and a strong advocate of the approach, he coined the term "jointness" to indicate a coming together of equals for their mutual benefit. He preferred the term "jointness" to "cooperation" for a variety of reasons, including the fact that cooperation is often used to refer to unilaterally established management programs of job enrichment. Interview with Donald Ephlin, Former Vice President, UAW, in Austin, Texas (Mar., 1991).

2. See JULIUS G. GETMAN & BERTRAND B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES* 5 (1986) (discussing the NLRA's apparent "capitalist exemption"). From the beginning, the Act has been interpreted so as to minimize interference with managerial authority and entrepreneurial decision making; see also JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 5-6 (1983) (describing cases in which workers' rights under the NLRA have been limited in favor of management discretion).

amendment to the Act along the lines herein suggested would make the law an ally rather than an opponent of labor-management cooperation.

We have chosen to deal with the issue of competitiveness not by breaking it down and analyzing each of its conceptual components, but by telling a complex story, utilizing the words and insights of employees. As told by the employees, this story is about a great many things other than unions and competitiveness. However, the issues that affect the lives and communities of these employees are the very ones to which policymakers and managers must pay attention if they wish to encourage high worker performance and high wages.

The methodology of this Article will appear unusual and perhaps even confusing to readers familiar with traditional law review writing.³ Even labor law writing, which often concerns itself with the interests of employees, rarely includes the voice of employees. This Article draws on over two years of interviews and discussions with people in the paper industry. It includes many quotations from employees to describe the dynamics, both internal and institutional, that make a cooperative, high performance strategy effective.⁴ Hearing the voices and listening to the experiences of those whose interests labor law and policy are intended to promote gives a unique and valuable perspective on labor law and labor relations. In particular, one can better understand the psychological dynamic that leads to high productivity in some circumstances but not in others.

3. Professor Leslie's comment to this Article, see Douglas L. Leslie, *Retelling the International Paper Story*, 102 YALE L.J. 1897 (1993), demonstrates how the unconventional approach taken in this Article may lead to misunderstanding. For example, Leslie claims that we have argued for overruling the *Mackay* doctrine, *id.* at 1904-05, solely on the ground that union strikes ought to be more effective. In fact, we offer a variety of reasons for overturning *Mackay*. Our primary concern is not with the power of unions, but rather with the destructiveness of *Mackay*—its devastating impact on the employees replaced, their families, and their communities.

Leslie also misunderstands us to the extent that he suggests that our description of striking workers is based on some "political agenda." The truth is that our description is based on a painstaking investigation of a strike and its aftermath. The investigation involved many in-depth interviews with union leaders, rank-and-file employees and their families, low-level managers, and high company officers. We visited the homes of strikers and replacement workers, talked to their children, watched hundreds of hours of taped union meetings, and conferred with other scholars who were studying the strike. Perhaps we are biased, but no one we know who has studied the strike—including high-level management from other companies—has a different opinion of the employees or the performance of the union.

Furthermore, Leslie's suggestion that, had we used a more scientific methodology, we might have come up with something useful is both erroneous and patronizing. Neither of us is unaware of the importance of more rigorous social science methodologies. However, it is equally important for scholars to listen attentively to the voices of employees and not to dismiss these voices as self-serving. The primary need for scholars is not to be more detached or scientific, as Leslie suggests, but rather to listen.

4. Unless otherwise noted, all quotes are from interviews conducted by Professor Getman over a two-and-a-half year period from June, 1990 through December, 1992.

A. *The Traditional System*

To understand the need for reform in the system of labor law and industrial relations, we must first identify the chief advantages of the prevailing system and then explain why these advantages have diminished over time. The industrial relations system that evolved in the United States after World War II was deeply rooted in the mass production economy which developed during the first half of this century. That economy derived its strength primarily from abundant natural resources, the mass production organization of work, and supportive institutions and policies. The mass production system allowed firms to amass wealth through scale economies, achieved through use of the assembly line and the associated authoritarian or "Tayloristic" organization of work.⁵ Economic success was achieved mainly by spreading high fixed costs over large production runs of standardized products.

The traditional collective bargaining model of industrial relations developed around these economic characteristics. This model remained in place from the late 1930's to the beginning of the 1980's. The traditional model emphasizes distinct roles for labor and management. Its main feature is an adversarial negotiation between labor and management which occurs roughly every three years, the outcome of which is significantly determined by the ability of the parties to apply and withstand economic pressure. Day-to-day relations are governed by a lengthy and carefully worded collective bargaining agreement, which provides high wages and significant fringe benefits for the employees, recognition of management's unilateral right to make basic decisions, clearly defined job functions, and the allocation of jobs and benefits on the basis of seniority. Disputes concerning the meaning and application of the agreement are resolved through a formal grievance system culminating in arbitration.⁶

The traditional system had advantages for both labor and management. For the union, it provided a defined role, special recognition of key officers, and the ability to collect dues and fees easily. For employees (such as paper makers who worked at union mills) it provided a decent standard of living, security against arbitrary discharge, benefits based to a significant extent on seniority, and a voice in establishing working conditions. The union represented all employees and provided an opportunity for some employees to assume positions of leadership and responsibility. For management, the

5. For a discussion of Taylor's ideas, see generally RAY MARSHALL & MARC TUCKER, *THINKING FOR A LIVING: WORK, SKILLS AND THE FUTURE OF THE AMERICAN ECONOMY* 3-27 (1992), and FREDERICK W. TAYLOR, *SCIENTIFIC MANAGEMENT* (1947).

6. For a good description of the traditional model and its possible advantages, see SUMNER SLICHTER ET AL., *IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 1-26 (1960). For a good description of the cooperative, high-wage model, see BARRY BLUESTONE & IRVING BLUESTONE, *NEGOTIATING THE FUTURE: A LABOR PERSPECTIVE ON AMERICAN BUSINESS* 43-59 (1992); see also JULIUS G. GETMAN & JOHN D. BLACKBURN, *LABOR RELATIONS: LAW PRACTICE & POLICY* 185-332 (1983).

traditional model also had various advantages. It helped to ensure a stable, skilled workforce. It provided a system for resolving disputes, unquestioned control over key decisions and an efficient way of dealing with many employees simultaneously through their representatives.

The traditional model also posed problems. One problem was price instability due to rivalry between oligopolies.⁷ Mass production requires rival firms to acquire technology at high fixed costs, which firms then try to "spread" over as many items of output as possible. Such firms will continue to operate if they can cover variable costs and contribute anything to fixed costs (i.e., even if the firms cannot cover all costs). However, these fixed cost contributions are often sufficiently small that firms could operate for long periods of time without covering operating costs. Firms were thus encouraged to capture the market from the few competitors who had incurred similar fixed costs and thereby reduce the time needed to recover total costs. At first, rival firms tried to capture the market by competing on the basis of price. However, this created great price instability. Firms then discovered that it was more profitable to fix prices and to adjust to changing economic conditions by varying output and laying off workers. This strategy worked until the early 1970's and 1980's, when firms became vulnerable to foreign competitors who undercut their prices and had greater flexibility in responding to customers' needs.

Another major problem with the mass production system was how it encouraged management to treat workers.⁸ Scientific management, developed and popularized by Frederick W. Taylor, taught that there was one best way to perform a task. Management's responsibility was to determine that method through time and motion studies, model it, and impose it on workers through detailed rules, instructions, administrators, and supervisors. Taylor believed management had to transfer all thinking skills to managers and machines in order to gain control of the work. Otherwise individual and collective "soldiering" (loafing) by workers would cause gross inefficiencies.⁹ Thus, management fragmented work and carefully controlled workers in order to maximize output, thereby also affording workers little opportunity to use their creativity. Before the 1930's, workers attempted to gain some control of wages, hours, and working conditions through unions and collective bargaining, but the Tayloristic "de-skilling" of work, abundant supplies of unskilled workers, and pro-business legal and political systems made it difficult for industrial workers to organize.

A third major problem with the mass production system was that it led to worker and farmer incomes which were too low and unstable to sustain

7. On oligopolistic pricing, see WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICIES* 427-32 (2d ed. 1982).

8. See TAYLOR, *supra* note 5, at 32-35.

9. *Id.* at 32-33 (describing difficulty in determining maximum rate of worker efficiency).

demand for mass production products.¹⁰ President Franklin D. Roosevelt's New Deal addressed this problem by instituting social security, unemployment compensation, progressive income taxes, minimum wage requirements, and collective bargaining as a means to maintain purchasing power and prevent depressions. Collective bargaining and labor protections also were justified as ways to lessen the harshness of the Tayloristic management and competitive market system. For management, however, such protections may have meant less flexibility than was desirable, along with the constant danger of a strike.¹¹

Policymakers and the public largely overlooked these shortcomings of the mass production system. As modified by the New Deal, the system appeared to justify itself by the remarkable performance of the U.S. economy during and after World War II. This "golden era" of the U.S. economy represents the longest period of equitably-shared prosperity in history¹² and was due in no small measure to an industrial relations system that left the Tayloristic organization of work largely in place. Such prosperity limited the goals of unions. Workers merely wanted to gain a piece of an economic pie that seemed destined to grow indefinitely. Thus, unions' power was restricted largely to determining wages, hours, and working conditions.¹³

Since the power of nonunion workers to improve their wages and working conditions was directly related to employers' fear of unionization,¹⁴ this limited set of goals, in turn, meant that unions were more prevalent in sectors in which workers could not obtain better wages and conditions through competitive labor markets. In the private sector, collective bargaining was limited mainly to oligopolies and regulated monopolies like utilities and transportation, where companies could easily pass on increased wages in the form of higher prices, tariffs, or fares.¹⁵ As long as public opinion was favorable to unions and collective bargaining, these institutions were supported by the federal and some state governments.¹⁶

10. See MARSHALL & TUCKER, *supra* note 5, at 7.

11. See BLUESTONE & BLUESTONE, *supra* note 6, at 142-43.

12. *Id.* at 9-10.

13. See *id.* at 143-44 (suggesting that traditional model contemplates a limited role for unions). Contrary to popular impression, unions did not create detailed work rules; they merely codified them through collective bargaining. For an example of the popular understanding of the relationship between unions and work rules, see SLICHTER ET AL., *supra* note 6.

14. RAY MARSHALL, *LABOR IN THE SOUTH* 336 (1967) (asserting that workers could gain higher wages using threat of unionization).

15. See *id.* at 314-15.

16. See, e.g., DAVID LEWIN ET AL., *PUBLIC SECTOR LABOR RELATIONS* 23-125 (1988) (detailing dependence of public sector labor relations on government and public opinion).

B. *The Need for Change*

The traditional industrial relations system and its supporting institutions and policies were eroded mainly by technological change and intensified international competition. Technological change increased the importance of human resources by making it possible to substitute ideas, skills and knowledge for physical resources. Nobel Laureate Theodore Schultz argues that farmers have been able to increase production greatly by substituting ideas, skills and knowledge for cropland and physical resources.¹⁷ Similarly, Peter Drucker argues that the most important commodity of the 1920's, the automobile, was 60% energy and raw materials, while the computer chip, the most pivotal product of the 1990's, is only 2% energy and raw materials (sand or silicon).¹⁸ One must presume that the vast majority of the remaining cost paid for ideas, skills, and knowledge. Indeed, human capital analysts have demonstrated that almost none of the improvements in productivity since 1939 are due to physical resources. Twenty percent or less of the improvements can be attributed to physical capital, while 80% or more must be attributed to knowledge, ideas, and skills.¹⁹

Technological change has also decreased the efficiency of the Tayloristic organization of work. Information technology puts a premium on lean management systems and decentralized work. A premium also attaches to learning which helps to develop and adapt advanced technologies and work organizations. Tayloristic work organizations are typically very poor learning systems since information is controlled by administrators and there is consequently limited thinking by front-line workers. Modern technology makes it possible to receive many of the benefits of economies of scale without scale as traditionally defined. Scale is still important, not to spread large fixed costs over large production runs, but to recoup development costs and provide the capital for new development.²⁰

International competition makes a different organization of work necessary for enterprises seeking to maintain and improve their profits. Internationalization makes oligopolistic pricing and employment practices extremely vulnerable to firms that provide job security and compete by reducing prices,²¹ which is one of the reasons why Japanese companies gained market share in basic American industries during every business cycle in the 1960's and 1970's.

17. THEODORE W. SCHULTZ, *INVESTING IN PEOPLE: THE ECONOMICS OF POPULATION QUALITY* 7 (1981).

18. PETER F. DRUCKER, *MANAGING FOR THE FUTURE: THE 1990'S AND BEYOND* 6 (1992).

19. ANTHONY P. CARNEVALE, *AMERICAN SOCIETY FOR TRAINING AND DEVELOPMENT, HUMAN CAPITAL: A HIGH YIELD CORPORATE INVESTMENT* 3 (1982).

20. STEPHEN S. COHEN & JOHN ZYSMAN, *MANUFACTURING MATTERS* 154-56 (1987).

21. See MARSHALL & TUCKER, *supra* note 5, at 6 (arguing that lower prices and job security are threats to oligopolies).

The Tayloristic organization of work has difficulty competing with high-performance systems like those being developed in Japan, Europe, and some American companies like Xerox, the Ford Company, and General Motors' Saturn project. High performance organizations stress quality, which is best defined as meeting customers' needs; flexibility, in order to respond to changing markets, technologies and economic conditions; and productivity in the use of all resources, not just economies of scale. The traditional American company, by contrast, is producer-driven, not consumer-driven. It stresses stability rather than flexibility—tending to control markets and the pace of change rather than adjusting to them.

The Tayloristic organization of work emphasizes economies of scale, but is characterized by many inefficiencies, especially excessive layers of managers and indirect workers and larger than necessary inventories. Today, information technology makes it possible to eliminate these inefficiencies. Information can facilitate the flow of materials to eliminate excess inventories and the need for indirect workers and supervisors, thus increasing productivity, flexibility, and quality. Similarly, more participatory management systems reduce the need for many supervisors and improve communication and learning.

In addition, the traditional adversarial hierarchical management system impeded learning, while participatory systems accelerate it. Learning is important because high performance organizations must develop and use leading-edge technology and have highly skilled front-line workers. The traditional Tayloristic model stressed the use of standardized technology and unskilled labor. Clearly, this model will not be viable in a high-wage economy. Standardized technology will move to places where workers earn less money. American companies are unlikely to be competitive paying their workers \$15 an hour working on the same machines as their Mexican competitors who pay \$1.50 an hour. Finally, high performance organizations have positive incentive systems to motivate workers, who have considerable discretion to "go all out" to improve technology, productivity, and quality. The Tayloristic model, in which workers are motivated by fear, is not likely to produce excellence. Indeed, most American workers believe that improving productivity would cost them their jobs, while Japanese workers believe productivity improvements are beneficial to them.²²

Oligopolistic pricing is no longer viable in a more competitive global economy. Oligopolies adjust to declining demand by holding prices constant and laying off workers. High performance Japanese and European companies, by contrast, adjust to change by maintaining their work forces and reducing high prices. High performance companies will thus take market share from oligopolies both during downturns, because of lower prices, and during

22. RAY MARSHALL, *UNHEARD VOICES: LABOR AND ECONOMIC POLICY IN A COMPETITIVE WORLD* 129 (1987).

recoveries, because they have the capacity to meet rising demand. This process is illustrated by American oligopolies' loss of market share in the more competitive, global economy.

Similarly, internationalization of the economy makes it more difficult to practice the Keynesian economic policies that proved so successful in the United States and other industrialized economies in the 1950's and 1960's. In the 1960's, for example, the Johnson Administration was able to stimulate the American economy by cutting taxes, thereby causing an increase in consumption and investment and a substantial reduction in unemployment. In the more global economy of the 1980's, by contrast, the largest tax cut in history stimulated consumption (mainly by high income groups), but investment went down, because consumer and producer goods were imported from foreign producers. As a consequence, consumption exceeded production by a sizable margin—a shortfall which was paid for by borrowing from foreigners and depleting public and private capital. Rising debt put upward pressure on real (i.e., inflation-adjusted) interest rates, which tended to choke off domestic investments. Since U.S. real interest rates were higher than those in other countries offering similar investment risks, foreigners bid up the price of the dollar to take advantage of these high interest rates. The more expensive dollar, in turn, restricted U.S. exports and stimulated imports. In short, instead of reducing U.S. unemployment to full employment levels, as in the 1960's, the 1980's tax cut resulted in a high level of unemployment and economic stagnation.

The reduced effectiveness of Keynesian economics removes one of the sources of public support for collective bargaining. Declining public support emboldened anti-union forces to step up their efforts to defeat unions. Internationalization further weakened unions by strengthening employers' ability to move work sites to low-wage, nonunion locations in the United States and abroad.

C. Two Alternative Strategies: Low Wages vs. High Performance

In a more competitive world, firms, companies, and countries can compete either by reducing wages and other costs or by improving productivity. The labor cost option implies reducing wages to Third World levels. This option also makes working harder or selling more labor the only way to improve or maintain incomes. The high productivity option, achieved by creating incentives for companies and other institutions to become high performance organizations, requires the substitution of ideas, skills and knowledge for physical resources, and therefore results in steeper productivity and learning curves.²³

23. See generally MARSHALL & TUCKER, *supra* note 5, at 76-163, 201-15.

Not all employers have responded to the new economic environment by attempting to create a "union-free environment." Indeed, such a strategy is rare in non-English-speaking countries, most of which have developed competitiveness strategies which differ greatly from those of the United States. These strategies are designed to provide companies incentives to compete by increasing productivity and quality rather than by reducing labor compensation.

As the paper industry examples detailed in this paper show, U.S. companies and policymakers are attempting to develop industrial relations systems to fit their own competitiveness strategies. Some companies, like International Paper, have attempted to compete by reducing labor costs. Other companies, like Scott and Otis, have involved unions in discussing and implementing productivity and quality improvements in order to become more competitive. This high-performance option, pursued by most European companies,²⁴ is more compatible with our own country's national interest than the low-wage alternative. In the United States, for example, the only way the average family has been able to maintain its income since the early 1970's has been to work more hours,²⁵ a goal achieved mainly by having more women work outside the home. The decline in the growth of the workforce (and limits on the number of working women) make this option less accessible in the future. Unless we improve productivity growth, declines in real wages will be accompanied by declining family and national incomes. Moreover, the high-wage strategy requires less adversarial, more cooperative, industrial relations systems. Such systems improve the welfare of workers, their families, and their communities, as our case study shows.

A high-performance system requires that workers have an independent source of power. The relationships between workers and managers are inherently both adversarial and cooperative. However, since workers have considerable discretion, they are unlikely to cooperate fully—to go "all out"—unless they can protect themselves from the adverse consequences of doing so. Workers will not feel protected if management can exercise great discretionary power over them. Sooner or later, management will end the cooperative relationship by making unilateral decisions. A positive labor/management relationship can be achieved more effectively if the workers protect and promote their interests through an organization which they control.

High-performance strategies assign positive roles to worker participation and collective bargaining, while the low-wage strategy pursued by most U.S. companies attempts to weaken or destroy these arrangements on the assumption that the "employment at will" doctrine and increased labor market

24. NATIONAL CENTER ON EDUCATION AND THE ECONOMY, *AMERICA'S CHOICE: HIGH SKILLS OR LOW WAGES: REPORT OF THE COMMISSION ON THE SKILLS OF THE AMERICAN WORKFORCE* 61-65 (1990) [hereinafter *AMERICA'S CHOICE*]; see also MARSHALL & TUCKER, *supra* note 5, at 41-59.

25. LAWRENCE MISHEL & DAVID M. FRANKEL, *THE STATE OF WORKING AMERICA 1990-1991*, at 69-72 (1991).

competition will strengthen competitiveness. Clearly, these two approaches are based on very different perceptions of competitiveness. Most industrialized countries reject the low-wage option,²⁶ presumably because it causes lower and more unequal wages, and achieves economic progress mainly by working harder, not smarter—effects which characterized the United States during the 1980's.²⁷

The high-productivity strategy, by contrast, achieves competitive costs and higher quality by improving flexibility, by supporting highly skilled workers who can develop and use leading-edge technology, and by fostering lean management systems which use decentralized decisionmaking and intense employee involvement. A high performance work organization stresses positive incentives and employee empowerment. The Tayloristic system provides negative or even perverse incentives such as discharging workers when productivity improves. Tayloristic controls are increasingly ineffective because modern technology gives workers considerable discretion; it is hard to compel the kind of excellence that people can only be *motivated* to achieve. In short, high performance work organizations achieve productivity, flexibility and quality by substituting clear performance goals and positive incentives for rules, regulations and supervisors.

D. *The Paper Experience: A Summary*

Recent events in the paper industry illustrate some of the issues that have developed as the United States moves from a traditional, mass production economy to a more competitive knowledge-based economy. International Paper Company (IP) is the world's largest manufacturer of paper products and the largest private land holder in the United States, employing 45,000 workers nationally.²⁸ Since the 1930's, a majority of IP's hourly employees at several plants have been represented by the United Paperworkers International Union (UPIU).²⁹ Relations between the company and the union were good until the 1980's, when the company conducted a vigorous effort to reduce wages and increase the ability of management to act unilaterally. The ensuing struggle between IP and the UPIU was waged most fiercely at IP's Androscoggin mill

26. See AMERICA'S CHOICE, *supra* note 24, at 57-65 (supporting proposition that many industrialized nations choose high-productivity approach).

27. See LAWRENCE MISHEL & JARED BERNSTEIN, *THE STATE OF WORKING AMERICA 1992-1993*, at 43-55, 68-85 (forthcoming 1993).

28. Transcript of Hearing at 118, United Paperworkers Int'l Union Local 620, No. 6-CB-8207, 1992 WL 281693 (N.L.R.B. Sept. 30, 1992) (testimony of James W. Gilliland, Director of Employee Relations, International Paper Co.); Brief for Respondents at 3, United Paperworkers Int'l Union Local 620, No. 6-CB-8207, 1992 WL 281693 (N.L.R.B. Sept. 30, 1992).

29. For the early history of the union's relations with IP, see HARRY E. GRAHAM, *THE PAPER REBELLION: DEVELOPMENT AND UPHEAVAL IN PULP AND PAPER UNIONISM* 5-9, 18-19, 146-47 (1970).

in Jay, Maine, where 1,200 employees³⁰ went on strike in 1987. Partly as a result of this struggle, other paper companies, particularly Otis Specialty and Scott Paper, developed a more cooperative approach to labor relations.

The 1987 strike at the Androscoggin mill grew out of negotiations for a new contract between Local 14 of UPIU and IP.³¹ In the name of economic competitiveness, the company had sought significant concessions and the union, supported by the employees, refused to concede. The company chose to continue operating during the strike using replacement workers and supervisors.

After sixteen months of bitter combat the strike was lost.³² When the strike was over, only about seventy of the former strikers had jobs. They were called "super scabs" because they were willing to cross the picket line. The other workers (those who honored the picket line) had only a claim to future job openings under current labor law.

The story of the strike, the negotiations that preceded it, the struggle that followed it, and its impact on other major paper companies illustrates the complex ways in which unions affect competitiveness. The story also suggests the problematic relationship between our national labor law, labor-management relations, and competitiveness.

II. THE RELATIONSHIP BETWEEN IP AND THE PAPERWORKERS UNION

A. *The Relationship Prior to 1986*

1. *Bargaining History*

The struggle at the Androscoggin mill that preceded the 1987 strike developed slowly. During the 1960's and 1970's, labor relations at the mill, as at International Paper generally, were good: the employees were well paid, the union was accepted, and the company's labor relations personnel were respected. Although there had been hard bargaining during contract negotiations and periodic disputes about the interpretation of the collective bargaining agreements, there was little basic conflict concerning the role of the union. Indeed, the company looked to the union leadership for prospective floor-level managers. The employees, in turn, trusted the basic decency of the

30. See John Laidler, *Strike Leaves Bitter Legacy in Maine Town*, WASH. POST, Oct. 9, 1989, at A4 (referring to 1,267 former strikers).

31. Some of the employees were represented by a local of the International Brotherhood of Firemen and Oilers (IBFO), but the two locals combined forces for purposes of the strike and the primary strategists and leaders came from Local 14.

32. The union called off the strike unconditionally and agreed to work under the company's terms, although the union technically never accepted the contract at Jay, or at other IP plants.

company's labor relations experts. As one of the employees stated, "If you was right, quite often a dispute would be settled in your favor."³³

This positive state of affairs began to change during the early 1980's when International Paper, like the paper industry generally, experienced bad times. Because of unwise investments and the high price of the dollar, IP lost some of its recently acquired market share abroad. Both profits and the price of the company's stock fell, and the company appeared ripe for a hostile takeover.³⁴

Also during the early 1980's, the company's leadership changed. John Georges, who had experience in the chemicals industry rather than in paper, became president and introduced an increasingly aggressive industrial relations strategy. The company began to seek concessions whenever a collective bargaining agreement ended and new negotiations started. The approach was similar at all plant locations. The company did not seek to lower wages directly but sought to eliminate premium pay for Sundays and holidays—an incentive that had earlier been instituted at the company's initiative. The amount of premium pay varied from mill to mill. In Northern mills such as Androscoggin, money earned under premium wage rates constituted up to 12% of workers' total pay. In its effort to obtain greater managerial authority over the production process and thereby lower labor costs, IP's management first targeted the Southern mills which were considered less militant and less committed to the union.³⁵

Several officers of the union thought that IP's ultimate goal was to eliminate or subordinate the union. Others, including Wayne Glenn, the international union's president, believed that IP wanted to obtain concessions as a temporary response to its financial problems. Glenn, a former IP employee with a high regard for the company, was sympathetic to the company's financial plight. The union thus agreed to break up its multiple bargaining unit in the South, to accept the closing of inefficient mills, and to grant management greater flexibility in job assignments. According to Glenn, the union made these concessions as part of a tacit understanding according to which management agreed to invest in existing mills rather than build new ones, to abstain from mounting a direct challenge to the union in existing or new mills, and to acknowledge the union's cooperation in future bargaining when conditions improved. Glenn now sees his cooperation with management as a mistake. He says he trusted IP and was willing to accept an unwritten

33. Interview with Roland Samson, Former Striker, in Jay, Me. (June, 1990).

34. See Adrienne Biracree, *Capital Restructuring and Labour Relations: the International Paper Company Strike*, in 1 INT'L CONTRIBUTION TO LAB. STUD. 59, 64 (Cambridge Political Economy Society & Labor Studies Center, University of Notre Dame, 1991).

35. In most Northern mills, employees who worked on Sundays received double time. In Southern mills the rate was generally time and a half. See Brief for Respondents at 3, *United Paperworkers Int'l Union Local 620, No. 6-CB-8207*, 1992 WL 281693 (N.L.R.B. Sept. 30, 1992); Telephone Interview with Gordon Brehm, Special Assistant to the President, UPIU (Oct. 15, 1992).

understanding because of the company's long tradition of dealing honorably with the union.³⁶

In July of 1985, most of the senior supervisors and labor relations people at the Androscoggin mill were encouraged to retire. The company appointed a new personnel manager, a new labor relations director, and a new director of human resources.³⁷ Most of the employees thought that these changes signified a new, harsher labor relations posture at the mill. Thereafter, the relationship between management and the union became increasingly adversarial. Disputes arose about new programs, overtime pay, and the general treatment of the employees. The number of grievances and the number of cases scheduled for binding arbitration both increased dramatically.

2. *The Effort to Restructure Production*

Throughout the 1980's, International Paper sought to achieve greater managerial control and job flexibility at the Androscoggin mill through the institution of new programs. The company described these programs as efforts to introduce a "team concept." However, the programs were essentially efforts to increase managerial power at the expense of the union. IP sought to reduce the significance of job classification and to mitigate the effects of seniority.³⁸ The union viewed each of these programs with suspicion and hostility. It was

36. Glenn stated:

I can tell you they used to be one of the best companies to deal with. They had people who really had the workers at heart, their welfare. They dealt in an honorable fashion. You could believe anything they said. But they're all gone by the wayside. There have [been] vast changes at IP. The biggest was when John Georges became CEO.

Interview with Wayne Glenn, President, UPIU, in Nashville, Tenn. (Oct. 21, 1990).

A new agreement for the Androscoggin mill was negotiated in 1984. The atmosphere at the bargaining table was tense and unusually acrimonious as a result of the company's new aggressive approach to the union and the feeling among employees that the company had embarked on an anti-union campaign. For the first time in the plant's history, the union's membership authorized a strike. A compromise agreement was finally achieved which included a wage increase and reduction of holiday, but not Sunday premium pay.

37. The new Director of Human Resources, K.C. Lavoie, had once served as president of the local union. Lavoie was known to be tough and ambitious. During the period of his presidency he sometimes missed work to take classes in industrial relations. Union members covered for him. When he abruptly left the union presidency to accept a management position, many employees felt that he had used them to further his ambitions. Rank-and-file members and the union's leadership were both convinced that K.C. had used his earlier leadership position in the union in order to obtain a position with management.

In his new role, Lavoie showed little sympathy for the union and did not seek to win the employees over on the basis of past association. According to a rumor believed by both rank-and-file employees and floor-level supervisors, Lavoie announced at a social gathering that he would "break the union." Information about Lavoie came from many different interviews and informal discussions with former strikers. The unanimity of negative opinions was indeed impressive. Typical was one former striker's remarks:

I can't stand his guts and he knows it. He's one of those guys that like to pick a fight He's arrogant. I've seen him and I've heard through negotiations with Bill and them how arrogant he was. . . . I can't stand the guy because I know what he is.

Interview with Brent Gay, Former Striker, in Jay, Me. (June, 1992).

38. Interview with Bill Meserve, Former President, UPIU Local 14, in Jay, Me. (June, 1989).

not that the employees or the union were not concerned with quality or productivity. Indeed, they were quite proud of their skill as paper workers and of the quality of paper produced at the Androscoggin mill. Rather, many of the employees believed that they already functioned well as a team. They resented the implication that adequate productivity required greater managerial power.³⁹

The findings of August Carbonella, an anthropologist who studied mill conditions during this period, support the workers' position. As he noted, during the preceding decades:

[The] workers came to know at least three or four different jobs other than their own . . . Knowledge of short-cuts and trade secrets [was] shared collectively and developed over a long period of time. This collective knowledge gave workers a high degree of informal control over the pace of production . . . This, of course, often worked to the benefit of management.⁴⁰

Despite the possible production benefits of the existing system, IP sought to modify it without giving the union a major role. "Operation Breakthrough," the first of the company's efforts to take greater control over the production process, allowed workers to lodge suggestions or complaints directly to high-level management. The union objected to the new program on the grounds that it bypassed the processes established by the collective bargaining agreement.⁴¹

Management then introduced the "Quality Improvement Process" (QIP). This program involved meetings between workers and management to discuss suggestions for improving production and working conditions. The union, although suspicious of the program initially, participated in it. However, the union withdrew as conditions generally worsened. At about the same time, a management consulting group, Management Training Systems (MTS), tried to persuade the employees to write training manuals for their jobs. MTS and plant management argued that writing such manuals would help achieve needed flexibility. The union, however, was aware that MTS had developed a similar

39. According to former striker Roland Samson,

I think another problem, too, is [that] most of us read and we always hear about the Japanese . . . and where we have to work as a team. [IP is] implying that we don't work as a team now. But we always did.

Now when they started implementing this QIP, I didn't have a foreman in charge of me at night, so I made my own decisions, called maintenance when I needed them, [and] so forth . . . But what did they do when they implemented QIP? They assigned the foreman from another department to be my boss. They did just the opposite of what they should've been doing—just taking away autonomy.

Interview with Roland Samson, Former Striker, in Jay, Me. (May, 1989).

40. August Carbonella, *Historical Memory, Class Formation, and Power: A Central Maine Papermaking Community, 1920-1988*, 19 FOCAAL 1001, 1011 (1992) (citations omitted).

41. The union filed a grievance regarding "Operation Breakthrough" and processed it through the early steps of the grievance system. As a result, the program was eventually cut back substantially. Interviews with Bill Meserve, Former President, UPIU Local 14, in Jay, Me. (May, 1989-June, 1989).

system for Boise Cascade Company at a nearby mill in Rumford, Maine, and that the manuals had been used during a strike to train replacement workers. The union asked for assurance that the manual would not be used by strike replacements. Management refused. According to Bill Meserve, then president of Local 14, he asked the Director of Human Resources to “put it in writing that this is not a union busting tool, . . . and he refused to do that.”⁴² The union subsequently urged employees not to cooperate. The training manuals were thought to be part of the QIP program, and this conclusion, together with the presence of MTS, eliminated any chance that the union would cooperate in either endeavor.

Both employees and low-level supervisors agree that the company failed to explain its new programs adequately to the employees. International Paper’s General Counsel, James Melican, conceded that the company did not make a special effort to enlist the union’s support for these programs:

The QIP program was essentially designed or intended to improve the quality of our products across the system . . . It wasn’t a program designed with labor relations in mind. I think it was perhaps more focused from our standpoint on reaching out to the employees of the company at all levels than on worrying whether the union is going to interpret this as a way to push them to one side.⁴³

August Carbonella agrees with the assertion that the company’s efforts increased suspicion rather than productivity:

The engineers were particularly interested in learning the short-cuts that workers had developed and passed along over the years, and for these to be codified in a training manual. Union officials urged workers not to cooperate until an agreement could be reached, stipulating that this information would not be used in the advent of a labour dispute. When the company refused, speculation about a forced strike became a part of everyday conversation in the mill, and workers began to plan for what they considered inevitable.⁴⁴

42. Interview with Bill Meserve, Former President, UPIU Local 14, in Jay, Me. (1990).

43. Interview with James Melican, Vice President & General Counsel, IP, in Purchase, N.Y. (Sept., 1990).

44. Carbonella, *supra* note 40, at 1011-12.

B. *The 1986 Negotiations*

1. *The Demand for Concessions at the Androscoggin Mill*

By the mid-1980's, economic conditions in the paper industry had changed dramatically. Demand surged and IP made large profits.⁴⁵ Top executives positioned themselves to receive large bonuses, as earnings per share shot up 86%. Nevertheless, when negotiations for a new contract for the Androscoggin mill began in 1986, the company sought many concessions, including those that it had achieved earlier at the southern mills: the elimination of premium pay for Sunday work, the elimination of the Christmas holiday shutdown, the right to subcontract out maintenance work, and the union's acquiescence to the introduction of a new program, "Project: Productivity."⁴⁶ IP defended these plans in the name of competitiveness, citing increasing competition from foreign paper makers.⁴⁷

Project: Productivity was a complex twenty-page proposal intended to revise significantly the entire system of production and work assignment. The proposal reduced existing job classifications, and established a "team" approach which obliged employees who were not working on their regular job to help out in other areas. Both sides recognized that Project: Productivity would ultimately eliminate jobs and restructure the existing job and wage structure.⁴⁸ The new team system meant that fewer employees would be needed and that those who worked would work harder and with less protection against arbitrary managerial authority. The union's leadership also considered Project: Productivity to be potentially detrimental to safety because it contemplated having employees work at jobs for which they were not adequately trained. According to Felix Jacques, who was the union's First Vice President and a member of the negotiating team:

45. John Lovell, *A Town Divided*, BOSTON GLOBE, Feb. 5, 1989 (Magazine) at 18. IP's sales increased from \$3.7 billion to \$4.7 billion between the first half of 1987 and the first half of 1988. Profits increased by \$150 million during the strike. *Id.*

46. Proposed Company Agenda to UPIU Local 14 and IBFO Local 246 (Apr. 21, 1987) (on file with Professor Getman) [hereinafter Proposed Company Agenda]. Additional knowledge of the negotiating positions of the parties was obtained through interviews with the union's two chief negotiators, Bill Meserve and George Lambertson. Interviews with Bill Meserve, Former President, UPIU Local 14, in Jay, Me. (June, 1990-Aug., 1990); Interview with Bill Meserve, Former President, UPIU Local 14, in Pittsburgh, Pa. (May 21, 1991); Telephone Interviews with Bill Meserve, Former President, UPIU Local 14, (Oct., 1990 - Aug., 1992). Bill Meserve made his negotiating notes available to Professor Getman, who also had the opportunity to go through the negotiating files at the Local 14 Union Hall in Jay, Me. Telephone Interview with George Lambertson, Union Negotiator (May, 1992).

47. Proposed Company Agenda, *supra* note 46, at 1.

48. As a result of this recognition, the proposal was quickly modified to include a clause stating, "No employee currently on the Androscoggin mill payroll will be laid off as the result of the implementation of Project: Productivity. Employees displaced from their departments will be used as best suits the needs of the Mill . . ." Contract Proposal by International Paper Company to UPIU Local 14 (Attachment 3, at 2) (June 9, 1987). However, as the union negotiators quickly noted, the proposal was silent about the hours of work and pay scale available for the displaced employees.

Project: Productivity with flexibility was a dangerous thing. We had already, within our own ranks, a sort of flexibility and [we] helped each other out. They wanted to redefine [production] so they could use people any way they wanted to within the mill where needed. That was dangerous. It's physically dangerous if you haven't been in those areas for any length of time. Machinery at the paper mill travels quite fast and just one wrong move and you could be killed.⁴⁹

The union and its members also thought of Project: Productivity as a potential detriment to the production of quality paper. According to former Local 14 President Bill Meserve, "[i]f you know anything about running a paper mill, you know that you need specialists in each part of the process."⁵⁰

The behavior of the parties during the negotiations and their subsequent statements reveal that each had a different view of competitiveness. The union and its members saw improvement in quality as the key. They believed that such improvement could only be achieved by recognition of workers' skills. Management, on the other hand, felt that competitiveness could best be achieved by cutting costs and deemphasizing job specialization.

The union estimated that the company's proposals would eventually eliminate about five hundred jobs held by union members—close to half of the existing jobs in the bargaining unit—and that loss of Sunday overtime would constitute an 8% wage decrease. The company claimed that it needed these changes to remain competitive.⁵¹ The union asked to see the company's books in order to make a judgment about the legitimacy of the claim. The company refused. In order to support its denial legally, the company made clear that it was not claiming financial inability to accept the union's proposals.⁵²

2. *Negotiations Company-Wide*

At the same time that these events transpired in Jay, similar negotiations were taking place at IP mills in Lockhaven, Pennsylvania, and in De Pere, Wisconsin. Also, negotiations had begun in Mobile, Alabama, some ten months before the strike at Jay. The Lockhaven negotiations made clear that the company was seeking to impose uniform conditions regardless of a plant's financial situation. Company officials conceded that the mill was not only

49. Interview with Felix Jacques, President, UPIU Local 14, in Jay, Me. (Nov., 1991). Union negotiators felt that accepting management's proposal in the form presented would betray the interests of many of their members. But they did not reject the proposal outright. Instead, they asked for an equal voice in the implementation of Project: Productivity and that disputes be submitted to a mutually acceptable outsider for disposition. The company was fearful that the program was one the union would ultimately oppose. It insisted on limiting the union to an advisory role that would leave complete discretion in the hands of management.

50. Interview with Bill Meserve, Former President, UPIU Local 14, in Jay, Me. (June, 1992).

51. See Lovell, *supra* note 45.

52. Interview with Bill Meserve, Former President, UPIU Local 14, in Jay, Me. (May 15, 1990); Interview with Bill Meserve in Jay, Me. (May 24, 1990).

productive and profitable by its own standards, but that the margin of profit actually exceeded the company's target of a 15% return on investment.⁵³ Nevertheless, the company insisted on the same concessions that it sought at other mills on the ground that it wanted uniform parameters in labor relations.⁵⁴

The company sought to make Mobile the major focus of the negotiations. When the Mobile locals refused to accept the company's proposals, IP locked the employees out of the plant and continued to operate with supervisors and temporary replacements. Support of the Mobile locals was particularly important to the international union because it was the first of the Southern locals to resist the company's demands for concessions—concessions that the top leadership of the union believed violated their earlier tacit agreement with the company.

IP's actions in Mobile caused labor relations to deteriorate further in Jay. The visible presence of the Burke, Edwards, & Kennedy (BE & K) Company in the plant area underscored the company's intent to continue operations at the Androscoggin mill in the event of a strike. BE & K had supplied replacements during a strike against Boise Cascade the previous year in Rumford, Maine, and it also had provided temporary strike replacements to support IP's lockout at the Mobile mill. According to Adrienne Birecree, who has studied negotiations between IP and its unions over a long period of time, the presence of BE & K was crucial to the company's strategy.⁵⁵ In fact, the company started taking applications for strike replacements before the employees went out on strike.

The Jay union's negotiators were angered by the company's proposals and by its negotiating style. They felt that the company was eager for

53. See *infra* note 54.

54. This was a particularly hard blow to the employees at the Lockhaven mill who had just been honored by the manufacturer for setting a world productivity record on certain key equipment. The message that the employees at Lockhaven received from IP was that the employees were not going to share the benefits of their productivity. According to Willie Stout, a third generation paper-maker:

Their goal at the time we were negotiating in 1987 was 15% return on equity and at the bargaining table they told us that the Lockhaven plant was exceeding that 15%. They also told us that they needed the concessions because of the world marketplace.

They said [that] because of new production coming on in the [1990's] and because of the world marketplace, . . . they would have to be extremely competitive and they wanted to [keep] their costs in line for the future. What we offered was that when there was a downturn and they could show to us with real figures [that] there was a downturn in the industry and [that] they needed the help, we would be there to help them. And they said we have to have [the concessions]. This is [the company's] agenda and these items will be here today, will be here tomorrow and will be here when we conclude these negotiations.

Interview with Willie Stout, Former Striker, in Lockhaven, Pa. (Sept., 1990).

55. A construction firm based in Birmingham, Alabama, BE & K provided key contract labor during the dispute at the huge Jay and Mobile mills. Between 1983 and 1985, BE & K began providing the industry with valuable assistance during strikes. "Often the firm has either received construction contracts and/or its employees have been on-site and available during difficult negotiations with union workers." Adrienne M. Birecree, *Corporate Development, Structural Change and Strategic Choice: Bargaining at International Paper Company in the 1980's*, 15 INDUS. REL. L.J. (forthcoming Fall 1993).

confrontation. This feeling was reinforced by the fact that the company negotiators were not from corporate headquarters as they had been in past years. Instead, the new negotiators were from the highly unpopular new management of the Androscoggin mill. According to experienced union negotiators, the company's team behaved in a manner that revealed that it had little or no authority to compromise any of the company's basic demands.⁵⁶ To the union's negotiators, the company seemed to be engaging in take-it-or-leave-it bargaining, sometimes referred to as Boulwarism.⁵⁷

Despite the possibility of permanent replacements being hired, UPIU leaders urged rejection of the company's final proposal. The membership voted against the proposal overwhelmingly, and more than 90% also voted to authorize a strike.⁵⁸ The membership of Local 14 was incensed by IP's proposals and was unwilling to work under their terms. Many thought that a failure to strike would ensure IP's ability to insist on its own terms. Tom Pratt,

56. A company may switch from corporate to local negotiators in order to facilitate agreement when local issues predominate in the negotiations, but IP was basically seeking company-wide concessions about such things as Project: Productivity and Sunday overtime. These ideas did not originate locally, and it seems highly doubtful that the local negotiators had anything special to offer in dealing with them.

To exacerbate matters, the most outspoken member of the company's bargaining team was K.C. Lavoie, *see supra* note 37, which further infuriated George Lambertson, the union's chief negotiator and a person with a many years of collective bargaining experience. To this day, Lambertson cannot describe Lavoie's role in the negotiation without uttering a string of invectives. In addition, Project: Productivity was explicitly declared by the company to be non-negotiable.

57. The tactic, named for Lemuel Boulware, former head of labor relations at General Electric Company (G.E.), was a complex one. *See* HERBERT NORTHRUP, *BOULWARISM* 27-28 (1964).

For a variety of reasons, Boulwarism has come to be synonymous among union negotiators with a take-it-or-leave-it style. According to Bill Meserve:

[IP's negotiators] would not modify their agenda. They would eliminate a few menial things on their agenda. But the key issues on their agenda they would not change. When we had some negotiating sessions we would drive from Jay to Lewiston which is about 30 miles away. We would have all our materials with us, go in there, and sit down.

The company would come in. The cameras would click. They'd say to us, "Do you have a counterproposal for us today?" We'd say, "No. We have presented a counterproposal to you." They would say, "We reject that counterproposal." We'd ask, "What do you dislike about our proposal?" "We dislike the whole thing. We reject the whole thing. Do you have a new proposal for us?" "No, we don't." Three minutes or ten minutes and it was over. It happened often.

Interview with Bill Meserve, Former President, UPIU Local 14, in Jay, Me. (June, 1989). The union's bargaining notes support this description. On almost all issues, the notes indicate that the company rejected the union's proposals without a counteroffer and did not change its own positions in response to offers of compromise from the union.

58. *See* Lovell, *supra* note 45. The international union leadership was concerned that a strike might prove disastrous to the local union. It urged the local to consider in-plant strategies or the option of working without a contract. UPIU International President, Wayne Glenn, suggested that since Sunday overtime was one of the critical issues in the negotiations, the employees should refuse to work on Sundays. It is difficult to determine, years after the fact, how strenuously the international leadership argued against striking. According to the local leadership, high union officials were more eager that the offer be rejected than they were concerned with the consequences to the employees of a strike. There is little doubt that at some point prior to the strike, Wayne Glenn urged the leaders of the local union to join together in a voting pool, stating something like, "This is the time to put your balls on the table or to take them home in a thimble." Interview with Bill Meserve, Former President, UPIU Local 14, in Jay, Me. (June 15, 1990); *see also* Peter Kellman, *You Can't Get to Second With Your Foot on First* 30 (Dec. 1, 1992) (unpublished manuscript, on file with authors) (confirming Glenn's statement); Interview with Wayne Glenn, President, UPIU, in Nashville, Tenn. (Oct., 1990) (same).

a truck driver with eighteen years seniority who had been working as a temporary supervisor prior to the negotiations, shared this common point of view. Pratt has ten young children and needed his job, yet he felt that the employees had no other choice. If they accepted the company's proposals, not only would they have had to accept loss of jobs and benefits, but they also would have doomed the battle of their sister union at Mobile, thereby weakening the entire union.

If we had accepted this contract or not voted to strike and worked without one, they could have squeezed 1,200 workers in the South until they relented to the contract which was offered them then They could have squeezed us and they could have done that to every plant. . . . So we, in essence, would have been cutting our own throat anyway. This company was out to squeeze the worker and they were going to do it systematically throughout the U.S. I have no doubt in my mind. I sat on both sides and I could see it coming.⁵⁹

International President, Wayne Glenn, agreed: "I don't think we ever would have had the strike if they hadn't locked us out [in Mobile]. We would have done a lot of yo-yo-ing and talking and then probably settled."⁶⁰

C. *The Strikes of 1987-88*

1. *Goals and Strategies*

The company's goals were clear: it wanted to emerge from the strike with increased managerial authority, the ability to reduce the work force, and lower labor costs. IP executives were at least aware, and probably pleased, that achieving these goals would reduce the power of the union. The company based its strategy on the power inherent in its wealth and in the number and productivity of existing facilities. Because of its experienced supervisors and automated production processes, International Paper was in a position to continue operations at a struck facility by utilizing supervisors, replacements, and union members who were persuaded to abandon the strike. IP's executives concluded that the experienced unionized employees were not crucial because new technology made many of the traditional paperworker skills obsolete.⁶¹ Company officials felt that by pursuing this aggressive course, IP would either

59. Interview with Tom Pratt, Former Striker, in Livermore Falls, Me. (May 7, 1990).

60. Interview with Wayne Glenn, President, UPIU, in Nashville, Tenn. (Oct., 1990).

61. An example given by James Gilliland, IP's Director of Employee Relations, is the function of the boiler technician. The technician used to look at the color of the smoke from the boiler to determine if the mix of gas was correct. A great deal of experience was necessary to perform this function adequately. Now, the computer monitors the mix and the crucial skill is operating the computer—something that can be taught far more easily than the experience-based skills of the old system. Interview with James Gilliland, Director of Employee Relations, IP, by Adrienne Birecree, in Purchase, N.Y. (Dec. 7, 1990).

convince the union to capitulate or else it would create a new work force composed largely of permanent replacements.⁶² The company's strategy was aided by a strong seller's market in paper at the time, which meant that even poorly produced paper could be easily sold.

By the time the union had been on strike for three weeks, IP had replaced over 500 of the strikers. By early fall, the company had replaced almost the entire workforce of 1200 people who were represented by the union. The future of the replacement workers quickly became a major concern of the union, and the major issue in the sporadic negotiations held between the parties. This was reflected in the union's slogan, "no one goes back 'til everyone goes back," and in the chant repeated enthusiastically at all union meetings and rallies, "scabs out, union in."⁶³

The company had the opportunity to meet and communicate with the replacement workers during the strike.⁶⁴ IP used these meetings to convince the replacements of the fairness of the company's position. Most replacement workers felt that they were merely third parties to a dispute between the company and the union, and that if they did not take the offered jobs, someone else would. Many replacements were opposed to the union, and several argued that they owed it to family or themselves to take advantage of an opportunity to better themselves financially.

The modern strike is often described as industrial warfare. The modern strike, like modern warfare, is likely to involve many battles and a variety of theaters of operation. Some battles are fought at the location of the struck facility. Other battles are fought further away—at political rallies, before federal and state agencies, and in state legislatures, board rooms, union halls, universities, and stockholder meetings. Some of the battles involve physical confrontation; others are battles of will. In general, the more numerous are the battlefields, the better is the union's chance for success.

62. Because of the union's pool system and the reduced number of supervisors, the company required replacements to continue operating. Company officials argued that it would have been either impossible or too costly to operate at Northern mills utilizing temporary rather than permanent replacements. Interview with James Melican, Vice President & General Counsel, IP, in Purchase, N.Y., (Sept., 1990).

Accordingly, the replacement workers at Jay, Lockhaven and De Pere were informed that they were being hired as "permanent replacements" as defined under the National Labor Relations Act. *See, e.g.*, *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967) (reaffirming that NLRA entitles employers to refuse to reinstate employees who have been engaged in an economic strike if jobs claimed are occupied by permanent replacement workers). However, in order to hedge its bets in the event that it needed to compromise with the union, the company also informed the strike replacements that "after a new labor agreement has been signed, the terms and conditions of your employment will be governed by that agreement." Form Letter from International Paper to Strike Replacements 1 (undated) (on file with authors). This language would have, for example, permitted the company to agree with the union to make places available to the strikers based on seniority and therefore to place the "permanent replacements" on layoff status immediately after the strike.

63. Interview with Tom Pratt, Former Striker, in Livermore Falls, Me. (Aug., 1990).

64. Interviews with Unnamed Replacement Workers, in Jay, Me. (Summer, 1991). These interviews were conducted under a pledge of anonymity.

From the beginning of the strike, Local 14 leadership was aware that it needed not only to maintain the solidarity of its own membership, but also to enlist the support of other parties.⁶⁵ At one of the first meetings after the strike, Peter Kellman, one of the local union's principal strategists, told the membership that the strike could be lost at Jay but it could not be won there.⁶⁶ In particular, the local leadership realized that such a strike could only be conducted with the support of UPIU because the international union, like IP, had substantial resources and widespread local affiliates. The leadership reasoned that even if a strike caused IP to lose money at a single facility or at a small number of mills, the company had the resources to operate profitably throughout the system. If the strike expanded, however, the financial pressure on IP would be greatly increased, and the productivity at each of the struck mills would be reduced because fewer supervisors and trainers would be available to work with the replacement workers at any given plant. Union leaders felt certain that while supervisors and replacement workers could keep plants operating and thereby minimize the company's short-term losses, they could produce neither the quality nor quantity of paper that had previously been produced by the striking workers.

2. *Inspiring Union Solidarity*

The most immediate of the local union's goals, however, was to maintain the solidarity of its own membership. Both sides were aware that if the union could not achieve solidarity among the striking workers, it could not obtain any of its other goals. Furthermore, without support from its own members, the

65. It would have been possible for the company to win the strike even if the local union suffered no defections and even if public opinion had not been solidly behind the strikers. Any union striking against a wealthy corporation with far-flung operations needs a strategy to overcome the company's advantages in money, resources, and the law. The basic strike is a limited weapon when undertaken by a local union at one facility against a company with many such facilities because the union can shut down, at most, only a fraction of the company's operations. Companies with many operating facilities are often in a position to shift some operations from striking facilities to other locations. Thus, to strike successfully today against such an employer, a union will usually need to expand the struggle and find additional ways to put pressure on the company.

Despite the company's advantages, IP officials recognized that adverse public opinion might strengthen the solidarity of the strikers and increase the length and cost of the strike to the company. Accordingly, IP developed a public relations program to convince employees, through letters and newspaper advertisements, to cross the picket line and return to work. The company utilized a series of television spots and newspaper advertisements seeking to enlist public opinion on the company's behalf.

66. Meeting of June 1, 1987 (tape on file with authors) (statement of Peter Kellman, Union Organizer). See also Kellman, *supra* note 58, at 88.

Kellman's role in the strike was interesting and somewhat controversial. Kellman was not a striker. He was sent by the Maine branch of the AFL-CIO to help coordinate and guide the strike. He became an important and influential figure and a close ally of local union president, Bill Meserve. Kellman, a veteran of the civil rights movement, spent a great deal of time as an organizer in Selma, Alabama. He described one of his roles in the strike as "helping to teach the labor movement the tactics of the civil rights movement that they learned from the labor movement." Interview with Peter Kellman, Union Organizer, in North Berwick, Me. (June 1992).

union could expect little support from other unions, the public, or politicians. Maintaining employee solidarity during a long strike is no easy task, particularly when the company continues to operate. For the employees of the Androscoggin mill, a long strike meant reduced wages, a possible loss of benefits, and separation from the activity which had previously occupied most of their time, energy, and emotion. It also meant being in conflict with the company for which they worked. The union was able to maintain the enthusiasm and support of its members by organizing a variety of strike-related activities, the most notable of which was the regular open meeting on Wednesday nights at the local community gymnasium.

At first, the Wednesday meetings were primarily business meetings in which union members planned strike strategies and resolved logistical issues. But as the strike wore on, these meetings developed an intense, emotional quality. The crowds steadily grew larger and more enthusiastic. The audience included strikers, relatives, townspeople, leaders and members of other unions, and, increasingly, people from around the state and the region who heard about the meetings and came to be inspired. The many outsiders who attended the meetings were always greeted with great enthusiasm, often with standing ovations and rhythmic applause.⁶⁷ As the strike wore on, visitors often told the crowd that they (the strikers) were the cutting edge of the labor movement and that it would be at Jay that the decline of organized labor would end. Brent Gay, a former striker, stated, "I felt that we were at a turning point This is the place where [the labor movement] would start going the other way."⁶⁸ To people from an isolated Maine community, these comments engendered a great sense of pride and solidarity.

As the strike progressed, the emotional quality of the Wednesday meetings helped strengthen the strikers' solidarity. The meetings included modernized renditions of familiar union ballads and communal singing. Many of the people who attended still become emotional when they speak of the meetings. Bonnie Samson, the wife of a striker, described the impact as follows:

It was great. It really was. Those Wednesday nights you knew you weren't alone. Everybody was in the same boat. . . . [P]eople would stand around afterwards and talk and it was enough to keep everybody together and going from one week to the next. And the union hall was full all the time. If you ever felt low, all you had to do was to come to the union hall and hang around for five minutes.

And the nicest part about it was . . . people would come from all over the country, I mean, the world. They came from Australia,

67. At one of the first meetings, Dominic Bazardo of the Hotel Employees & Restaurant Employees International Union chided the crowd for not applauding like a union. He led the crowd in rhythmic clapping, and this practice continued until the end of the strike. Meeting of July 15, 1987 (tape on file with authors).

68. Interview with Brent Gay, Former Striker, in Jay, Me. (May, 1989).

Hawaii, just to say, "You're doing the right thing. We're behind you. We hope you win." And then they would bring like thousands of dollars of donation money from their own locals. That's what I mean about the family feeling. You knew that there was help out there, you weren't standing there alone.⁶⁹

As the strike continued, the number and variety of outside visitors and speakers increased. The speakers included union officials, politicians, students and faculty members from nearby colleges, and political radicals seeking to take advantage of the employees' anger and sense of betrayal.⁷⁰ The meetings and the variety of speakers and guests that came to Jay proved educational to many of the employees, bringing them into contact with people, ideas, and forms of expression with which they were not familiar.

Given the intensity of their feelings and the evident need for unity, it is not surprising that the strikers' greatest anger was directed at those in their own ranks who crossed the picket line and returned to work. These individuals were referred to as "super scabs" and were socially ostracized, often even by members of their own families.⁷¹ Of course, the strikers also expressed considerable hostility toward the replacement workers (scabs) who were viewed as incompetent, unprincipled outsiders⁷² who usurped the benefits that had been acquired through the long-term efforts of union members.

3. *Union Tactics: Applying Pressure to the Company*

a. *The Picket Line*

The energy generated by the union members' solidarity gave rise to a variety of tactics designed to make IP yield to union demands. Initially, the union maintained several picket lines at each of the gates to the plant. But by court order, the union was soon limited to no more than twelve picket lines at any one location. The pickets did not prevent replacement workers from entering the mill. Even before the injunction was issued, when the strikers were able to mass at the entrances, the replacement workers were able to go to and return from work escorted by company officials, supervisors and

69. Interview with Bonnie Samson, Wife of Former Striker, in Jay, Me. (Oct., 1991).

70. Among the politicians who addressed the meetings were Richard Gephardt, Jesse Jackson, and the Massachusetts Commissioner of Labor. Jackson's picture is still prominently displayed in the union hall in Jay. The feeling seems to have been reciprocal. Jackson was in Maine during the 1992 election campaign and stated publicly, "I will always have a soft spot in my heart for the striking paper workers in Jay." Telephone Interview with Peter Kellman, Union Organizer (July, 1992).

71. See generally Laidler, *supra* note 30.

72. Because BE & K is located primarily in the South, the strikers assumed that the replacement workers had mostly come from there. The strikers' resentment thus intensified when a group of replacement workers flew the confederate flag over the plant during a union march. Songs about sending the scabs back to Alabama were a regular part of the Wednesday night meetings.

security forces. Strikers shouted insults and sometimes threw rocks, but the union did not keep the replacement workers from their jobs. (The replacement workers responded to the union's efforts with insults and profanities of their own. On paydays they would often go through the line waving their paychecks.) The picket line also did not significantly interfere with pick-ups and deliveries. Since most of the employees did not like picket duty, the union had trouble staffing the line and often had to use strikers' wives as picketers.⁷³

b. *Violence, Sabotage, and Other Unlawful Acts*

Throughout the strike, the local union leadership stressed the importance of abiding by the law and shunning violence, sabotage, and other unlawful acts.⁷⁴ The leaders felt that violence would ultimately backfire by turning public opinion, and even some of the union's own members, against the strike. Before the union's policy was widely understood, resentful employees who worked the final shift before the strike did considerable damage to company property.⁷⁵ In addition, there was a group among the strikers that either flouted or resented the union's nonviolent policy. Replacement workers were sometimes attacked. Rocks were thrown at their cars, and the road from Jay south along Route 4 became unsafe to travel at night. Although some violence occurred, it was sporadic and generally not attributable to the union.

Indeed, the most publicized acts of violence turned out not to be caused by the union, its members or supporters, but by people seeking to blame the union.⁷⁶ According to Father McKenna, the local Catholic priest, it was the

73. The wives' participation drew families together in many cases. Interview with Dee Gats, Wife of Former Striker, in Jay, Me. (June 1992).

74. Indeed, the union even rejected nonviolent actions that would have brought members into conflict with the authorities. Peter Kellman, a veteran of the civil rights movement, proposed that the union employ the tactics of nonviolent civil disobedience during the strike. The proposal was voted upon and narrowly defeated by the union's executive board. Kellman wanted a steady stream of people willingly to subject themselves to arrest as a way of protesting the company's policy of permanently replacing the striking workers. He believed that this tactic would draw attention to the strike and provide an avenue for union supporters among the general public to manifest their solidarity with the striking workers. Interview with Peter Kellman, Union Organizer, in North Berwick, Me. (June 12, 1989).

75. According to IP General Counsel, James Melican, this was a reason for the company's tough stand against the strike. Interview with James Melican, Vice President & General Counsel, in New York, N.Y. (Sept., 1990).

76. In one early newscast, for example, a self-proclaimed victim of union violence was shown crying bitterly and wondering how the strikers could be so unconcerned for the life of her child as to attack her house with the baby inside. In later newscasts, it was revealed that no attack was made on her house and that she fabricated the entire incident.

press that created the impression that the strike was violent.⁷⁷ This assessment was further corroborated by some of the replacement workers.⁷⁸ The strikers and their families resented the media's initial assumption that violence was union-instigated.

Many of the former strikers feel ambivalent about the policy of non-violence. Even Tom Pratt, a former striker who supported the union's anti-violence policy and felt it to be morally correct, believes that violence might have helped the union's cause:

Anybody that goes out on strike today is foolish. The way laws are, you're history, you're all done. . . . We did it by the law and we got our ass ripped. . . . Had we not gone by the law and wrecked everything up there . . . the federal government would have moved in and made everybody sit down and settle it. . . .⁷⁹

Many former strikers have made it clear that they would advocate more militant tactics if faced with a similar situation today.

c. *The Voting Pool*

At the suggestion of then Local 14 President Bill Meserve, a meeting was held in Nashville in May, 1987, to develop a general strategy for increasing the pressure on International Paper. The meeting involved the leadership of the international union, including its president, Wayne Glenn, and leadership of the four locals then in negotiation with IP. (The locals involved represented employees at IP's Jay, Maine; Lockhaven, Pennsylvania; De Pere, Wisconsin; and Mobile, Alabama plants.) The primary technique agreed upon, at the suggestion of Wayne Glenn, was the voting pool—a tactic that had been used successfully by the union in its 1986 negotiations with Champion International. In essence, the pool was a consolidated voting unit composed of different locals. By entering the pool, a local union pledged not to accept a contract until a majority of all the employees in the pool voted to accept the company's offer. If no agreement was reached, more local unions would join the pool, making it increasingly difficult for the company to maintain operations. Bill

77. Father McKenna described the situation:

They would come around and ask all the time, "Isn't there any violence that you know about?" And I would say, "Gee, I'm sorry—" But they kept looking and looking. A management guy admitted to me in church one day that what I said was true. . . . It was amazing how little violence there was. These are very good people.

Interview with Father McKenna, Local Priest, St. Rosa de Lima Church, in Jay, Me. (June, 1992).

78. One of them stated a few years after the strike: "There was very little violence. Very little." Interview with Unnamed Replacement Worker, in Jay, Me. (May, 1992). The interview was conducted under the promise of anonymity.

79. Interview with Tom Pratt, Former Striker, in Livermore Falls, Me. (May, 1990).

Meserve and other leaders of Local 14 supported the plan, and the membership overwhelmingly approved it.⁸⁰

The four members of the voting pool stood together throughout the strike, and there was considerable interaction and emotional support among them. In particular, members of the other locals felt inspired by the solidarity which the employees at Jay projected. However, the plan for a continually expanding pool did not work as the employees had hoped or as the international leadership had predicted. The key defection came early in the strike (in the fall of 1987) when the local union at the mill in Pine Bluff, Arkansas, decided not to join the pool, despite visits from Local 14's leaders and urging by officers of the international union.⁸¹

The leadership of the international union sought to compensate for the failure of other locals by having UPIU President, Wayne Glenn, refuse to approve locally negotiated contracts during the strike. Typically, Glenn's approval was necessary to finalize an agreement. But after the company agreed to sweeten its offers to nonstriking locals, Glenn felt compelled by internal political pressure to sign off on agreements reached by the IP locals not in the pool. When Glenn informed Bill Meserve and the leaders of the other striking locals of this fact, the decision was made to call off the strike.⁸²

d. *The Corporate Campaign*

The other major economic tactic adopted at the May 1987, meeting was the adoption of a "corporate campaign" against IP. A corporate campaign generally involves actions against employers such as work slowdowns, negative publicity, demonstrations, and efforts to disrupt the company's executive structure and its relationships with other employers. The international union successfully used a corporate campaign against IP in 1983.

The corporate campaign concept was originally conceived by Ray Rogers, a dedicated organizer and union activist. Rogers was, and remains, highly popular with the union's rank and file. Rogers had, however, become anathema to much of the leadership of organized labor in the United States, who claimed that he was too expensive and too interested in personal publicity. He had

80. According to Meserve,

The plan we had was for coordinated bargaining and a full voting pool. [On May 19 of 1987] we signed on to this deal. It would have worked very well, because as other contracts came up from other locations, they too would have rejected the company's proposal and joined the pool . . . That strike would not have lasted six months . . . It would have been resolved. We would have had over half of IP's mills shut down.

Interview with Bill Meserve, Former President, UPIU Local 14, in Jay, Me. (Dec., 1990). For more on the background and limitations of UPIU's pool voting scheme, see *Paperworkers' Pool Voting Strategy Being Challenged in NLRB Complaints*, DAILY LAB. REP. (BNA) No. 201, at A-7 (Oct. 17, 1990); *Union's Voting Pool Against IP Challenged*, PULP & PAPER, Aug. 1991, at 25.

81. See Kellman, *supra* note 58, at 212-13.

82. Interview with Peter Kellman, Union Organizer, in North Berwick, Me. (June 12, 1989).

several opponents among the UPIU's Executive Board and President Glenn therefore decided to hire the Kamber Group, rather than Rogers, to run the corporate campaign.

The Kamber Group conducted a nonaggressive campaign, limited to press releases and television spot advertisements utilizing prominent actors and actresses. Neither the employees nor Wayne Glenn were satisfied. At a strategy meeting in the fall of 1987, Glenn, at the urging of the local leaders, agreed to replace the Kamber Group with Ray Rogers.⁸³ Rogers subsequently conducted an aggressive campaign utilizing rank-and-file members and their families.⁸⁴

One major goal of the corporate campaign was to disrupt relations between International Paper and other companies. The primary targets were companies whose executives and board members were also on the board of IP, and financial institutions that loaned it money. Other unions that supported the strike were asked to withdraw deposits from targeted financial institutions.⁸⁵ Letters, demonstrations, and consumer boycotts were directed at companies such as Coca-Cola, Avon, and Bank of Boston, because each of them had a director who also served on IP's board. Given the limitations imposed on such tactics by the secondary boycott laws, it is doubtful that much was achieved other than the personal embarrassment of some of the board members. Nevertheless, these activities did encourage many in the community to feel as though they were engaged in a carefully constructed strategic plan. The campaign convinced many people that they were at war with corporate America. To this day, many people in the Jay area will not drink Coca-Cola.

Ray Rogers recognized that the union's most effective strategy would be to apply pressure at other IP facilities whose employees were represented by UPIU. The local union leadership shared this view. At one meeting Bill Meserve stated, to enormous applause, that the international union needed to convince the other locals that it was not in the union's interest for them to set "production records."⁸⁶ This was a theme that Ray Rogers repeated frequently. Many of the former strikers still believe that the strike could have been won had the international made a greater effort to involve other locals in slowdown activities.

The leadership of the international union did not share the strikers' belief in the efficacy of slowdowns. UPIU officers claim that slowdowns were

83. Interview with Wayne Glenn, President, UPIU, in Nashville, Tenn. (Sept., 1991).

84. The first major activity that Rogers organized was a caravan that travelled across Maine into Massachusetts to enlist support from other unions, the public, and various interest groups.

85. According to Peter Kellman, \$200 million was withdrawn from the Bank of Boston by the iron workers. One of the major goals of the corporate campaign was to get former U.N. Delegate, Donald McHenry, who was a member of the Board of IP and the Bank of Boston, to resign from the IP board. Ray Rogers believes that this strategy almost worked. Ray Rogers, Lecture to Advanced Labor Law Seminar, Boston College (Apr., 1992).

86. Interview with Bill Meserve, Former President, UPIU Local 14, in Jay, Me. (Dec., 1990).

difficult to orchestrate because other locals refused to go along. According to Wayne Glenn, "Hell . . . we never could get people aboard on it [I]t's hard to do in a paper mill. Mills are so automated; they either run or they don't run."⁸⁷ Nor did Glenn believe that the union could sustain an effort to slow down production by "working to rule" (i.e. by rigidly adhering to work rules—even when workers could use shortcuts). Said Glenn, "Oh, we worked to rule in a lot of the places, but after a few weeks people get tired of it Yeah, it's hard to be effective [in slowing work] without getting involved in sabotage, and we told everybody not to do that."⁸⁸

Many of the strikers believed that the corporate campaign was successful in putting pressure on IP. The company's General Counsel, James Melican, conceded that IP was bothered by the pressure. In the spring of 1988, the company agreed to national negotiations (which the union had previously sought in vain) to end the strike. The major condition was that the corporate campaign be suspended. Wayne Glenn agreed. National negotiations were conducted at Louisville, but failed because IP refused to remove or shift replacement workers as suggested by the federal mediator. Subsequently, it was difficult to restart the corporate campaign.⁸⁹ Many local union members concluded that the initial decision to suspend the campaign was a major mistake.⁹⁰

e. International Paper v. Town of Jay

The union's strike tactics were not limited to direct economic pressure. The union also sought to enlist the political support of the Town of Jay. Strikers, their family members, and supporters were elected as town selectmen. The selectmen prepared three ordinances intended to pressure IP. Two of these laws restricted the hiring and housing of replacement workers. The third was an "Environmental Protection Ordinance" that required town officials to enforce federal, state, and local environmental laws.⁹¹ Paper mills often operate on the edge of environmental laws. IP employees and the Jay

87. Interview with Wayne Glenn, President, UPIU, in Nashville, Tenn. (Oct., 1990).

88. *Id.*

89. According to Peter Kellman, "You get people out on the road and suddenly you bring them all back and they sit down for six weeks, and all the people they've been in contact with, you essentially lose contact with, and it takes a lot more to get anything like this going again." Interview with Peter Kellman, Union Organizer, in North Berwick, Me. (June 12, 1989).

90. Said one former striker: "That's when I learned . . . if I ever get on top of them again I'll never get off." Interview with Roland Samson, Former Striker, in Jay, Me. (May, 1990).

91. *International Paper Co. v. Town of Jay*, 672 F. Supp. 29, 31 (D. Me. 1987). The "Temporary Housing Ordinance" prohibited the construction of movable or temporary living quarters for 10 or more people "except pursuant to Maine's Mobile Home Parks statute and Land Subdivisions statute." *Id.* at 31. This was intended to make the housing of replacement workers on the company's premises more difficult. The "Professional Strikebreaker Ordinance" prohibited business from hiring employees who had twice before been hired as strike replacements. *Id.* at 31; see also *Court Holds Town's Environmental Law is Not Preempted by Federal Labor Statute*, DAILY LAB. REP. (BNA) No. 68, at A-1 (Apr. 9, 1991).

community generally believed that mills were given an unstated exemption from some of the more onerous aspects of the law by states eager to attract and keep business in their communities.⁹² The environmental ordinance showed the company that the town could override state leniency.

The ordinances were adopted by popular referendum. IP promptly challenged their legality in federal court, claiming that they violated federal labor law and were intended to make the town a party to the labor dispute. The company won a preliminary injunction against the replacement housing ordinance's enforcement.⁹³ The court held that the antistrikebreaker ordinance was not ripe for review, but it upheld the validity of the environmental ordinance since the ordinance did not create any new standards for IP.⁹⁴ The town repealed the antistrikebreaker legislation shortly after this decision, and passed a new environmental ordinance which IP again challenged in the courts. The legality of this ordinance was upheld in *International Paper Co. v. Town of Jay*.⁹⁵ The Court of Appeals noted "the critical role that Jay's citizens played in enacting the Ordinance," and it pointed to "the legitimate governmental interest of controlling the discharge of pollutants into the air, water, and ground. . . ."⁹⁶ Despite a political effort by IP to repeal the ordinance,⁹⁷ it was reaffirmed by the voters.

4. *The Outcome of the Strike*

The strike ended in the fall of 1988. After sixteen months of intense effort, using both traditional and innovative tactics—picketing, marches, emotional meetings, corporate campaigns, town ordinances, and a combined union voting pool—local union leadership decided to call off the strike and indicated employees' willingness to return to work on the company's terms.

92. Interview with Roland Sampson, Former Striker, in Jay, Me. (June, 1991). This belief is given credibility by IP's decision to contest the Jay ordinance legally despite the company's admission that the ordinance merely duplicated existing state and federal regulations. See Laidler, *supra* note 30.

93. 672 F. Supp. at 35.

94. *Id.* at 31-35.

95. 928 F.2d 480 (1st Cir. 1991).

96. *Id.* at 485.

97. IP's campaign included not-so-subtle threats to close the mill. For example, IP spokesman Gary Bickford was quoted on several occasions on the financial cost to the community "should the mill be forced to shut down because of this ordinance." Barbara N. Yeaton, *Bickford Tells Franklin GOP About Future of Western Maine*, LEWISTON DAILY SUN, Feb. 27, 1989, at 9.

The ordinance was preserved after a heated campaign in which the new environmentally conscious attitude of the employees was made manifest. For example, at a meeting in which mill manager Jim Thompson urged repeal of the ordinance, several speakers pointed out that the state rarely took action against IP related to reporting spills and leaks. David Anderson, *IP Manager Defends Company's Environmental Record*, LEWISTON DAILY SUN, Mar. 9, 1989, at 13. One woman, however, said that such incidents had always occurred and argued that "the concern was political and strike-related, not truly environmental." *Id.* The next speaker accepted her contention that the town had been willing to overlook environmental concerns for economic reasons but he explained, "We sold the environment of this town 25 years ago for a paycheck. Now it's time to take back control. My kids are worth more to me than \$300,000." *Id.*

Most members of Local 14 were surprised at the decision. They thought that the union was winning its struggle, that public opinion was turning in their favor, and that IP was hurting financially. Only about 60 of the 1200 employees had crossed the picket line⁹⁸ and most strikers were prepared to hold out longer. The decision to call off the strike was based on Wayne Glenn's statement to the leaders of the four striking locals that he would have to start signing off on agreements between IP and other locals. This statement convinced the leadership that the strike would be lost, and they did not wish to subject their membership to another winter of struggle. In addition, the union wanted to obtain recall rights for its members under the *Laidlaw* doctrine.⁹⁹

The decision to call off the strike was not voted on by the membership of Local 14. Bill Meserve, the local union's president at the time, and others in the local leadership were fearful that announcing a membership meeting to vote on ending the strike would lead many workers to return to work prior to the vote and thus destroy the union's hard-won solidarity. Meserve describes this as "the toughest decision I ever made." He remembers, "I went back to my hotel room and cried like a baby."¹⁰⁰ Some members of the local still resent the decision. The feeling that "I voted to strike—I should have had the chance to vote on ending it" remains quite strong.¹⁰¹ Local 14's decision—made in the interests of local solidarity—may have, in fact, undercut it.

As soon as it was legally possible, a petition was filed by replacement workers to decertify the union. The union was able to delay the vote until July of 1992 by charging IP with unfair labor practices concerning the company's implementation of the *Laidlaw* doctrine. By that time, over 300 former strikers were in the IP workforce.¹⁰² To win the decertification vote among IP workers, the union needed roughly 220 votes from the almost 700 replacement workers.¹⁰³ Because of feelings of mutual animosity, however, the union did not really seek to organize the replacement workers until shortly before the election when a vote to admit them to the union was passed.¹⁰⁴ The former strikers were in the uncomfortable position of soliciting support from people whom they distrusted and despised. They found it difficult to solicit votes

98. See Laidler, *supra* note 30 (stating that, as of one year after the strike, IP had rehired only 105 of the 1,267 former strikers).

99. The doctrine enunciated in *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), gives permanently replaced strikers priority in filling later job vacancies. The doctrine "has been unanimously approved by the courts of appeals." ROBERT A. GORMAN, *BASIC TEXT ON LABOUR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 345 (1976).

100. Interview with Bill Meserve, Former President, UPIU Local 14, in Pittsburgh, Pa. (May, 1991).

101. *Id.*

102. See *DAILY LAB. REP. (BNA)* No. 201, at A-7 (stating that more than 200 former strikers had been rehired as of Oct. 17, 1990).

103. Interview with Rick Thomas, Union Organizer, in Lewiston, Me. (May, 1992).

104. Although over 80% of the voters supported the admission of replacement workers, voter turnout was low and there was little enthusiasm for former strikers for the change. *Id.*

without expressing their latent anger.¹⁰⁵ The company campaigned successfully in favor of decertification, winning by a vote of 660 to 380.¹⁰⁶

D. *The Continuing Impact of the Strike on Productivity*

1. *Relations Among Workers at the Androscoggin Mill*

Relations among workers at the Androscoggin mill were warm up until the strike. Afterwards, the mill was divided into battling factions. Relations were most strained between the former strikers and the replacement workers. When they returned to the mill, most former strikers found it very difficult to socialize with the replacement workers. Typical was Maurice Metevier, one of the first returnees. "I go in everyday with the same thought: 'Just because I've got my job doesn't mean it's over.' I've still got 600-800 friends on the outside and until they're back, I refuse to socialize with these people."¹⁰⁷ The rehired workers who had been out of work longer were even angrier. Such workers were openly contemptuous of the replacements and hostile to supervisors. One described "walking around with a knot in my stomach."¹⁰⁸

The former strikers' anger is typified by a conversation rumored to have taken place during the summer of 1989. According to a story widely-circulated at the time, a replacement worker was killed in an automobile accident and one of the former strikers was heard to exclaim, "What a pity." When another replacement worker told him that he was the first former striker to be sympathetic he responded, "I meant it's a pity they weren't car pooling. That would mean four more jobs for *our* people."¹⁰⁹

During the initial post-strike period, the former strikers limited their social interaction almost exclusively to each other. Gradually, however, relations with the replacement workers improved. The former strikers came to see the replacement workers as individuals and spoke with them during break times, even though they did not socialize with them away from the mill. A few strikers made a special effort to be understanding, focusing their anger on IP instead of the replacements. Tom Pratt stated:

105. In June of 1992, Professor Getman was present at union strategy meetings during which former strikers reported on their sometimes angry conversations with the replacement workers.

106. Telephone Interview with Peter Kellman, Union Organizer (July, 1992).

107. According to Maurice Metevier, when the strikers first returned, the replacement workers were "very friendly overall. I'd say mostly." Metevier tried to explain the replacement workers' friendliness: "I feel that most of it is guilt. . . . Why the hell would they be friendly towards us? We swore at them, cursed at them, we did everything you could possibly imagine, and a lot of rocks were thrown. There was an awful lot of stuff done to them." Interview with Maurice Metevier, Former Striker, in Jay, Me. (Aug., 1990).

108. Interview with Peter Pelletier, Former Striker, in Pittsburgh, Pa. (May, 1991); Interview with Bill Meserve, Former President, UPIU Local 14, in Pittsburgh, Pa. (May, 1991).

109. Interview with Tom Pratt, Former Striker, in Livermore Falls, Me. (May, 1990).

The company used those people. They were pawns . . . And so, although it would probably be hard for me to become friendly with somebody who took my job . . . at the same time I don't hate anybody. I hate the idea that people can be manipulated by a big corporation without paying the price. . . .¹¹⁰

Nevertheless, many who spoke socially with replacement workers (or even treated them decently) felt disloyal to their former coworkers who were not recalled. Many continued to find the task of dealing with their anger difficult, even as they spent more time at the mill with the replacement workers. For example, by the summer of 1992, Maurice Metevier had begun to talk with the replacements, but his anger remained close to the surface.

I work with them. I'll actually even be not totally hateful. I'll be somewhat sociable. I will interact with them. But I will not have any friendships with them on the outside. I have no respect for the people at all. I look at them as a body. We are there, they're there. We will work together. We'll get along without throwing rocks at each other while we are here, but there will be no conversation.¹¹¹

Those who had not returned to work continued to talk about the "scabs" in the same angry, contemptuous tones as before.¹¹² The former strikers could rarely approach the replacement workers without showing animosity. Moreover, during the campaign conducted prior to the decertification election, the company reminded the replacement workers of the animosity previously manifested and still felt by the strikers.¹¹³ IP reinforced the division between "strikers" and "scabs" which, in turn, led to the decertification of the union.¹¹⁴

110. Interview with Tom Pratt, Former Striker, in Livermore Falls, Me. (Aug., 1990).

111. Interview with Tom Pratt, Former Striker, in Livermore Falls, Me. (May 1990).

112. This was most evident in interviews with Dee and Joe Gats and with Rick Romano. Interview with Joe and Dee Gats, Former Striker and Wife, in Jay, Me. (May, 1992); Interview with Rick Romano, Former Striker, in Jay, Me. (May, 1992).

113. The company put out a series of flyers, titled, "It's Your Turn," that regularly reminded the replacement workers of the antiscab language of the union. Flyers to the same effect were circulated by some of the crossovers and replacement workers. "It's Your Turn" (anti-union flyer) (1992) (on file with authors).

One anonymous circular stated, "How many times have you heard 'once a scab always a scab' . . . There is a far greater chance of losing your job if the union remains in power." "Once a Scab, Always a Scab" (anti-union flyer) (1992) (on file with author). Another addressed to "Team Andro" stated, "Isn't this the same Union that said . . . 'Scabs Out Union In'? . . . IP still says we are permanent replacements, and the Union says it will rid this mill of 'Scab Labor'." "Scabs Out, Union In" (anti-union flyer) (1992) (on file with authors).

114. Few replacement workers voted to maintain the union. Interviews with the replacement workers suggest that, for some, the vote against the union was neither an expression of satisfaction with IP, nor of opposition to the concept of unions, as much as an expression of their continuing resentment of the verbal and physical assaults of the strike and their recognition of the continuing anger of the strikers towards them. Interview with Unnamed Strike Replacement, in Lewiston, Me. (June, 1992).

The former strikers felt especially betrayed by the crossovers and, for that reason, the greatest employee anger was directed toward those who abandoned the strike. They were frequent targets of abuse and assault. Even Tom Pratt found it difficult to be charitable towards them, comparing them unfavorably to one employee who opposed the strike and who refused to take part.

At least he didn't change his morals just because his pocketbook got tight. I voted to strike. Just because my pocketbook gets tight, does that mean that I now say, "IP, you're right"? No, that's like going back 200 years ago when Americans were fighting for independence and saying, "Gosh, we lost that battle maybe we better concede." I mean come on. Right is right and wrong is still wrong.¹¹⁵

Despite the employees' anger towards the company and its labor relations director at the Androscoggin mill, there were emotional farewells between the strikers and many of the working supervisors. Several of the supervisors made clear their distaste for the company's style of negotiating, particularly the threat of permanent replacements. Some supervisors could barely face the striking employees. Tom Pratt states: "I went around the mill—shook some hands of salaried people I worked with and I said, 'I probably won't be in here for a long time, if ever.' They said, 'I hope it doesn't come to this.' There were foremen who literally cried that day."¹¹⁶

Low-level supervisors were split in their appraisal of the negotiations. Several thought that the company tried to get "too much too fast."¹¹⁷ Some thought the union had been unrealistic. Few supervisors, if any, favored the company's hiring of permanent replacements.¹¹⁸ Several retired supervisors had supported the union publicly by attending the Wednesday night meetings and even walking the picket line.

A few low-level supervisors took early retirement and many others expressed the desire to do so during the strike. Many of the front line supervisors had relatives among the strikers and had themselves come up from

115. Interview with Tom Pratt, Former Striker, in Livermore Falls, Me. (May, 1990).

116. Interview with Tom Pratt, Former Striker, in Livermore Falls, Me. (July, 1990).

117. Interview with John Wall, Former IP Supervisor, in Jay, Me. (May, 1992). According to John Wall, a former supervisor who eventually left the company because he found the new environment intolerable, "They were just going to replace the people if they didn't go along with the contract, and they didn't worry about how the salaried people felt about the whole thing. We had nothing to say of what was going on. It was just . . . you're gonna get paid and you do your job and that's it." *Id.* Another supervisor who declined to be named described his dismay at coming into work and "seeing a bunch of jokers standing around." Interview with Unnamed Supervisor in Jay, Me. (May, 1992).

118. Many supervisors objected to the disruption of community caused by the replacements.

You went fishing with [the old crew], you went bowling or hunting or something like that. It was a community sort of thing. They'd see you, and you knew everybody. The new workers came in . . . they could have been convicts or anything, but you knew nothing about them.

Interview with John Wall, Former IP Supervisor, in Jay, Me. (May, 1992).

the ranks as loyal union members. The strike put them in a very difficult position. They were required to cross the picket line, do some of the strikers' work, train replacement workers and sometimes escort them into the plant, and make deliveries dropped off by union workers unwilling to cross the line. Thus, the low-level supervisors found themselves on the front lines of the battle—the personification of the company's determination to win the strike. A great deal of anger was directed toward these supervisors as the strike progressed.¹¹⁹ Many of the supervisors have not forgiven the strikers for the insults and anger expressed on the picket line.¹²⁰ Some close relationships either ended or changed because of strikers' resentment of supervisors.¹²¹ Dee Gats, for example, was one of the wives who became heavily involved in the strike. Her sister, with whom Dee was once very close, is married to a foreman who supported the company during the strike. Dee and her sister have not socialized or even spoken on the phone in four years. Dee also became estranged from her brother, a supervisor. Even though she never discussed the strike with him, she notes that she regularly saw him "crossing the line."¹²²

2. *Strikers' Attitudes Towards the Company*

The attitude of most of the strikers towards the company was permanently altered. Employees who were once proud of working for IP came to feel hatred toward the company and its high officials. The anger of the employees developed because they felt that IP's demands were unreasonable and that the company was not bargaining in good faith. Relations were made worse by the hiring of permanent replacements, and by IP's campaign to

119. On one level, it seemed that the strikers were aware that the supervisors were merely doing their job, but on an emotional level, they equated the supervisors with the company. Perhaps their anger would have been reduced if the strikers and supervisors had a chance to meet and discuss their feelings with each other. But the circumstances did not provide such an opportunity.

120. According to John Wall, "I've seen a few of them on the streets or in the store and they've come up to me and I've mentioned what they said on the picket line and they said that well they forgot about that. I said well you may have, but I haven't." Wall is typical of many low-level supervisors in being angry at both IP and the strikers for the loss of community. Interview with John Wall, Former IP Supervisor, in Jay, Me. (May, 1992).

121. Interview with Dee Gats, Wife of Former Striker, in Jay, Me. (Oct., 1991).

Roland Samson, a former striker, still feels uncomfortable in the presence of his brother-in-law, a supervisor, whose own sympathies were never manifest during the strike.

None of the family broke ranks but a problem I have is that I have a brother-in-law that's in management . . . We're not enemies, but it's hard for me to deal with him I guess in a way. I try not to cause problems so I try to keep the contact to a minimum because I am strongly opinionated . . . and he works for the company . . . I don't know how he felt about it in his heart, but I mean, of course, he continued to work in the plant . . . Him and I, we never had a blow out or anything like that. I think my mother felt both sides tugging, because he had a problem, too. He had a rock thrown through his window and he had to go through a gate every day with strikers calling to him. So it was no picnic for him either, I'm sure.

Interview with Roland Samson, Former Striker, in Jay, Me. (June, 1991).

122. Interview with Dee Gats, Wife of Former Striker, in Jay, Me. (Oct., 1991).

convince the strikers and the public that the company had acted fairly. The employees felt betrayed and falsely portrayed by the company. The attitude of Maurice Metevier was typical:

I'm not so trusting anymore. I'm trusting of the ordinary worker. I understand them. But big business—[the strike] sure opened my eyes to what big business really is. I feel completely betrayed. I can't totally comprehend why a company would do something like this to its employees. It's employees [that] make them their money. Granted, you need both [employees and managers]. But why would they sell their damn employees out?¹²³

In addition, the strikers felt that IP attempted to demean their role as papermakers. In various ways, IP officials announced to the employees and to the public that the experienced papermakers were unnecessary to produce quality paper. Top company officials believed that automation made experience far less important to the production process.¹²⁴ The strikers bitterly resented this claim, as they had based their professional identity on their skill as workers.

3. *Employee Work Behavior*

Post-strike work behavior was not a simple issue for the former strikers. They were proud of their skills as paper makers and traditionally had believed that the company was entitled to their best efforts. As Roland Sampson stated, "I was brought up to believe you had to do your job as well as you could. That was expected. That was part of earning your pay We looked down on people who did not do their job[s] well."¹²⁵ The general feeling of pride in being productive paperworkers was echoed by the signs on Maine's Route 4 announcing, "Welcome to Jay—A Paper Making Town." On the other hand, working for a company one has come to hate, alongside replacement workers whom one despises, is emotionally painful. As one former striker described it, "First couple of weeks back I nearly didn't eat in the lunch room. I went home all tore up. Eight hours was forever and I threatened to kill if they forced me to work overtime. It was that bad, and I used to work a lot of overtime before the strike."¹²⁶ Many resolved the issue with an uneasy compromise. They worked hard, but with little thought about how best to do their jobs. They refused to give the company the benefit of their experience and know-how. Maurice Metevier described his new attitude towards his job:

123. Interview with Maurice Metevier, Former Striker, in Jay, Me. (Aug., 1990).

124. Interview with James Gilliland, Director of Employee Relations, IP, by Adrienne Birecree, in Purchase, N.Y. (Dec. 7, 1990).

125. Interview with Roland Sampson, Former Striker, in Pittsburgh, Pa. (May, 1991).

126. Interview with Dennis Couture, Former Striker, in Jay, Me. (June, 1992).

I absolutely refuse to give any intelligence. There's all kinds of tricks of the trade that you learn, and when I'm working with a scab, I will not use anything I ever learned. We do it the old way: brute strength and ignorance. I pull my ass eight hours knowing full well in five minutes I could get it done another way.¹²⁷

Prior to the vote on the decertification petition, both replacement workers and former strikers agreed that the quality of the paper produced at the Androscoggin mill was poor, although each group blamed the other.¹²⁸ Although some IP managers offered an optimistic view of productivity at the mill, in general supervisors agreed that the mill's performance was weak.¹²⁹ Several wondered how the place could be making money.¹³⁰

According to union officials, there is little likelihood of significant productivity improvement in the near future. "This battle is going to continue. I don't see it ending."¹³¹ Reports from Jay and from Lockhaven are that profits, production, and quality all continue to be significantly lower than they were before the strike.¹³² According to one of the former Lockhaven

127. Interview with Maurice Metevier, Former Striker, in Jay, Me. (May, 1992).

128. A letter circulated during the campaign stated, "Old wounds are being reopened, fresh hostilities started and an overall terrible attitude and atmosphere being recreated." Letter from Dick Mealey, Paper Machine Clerk, to Fellow Coworkers (June, 1992) (on file with authors). A crossover worker claimed that the union people "hardly work," and a union worker stated, "I'm finding that no matter how good a job we do on my end of the plant, [the replacement workers] cannot handle the product we make. So we can make the best product in the world and it doesn't do a bit of good." Interview with Brent Gay, Union Worker, in Jay, Me. (June, 1992).

129. For example, according to James Livingston, Manager of Human Resources at the mill since January of 1989, "Things were in a state of upheaval following the strike, but they have been improving especially since the decertification election." He states that absenteeism is down and mill safety is "at an all time high" and "bitterness is largely a thing of the past." Telephone Interview with James Livingston, Manager of Human Resources, IP (Mar. 3, 1992); see also Lovell, *supra* note 45 (noting IP's record profits during the strike). These optimistic claims are disputed by several former strikers. Telephone Interview with Bill Meserve, Former President, UPIU Local 14 (Dec., 1992); Telephone Interview with Peter Kellman, Union Organizer (Jan., 1993).

130. The situation at the Mobile mill was less hostile as state law enabled locked-out employees to return to their jobs. According to one of the Mobile local's former officers, "There's no animosity now. I don't want you to think there's a love affair at IP Mobile, but there's no cutthroat animosity." Interview with Frank Bragg and Willie Stout, Former Strikers, in Nashville, Tenn. (Sept., 1991). Although production has improved since the lockout ended, local union officials state that production was still not back to pre-lockout levels even two years after the strike. "The production is up there but it's not like it was. There is still the 'I don't give a damn' attitude." Interview with Frank Bragg and Willie Stout, Union Officers, in Jay, Me. (Sept., 1990).

131. Telephone Interview with Bill Meserve, Former President, UPIU Local 14 (Dec., 1992).

132. According to Bill Meserve, as of October 1, 1992, the mill's year-to-date loss was \$32,440,595.98. Meserve is confident of the accuracy of his figures but will not reveal his sources. Management officials refuse to discuss profit and loss at particular locations. Telephone Interview with Bill Meserve, Former President, UPIU Local 14 (Dec., 1992).

According to Willie Stout, a former Lockhaven striker now on the staff of the international union, union members returning to work have reported that the company has held meetings with the workers and told them that the company was losing a million dollars a month in 1989.

Lost a million dollars a month and that they had to really put their nose to the grindstone and produce, or equipment would be shutting down in that plant. Reports are production is not near the production that we had when the experienced workers were there, and also many of the people that I worked with tell me that we're no longer making the special grades, high profit-margin papers.

employees, "They're running a very basic sheet of paper, something that's easy to run and doesn't have to meet the specs for the customer. That's not like the specialty papers that we used to run."¹³³

Brent Gay, a former striker, explained the poor productivity in terms of the lack of expertise of the replacement workers and the anger of former strikers, including himself:

Well, it's a hard job. I had a lot of pride in my job before, and I always tried to work out problems. I did the extra. When I went back, and here's a scab that they've put on my job for two years who don't know nothing and they try to tell me he's doing as good a job as I used to do, [I think:] 'To hell with you!' You deserve him! You're gonna get nothing out of me except I do absolutely what I have to.

Some of the replacement workers . . . ask you about problems. "What do you think the problem is?" I tell them, "I don't know." Finally told one guy. He kept asking me [how to solve problems]. I said, "Look, I could tell you how to solve that. I'm not gonna. Every time I do that, I'm cutting a guy's throat on the outside, and I'm not gonna do that." "Oh, I understand." He never asked me again after that.¹³⁴

Nevertheless, most of the former strikers remain convinced that their cause was just and that their fight was conducted valiantly. Said one former striker:

I'm sick of it. I'd like to say the hell with it, but I can't. If we all said 'to hell with it,' where will our kids end up? What's going to happen to them? Is some corporate giant going to squelch them the same way? I've lived well and I would like to see my kids have the same thing.¹³⁵

4. *Replacement Workers' Attitudes Toward the Company*

Initially, many of the replacement workers were grateful to IP for their jobs and apparently they worked hard. However, they did so without special knowledge of the complex machinery in the mill. During the strike, the company conducted regular meetings with replacement workers to boost their morale. After the strike ended, however, the meetings ended and conditions in the plant became more tense and divided. Several of the supervisors were thought to favor the strikers with whom they had grown up, and some were thought to favor the replacements. Over the next few years, the divisions and

Interview with Willie Stout, Former Striker, in Jay, Me. (July, 1990).

133. Interview with Willie Stout, Former Striker, in Nashville, Tenn. (Sept., 1991).

134. Interview with Brent Gay, Former Striker, in Jay, Me. (June, 1992).

135. Interview with Maurice Metevier, Former Striker, in Jay, Me. (Aug., 1990).

turmoil led many of the replacement workers to feel negative towards the company.¹³⁶ Both former strikers and replacement workers complain about the lack of intellectual challenge in the work as presently organized.¹³⁷

5. *Divisions Within the Union*

Inevitably, after the strike, divisions surfaced within the union. Some of these divisions resulted from disagreement about tactics. Even today, a variety of different views persist about what should have been done by the union. Some believe the union should not have struck but should have used tactics that could be applied while still on the job. Others think the union should have been less opposed to violence, while some feel that the union should have been more open to compromise. While there seemed to be little open disagreement about the need for the union to reach out to social activists and political radicals,¹³⁸ some union members felt that radical outsiders sought to take over the strike.¹³⁹

But much of the division within the union involved animosity between the international union and Local 14. Most of the former strikers blame the international union leadership for failing to expand the pool voting scheme. They blame other IP locals for failing to engage in slowdowns or other

136. According to one of the first replacement workers:

The first year, actually the first 8-9 months, they rolled out the red carpet, most anybody could see right through the red carpet. If you want to go around with your nose being brown you are gonna get . . . whatever you want. And if you happen to mess up on the job that's swept under the carpet, and they don't pay attention to it. But if you are, like a lot of people are, who don't believe in sucking up, they really come down on you . . . IP is middle-management heavy. They've got some cushy jobs and they bring down big money. It doesn't matter if they see you out on the streets in this industry or any of them. You have your Lee Iaccoca's out there making seven [million], and they lay off 20 or 30,000 hourly workers . . . I'm against big business. I didn't think that way in [1987].

Interview with Unnamed Replacement Worker, in Jay, Me. (May, 1992). The interview was conducted under a pledge of anonymity.

137. According to a replacement worker:

I'm in control of the tool box instead of wrenches and screw-drivers. I'm the kind of person that if I can think about something and do it with my hands, I enjoy the job . . . There is nothing [at this job that is] intricate. There's no challenge. The challenge is garbage. The computer does it all . . .

Interview with Unnamed Replacement Worker, in Lewiston, Me. (June, 1992). The interview was conducted under a pledge of anonymity.

138. Some former strikers felt inspired by the radicals:

I feel like these kind of people are earth people and they are not people who destroy things. They are soft and have . . . big heart[s] and they can do as much in their own way as somebody who does it in a different way. . . . You felt good about them being there because even though they didn't have as much as you or didn't look like you, they support[ed you] and they knew what was going on.

Interview with Rick Romano, Former Striker, in Jay, Me. (Oct., 1991).

139. For example, Felix Jacques, the current president of Local 14, felt that the inclusion of political radicals caused division and weakened the union's appeal to others. Interview with Felix Jacques, President, UPIU Local 14, in Jay, Me. (Nov., 1991).

behavior that would have put pressure on IP. Many of the former strikers also resent the local leadership's decision to end the strike without a vote.

E. *The Impact of the Strike on the Community*

The strike and the replacement of the old work force transformed the once peaceful communities of Jay, Livermore Falls, and Wilton into battle zones. The effects of the strike on the community did not disappear with the end of the strike. According to Charles Noonan, the former town manager of Jay, the strike has caused problems which may last generations. Says Noonan: "It has caused tremendous problems in the social fabric of the community. It has torn the community apart. Friendships that existed for lifetimes are gone; people who went to high school together and grew up together will not speak to each other."¹⁴⁰ An article in the Catholic newspaper, *The Church World*, describes one woman's bitterness as follows: "In time, I'll probably forgive—but I'll never forget."¹⁴¹ The newspaper also described the experience of one supervisor at the Jay mill: "[The supervisor] makes a legitimate point: 'People have a right to go on strike, but dammit, I have rights too.' Nails have been thrown in his driveway, and rocks thrown through his window. He, too, has cause to be upset."¹⁴²

The strike also divided families. A woman whose husband abandoned the strike found that her sisters, whose husbands remained on the picket line, would no longer talk to her. Tom Pratt, whose family remained intact and who eventually got another job, considered himself to be one of the lucky ones even though he had depleted the money he saved for home improvement and his children's education.

Some were not as fortunate as I was. There were divorces. There were problems, physical [and] mental. It's devastating. You're pitting brother against brother in many cases. I don't have no relations in this

140. *Prohibiting Discrimination Against Economic Strikers: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 102d Cong., 1st Sess. 79 (1990) (testimony of Charles Noonan, Town Manager of Jay, Me.).

141. *THE CHURCH WORLD*, Feb. 18, 1988, at 3. The sense of division was noticeably acute in the local high school. The high school was the one place where families of strikers and the families of replacement workers were required to mix for prolonged periods. School administrators chose not to deal directly with the issues involved in the strike but it was inevitable that teenagers whose families were engulfed in conflict would become emotionally involved. Students came to school with their loyalties emblazoned on their T-shirts and jackets and defined themselves as "strikers" or "scabs." The majority of the students were related to strikers, and the children of the replacement workers frequently received insults and abuse. Bonnie Samson, Roland's wife, committed as she was to the union, was troubled by the idea of visiting the sins of the replacement parents upon their children.

There was an incident, a lot of incidents where some of the children of scabs, would go to school and the other kids would call them scabs or whatever. You know. Of course, they hurt their feelings and it's not their fault. No. But kids, younger kids, don't realize that. Interview with Bonnie Samson, Wife of Former Striker, in Jay, Me. (June, 1990).

142. *THE CHURCH WORLD*, *supra* note 141.

area so that I didn't feel it personally, but I saw it. I saw one brother on one side of the coin and the other as a striker and they literally would fight each other because one was working for the company and one was not The company pitted one against another and some of this is never going to go away. All of the top management that makes these decisions, they don't live here in this town. They live in towns removed from the area.¹⁴³

One institution that was not overtly effected by strike-related divisiveness was the local Catholic church, St. Rosa de Lima. The priest, Father McKenna, decided that the church should be "an island of peace" during the ongoing struggle. It was not a decision that he reached easily. His own background was working class and his sympathies were strongly with the strikers. He saw the strike as an opportunity to make the church's teachings relevant to the lives of the strikers, but he reluctantly decided that it would not be right for him to encourage the strikers to support the strike when it might cost them their jobs.

It was a golden opportunity for Christian social justice—I would have liked to preach great sermons about it because, in their whole lifetime, this was probably the greatest social issue that involved themselves. We always work at hunger over in India but, gee, this was their own personal life, but unfortunately I did not deal with it right there. I decided, well let's make this a place of peace. It is a regrettable situation. But there were a couple of reasons. I felt that this was their decision. I could not encourage anyone to do anything that would jeopardize their jobs. I couldn't because they are going to be stuck with the consequences. If it failed—I didn't want to encourage them—it had to be their decision.¹⁴⁴

In Jay, as in Lockhaven, the economic base of the community and the sense of common enterprise were both severely damaged by the strike. As one of the former Lockhaven strikers, a third generation paper worker, stated: "[A]pproximately six local stores or shops have closed. Closed their doors completely because the replacement workers or the scabs don't want to come in contact with former union members so they don't shop in that area. It's devastated the community economically."¹⁴⁵

143. Interview with Tom Pratt, Former Striker, in Livermore Falls, Me. (May, 1990).

144. Interview with Father McKenna, Local Priest, St. Rosa de Lima Church, in Jay, Me. (June, 1992).

145. Interview with Willie Stout, Former Striker, in Nashville, Tenn. (Sept., 1991).

III. DIFFERING APPROACHES TO PAPER INDUSTRY LABOR RELATIONS POST-STRIKE

A. *Labor Relations at Other IP Mills After the Strike*

After the strike and lockout were lost, UPIU leaders felt they were in a weak position in dealing with International Paper. The company continued to demand concessions whenever a new agreement was negotiated and the union's members, aware of the likelihood of replacement, were fearful of striking. To meet the new situation, the union decided to reinstate and enlarge the voting ratification pool system that was employed unsuccessfully during the strike. According to the testimony of Union Vice President, Boyd Young, "The goals of the pool were simply to avoid concessions and to resist permanent replacement."¹⁴⁶ In August 1988, the union's constitution was amended specifically to provide for pool voting as a way of coordinating bargaining and avoiding the further concessions sought by IP.

In 1989, at a meeting of the International Paper Union Council (a council of UPIU locals representing IP employees), it was decided that pool voting would be proposed to the membership at each local.¹⁴⁷ A "coordinated bargaining" agreement was drafted in committee based upon the prior pool voting arrangement and pools existing under other employers in the industry. Copies of the completed agreement were then distributed to IP locals so that employees could discuss and vote on them.¹⁴⁸ The leadership of the international union encouraged local members to vote in favor of joining the pool in order to increase their bargaining power.¹⁴⁹ Locals at twenty-four of the sixty-six IP facilities represented by UPIU joined the pool.

All the locals that agreed to enter the pool were engaged in bargaining with IP, and the company made final proposals to each of the pool locals that demanded major concessions from the union.¹⁵⁰ The proposals were made at a variety of pool locations and then were ratified by each of the participating

146. Transcript of Hearing at 866, United Paperworkers Int'l Union Local 620, No. 6-CB-8207, 1992 WL 281693 (N.L.R.B. Sept. 30, 1992). When asked by the NLRB's Administrative Law Judge Itkin, "May I ask you how the pool resists permanent replacement?" Young responded, "By this pool group agreeing to work without agreements, the contract expires and if a number or many of the locals in the pool would choose to strike . . . it would be very difficult for International Paper Company to replace that number of workers." *Id.*

147. *Id.* at 52-53, 837.

148. *Id.* at 837.

149. In most cases, the company conducted a campaign prior to the vote which sought to get employees to vote against joining the pool. The company sent letters and position statements on the pool directly to employees' homes, stressing the possibility of strikes being called by the pool. *Id.* at 108; Respondents Exhibits 6A, 6B, 7, 8, 9, 14, 15, 91, United Paperworkers Int'l Union Local 620, No. 6-CB-8207, 1992 WL 281693 (N.L.R.B. Sept. 30, 1992).

150. Concessions were made in at least one of IP's four "corporate objective" areas—elimination of Sunday and holiday premium pay, elimination of cold shutdowns, management flexibility, and caps on employer contributions toward health care. Respondents Exhibits 2, United Paperworkers Int'l Union Local 620, No. 6-CB-8207, 1992 WL 281693 (N.L.R.B. Sept. 30, 1992).

units.¹⁵¹ Although a tentative agreement was reached at one location (Erie, Pennsylvania) none of the locals asked to be released from the pool.¹⁵² In a pool-wide vote tally on the company's proposals in December, 1991, the pool rejected the company's proposals.¹⁵³

The establishment of the pool seemed to reinvigorate the union in a variety of ways. For example, local presidents and delegates organized "Project Solidarity," a new organization to help improve communication among some of the locals interested in the pool concept. These leaders "[felt] that the labor movement need[ed] to have direct grass roots involvement in order for [workers] to advance [their] own case."¹⁵⁴ The union's professional staff was asked to "leave the room" when Project Solidarity was first discussed.¹⁵⁵

After UPIU declared and implemented the second pool in March, 1990, IP filed charges against the union and its locals, and a complaint was issued by the Regional Director of the NLRB. A hearing on the complaint was conducted before Administrative Law Judge Frank H. Itkin. Holding that the pooled voting ratification procedure "impermissibly burdens [and] delays" the collective bargaining process,¹⁵⁶ the judge found a violation of section 8(b)(3) and 8(d) of the National Labor Relations Act, which make it an unfair labor practice for a union to refuse to bargain collectively and in "good faith."¹⁵⁷ He concluded that the Act imposes upon the parties a duty of diligence and promptness and that the pool ran afoul of this obligation by "inherently" delaying the bargaining process.¹⁵⁸

151. Only those employees who were subject to the contract provisions were eligible to vote. In no case did the local union leadership recommend acceptance of proposals. Nevertheless, leaders at Erie recommended that the proposal not be rejected. According to the union's brief, Brief for Respondents at 12, *United Paperworkers Int'l Union Local 620*, No. 6-CB-8207, 1992 WL 281693 (N.L.R.B. Sept. 30, 1992), the company's proposal was voted on favorably by the Erie Local and was voted down at four other facilities. See Transcript of Hearing at 509, 853, *United Paperworkers Int'l Union Local 620*, No. 6-CB-8207, 1992 WL 281693 (N.L.R.B. Sept. 30, 1992). The vote was not disclosed at Jay, Maine and several other locations.

152. Since the administrative law judge's decision, only one local, Turner Falls, Massachusetts, Local 1711, has requested release. That collective bargaining agreement was later signed by UPIU President Wayne Glenn.

153. To encourage the company to improve some or all of its proposals, the union postponed the operation of the pool. Transcript of Hearing at 840-41, *United Paperworkers Int'l Union Local 620*, No. 6-CB-8207, 1992 WL 281693 (N.L.R.B. Sept. 30, 1992) ("So we gave a grace period there to allow the company to make offers that [were] competitive with the industry and to allow our local unions the opportunity to change their minds and they were noted."). However, this good faith effort by the union was not reciprocated by IP. The company did not take the desired step of sweetening its offers or removing its demand for concessions in order to stave off rejection by the pool. It has instead simply imposed its own bargaining positions after impasse. As told to UPIU Vice-President Boyd Young, by IP Director of Employee Relations, James Gilliland, it is IP policy *not* to "sweeten" final offers. *Id.* at 841-42.

154. *Id.* at 681-82.

155. *Id.*

156. *United Paperworkers Int'l Union Local 620*, No. 6-CB-8207, 1992 WL 281693, at *18 (N.L.R.B. Sept. 30, 1992) (attaching decision of Itkin, A.L.J., Dec. 17, 1991).

157. 29 U.S.C. § 158(b)(3), (d) (1992).

158. *Id.* at 32.

Judge Itkin's conclusion was supported by the Sixth Circuit Court of Appeals, which reversed a district court's denial of an injunction against the union's use of the pool voting system.¹⁵⁹ The Court of Appeals, like Judge Itkin, found that the pool violated the Act's "proscription against undue delay."¹⁶⁰ In September, 1992, the NLRB issued its decision upholding the conclusion that the pool system "violated Sections 8(b)(3) and 8(d)" of the Act.¹⁶¹ The Board rejected the theory that the pool's vice was delay in the bargaining process,¹⁶² and accepted the argument that the union did not intend to stall the process and that the delay was a product of "lawful forms of economic action such as strikes, lockouts or the replacement of economic strikers."¹⁶³ However, the NLRB held that the pool violated the duty to bargain because it is "a system that allows for refusal to sign an agreement on the basis of a non-mandatory subject of bargaining, i.e., subjects that do not concern the wages, hours and working conditions of the unit covered by the agreement."¹⁶⁴ The union is still contesting the legality of the various decisions holding the pool to be illegal. But it has dismantled the pool and replaced it with a system of coordinating bargaining overseen by the international union staff.¹⁶⁵

After the strike, Wayne Glenn attempted to repair relations between the international union and IP. His effort failed. According to Glenn, he explained to IP officials the resentment the workers felt concerning IP's use of permanent replacements and suggested that the company hire a job placement firm for displaced workers.¹⁶⁶ Although IP agreed initially to hire such a firm, Glenn claims that he soon found out that the company had no intention to make good on its promise.¹⁶⁷ Glenn says that he contacted IP and attempted to explain the disastrous effect that its broken promise would have on the company's relationship with the union, but to no avail.¹⁶⁸

According to Glenn, his efforts to reestablish good relations with IP were resented by many local union members and leaders. "[Union members] want to just go to war now 'cause there's so much hatred. We've got fifty-something plants of IP out in contract business; if we could restore the relationship and get the company to straighten up [its] act, we'd all be better

159. *Kobell v. United Paperworkers Int'l Union*, 965 F.2d 1401 (6th Cir. 1992). The regional director of the NLRB had applied for the injunction.

160. *Id.* at 1408, 1409.

161. *United Paperworkers Int'l Union Local 620*, No. 6-CB-8207, 1992 WL 281693, at *3 (N.L.R.B. Sept. 30, 1992).

162. *Id.* at *3.

163. *Id.* at *3.

164. *Id.* at *4.

165. Telephone Interview with Lynn Agee, General Counsel, UPIU (Nov. 8, 1992).

166. Interview with Wayne Glenn, President, UPIU, in Nashville, Tenn. (Sept., 1990).

167. *Id.*

168. *Id.*

off.”¹⁶⁹ The impact of the strike at Jay continues to be felt in sporadic demonstrations against IP recruiters conducted by the union and its supporters at various college campuses.¹⁷⁰

B. *Labor Relations at Other Paper Companies*

International Paper was not the only paper company to get tough with UPIU during the mid-1980's. IP's efforts to cut back on Sunday overtime and increase management's control over production methods in the mill were similar to those of other paper companies, notably Boise Cascade, Georgia Pacific, and to a lesser extent, Scott. Glenn charges that several major paper companies agreed upon a common hard-line approach to the union at a secret meeting held in Atlanta in 1986. He states that IP called the meeting and that five other companies (Champion, Stone Container, James River, Scott, and Georgia Pacific) were persuaded to agree on a concessionary bargaining strategy.¹⁷¹

There is good reason to believe Glenn's claim. At a minimum, anonymous interviews suggest that the other companies were aware of, and closely monitored, IP's efforts.¹⁷² Moreover, in the aftermath of the 1987 strike and the fierce battle waged by the local unions, particularly Local 14, several of the other paper companies decided not to follow IP's lead. Indeed, according to Wayne Glenn, “[The union] separated IP totally. We've pulled the other companies one-by-one away from 'em. And every one of them don't even want to be *accused* of being like IP.”¹⁷³

1. *Otis Specialty Paper*

One company that makes a point of operating differently from IP is Otis Specialty Paper, Inc. which operates “the Otis,” a smaller mill in Jay, Maine. The Otis was once owned by IP, and the mill is situated only a few miles down river from the Androscoggin mill. Relations between the Otis and its union are excellent. In fact, the current director of human resources, Mike Luciano, is a former IP striker whom the Otis hired as a human resources

169. *Id.*

170. For example, in the spring of 1992, IP recruiting at the Industrial and Labor Relations School was disrupted by a group of “labor supporter students singing union songs.” Interview with Mark Brooks, Director of Special Products, UPIU, in Nashville, Tenn. (Oct., 1990).

Toward the end of 1992, high-level IP and UPIU officials began negotiations looking toward what was called a “Peace Accord,” seeking “a return to the cordial and generally cooperative atmosphere that has characterized their relationship over the years” Memorandum of Agreement Between United Paperworkers International Union and International Paper, at 1 (Dec. 7, 1992).

171. Interview with Wayne Glenn, President, UPIU, in Nashville, Tenn. (Sept., 1990).

172. Interviews with Unnamed Champion Paper Co. Executives, in Austin, Tex. (Fall, 1990); Telephone Interviews with Unnamed Scott Paper Co. and Otis Paper Co. Executives (Fall, 1992).

173. Interview with Wayne Glenn, President, UPIU, in Nashville, Tenn. (Sept., 1990).

specialist while the strike was still in progress. When the Otis hired Luciano, the company told him that part of his job was to improve relations with the union because management wanted "to make sure that nothing happen[ed] like [what] happened up the river."¹⁷⁴

Luciano was the first of many former strikers hired by the Otis, and he played a major role in helping the Otis attract other former strikers.¹⁷⁵ "What I wanted to do was to bring some of these people in, because I knew there [were] some good people out there that could help at the mill and bring some experience." Luciano felt certain that the former Androscoggin mill employees would fit well into the cooperative labor-management system contemplated by managers at the Otis. "[The former strikers] were excellent papermakers. I knew there was an interest in productivity, from my days at the Androscoggin mill. When the machine broke down [there], you moved your rear end to get that thing going again, and nobody told you to do that."

Both Luciano and others in the management of the Otis are quite happy with the work of the former strikers:

They have not brought any animosity toward management, or paper manufacturing plants, with them into this mill. They brought their experience. They shared ideas with the guys downstairs and learned some things, and have worked out great. I think the thing that [management] learned, was that we needed to talk, listen, work more closely with the people downstairs, involve them more.¹⁷⁶

With the cooperation and trust of their employees, including the former IP strikers, management at the Otis has begun to change production methods and has involved the employees and the union in this process.¹⁷⁷ The company has not sought to extract labor concessions or to increase management discretion. On the contrary, the role of floor-level management has been reduced and employees are encouraged to solve problems and devise new methods for producing high quality paper. According to Mike Luciano, volunteers from the workforce were recruited and trained to serve as

174. Telephone Interview with Mike Luciano, Former Striker (Oct., 1992). Luciano was surprised to be hired as a human resource specialist at Otis because he had not finished college and because several of the other candidates had masters degrees in human resources. However, he concluded that at the Otis, "they have the Abe Lincoln rule: 'what you have learned in life is just as important as what you learn academically' . . . and if you've got common sense, they feel that you can do the job." *Id.*

175. *Id.* In order not to be seen as favoring his fellow strikers, Luciano set up a three-person panel interview system for the Otis:

In the past, it was one or two people that did the hiring. I said, "I don't want to do that. I don't want to have a conflict of interest and have people think I'm hiring all strikers." So we put together a board-type interview. I'll be part of the interview process, but it will be a consensus agreement when we hire someone.

Id.

176. *Id.*

177. *Id.*

facilitators of Statistical Process Involvement (SPI) teams. The goal of these teams is to provide mutual assistance in solving problems and completing projects. Teams are selected and convened on an ad hoc basis. Meetings are held in informal "break-out" rooms specifically designed and built to support the process.¹⁷⁸

Luciano states that the company has learned the value of involving employees in the process of change. "Let's say we want to improve some kind of process on the machine. We take it down to the people who have to work with it. And they say, 'You can't put that there, because when we get in to thread it, we have to get into this position, so this would be in the way. It would be better over in this position.' So we learn—before we spend money and put it in a place that it's not going to work. We learn what they have to work with in order to make it right."¹⁷⁹ Luciano contrasts the Otis mill's attitude toward innovation with that of the Androscoggin mill during his time there:

I don't think change was a way of life at IP. I can remember when they asked us to run trials on the machines everybody would moan and groan. Down here, it's, "Hey, that's our bread and butter. That's what we do." . . . Everybody in this mill—maintenance, janitors—everybody has been through a statistical process improvement training. . . . And every area has improved down here. We've got teams that have learned to work together.¹⁸⁰

The increased responsibilities of the employees under the new system also include greater contact with customers. "We have an operator-exchange program with our customers, . . . if there's a problem with a sheet, . . . [w]e fly these operators to our customers, and see what the problem is." The Otis has found that "this approach increases the commitment of the employees to

178. *Id.* According to Luciano the SPI system works as follows:

We put people through all this training and then we took some volunteers who wanted to be facilitators. We built some break out rooms because . . . when I worked in the mill, I didn't want to go all the way up to the main office in front of all these guys wearing shirt[s] and ties and tell them my problem. We made these break out rooms in the work areas. So if they've got a problem that they need to solve, or they've got a project that they've got to work on, they have a place to go. They have a facilitator that we can pull off shift . . . and lead this team through the process of solving the problem . . . I definitely feel that this approach increases the commitment of the employees to quality production and understanding of the production process. And it also increases our knowledge.

Id.

179. *Id.* Employees, according to Luciano, are also involved in the implementation of new machinery.

We just put in a new wrapping, automatic wrapping system. What we did is we had the manufacturer assemble it at their plant. We shipped some paper down there, we shipped our operators down, our electrical people, our maintenance people down, and ran the thing before it ever came to the Otis mill, to work out the bugs. . . . [T]he old way would be to bring it in [and say:] "Here it is, guys. Use it."

Id.

180. *Id.*

quality production and increases their understanding of the production process.”¹⁸¹

Luciano believes that the paper industry is making a “major change” away from the adversarial approach of his union days and towards a more “cooperative approach” in which the parties “sit down and discuss what we can do to improve the situation.”¹⁸² He believes, however, that participation in the new, more cooperative, program was risky for the local union. “Our local has been looked at by the AFL-CIO as being maybe a little too cooperative. But they’ve gone ahead and stuck their necks out and brought some ideas to the AFL-CIO that they may not have liked in the beginning.”¹⁸³

Luciano’s positive description of the new approach to labor management relations and productivity at the Otis is echoed by Dwayne Lake, President of UPIU Local 11 and the bargaining representative for most of the employees at the Otis. According to Lake, when the new “jointness” policy began, many of the employees were skeptical but, “there’s not anyone [who is] very skeptical now. If the company want[s] to change things, put in a new machine or move an [old] one, they ask [for] our opinion.” Lake believes that the new policies of the Otis “have worked out very well for [union members]. The company and the union work together.”¹⁸⁴ There are joint labor-management meetings every two weeks with an open agenda during which anything that is bothering the employees’ concerns can be voiced.¹⁸⁵

Tom Pratt, now an officer of UPIU Local 11 at the Otis, has indicated that he and his fellow employees are happy with the new spirit of cooperation. “Everybody understands the system and management and the union really cooperate. We know that the more profit they make, the more job security we have. Plus we have profit sharing.”¹⁸⁶ Pratt points out that the Otis mill employees are committed to the idea of competing through the production of high quality paper and an error-free production process.

What’s exceptional is the place is making money in the recession. They’re making record profit. Everybody cares, and everybody tries to work for better quality. We make quality paper. They work harder, but it’s a caring feeling there. If there’s just a minor problem, they take real insurance to make it perfect. So we don’t get paper back from the customer. Customers bring people to look at the way we do things. We have a real quality concept, not like we’re all just there for a pay check. We are all here for a pay check, but the attitude is: “let’s do more.”¹⁸⁷

181. *Id.*

182. *Id.*

183. *Id.*

184. Telephone Interview with Dwayne Lake, President, UPIU Local 11 (Oct., 1992).

185. *Id.*

186. Interview with Tom Pratt, Former Striker, in Jay, Me. (June, 1992).

187. *Id.*

The success of the Otis mill's approach is further evidenced by workers' trust of management. Such trust was revealed when employees agreed to write training manuals despite the concern some felt that they would be creating "handbooks for scabs."¹⁸⁸ The company reciprocated by informing the union of its plans and financial situation, by inviting union representatives to attend board meetings, and by adding quarterly payments to the profit sharing program to give employees more of a stake in the company.¹⁸⁹ Consequently, according to both employees and management, product quality has been greatly improved in the past few years.¹⁹⁰

The Otis mill in Jay has used cooperative labor relations to do more than improve production quality and worker satisfaction. The mill also highlights its approach when soliciting customers. Customers are typically invited to visit the mill to dispel any presumption that animosity exists between the company and the union. Lake feels that customers who know that the mill is located in Jay might otherwise assume that Otis management and labor consider themselves adversaries, as do management and labor at the nearby IP mill.¹⁹¹

The Otis mill's cooperative approach apparently has reduced the number of formal grievances filed and increased the frequency with which such grievances are settled without formal hearing. According to Luciano, "More and more grievances are being answered on the lower steps, and there has not been an arbitration case here in five years."¹⁹² The company's cooperative approach also has made collective bargaining less contentious.¹⁹³ Moreover, while the new approach has made some floor-level managers worry about their job security, Luciano feels that the company's efforts to reassure these

188. Telephone Interview with Mike Luciano, Former Striker (Oct., 1992).

189. *Id.*

190. *Id.*; Interview with Tom Pratt, Former Striker, in Jay, Me. (June, 1992).

191. Interview with Dwayne Lake, President, UPIU Local 11 (Oct., 1992).

192. Telephone Interview with Mike Luciano, Former Striker (Oct., 1992).

193. A sign of the new climate is that bargaining sessions for new agreements are more cooperative. Luciano comments:

At the last negotiation, improving the profit sharing program was one of their interests, and it was also one of our interests, and we now pay [profit shares] quarterly. Believe me, there's a lot of interest in our profit about this time because we just finished a quarter. They want to know "How much is it gonna be?" and "When's it gonna get there?"

Id. Luciano described the first bargaining session under the new system as "weird," given the contrasts between the old and new styles of negotiation.

[Formerly negotiators] jumped up on the table and made your teeth fly out. First you call each other names and then you get down to business. [Now] you don't go in with any kind of an agenda. And we found that items like language weren't that hard to work with. But when it got to wages, you kind of reverted back to the old system: "Okay, you want a dollar, I'll give you twenty-five cents and then you settle in the middle." But then we caught ourselves and went back to what's right for the business. The union is definitely interested in quality and the company making a profit because we have a profit-sharing plan here, and it really affects [union members].

Id.

managers that they are important to the company's operations are assuaging these concerns.¹⁹⁴

The cooperative labor relations approach at Otis is geared to enable the mill to compete with other paper producers based on quality and service to customers. Luciano states that since the new program was instituted "quality has improved dramatically—based on returns and allowances, the number of splices made, the amount of paper damaged during production, and the reaction of customers."¹⁹⁵

The difference between current conditions at the Otis and Androscoggin mills was vividly described by Tom Pratt. For a period during the summer of 1992, Pratt worked both at the Otis and at Androscoggin, to which he was recalled by virtue of the *Laidlaw* doctrine.¹⁹⁶ He was shocked by the inefficiency and lack of employee effort that he found at the Androscoggin mill. He noted many safety violations, long and aimless training periods, instances of laborers actually sleeping while at work, and excessive coffee breaks.¹⁹⁷ Pratt explained:

I went in, and I worked eight hours Monday training, [during] which we did nothing. Actually it was a joke. They are so inefficient; they had us all standing around waiting. I went in to see if they have a time card made out for me. They didn't. So I came back out to go up to my department, and one of the guys up there, a good dedicated man, said he's leaving 6:30 that night. I said, "How's it going?" He says, "The place is sick, they give you a job to do that takes two hours. You are here for twelve. It's really sickening. You wonder how long they can keep going like this.

So I went up into the department I was in, and there was only one machine running that night, out of five. On orientation day I was up there. I think there was only one machine running up there too. So I went up and I talked to the foreman. He's a foreman I knew. He gave me some safety books, and I started reading them, the do's and

194. *Id.* Luciano notes,

The people on the line [low-level supervisors,] have been a challenge. They're a little bit nervous. [W]e're giving more and more responsibility to the people on the floor, and they're wondering about their jobs. But, there are so few of them. Here at night there is only one salaried person that we have who covers the entire mill. He's the boss machine tender. He's there to answer their questions.

They [the supervisors] thought they were getting burned out from the responsibility they had, and it was good to share it, but they didn't know how far the sharing would go. I think they were initially skeptical, but it has improved. They've been part of every meeting, too. We haven't left them out of anything.

Id.

195. *Id.* Luciano continues,

I will not say it's a rose garden. I mean, there's people who don't like change, but this little mill is doing excellent. It's above-plan. And I'm really proud to be a part of this whole operation. I don't see the fighting that I saw up the river. Our people don't say, "This is my turf. This is what I do, and this is all I do."

Id.

196. See *supra* note 99.

197. Interview with Tom Pratt, Former Striker, in Livermore Falls, Me. (May, 1990).

don't's and all that. I was just reading right along, and he says, "Hey you're going too fast. Why don't you take a coffee break?" I said, "Okay." I took the coffee break. It's the same thing everywhere. Nobody's working. Then I shot the breeze with him for probably an hour. I was very relaxed. I didn't care. Then he says, "Well, ain't too much going on tonight. Why don't you go train on the winder? Take as long as you want and whenever you feel comfortable with it let me know and you'll train on something else."

. . . I had read the do's and don't's and all the different safety things, and I saw between ten and twelve safety violations in the eight hours I was out there watching the show. They were all minor things, but they were all against what they had me read. And I thought, "This was quite a program." As I was there, they were telling me about this one scab who works on the wrapper, who wants to be a foreman, and sets up when the foreman is on vacation or whatever. He was sleeping on the table. We got a foreman who walks by, and the guy's sleeping on the table. I just went about my business. But I couldn't believe it. When the machine was down and product flow was not there, you used to have people straighten up the rolls of unfinished paper, and sweep or whatever, clean up. Nothing. The whole night. Not even a half hour's work. I'm not saying the people didn't work; they did work off and on a little bit. It was really strange. There was no work ethic.¹⁹⁸

Not surprisingly, Pratt chose to remain at the Otis even though he had economic reasons to return to Androscoggin.

The Otis mill had two advantages that helped to cultivate a cooperative spirit. One was a long history of good labor-management relations. The second was its relatively small size. These factors made it easy for the Otis to concentrate on producing high quality paper. Though the Otis enjoys these advantages, Mike Luciano is among those who believe that the labor relations policies of the Otis "can be used anywhere."¹⁹⁹

2. *Scott Paper Company*

The Scott Paper Company was the first of several of the large paper companies to achieve a more cooperative relationship with UPIU. According to John Nee, Scott's Corporate Vice President for Corporate Labor Relations, "We are in the throes of a major transition from the traditional style of labor relations to a new program of jointness."²⁰⁰ The Scott "jointness" or cooperative labor relations program began during the period of the 1987-1988 IP strikes. According to Nee, Scott's decision to start the program was very

198. *Id.*

199. Telephone Interview with Mike Luciano, Former Striker (Oct., 1992).

200. Telephone Interview with John Nee, Vice President for Corporate Labor Relations, IP (June, 1992).

much influenced by IP's approach to its problems, which "showed that traditional adversarial labor relations were not working."²⁰¹

Jimmy Dinardo, the union's former New England area Vice President and co-chair of the Scott Joint Labor-Management Program, described how the program was initiated:

[John Nee] called me one day and said, "Jimmy, we can't go the way IP is going; we've got to find a different way." I said, "You're right." And I've dealt with John for many years. So I had a lot of trust in him. He said, "I'd like to get into jointness." I said, "Well, let's see what we can do." And it wasn't easy for me to change over, I'll tell you. It wasn't easy at all . . . [Y]et I knew there had to be something better, Jesus, you know—suicides, divorces, kids not going to college because their fathers lost their jobs. I knew there had to be something better than that. We had to find something. So when John suggested jointness to me, I went right after it . . . So we set a meeting up with myself and Wayne Glenn, John Nee and his boss, Bob Rice. We met in Tennessee. We developed a committee of top management people and a committee of top union people. From there we worked it down into the plants. And it took some time.²⁰²

Unlike the Otis mill, Scott faced monumental cultural change in shifting from an adversarial model (in which the company had tried to compete by lowering labor costs) to a cooperative approach (in which the company would compete by producing high-quality products and minimizing errors). Both union and management officials agree that implementing the cooperative model requires mutual trust. Management must trust the judgment of their employees and their willingness to work without traditional supervision. Employees must trust in the fairness of management and in the implicit promise that sharing knowledge will not necessarily lead to reduction in employment. At a small operation, such as Otis, where labor relations have always been good, acceptance of the new, non-adversarial approach was achieved fairly easily. In contrast, labor and management at some Scott mills, particularly those

201. *Id.*

202. Interview with Jimmy Dinardo, Chairman of Joint Labor-Management Program, Scott Paper, in Augusta, Me. (June, 1992).

The first contract negotiated using the new approach was at the Champion Company mill in Bucksport, Maine. At the time, John Nee was Champion's director of labor relations. Dinardo had a difficult time convincing the employees to take a new approach. He himself was, for some time, doubtful about the validity of the new course:

You know, for months after the strike, . . . after the contract was accepted in Bucksport, I couldn't sleep nights. I thought maybe I'd done the wrong thing, you know, getting them to accept that contract. But today I'm pretty pleased [about] the way it went and I meet people from Bucksport in the street once in a while and they'll tell me, "You know we thought you were crazy, but you did the right thing, goddamn it." It worked out for them.

Telephone Interview with John Nee, Vice President for Corporate Labor Relations, Scott Paper (June, 1992).

characterized by a history of adversarial relations, struggled to build the requisite trust.²⁰³

Consequently, the progress towards mutual trust at Scott Paper has been uneven. In some mills, especially those with a history of conflict, the program has been only marginally successful; in those mills, the program has been controversial within the union, and distrusted by many in mill-level management.²⁰⁴ By and large, however, the company has been able to convince union officials and staff of its good will and sincerity, due in no small part to the fact that jointness has the full support of high-level management.²⁰⁵ Jimmy Dinardo personifies the union's transformation in attitude: "We used to teach people that you don't give to these companies. They're out there to rape you, get what you can out of them. Never work with them, work against them. But I did a 180 degree turn. A lot of people must look at me and say, 'Jesus, that ain't what he always told me.'"²⁰⁶

Scott's cooperative labor relations approach has generated results similar to those found at the Otis mill. First, the company's jointness program has made its collective bargaining sessions less contentious. John Nee, the head of Scott's human resources, is regarded by union officials as one of the best company negotiators with whom to deal. Nee states that although he recognizes that a strike could occur, he would strongly oppose any effort to hire permanent replacements.²⁰⁷ Union officials have similarly praised John Schlagle, Scott's Vice President for Labor Relations. As Jimmy Dinardo stated:

I find that negotiations that used to take two months, month and a half . . . we do in three days now at Scott. . . . The company comes in with a different attitude. The working people come in with a different attitude. Today, the people realize if the company makes good, we're going to make good. Give us a share of what you make and we'll help you make it. And I think that's gotta be the coming thing. In Europe, unions are growing in size, and they're completely

203. Telephone Interview with Jill Kriesky, University of Alabama, Birmingham Labor Education Center (Oct., 1992).

204. Telephone Interview with Peter Kellman, Union Organizer (Nov., 1992). Mr. Kellman has interviewed employees at many Scott mills in Maine concerning the impact of the jointness program and has concluded that the program is working to provide employees with greater responsibility for and control over their jobs. Because this increased responsibility may threaten that of mill supervisors, top management committed to jointness programs must be vigilant to see that mill supervisors do not undercut the program.

205. According to John Nee, "We are fast arriving at the conclusion that working together is the only answer if we expect to be a world-class company with long and secure working relationships with our employees." Telephone Interview with John Nee, Vice President for Corporate Labor Relations, Scott Paper (June, 1992).

206. Interview with Jimmy Dinardo, Chairman of Joint Labor-Management Program, Scott Paper, in Augusta, Me. (June, 1992).

207. Telephone Interview with John Nee, Vice President for Corporate Labor Relations, Scott Paper (June, 1992).

into jointness. We've gotta do the same thing or we're going to keep going down."²⁰⁸

Dinardo is particularly pleased with the fact that, under the new jointness approach, problems are resolved as they arise rather than being saved for collective bargaining sessions, when the union felt that it had the most bargaining power.²⁰⁹

Second, the program has apparently boosted workers' commitment to the company's success. Third, the program has created a more productive, team-oriented environment. Currently, Dinardo feels extremely positive about Scott Paper Company and he is committed to the company's success. "I have great faith that Scott's gonna do well We're going to make Scott number one, if we can. That's the way I feel about it."²¹⁰

Of course, not all rank-and-file union members feel the same way nor do they all favor the new style of labor-management relations. Rank-and-file attitudes remain mixed. Some feel the new approach is more cosmetic than sincere. Others feel that the union has been undercut and that the militancy of its members has been destroyed. Most others, however, agree that the new programs are working and that the local union has become more effective and militant.²¹¹ To a considerable extent, the rank-and-file attitudes toward the new Scott programs parallel their attitudes towards the union and the officials who have been involved in the programs. Where local-level union members have confidence in their own leadership, they tend to have greater trust in their management counterparts. Thus, Scott officials recognize that they have an interest in strengthening the union and in encouraging the members to have faith in the union's leaders.

When Scott determined that it would seek to develop good relations with the union, it simultaneously developed a new approach to competitiveness which focused on making a high-quality product using highly skilled employees. Management and the union now work in concert to orient workers' efforts toward the company's strategic goals. As a union official at Scott's mill in Westbrook, Maine stated, "They're positioning themselves to focus on quality [by] tightening up the [production] specs."²¹²

208. Interview with Jimmy Dinardo, Chairman of Joint Labor-Management Program, Scott Paper, in Augusta, Me. (June, 1992).

209. Said Dinardo:

What the jointness program does is improve communications. You talk with each other and you work all these problems all throughout the year, so the only thing left on the table when you go into negotiations is money. You don't have all [the] kinds of baggage that you did. You've got a system that works that out during the life of the labor agreement. It's just an ongoing thing.

Id.

210. *Id.*

211. Telephone Interview with Carl Turner, Paperworker, Scott Paper (Oct., 1992). Telephone Interview with Peter Kellman, Union Organizer (Nov., 1992).

212. Telephone Interview with Mark Bryant, Union Official for Scott Paperworkers (Sept., 1992).

During the years since the jointness program has been in effect, Scott's commitment to it has become stronger. Scott currently maintains a National Joint Action Committee, chaired by Nee and a union counterpart.²¹³ The program has involved greater consultation with the union at every level. There are site-jointness committees at every facility. Fewer decisions are made unilaterally by management and more decisions about production are made by the employees. The new cooperative model has translated into a reduction in the number of managers at many of the Scott mills.²¹⁴

Nee and other corporate officials at Scott believe that the program has achieved valuable results for the company. Nee observed that the most significant evidence of success has been achieving important improvements in production and in the way productive operations are designed. Improvement has also been shown by greater concern with safety and by improved morale manifest in a lower absentee rate and a significant reduction in employee grievances. Nee stated that the new program is currently not at all controversial with the company. The few sources of tension concern how much time, resources, and funds should be invested in it. Nee feels that the cooperative approach is secure because, despite the woes of the paper industry over the past several years, Scott has not retrenched at all on this program. The leadership of the entire company is behind it. Nee's own confidence in the advantages of jointness as the key to competitiveness is clear: "In the end we will win not by virtue of low costs but by developing the capability of our workers."²¹⁵

The difference between Scott and IP is best illustrated by comparing employee-management relations at the two companies' state-of-the-art mills in Mobile, Alabama. At the Scott mill, jointness programs between the company and the union have created a new spirit of cooperation, which has helped to make the mill the most profitable of Scott's facilities. The Mobile jointness program is overseen by a committee with equal representation of management and union. The president of the local maintenance union, A.C. Lucky, and the company's director of human resources, John Sharp, chair the jointness committee. Both agree that the program has transformed labor relations and the production process in a way that has helped both the company and the union. In particular, Lucky and Sharp believe that Scott's cooperative approach has allowed workers to utilize their skills and knowledge more fully, to assume more responsibility, to improve safety, and to reduce absenteeism.

213. Jimmy Dinardo was co-chair of the jointness committee until his voluntary retirement from the union in the Fall of 1992.

214. Telephone Interview with John Sharp, Manager of Human Resources, Scott Paper, in Mobile, Ala. (June, 1992).

215. Telephone Interview with John Nee, Vice President for Corporate Labor Relations, Scott Paper (June, 1992).

The union's perspective on the program is described by A.C. Lucky, the President of UPIU's maintenance local at the Scott Mobile facility:

I don't have any doubt that it's working. . . . We know that it's working now because when you look at the profit that this plant makes versus the rest of 'em . . . and the money they're putting here, we know it's a success and we know that . . . we're about fifty percent of [Scott's] profit . . . in the continental United States.

I'm basically a mechanic. We used to take three-by-five cards and our supervisor would say, "Go check this high pressure water pump and the packing needs fixing, or the bearing's bad on it, or the impeller's worn out, or whatever." They would identify what the problem was and we would go and fix it. . . . None of us liked it, but that was the way it was. So now what we do in maintenance is we basically don't even have supervisors any more. We do our own checking, planning, [and] ordering [of] materials. We spend this company's money and we push to spend it wisely. . . . [I]f we need up to a certain amount of parts on a piece of equipment, then I have the authority, not as a union official, but as a mechanic, to order it from downtown, or from Washington, D.C., or from Houston, Texas, if that's where our vendor might be. I can order it, and I can send it . . . through purchasing with my name on it, rather than having to go through all those other people. . . . [This approach] adds a lot of ownership and a lot of pride in to what we're trying to do because we do have the right to do whatever we need to do. [This pride] gets bigger and bigger and people start . . . saying, "Hey, don't take this away from us, Lucky. . . . Build on it. . . . It's not only feeding us, but it's making our families better, it's making our life better."

Our absenteeism went down, our insurance premiums are decreasing. I think there have been eight grievances out there in the past two or three years. Management has done a good job in this area. They work with you and they're concerned about if you're doing your job the best you can. There's so much respect. . . . [I]t don't frighten me because I like that respect. I like to give it and I like to receive it, but sometimes it does make [one] sit back and just count your blessings and think about what you're doing and where you're at and hope to goodness that it continues to move forward in the future.²¹⁶

Lucky's description is echoed by John Sharp, who described Scott's team orientation as follows:

Our jointness effort is primarily geared toward working together off of a foundation of team work. We use a term here called "asset teams." We establish a team of people around a certain set of assets so that the team will be skilled in all aspects of its job. We've got close to ninety asset teams across the organization. We're trying to

216. Telephone Interview with A.C. Lucky, President, Local Maintenance Union (Sept., 1992).

deal with how to work together, how to understand your upstream and downstream customers, working to achieve the goals of the total organization by getting maintenance and production to work together. We've commissioned a design team that deals primarily with the training needs of the organizations as well as the delivery of those training needs.

[The workers] are doing the complete job of shut-down planning, they're scheduling themselves on shifts. There are people who are calling in support people to help them where before they would have said that these are all supervisory jobs. . . . [O]ur safety performance has improved substantially. Our absenteeism rates are way down. When we initially talked about things like flexibility in job duties . . . there was a lot of resistance for this type of thing six, seven years ago. Now if you ask people to consider going back to the way we used to do things, you'd have a real fight on your hands.²¹⁷

Sharp also notes that:

The expiration date of [the previous collective bargaining agreement] is May 31, 1992. We actually met with the union in December, 1991, and negotiated a five-year extension to the current agreement. This is something we would not have a prayer of accomplishing if we had not begun our jointness work when we did.²¹⁸

Conditions at the IP mill in Mobile are very different. Billy Culpepper, a thirty-year employee who is President of the UPIU local at the IP mill in Mobile, states that employees are not working as hard and there is less commitment to quality than there was before the 1987 lockout. Most employees "just want to do their jobs and go home. There is less concern with quality [and] fewer dedicated employees than there used to be."²¹⁹ This is not because IP has continued to crack down on the employees. Quite the contrary. At Mobile, as at Jay, the employees report that company discipline has been lenient since the struggle ended. However, the employees at the Mobile mill resent the continued presence of BE & K maintenance employees to whom work formerly done by union employees has been contracted out. They also resent the lowering of their pay and the company's continued hard bargaining stance on retirement issues. The current adversarial relations bring no joy to

217. Telephone Interview with John Sharp, Manager of Human Resources, Scott Paper (Sept., 1992). In Sharp's view, the main function of the new program is to restructure the relationship between the employees and their jobs so the workers' skills and abilities can be better used. "Our jointness effort is geared toward working together, helping people to fully utilize the skills that they have in order to get their jobs done, and making sure labor and management are working together in a way that fully considers and understands each other's needs in the process." *Id.*

218. Letter from John L. Sharp, Manager of Human Resources, Scott Paper, to Julius G. Getman (Sept. 1, 1992).

219. Telephone Interview with Billy Culpepper, President, UPIU Local 337, Mobile, Ala. (Oct., 1992).

Culpepper. He says that when he attended a state-run labor management seminar and heard a report about the Scott program, "It made me feel pretty bad because we don't work together."²²⁰

The situation at IP's Mobile and Androscoggin mills illustrates that division among employees is likely to have a negative effect on productivity. Thus, management has a stake in the harmony of the work force. The more diverse the work force, the more difficult it is to achieve harmony. Unions are, among other things, potential vehicles for achieving unification of the work force. That unity is essential if a cooperative program is to be effective.

3. *Other Paper Companies*

In the fall of 1992, Gordon Brehm, executive assistant to UPIU president Glenn, stated that every large paper company other than IP is currently "at least exploring greater cooperation with the union."²²¹ The approaches taken by these companies range from that of Georgia Pacific, a latecomer to jointness which invited Wayne Glenn to address a management meeting in Atlanta in May 1992, to Champion Paper Co., which has embarked on serious efforts at several mills. Champion's Bucksport, Maine, mill was one of the first to initiate a cooperative program. Champion's jointness program has the strong support of CEO Andrew Sigler:

The only way people are going to be more productive is if they want to be. So you have to create an atmosphere in which they are comfortable, where you recognize them as important, and ask them of their free will to participate. Empowerment—we've been doing it for a dozen years. And in Bucksport I think there's as good a model as any place. If you let people get involved, and use their heads, be part of this, it leads to a more effective place.

And we don't do it out of a warm, cuddly feeling. We do it because that's the way to run things better. And it works. Unions are part of what we do. The union is there, elected representative of employees, and they are part of what we are talking about. In some ways it's easier to work with a plant that has union representation.²²²

In the late fall of 1992, IP itself approached the union about developing a new, more cooperative program.²²³ As of February 1993, labor and

220. *Id.*

221. Telephone Interviews with Gordon Brehm, Special Assistant to the President, UPIU (Oct., 1990-Nov., 1990).

222. *Empowerment, Outreach Make Sense for Champion*, PORTLAND PRESS HERALD, Sept. 29, 1992, at 3C.

223. The 1992 proposal by IP to the union states: "[T]he company agrees that there is no further plan or objective to seek concessions in wages or benefits across the bargaining table. Further, in future negotiations, the union and the company will seek ways to restore money lost in concessionary bargaining

management had made real progress toward what they have termed the "Peace Accord." Apparently, the wisdom of pursuing cooperative labor relations has come full circle.

IV. CONCLUSIONS

A. *The Paper Industry and Labor Relations Policy*

The strike of 1987-1988 and its aftermath indicate the speed with which the traditional model of labor relations is changing. The desire of companies to compete more effectively is leading inevitably toward new policies seeking to lower costs, and/or increase flexibility and teamwork. The first of the newer models, that employed by International Paper, seeks to achieve these benefits through lower wages, a more limited role for the union, and increased managerial control over the production process. The second approach, that adopted by Scott and the Otis, emphasizes greater autonomy by employees and greater cooperation between the employer and union in all aspects of production.

The appeal of the low-wage/management power model to management is understandable; the model seems to promise both lower costs and greater flexibility.²²⁴ Nevertheless, the paper industry experience suggests that the application of this model is likely to be resented bitterly by employees and unions, and that the likelihood of success is uncertain because it does not enlist the enthusiasm, ability, and potential of the employees.²²⁵ International Paper was able to defeat the strike, lower wages, and increase the power of management. The company was able to rid itself of the union at several locations. Yet other paper companies have decided not to follow the same approach and IP itself seems to be backing away from it.

The primary reason why imposing this model did not turn out to be as desirable in practice as it may be in theory is that the union and the employees engaged in a fierce struggle over the approach. The strike at Androscoggin reaffirms what many employers have learned: when the spirit of resistance is kindled and unions are well-led, they are capable of inflicting great and long-

in previous years." However, in return, the agreement would require the following concession: "The Union further agrees that the kinds of activities engendered by its Special Projects department in the past against International Paper will cease and will not be renewed so long as the company adheres to and pursues the goals and issues in this agreement." Memorandum of Agreement Between United Paperworkers International Union and International Paper, at 2 (Dec. 7, 1992).

224. Indeed, the low-wage, managerial control model has served as a basis for the misuse of the concept of employee participation, whereby employers' purported efforts to democratize the workplace often turn out to be anti-unionization programs. See generally Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499 (1986).

225. For a discussion of the typical workers' concern for quality and productivity, see Cynthia Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 949-56 (1992).

lasting harm on employers. Feelings of anger and resentment, which inevitably develop during a strike, once flamed are not likely to be quenched easily. Indeed, they are likely to spread. Anger will be directed toward supervisors, replacement workers, and any other entity thought to represent the company. Similar feelings may be directed towards fellow employees or towards the leadership of the local or international union. Such angry feelings are likely to ensure a divided, hostile workforce, a long battle over the status of the union, and ongoing subtle sabotage by angry, defeated employees who hate their jobs and who want to see their employer punished.

Such animosity is likely to come not only from the group of employees whose pay is cut but also from others who either identify or sympathize with those affected. Some managers, particularly low-level supervisors who have come up from the ranks, identify more with the rank-and-file employees they supervise than they do with top-level management. These managers are likely to oppose their employer's intention to lower benefits for those they supervise. They also may recognize that their own wages and benefits are tied to those of the other employees. Aggressive, low-wage policies will also often cause divisions among the employees about how the union should respond. A workforce which is divided by such concerns is not an advantage for management. Not only are the employees likely to be distracted from their primary tasks, but they may engage in spontaneous, uncoordinated job actions.

Employee hostility is even more likely when the employer's low-wage policy leads to a strike and the hiring of permanent replacements. Many managers are likely to dissent openly or secretly from company policy. Divisions among employees become stronger and more complex. When production is resumed, former strikers will be alienated from management, replacement workers, and crossovers. Division among the former strikers will arise concerning strike and post-strike strategy. Former strikers will differ in their views about how to deal with replacement workers and supervisors. Such division within the work force is likely to facilitate decertification of the union. But such division will also almost certainly make workers unhappy and unproductive. Eventually, replacement workers may come to share the anger of the former strikers against the employer, even if they do not come to accept the union.

Thus, a combination of increased managerial control and reduced union power, rather than helping a company to compete, may actually put the company at a competitive disadvantage by making it less productive. To compensate for this decrease, management may further lower costs, thereby continuing a cycle of anger and wage reduction that makes employees' wages and benefits constantly vulnerable. In such a deteriorating labor relations climate, great indirect costs are likely to be inflicted on other segments of society. Communities may be hurt or destroyed, relationships disrupted, education delayed or prevented, marriages broken, and families divided.

Yet such an outcome was by no means inevitable at the Androscoggin mill. Had IP sought to improve productivity through the introduction of a truly cooperative team approach, there is reason to believe that the result would have been positive. The union stated during negotiations that it would have accepted such a scheme. The results of management's tactic was tragic for the employees and costly to the company, especially as conditions at the Androscoggin mill before 1985 presented a promising opportunity to improve productivity through greater employee and union participation. Labor relations prior to the strike had been good. The work force was united by bonds of kinship, common lifestyles, experiences and previous social relationships. Employees were tied to management by common backgrounds, a long history of employment, years of harmonious working relationships, pride in their work, and often, family ties. The leadership of the union consisted of long-term employees, who were well-disposed toward the company and eager to see the mill prosper. The union was strong, democratic, efficient and trusted by the employees, capable of enlisting the loyalty of its members and of developing programs calling on their intelligence and creativity. The employees not only were committed to a way of life that depended on IP's success, but their concern with the quality of their work was manifest at a nearly obsessive level throughout and even after the strike. Nevertheless, International Paper insisted upon a team approach controlled entirely by management.

It is not surprising that other paper companies that watched the Androscoggin mill's labor relations climate degenerate in the wake of the strike decided that "there has to be a better way" to manage their own labor relations. At Otis and Scott, the traditional model was replaced by an industrial relations policy that emphasized increased union-management cooperation and joint decisionmaking, thereby improving both productivity and profits. Preliminary evidence from the Scott and Otis jointness programs suggests that, relative to the traditional approach, jointness engenders a greater sense of community, more committed, creative, and productive employees, and reduced absenteeism, conflict, and complacency.

Thus, jointness seems to improve the quality of work life for employees while enabling employees to contribute more effectively to the success of the enterprise.²²⁶ This follows from the attitudes of most workers. If one listens to paperworkers speak about their jobs, one learns that they take great pride in their work and care about their mills' productivity. Like the IP workers at Jay, Lockhaven, and Mobile, these employees repeatedly manifested their concern for quality and productivity when interviewed for this Article. This concern is typical of American workers.²²⁷ The interviews also made clear

226. See generally BLUESTONE & BLUESTONE, *supra* note 6, at 145-86; PAUL C. WEILER, *GOVERNING THE WORKPLACE* 213-24 (1990).

227. See generally Estlund, *supra* note 225.

that pride in work and concern with quality lessens when employees are angry with their employer or each other.

Jointness may evolve from a cooperative traditional relationship, as happened at the Otis, or from a potentially threatening adversarial relationship, as was the case at Scott Paper Company. What both situations have in common is a strong union presence—an opposing power that convinces the employer either that the union has a positive contribution to make or that economic combat with the union would be too potentially harmful to risk.²²⁸ Where an employer is strong enough to insist upon keeping wages low and on maintaining unilateral control over key production decisions, management is unlikely to achieve jointness. Jointness entails a reduction in the numbers and strength of management, and it requires management to share power with labor.

Our national labor law reflects an understanding of the importance of balanced bargaining power in industrial relations. The framers of that system assumed that the strike weapon would essentially equalize bargaining power between employers and employees.²²⁹ Indeed, one of the key concepts that helped to shape the NLRA was that the law could “counterbalance the power of employers by facilitating the use of strikes and other forms of economic pressure by employees.”²³⁰ The paper industry experience supports the general assumption of the NLRA’s drafters that by increasing union power and making it more nearly equal to that of management, the law encourages mutual cooperation and not economic strife. However, the paper industry experience also indicates that the balance of power has shifted. Employers are more able to withstand strikes and unions are less able to utilize them successfully. Yet the Board and the courts, which have uncritically accepted a neoclassical concept of the role of unions,²³¹ have become more protective of employer economic pressure.²³² Consequently, employers like International Paper may be encouraged to pursue concessions because they believe that they can crush union resistance through tough bargaining and unilateral implementation together with the threat of hiring permanent replacements in the event of a strike. Further, employers may couple the threat of replacement with the threat that the union will be decertified.

228. The industry in which jointness is most developed is the automobile industry, an industry in which the union has long had a powerful bargaining position.

229. See Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1195-96 (1967).

230. See *id.* at 1195; WEILER, *supra* note 226, at 118.

231. See *infra* notes 239-242 and accompanying text.

232. Thus, the employer’s right to lockout has been recognized and expanded, see *Harter Equipment*, 280 N.L.R.B. 597, 600 (1986), *enforced sub nom.*, *Local 825, International Union of Operating Eng’rs v. NLRB*, 829 F.2d 458, 462-63 (3d Cir. 1987), as has the employers ability to favor employees who cross a picket line during a strike, see *TWA v. Independent Fed’n. of Flight Attendants*, 109 S. Ct. 1225 (1989).

One of the reasons why the strength of unions has declined is that the threat of a strike has become far less potent. The basic elements of a strike are the withholding of labor by the union and the establishment of a primary picket line at the premises of the "struck" employer. Where the employer produces a product, the goal of withholding labor is to stop or seriously impede production. The picket line helps accomplish this objective by convincing employees not to work and by appealing to unionized employees of other employers not to make pick-ups or deliveries at the premises of a struck employer.²³³ For the strike and picket line to be effective as a threat, the services of both unionized employees and those they induce to honor the picket line must be crucial to production.

Many of the preconditions for a successful strike existed at Jay. The union was united, well-organized, well-led, and had a substantial strike fund. The employees were experienced, highly-skilled, and many had enough savings to permit them to strike for a considerable period. The union had great support in the community and the backing of several influential political figures. The Wednesday night meetings, the voter pool, and the support of the town selectmen and voters all testified to solidarity and influence that might not have been available elsewhere.

Despite these ostensible strengths, however, the IP paperworkers' strike was doomed to fail. The threat of a strike loses much of its power when, as at the Androscoggin mill, an employer is able to operate in the absence of striking workers. It would seem that many of the factors that allowed the Androscoggin mill to operate despite the strike are applicable to other companies and industries. Automation enabled the company to continue production (albeit less effectively) without the skilled workers who had walked off the job. This ability was strengthened by the existence of a sophisticated supplier of replacements. The events at Androscoggin suggest that an employer's ability to operate during a strike may encourage managers to use the strike as a vehicle for getting rid of highly paid employees, active union supporters, or the union itself.

The lawful picket line, the traditional adjunct to the strike, is only of limited value to a union in a situation such as that faced by Local 14. It is increasingly rare for picket lines to seriously disrupt pick-ups and deliveries. As Peter Kellman points out, even when directed at loyal union members from other companies, the picket line today is unlikely to have much effect.

UPS packages are picked up off mill property by scabs or management and brought in. Union truck drivers leave their trailers off someplace away from the mill and scab drivers are hired to bring

233. Where the employer sells directly to the public, the picket line is also used to appeal to union supporters among the general public not to patronize the struck employer but to take their business elsewhere.

them in. Union railroad engineers and conductors leave their trains outside of the mill gate and managers or scabs bring the trains on and off mill property. At this point in time the solidarity does not exist among union workers to the degree that . . . working union truck drivers and railroad workers will wildcat strike in support of striking mill workers. They won't cross the line themselves but they will allow their work to cross the line.²³⁴

The major value of the picket line is as a deterrent to strikers who might otherwise return to work but who are dissuaded by the unpleasant prospect of having to cross a line staffed by coworkers. While community disapproval might be manifest towards returnees even in the absence of a picket line, crossing the line involves direct, angry confrontation. Beyond this limited deterrence effect, however, the picket line seems largely ineffective. The line does not keep out replacements as they, by definition, have already made up their minds to cross the line. To change their minds almost always requires more than an appeal to reason.

The union's need to supplement the traditional strike and picket line suggests that unions will seek new and increasingly powerful tactics against employers. Violence is another weapon by which employees can apply pressure to an employer. Employees regularly use violence during strikes where employers hire permanent replacements. Strikers have traditionally been willing to use violence to prevent others from taking their jobs. Increasingly, however, employers have been able to reduce the amount of violence through the combination of injunctions and hired security forces.²³⁵ Finally, corporate campaigns and other unorthodox pressure tactics are being developed at almost every level of organized labor.²³⁶

234. Kellman, *supra* note 58, at 96. Kellman went on to write:

The reality of 1987 was that to strike a small part of a large corporation and set up picket lines was a company tactic, not a worker's tactic. Winning against IP had nothing to do with the picket line in Jay, it had everything to do with the record production levels being set by union workers at IP mills in Georgetown, South Carolina, and Pine Bluff, Arkansas.

Id.

235. As Peter Kellman noted in his manuscript describing the events of 1987-88:

What usually happens and what did happen in Jay when scabs were going to be brought into the mill, workers spontaneously massed at the gate. Scabs were verbally harassed, car windows were broken and some of the scabs didn't cross the picket line and went home. Other drove through the lines. After a while the state police showed up and the crowds massed at the gates dispersed. IP sought and got an injunction against mass picketing. The court limited the picketers to 12 at each gate.

Id. at 95.

236. This conclusion is based on discussions by the authors with a variety of different labor groups including the Industrial Union Department of the AFL-CIO, the Amalgamated Clothing and Textile Workers Union, the Hotel Employees & Restaurant Employees International Union, UPIU, and the Service Employees International Union.

Studies have shown that the frequency of strikes has been declining.²³⁷ Such decline is desirable, however, only if it is a product of improved labor-management relations and not evidence of weaker unions. Without strong unions, workers will be less willing to engage in the information sharing that is required to utilize fully their skills and the assets of the employer. If UPIU Local 14 had not struck the Androscoggin mill, but had instead worked under the company's unilaterally established terms, the anger of union members toward IP would inevitably have manifested itself over a long period, through slowdowns, harassing tactics, the filing of great numbers of grievances, and other in-plant strategies that would have reduced production, worsened relationships between labor and management, and increased the company's perceived need for concessions from the workers. It is not surprising that, after the 1987-1988 strike, many local unions joined the voting pool and developed other grass-roots and corporate maneuvers, since the employees were angry but could not afford to strike. Even when unions and their members feel that a strike cannot be won, they are likely to find some strategy for applying pressure against an employer seeking to combine high profits with low wages. The strategy is likely to involve joining forces with other unions, as was done in the voting pool, or limiting productivity by refusing to share information and apply knowledge, as the workers at the Androscoggin mill did. The relationship between IP and Local 14 also helps to explain the resistance by many U.S. unions to changing the traditional model in favor of one based on greater cooperation.

International Paper's misuse of the concept of employee participation is far from unique. In many companies, changes described as efforts to democratize the workplace, often turn out to be programs developed for far less laudable purposes.²³⁸ Most employee participation schemes developed by non-union firms are undertaken to prevent unionization. They are attempts to preserve power, not to share it. In unionized firms, participation programs are frequently put forward by management to overcome union and employee resistance to traditional managerial objectives. Often, their purpose is to get employees to work harder for the same or less pay, to get different units to compete with each other, or to save money by having lower-paid workers available to do jobs previously done by higher job classifications. All of this helps to explain why the labor movement in this country has been slow to embrace sincerely the concept of worker participation, and why even when union leaders embrace the concept of cooperation and participation, a substantial level of employee suspicion is likely to remain despite the great potential value of such programs.

237. See, e.g., BRUCE KAUFMAN, *Research on Strike Models and Outcomes in the 1980s: Accomplishments and Shortcomings*, in RESEARCH FRONTIERS IN INDUSTRIAL RELATIONS AND HUMAN RESOURCES 78 (David Lewin et al. eds., 1992).

238. See Kohler, *supra* note 224.

B. *The Paper Industry and Economic Theory*

Our view that strong unions are consistent with and, indeed, necessary for promoting labor competitiveness may seem somewhat counterintuitive to scholars and policymakers, many of whom are more familiar with competitive microeconomics than with labor economics, management science, or industrial relations. Competitive microeconomics attempts to harmonize labor theory with neoclassical economics,²³⁹ which sees unions as the enemies of competitiveness. According to Belman, neoclassical economists believe that "[t]he best intentioned union can only interfere with a firm's adaptation to the market, lowering productivity, increasing costs and raising prices. Productivity will decline further if unions establish rules restricting managerial authority"²⁴⁰ Some neoclassical economists also contend that unions "tend to interfere with competitiveness by perpetuating restrictive work rules, impeding the development of technology, and reducing productivity."²⁴¹ This point of view has been especially popular among law and economics scholars at the University of Chicago.²⁴²

Nevertheless, it is conceded by the best of the neoclassical theorists that they have little to say about labor *policy*. For example, Nobel laureate Paul Samuelson emphasized that "when the economic theorist turns to the general problem of . . . labor economics, his voice becomes muted and his speech halting. If he is honest with himself, he must confess to a tremendous amount of uncertainty and self-doubt concerning the most elementary and basic part of the subject."²⁴³ Reviewing the claims of the "newer" labor microeconomics, John Dunlop concludes:

[They are] appropriately very modest [T]he judgment [by industrial relations specialists] is likely to be that the models are far too esoteric. They apply to few situations, and they will not take us very far toward a general theory of labor market and wage theory. The amendments to microeconomics are not adequate to the magnitude of the gap between the competition model and reality.²⁴⁴

239. See, e.g., GARY BECKER, *ECONOMICS OF DISCRIMINATION* 55-74 (2d ed. 1971).

240. Dale Belman, *Unions, the Quality of Labor Relations, and Firm Performance*, in *UNIONS AND ECONOMIC COMPETITIVENESS* 41, 43 (Lawrence Mishel & Paula B. Voos eds., 1992).

241. Ray Marshall, Address at the Conference on Empowering Workers in the Global Economy: A Labor Agenda for the 1990's, at 3 (Oct. 22, 1991) (transcript on file with authors) (characterizing the contentions of neoclassical economists with respect to labor theory).

242. See, e.g., Richard Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357 (1983) (arguing from an underlying premise that unions are impediments to competitiveness).

243. See, e.g., 2 PAUL A. SAMUELSON, *THE COLLECTED PAPERS OF PAUL A. SAMUELSON* 1557 (Joseph E. Stiglitz ed., 1966).

244. John Dunlop, *Industrial Relations and Economics: The Common Frontier of Wage Determination*, 1984 *INDUS. REL. RES. ASS'N PROC.* 14-15.

The failure of neoclassical economics to serve as a useful basis for labor policy originates in its theoretical framework. Neoclassical microeconomics is based on static, abstract assumptions like perfect competition that limit its usefulness for a dynamic world where rivalry is a more useful concept than atomistic competition.²⁴⁵ Neoclassical economists typically compare performance under presumed monopolies with the outcomes that would obtain under competitive conditions. However, it was very rare in the United States for a company in a highly competitive industry to be unionized,²⁴⁶ such that collective bargaining was almost never an important practice among companies in such industries. A bargaining model with no spillover effects is more appropriate for these industries.

Not surprisingly, then, most labor economists who are actively involved in labor policy research and consulting have found very little of value in neoclassical economics.²⁴⁷ Indeed, the main influence of neoclassical, microeconomic labor theory is among academics in the United States, who favor such theory because of its presumed "rigor." In their attempts to become more rigorous and abstract, however, we believe that these academics have contributed to scholarship that has become less and less relevant for policymaking. As the somewhat unorthodox methodology of this Article suggests, we would prefer to be as accurate as we can be, knowing full well that the truth may have eluded us, rather than to be rigorous but wrong. We believe that policy research in this area must be based on both empirical work and on an appropriate conceptual framework or theory.

Those who are steeped in neoclassical microeconomic theory may challenge our support for labor unions as the primary agents of collective representation, claiming that it is based on our values rather than on economic analysis. We do not argue that our policy analysis is "value free." Indeed, we think most economic paradigms are value laden.²⁴⁸ It is not entirely coincidental, for example, that those who extol the virtues of competitive microeconomics for policy purposes are proponents of conservative *laissez-faire* economics that has a bias against group or political activity, and do not believe that "government" can improve market performance.²⁴⁹ The market, in our view, is a wonderful institution, but it operates best in the presence of supportive public policies to maintain price stability, equity, and important

245. For a discussion of the greater importance of rivalry relative to competition, see generally MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 170 (1990) ("Loss of domestic rivalry is a dry rot that slowly undermines competitive advantage by slowing the pace of innovation and dynamism.").

246. MARSHALL, *supra* note 14, at 116.

247. See Dunlop, *supra* note 244, at 14-15.

248. For examples of others who believe economic paradigms are value laden, see generally JOHN KENNETH GALBRAITH, *ECONOMICS IN PERSPECTIVE: A CRITICAL HISTORY* (1987); GUNNAR MYRDAL, *THE POLITICAL ELEMENT IN THE DEVELOPMENT OF ECONOMIC THEORY* (1954).

249. See, e.g., MILTON FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 5-6, 37-69 (1980).

economic functions like technology, information systems, economic rivalry, and human resource development—none of which can be achieved by “competitive” markets alone. It is true that our policy agenda stresses the efficacy of democratic institutions—political, economic, and social. We believe, however, that there is abundant empirical evidence that these democratic processes, when grounded in consensus-based policies, can produce much better economic outcomes than can competitive market forces alone.²⁵⁰

Thus, our support for unions owes less to ideology than to our interest in competitive strategy. Proponents of competitive microeconomic theory see no need for strategies. They believe that there are no strategic economic activities—that chocolate chips are as important as computer chips. We strongly disagree. There are strategic industries, and there is a high degree of consensus among international experts on what they are.²⁵¹ We, like many observers, believe that policymakers, labor, and management should work together to create high performance organizations that provide highly skilled workers with high wages. A report by a bipartisan commission representing labor, management, and academia has recommended what we have called a high-wage economic strategy.²⁵² The commission found that all of the industrialized countries that it compared to the United States rejected wage competition as the basis for economic policy because they believe that such an approach fosters lower and more unequal wages.²⁵³ These countries also believe that the low-wage approach also limits the methods for increasing income to working harder. It would appear that America’s foreign competitors have correctly assessed the low-wage approach. Since the United States has backed into a low-wage strategy, real wages for most workers have decreased from the level they were in the early-1970’s, although the average income of college-educated workers rose over the same period.²⁵⁴

Proponents of the high productivity option, by contrast, emphasize improvements in work organization and worker skills to make it possible to substitute ideas, skills and knowledge for physical resources, which puts people on much steeper earning and learning curves. They believe that, to be effective, a high performance organization requires a high level of employee involvement and an independent source of representation for workers. These

250. See MARSHALL, *supra* note 22, at 214-49.

251. See, e.g., LESTER THUROW, *HEAD TO HEAD: THE COMING BATTLE AMONG JAPAN, EUROPE AND AMERICA* 45 (1992) (identifying as key industries of next few decades, microelectronics, biotechnology, communications, civilian aviation, new material science, robots, machine tools, computers, and computer software).

252. See AMERICA’S CHOICE, *supra* note 24, at 91. The Commission on the Skills of the American Workforce based its report on over 2800 detailed interviews involving companies and public officials in the United States, Japan, Singapore, Sweden, Denmark, Germany, and Ireland.

253. See *id.* at 57-65; see also MISHEL & BERNSTEIN, *supra* note 27, at 31-37 (showing lower and more unequal wages in the U.S. in recent years).

254. Lawrence Mishel & Jared Bernstein, *Declining Wages for High School and College Graduates*, Briefing Paper for Economic Policy Institute (1992) (on file with authors).

proponents believe that unions increase employee voice and thereby increase productivity, stability and efficiency. This view emphasizes the contribution that well-motivated, skilled workers can make to productivity. It also recognizes the benefit to both labor and management of having workers interact with management as a unit:

Collective voice—workers communicating with management as a group—is . . . superior to individual efforts to communicate with employers. The power imbalance between employers and employees, and an individual's inability to establish readily enforceable agreements with employers restrict the effectiveness of individual voice. Provision of binding rules for promotion and due process, commonly associated with unions, can increase efficiency. Without such arrangements, workers will hoard knowledge to provide job security and increase opportunities for promotion. With enforceable arrangements for seniority and due process, workers will be more willing to share production knowledge, [thereby] increasing efficiency. Collective voice is also more effective for addressing problems with common working conditions.²⁵⁵

Indeed, some proponents of the high productivity option believe that "unions are essential to competitiveness [in] those countries that wish to pursue a high wage strategy."²⁵⁶ The data would seem to support this belief in the high wage strategy; companies in countries with stronger workers' organizations and less authoritarian management systems than those in the United States have been taking market share from American companies.²⁵⁷

In its statements and behavior throughout the strike, IP demonstrated its adherence to the neoclassical view, which most observers agree has been the predominant view of management in the United States during the past two decades. IP sought to improve its competitive position by reducing labor costs and increasing managerial discretion.²⁵⁸ Local 14 and its members, although

255. See Belman, *supra* note 240, at 44.

256. See Marshall, *supra* note 241, at 23. The key role played by organized labor in developing the cooperative programs at Scott and Otis supports the conclusion of Professor Benjamin Aaron of UCLA, a well known neutral in labor management relations: "Given that a certain amount of conflict between employers and workers is inevitable, I believe that unions are an indispensable element in arrangements to moderate and regulate that conflict." Benjamin Aaron, *Laws Promoting Cooperative Labor Management Relations* (forthcoming 1993) (manuscript at 13, on file with authors).

While the available empirical data do not resolve the issue of the need for a union in establishing a cooperative labor management system, they do support the conclusion that such programs work best when the employees are represented by a union. See BLUESTONE & BLUESTONE, *supra* note 6, at 172-173.

257. See, e.g., MARSHALL, *supra* note 22, at 118-30; Daniel J.B. Mitchell et al., *Alternative Pay System, Firm Performance, and Productivity, in PAYING FOR PRODUCTIVITY* 87 (Alan S. Blinder ed., 1990); Lowell Turner, *Industrial Relations and the Reorganization of Work in West Germany: Lessons for the U.S., in UNIONS AND ECONOMIC COMPETITIVENESS*, *supra* note 240, at 239.

258. IP's strategy in this respect has been popular among American companies:

As the seventies drew to a close, American business and labor found themselves under siege. Business leaders responded mainly by finding ways to cut costs and shut foreign producers out of our domestic market. Cost reduction was achieved by automating to

unaware of and unconcerned with the academic debate, were nevertheless deeply committed to the view that competitiveness should be achieved through the production of high-quality products and that union workers and unions play an important, if not essential, role in achieving high quality.

Proponents also recognize that for unions to play such a role, both labor and management must be prepared to move beyond the traditional adversarial relationship. The paper industry experience illustrates the extent to which the impact of a union on productivity may be influenced by the labor relations climate in the particular facility.²⁵⁹ At IP's Androscoggin mill, the union had only a negative impact on productivity, while at the Scott and Otis plants, the union had a significant positive impact. Such divergence of experience among unionized employers has led some labor economists to conclude:

[I]t is the handling of conflict, not unions, which affects productivity. Managers and employees have shared interests, but also legitimate differences in interests. It is these differences which underlie conflict in the workplace. The institutions and procedures for managing conflict that govern employee and managerial behavior thereby regulate firm performance. Low trust/high conflict environments, environments with elevated levels of grievance activity, work stoppages, and dissatisfaction are not conducive to employees doing more than is required to earn a paycheck and avoid dismissal. Employers, lacking the support of their labor force, cannot avail themselves of employee loyalty and intelligence to improve the product or production methods. Conversely, high trust/low strife environments provide a foundation for improving efficiency. By developing trust, emphasizing problem-solving, and respecting the divergent and conflicting interests of the parties, . . . joint programs

eliminate jobs and thus reduce labor costs, transferring production to other countries with lower labor costs, getting out of production altogether and becoming U.S. marketing agents for foreign firms with lower production costs, negotiating wage reductions with unions that saw massive job loss as the only alternative, and increasing the proportion of their work force composed of contingent labor—people who could be released on a moment's notice and who did not have to be paid fringe benefits.

MARSHALL & TUCKER, *supra* note 5, at 33.

259. A variety of factors may contribute to a company's labor relations climate:

The structure of bargaining, the history of labor management relations, the environment in which firms and employees operate, and the consequent attitudes of labor and management affect firm performance. In plants and firms in which there is little trust between employers and employees, in which production workers are largely excluded from decisions affecting them, and in which there is ongoing conflict over the boundary between subjects of bargaining and those under unilateral managerial control, there will be little incentive for workers and managers to share information, workers will only produce under compulsion, and the rules of the work site—originating from conflict—will be used to assert or limit control rather than improve output. In contrast, in environments in which there is high trust, where employees and their unions are integrated into the decision process, and in which the parties accept the legitimacy of one another's goals, productivity gains and cost reduction can be realized through creative bargaining, cooperation in development of better production techniques, and a reduction in the use of restrictive work practices and monitoring.

Belman, *supra* note 240, at 45-46.

make it possible to implement new technologies, job practices, employment relations, and management structures in a manner consistent with the concerns of both labor and management.²⁶⁰

The paper industry demonstrates that the aggressive low-wage path taken by IP, once embarked upon, fosters continuing strife that is bound to have harmful economic consequences. The experience also suggests why it is important for national labor policy to encourage the cooperative model of labor relations illustrated by Scott and the Otis. Such approaches improve the quality of life for employees and their families, strengthen feelings of community and loyalty, and permit U.S. industry to compete on the basis of high quality rather than low costs. The benefits of cooperation have been established across a broad spectrum of industries and activities.²⁶¹

C. *Jointness and the Law*

1. *The Impact of Current Law*

Labor law does not deal directly with union-management cooperative (or "jointness") programs.²⁶² Nothing in the NLRA, nor in any other statute, mandates, or directly encourages, the development of such programs. Nor does any provision of current law, including the NLRA, prohibit them.²⁶³ Rather,

260. *Id.* at 70-71.

261. See BLUESTONE & BLUESTONE, *supra* note 6, at 174-179 (citing studies of companies including Corning Glass, Ford Motor, Campbell Soup, Northern Telecom, A.O. Smith, as well as the New York City Department of Sanitation). As has been noted with respect to the automobile industry,

The advantages of this form of work organization are enormous. The ranks of middle management and many support functions are thinned out, creating a very large productivity gain through cost reduction. Quality improves dramatically. There is better coordination of the myriad functions involved in building a car and many fewer mistakes are committed. Improvements in the design and construction of the cars are made constantly, instead of waiting for new model introductions, creating a strong market advantage. It becomes possible to go after small market segments, because success no longer depends on producing thousands or millions of identical products. Worker motivation and morale are greatly enhanced, because the workers take real pride in their work—they are no longer expected to leave their heads at the factory gate. Taken together, these changes give firms organizing this way a decisive advantage over their low-wage, low-skill competitors. Low-wage countries are in no position to compete using these methods of work organization because their workers lack the skills that are essential to its success.

MARSHALL & TUCKER, *supra* note 5, at 38. The cooperative approach works equally well in machine tools, insurance, banking and retail sales—in fact, across the whole spectrum of manufacturing and services. See BLUESTONE & BLUESTONE, *supra* note 6, at 165-186.

262. Indeed, the only cooperative programs with which labor law seems to deal directly are those which employers undertake unilaterally in the nonunion sector. While the extent to which such programs violate the law has not yet been determined, nonunion cooperative programs often have the attributes of "company unions," which section 8(a)(2) of the NLRA prohibits. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1992) (stating that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it").

263. An argument can be made that some jointness programs are prohibited by section 8(a)(2) of the Act. To so hold, the Board and the Courts would have to hold that work teams, or other bodies set up to

the NLRB and the courts have, as far as one can tell, accepted the conclusion that the Act meant to foster rather than prohibit cooperative programs that develop out of free collective bargaining. The law's regulation of jointness programs manifests itself indirectly, through the law's regulation of collective bargaining, which is itself indirect.

Regulation of collective bargaining under the Act does little to correct imbalances of bargaining power between labor and management. The duty to bargain in good faith has been made deliberately weak under the law in order to avoid significant governmental interferences with the collective bargaining process. Unions are rarely charged with bad faith based on negotiating behavior and claims against employers are rarely successful. In general, an employer will be found to have bargained in good faith so long as its negotiators are willing to discuss proposals and indicate that they would sign some agreement, no matter how one-sided.

Further, even if the employer is found guilty of an unfair labor practice, neither the Board nor the courts may remedy its violation by structuring the agreement of the parties.²⁶⁴ Any bargaining agreement achieved will be attributable solely to the collective bargaining process in which the economic power of the parties is the crucial ingredient. As the Supreme Court stated in *NLRB v. Insurance Agents' International Union*,²⁶⁵ "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."²⁶⁶ In the *Insurance Agents'* opinion, the Court stressed that our system of collective bargaining relies on the parties' abilities to apply and withstand economic pressure as the major spur to agreement.²⁶⁷

However, as previously noted,²⁶⁸ The strike at Jay casts into doubt whether strikes can continue to play as crucial a role in our industrial relations system as they have in the past. According to Wayne Glenn, "Until we get the law changed . . . I think that strikes are about a thing of the past."²⁶⁹ It is our conclusion that the law needs to be amended to equalize bargaining power rather than to exacerbate existing differences.

facilitate cooperation, are "labor organizations" and that employer cooperation constitutes unlawful "support," or even "domination" for purposes of section 8(a)(2). See Note, *Does Employer Implementation of Employee Production Teams Violate Section 8(a)(2) of the National Labor Relations Act?*, 49 IND. L.J. 516, 529-36 (1974).

264. H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970); GETMAN & POGREBIN, *supra* note 2 (discussing NLRA's "capitalist exemption" which prohibits Board from interfering with managerial authority and entrepreneurial decisionmaking).

265. 361 U.S. 477 (1960).

266. *Id.* at 488.

267. See, e.g., *id.* at 489 ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the [NLRA has] recognized.").

268. See *supra* part IV.A.

269. Interview with Wayne Glenn, President, UPIU, in Nashville, Tenn. (Oct., 1990).

2. *Recommendations for Legal Reform*

We recommend that several actions be taken to correct the imbalance of bargaining power that frustrates labor-management cooperation. Specifically, we recommend removing protection for employers' ability to replace striking workers, relaxing doctrines which effectively exclude many topics of jointness from collective bargaining, accepting techniques such as the pool voting scheme by which different UPIU locals attempted to coordinate their bargaining with IP, and changing those aspects of the law that prohibit supervisors and managers from participating fully in jointness programs.

a. *The Elimination of the Mackay Doctrine*

Despite the Act's explicit recognition of the right to strike,²⁷⁰ employees who exercise this right may lose their jobs. In 1938, shortly after passage of the NLRA, the Supreme Court announced in *NLRB v. Mackay Radio & Telegraph Co.*²⁷¹ that

an employer, guilty of no act denounced by the statute, has . . . the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.²⁷²

Since this brief discussion, the Court has not seriously addressed the wisdom of this ruling, which has come to be known as "the *Mackay* doctrine." Indeed, the Court recently affirmed and extended the doctrine without considering its viability in the light of changes in labor law and industrial relations.²⁷³

The strike at Jay demonstrates that *Mackay* has helped to create a labor law system that permits the economic devastation of our best people. The employees most capable of subordinating their own interests to those of a group—those who refuse to cross the picket line in the face of permanent replacement—are the ones most likely to be replaced permanently under the doctrine. The employees who struck at the Androscoggin mill demonstrated throughout their struggle the characteristics that are most valuable to jointness programs: group cohesiveness, loyalty, creativity, discipline, intelligence, and

270. National Labor Relations Act § 13, 29 U.S.C. § 163 (1992) ("Nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . .").

271. 304 U.S. 333 (1938).

272. *Id.* at 345-46. The Court refers to the strike as a vacation of the employment relationship and the end of the strike as its resumption, but the law is clear that the employment relationship continues during a strike.

273. *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 109 S. Ct. 1225, 1233-35 (1989).

decency. The paperworkers were first-rate, productive employees.²⁷⁴ They were not guilty of disloyalty, greed, or excessive zeal for combat. These are precisely the type of people whose interests the law is intended to protect.²⁷⁵ Yet they are the ones most likely to be permanently replaced under the Doctrine. All 1200 employees who honored the picket line at Androscoggin lost their jobs. Many lost their savings. Those who have gone back to work for International Paper by virtue of the *Laidlaw* decision are angry and unhappy. Thus, by allowing employers to replace striking workers, the *Mackay* doctrine also allows employers to replace those very workers whose skills and attributes are most needed to foster a cooperative and productive working environment.

The strike at Jay also demonstrates that the *Mackay* doctrine has a detrimental effect on employees' perception of job security and, thus, on their willingness to cooperate with management. Scholars who have studied employer-employee relations have noted a strong correlation between

274. *Preventing Replacement of Economic Strikers: Hearings on S. 2112 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 125 (1990) [hereinafter *Hearings on S. 2112*] (testimony of James P. Melican, Vice President and General Counsel, International Paper Company).

At the Senate hearing, Melican argued that *Mackay* does not permit employers to rid themselves of unwanted unions because unions engaged in collective bargaining can avoid the *Mackay* doctrine's application by not striking. He stated, "[T]he union always has the choice of continuing to work without a contract—in that event, the employer . . . can't hire permanent replacements." *Id.* at 126. However, unions have this option only if they are willing to work under the employer's terms. After an impasse, the employer can unilaterally impose the contract that the union and its members rejected. If the employees refuse to work under those terms (for example, if the Androscoggin workers had refused to work on Sunday) the employer could have, at its option, replaced or simply fired the employees. *See generally* GETMAN & POGREBIN, *supra* note 2, at 139-42. In his testimony to the Senate, Mr. Melican made other points:

Why couldn't we have operated the three mills with mostly new hires, either by subcontracting out the work or by ourselves hiring hundreds of temporary employees? First, many states have passed "strikebreaker" laws which make it difficult or impossible to bring in subcontractors in the event of a strike. Secondly, in our case, the paper mill was located in a small town in a sparsely populated area. There was no place to house several hundred workers indefinitely. In order to minimize the potential for violence in the surrounding area, we installed trailers on the mill property, but at a Town Meeting, heavily dominated by strikers, a zoning ordinance to preclude the use of trailers was promptly passed. Thirdly, while temporary employees may be a possible solution in an urban area with a large and available skilled work force, that is typically not the case surrounding paper mills. Finally, even if a sufficient pool of skilled workers did exist in the area, or if there had been places to house those from outside the area, why would a worker give up a job he already had in order to take a job that might last a day or a week?

Hearings on S. 2112, supra, at 130.

The strikebreaker legislation to which Melican referred is undoubtedly unconstitutional. The zoning ordinance passed by the frustrated strikers of Jay was never enforced and was quickly held to be beyond the city's power and enjoined by a state judge. The company may have had difficulty hiring temporary replacements in the area but it was not limited to the area. There were several companies like BE & K which could supply temporary workers. Where temporary replacements are hired, the threat of violence would have been greatly reduced. Indeed, it is noteworthy that almost no violence took place at Mobile, while (despite the union's repeated efforts) there was a fair amount of violence at Jay. Interview with James P. Melican, Vice President & General Counsel, IP, in Purchase, N.Y. (Sept., 1990).

275. The Act provides rights only for employees, not for employers or unions. All unfair labor practices are articulated in terms of the violation of those rights.

employees' job security and labor-management cooperation.²⁷⁶ In its Saturn Project, for example, General Motors provided greater job security to employees as one of its first steps toward greater cooperation with the UAW.²⁷⁷ The correlation between job security and cooperation would also seem to be supported by the recent labor histories of other industrialized countries. In countries such as Japan, Germany, France, and Sweden, where cooperation has become the dominant approach to industrial relations, the law does not permit employers either to dismiss striking workers or to replace them permanently.

The *Mackay* doctrine is a constant reminder to employees that their jobs can be forfeited if they disagree with management. In such a threatening environment, employees are not likely to identify with the company, devote themselves to learning the enterprise and increasing its productivity, or share their knowledge with management, who might then pass such knowledge on to replacement workers.²⁷⁸

When International Paper sought to involve employees in creating job handbooks, ostensibly to initiate a new team system, the union and most of the employees refused to cooperate. The employees concluded that the handbooks were to be used by replacement workers and that the company's desire for the handbooks was proof of its intention to provoke a strike. Had the company sought to prepare the job manuals in the absence of the *Mackay* doctrine, the result might very well have been different. Indeed, a similar request by Otis to its employees was honored because the Otis employees did not anticipate the use of the handbooks by replacement workers. Prior to the strike, there was a real possibility of creating a cooperative relationship at the Androscoggin mill. However, the prospect of a seemingly more complete victory under the *Mackay* doctrine, made the company unwilling to take the necessary steps. At the same time, the union was also less flexible than it might have been because it feared that IP was trying to prompt a strike so that the company could hire permanent replacements.

It seems likely that the ability of employers to hire permanent replacements has reduced the number of strikes over the past decade. However, a reduction in strikes, caused not by improved labor relations, but by union and employee weakness, is not necessarily a positive sign for labor relations. When employees feel powerless and exploited they do not strike, but neither do they

276. U.S. DEPT. OF LABOR, U.S. LABOR LAW AND THE FUTURE OF LABOR MANAGEMENT COOPERATION 38 (2d interim ed., 1987) (noting that fear of job loss may be barrier to cooperation).

277. See MARSHALL, *supra* note 22, at 174-80.

278. Cf. Carbonella, *supra* note 40, at 1009-17 (noting that high degree of security enjoyed by workers in Jay after 1964 led them to share information with each other, and that worker cooperation decreased in the 1980's, when labor dispute appeared imminent).

use their best efforts to produce, innovate, cooperate with management, or share information.²⁷⁹

The combination of the *Mackay* and *Laidlaw* doctrines almost ensures a divided, angry workforce. At the Androscoggin mill, the hiring of permanent replacements as allowed under *Mackay* shattered the lives of employees, divided the community, and left a mill that was once a cooperative enterprise divided into warring, mutually suspicious factions.²⁸⁰ The return to work of former strikers under *Laidlaw* has exacerbated this problem. The replacements, many of whom are still learning the job, feel misunderstood, isolated, and underappreciated. Old-line senior supervisors are angry with the strikers and the company. The employees who returned to work through exercise of their *Laidlaw* rights feel guilty, confused, and fiercely angry at the company. These workers no longer feel any sense of loyalty to IP.

The *Mackay* doctrine undermines jointness by contributing to an imbalance of bargaining power between labor and management. The law's reliance on free collective bargaining to achieve industrial stability presupposes that in the great majority of cases, strikes will be disadvantageous to both unions and employers. When that assumption is accurate, both sides acting rationally will negotiate to avoid a mutually harmful strike. The parties are then generally able to sort out their goals and to develop the internal processes necessary to compromise. Eventually, appreciation of common interests will develop between labor and management. This is how good-faith bargaining was intended to operate.

However, *Mackay* undercuts the desire of the employer to avoid a strike. Instead, the doctrine gives the employer a motive not to reach an agreement,

279. It could be argued that even if the tragedy at Jay were a special instance of a righteous union battling a greedy employer, most cases involving permanent replacements are likely to involve a less admirable union and a less arrogant employer. Moreover, the case for the *Mackay* doctrine may be thought to rest in those instances where the parties reach a sensible settlement without a strike because unions are dissuaded from pursuing inflationary demands by the possibility of permanent replacement. Employer groups embrace this portion and contend that, in the absence of the *Mackay* doctrine, there would be more strikes and employers generally would be forced to accept agreements that would make U.S. industry less competitive.

For those who blame the demise of American industry on greedy unions, this argument is bound to have some appeal. Nevertheless, it should not be used as a basis for maintaining the *Mackay* doctrine for the following reasons. The record of American unions for fairly negotiating when management truly seeks cooperation is excellent. We believe that when employers are willing to open their books, give employees a stake in the enterprise, or adopt less hierarchical approaches to labor relations, unions have almost invariably responded positively. This has been true in the steel, coal, automobile, clothing, sports, transportation, and newspaper industries, as well as in many others. American unions and their members are well aware that they have a huge stake in the profitability of American companies. This point of view, constantly reiterated in Professor Getman's interviews with the paperworkers, is not limited to certain "responsible" unions. Furthermore, employers seeking to reject inflationary demands absent *Mackay* would be able to hire temporary replacements and unilaterally impose terms favorable to management.

280. At the Mobile mill—where IP hired temporary replacements—the bitterness has largely subsided. But at Lockhaven, De Pere, and Jay—where the company replaced strikers permanently—bitter divisions persist within the mill and in the community. See *Prohibiting Discrimination Against Economic Strikers: Hearings on S. 55 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 102d Cong., 1st Sess. 78, 80-81 (1991) (testimony of Charles Noonan, Town Manager of Jay, Me.).

but rather to force a strike; by forcing a strike, an employer can permanently rid itself of union supporters if not the union itself. Thus, when the hiring of permanent replacements is practically possible, the strike threat is transformed from a weapon of labor to a weapon of management. The employees face loss of their jobs, and the union faces lost members and status. The employer has the problem of trading an experienced work force for an inexperienced one, but is usually able to pay lower wages and benefits.²⁸¹

Proponents of the *Mackay* doctrine contend that current law provides protection against such tactics. For example, former NLRB General Counsel Peter Nash and Jonathan Mook stress the limits "placed on the economic conflict to guarantee the continuation of the bargaining relationship at the strike's conclusion."²⁸² These limits are defined as follows:

[P]ermanent replacement is available to the employer only in the case of an economic strike, not an unfair labor practice dispute and not an employer-instigated lockout. Also, although an employer may permanently replace striking employees when faced with an economic strike, the employer may not discharge an employee for engaging in strike activity. Consequently, . . . the striking employee is entitled to certain reinstatement rights when and if a vacancy later occurs. Finally, economic strikers remain eligible to vote in representation elections, and the NLRB does not assume that strike replacements are presumed to oppose the union.²⁸³

It is true that, under current law, an employer who is found to have replaced workers in order to oust a union or its supporters is guilty of an unfair labor practice. In reality, however, this formula provides little protection because the Board does not undertake an inquiry into the employer's motivation for replacing workers.²⁸⁴ For a variety of reasons, such a determination is beyond the Board's fact-finding capability.²⁸⁵

281. For legal and public relations reasons, a company which is bargaining to force a strike will deny that it is doing so, and will naturally structure its bargaining behavior to avoid a finding of bad faith by the Board. By regularly attending negotiations, giving explanations of its positions, and making a few concessions, it is relatively easy for an employer to avoid being found guilty of an unfair labor practice, while simultaneously taking positions the union negotiators are certain not to accept. See *supra* note 57 and accompanying text. The line between hard bargaining and "surface bargaining," i.e., bargaining with a view to forcing a strike, is so fine that in no case will it be obvious, even to company officials conducting negotiations, that the employer was "surface bargaining."

282. Peter G. Nash & Jonathan R. Mook, *Strike Replacement Legislation: If It Ain't Broke, Don't Fix It*, 16 EMPLOYEE REL. L.J. 317, 320 (1991).

283. *Id.*

284. See GETMAN & POGREBIN, *supra* note 2, at 139-40.

285. As Getman and Pogrebin point out:

The Board, in fact, does not seek to evaluate the employer's state of mind in order to determine the legality of its conduct. Instead, it has devised a fairly mechanical test to distinguish between legal replacement and illegal discharge. Unless it can be demonstrated that the employer has singled out for replacement those whom he knows to be active union members, he is permitted to lay off permanently any striking employees, as long as they are not notified that they are replaced or treated as having been replaced before new employees

The paper industry experience attests to the ineffectiveness of the law's ostensible prohibitions on misuse of the *Mackay* doctrine. IP officials must have been aware that ousting the union was the easiest way to increase managerial control and cut labor costs. Given the speed and insistence with which the company acted to replace experienced, productive employees, it is difficult to avoid the conclusion that their action was part of an effort to break or at least tame the union.²⁸⁶ The union was decertified at all three locations at which it struck—a result that seems almost inevitable given the strong feelings that are aroused in replacement situations. Yet at no time did the Board challenge the legality of IP's use of permanent replacements.

The employees at Jay fought an innovative and inspiring battle by which they damaged IP enough to motivate other companies to follow different policies. Had the employees fought a more conventional battle or been less unified, it seems likely that they would simply have added one more sorry chapter to the recent history of union defeats and demonstrated that employers can lower wages and increase managerial power without much consequence. To the extent that the strike made other employers, like Scott and Otis, decide that they should cooperate with rather than confront labor, the strike was in some sense a victory for paperworkers and for a more sophisticated and positive approach to competitiveness. But it was a victory achieved at great personal cost to employees who behaved precisely as contemplated by the Act.

Had it not been for the *Mackay* doctrine, the battle at Androscoggin need not have been fought. A policy that permits employers to make life miserable for so many people in the name of competitiveness should be abandoned.

b. *Bargaining Limits*

The benefits of employee involvement are not limited to traditional areas of union concern, but also include issues of productivity investment and product promotion. To the extent the law seeks to limit unions to bargaining about wages and working conditions, it unnecessarily limits the concept of jointness.²⁸⁷ In recent years, interpretation of the NLRA has become

are hired This test, which has been approved by the courts, is related only occasionally to the employer's reason for acting. It is more likely to indicate whether the employer had competent counsel.

Id. at 140 (footnote omitted).

286. In many cases, the permanent replacement of striking employees has seemed to be an aspect of the rash of corporate take-overs. Raiders who take over enterprises often utilize bonds to do so. As a result, they frequently begin severely in debt. In such circumstances, the thought of provoking a strike to rid themselves of highly paid employees and the union that represents them must seem a good way of consolidating control and reducing current costs.

287. This trend in the law is at cross purposes with current thinking about American competitiveness. In their important new book, *Negotiating the Future*, see BLUESTONE & BLUESTONE, *supra* note 6, the Bluestones propose a "seven-point enterprise compact" which includes a commitment that "[t]he company and the union agree that all strategic enterprise decisions will be made through joint action." *Id.* at 227. The book jacket has a statement from President Clinton that "[s]uch an approach . . . will have to be adopted,

increasingly inimical to the establishment of jointness, because the Board and the courts have been reducing, rather than expanding, the number of subjects regarding which a union can insist upon bargaining about as part of collective bargaining.

The drafters of the National Labor Relations Act made it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees" ²⁸⁸ This section was included in the Act because many employers had publicly announced that they would not bargain with unions regardless of the wishes of their employees. The duty to bargain, thus established, was conceived of as a limited requirement to meet and discuss, with a view to entering into a collective agreement. There was no obligation to agree, and employers were free to insist upon agreements favorable to themselves including clauses recognizing management authority to make unilateral decisions about wages, hours, and working conditions. There was no correlative obligation imposed upon unions because it was recognized that unions largely exist for the purpose of entering into collective agreements with employers. When the NLRA was amended in 1947 for the express purpose of making the Act more equal and evenhanded, ²⁸⁹ Congress added a similarly-worded provision regarding union unfair labor practice. ²⁹⁰ Proponents of the addition argued that unions should be prevented from bargaining with a "take-it-or-leave-it" attitude.

A union's obligation under section 8(b)(3) at first had little impact and the section was rarely litigated. However, this clause eventually became an instrument for limiting the role of unions and the sweep of collective bargaining. Based upon the language of section 8(d), the NLRB crafted a distinction between "mandatory" and "permissive" subjects of bargaining. ²⁹¹ Then, in *NLRB v. Wooster Division of Borg-Warner Corp.*, ²⁹² the Supreme Court adopted the Board's distinction. The Court upheld the trial examiner's view that the parties were only required to bargain about topics that came within the scope of Section 8(d) and that to insist upon including topics other than wages, hours, and other terms and conditions of employment was "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." ²⁹³ The Court said that labor and management could lawfully consider permissive subjects, but that the parties could not "insist

if America is to regain its competitive edge"

288. National Labor Relations Act § 8(a), 29 U.S.C. § 158 (a)(5) (1992).

289. GETMAN & BLACKBURN, *supra* note 6, at 34 (stating that 1947 additions to NLRA sought "to make the Board and the Act more neutral with respect to collective bargaining").

290. See 29 U.S.C. § 158(b)(3) (1988) (making it an illegal unfair labor practice "to refuse to bargain collectively with an employer . . .").

291. Section 8 (d) defines the duty to bargain as requiring the parties to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." 29 U.S.C. § 158(d) (1992).

292. 356 U.S. 342 (1958).

293. *Id.* at 349.

upon them as a condition to any agreement.”²⁹⁴ No such distinction appears in the Act itself.

When the Board first created the mandatory-permissive distinction, commentators criticized it as being inconsistent with the basic policy of the Act: to promote free collective bargaining. Nevertheless, the Board and the courts have, over time, used the distinction to restrict unions' ability to bargain about product quality and other issues deemed to be inconsistent with employers' need to exercise unlimited discretion in key areas. The major Supreme Court decision defining the scope of the mandatory-permissive distinction was *First National Maintenance Corp. v. NLRB*.²⁹⁵ In deciding that an employer's decision to close part of its operation was not a mandatory subject of bargaining, the Court identified three types of business decisions. "Mandatory" decisions are "almost exclusively 'an aspect of the relationship' between employer and employee"²⁹⁶ and thus must be negotiated between union and management. Such decisions include wages, hours, production quotas, and work rules. Other decisions such as choice of advertising, product type and design, and financial arrangements have "only an indirect and attenuated impact on the employment relationship," and are thus "permissive" with respect to collective bargaining.²⁹⁷ The third category of decisions affect jobs but also may involve "a change in the scope and direction of the enterprise."²⁹⁸ Regarding these decisions, the Court concluded that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise"²⁹⁹ The subjects of such decisions might be either permissive or mandatory depending upon the extent to which negotiations about them might benefit the process of collective bargaining balanced against the employer's need for unfettered discretion. However, the Court gave greater weight to this latter interest, as evidenced by the Court's holding and by its statement that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."³⁰⁰ The obvious assumption of this statement and of the Court's discussion of the plant closing issue is that unions have little interest in the financial success of an enterprise and little or nothing to contribute in discussions that focus on profitability.

Shortly thereafter, in *Otis Elevator Co.*,³⁰¹ the Board drew a sharp distinction between changes based on labor costs and those based on

294. *Id.*

295. 452 U.S. 666 (1981).

296. *Id.* at 677 (citing *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)).

297. *Id.*

298. *Id.*

299. *Id.* at 676.

300. *Id.* at 678-79 (footnote omitted).

301. 269 N.L.R.B. 891 (1984).

entrepreneurial or technological considerations. The Board announced that all decisions affecting the direction, scope, or nature of a business will be treated as nonmandatory topics unless they turn upon labor costs, and that the employer will be free to make such decisions without bargaining with the union about the effects of its decision.³⁰² The Board later softened this test somewhat in *Dubuque Packing Co.*,³⁰³ in which it held that the decision to relocate unit work would be a mandatory subject of bargaining unless the employer shows: “(1) that labor costs . . . were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer’s decision to relocate.”³⁰⁴

The Board and the courts have reduced the sphere of union involvement based on the distinction between mandatory and permissive subjects of bargaining. Indeed, the major area of permissive bargaining involves matters deemed reserved for managerial decisionmaking, if management is so inclined. That area has been expanded by recent Board and court decisions. The expansion of the subjects over which unions may not insist upon bargaining has a direct negative impact upon efforts to expand labor-management cooperation.

Many of the topics that labor and management routinely deal with in jointness programs fall outside the area of mandatory bargaining, e.g., product type and design, customer relations, and advertising. Furthermore, where significant decisions are made—for example, where product lines are adopted or dropped (topics that are also within the union’s area of interest under jointness programs)—the union’s only legal claim to a voice in the decisions is based on labor costs. The language and approach of the Board and the courts are directly contrary to the language, philosophy and approach taken by industry and labor in developing truly cooperative ventures. For example, Scott Paper and the Otis, in their jointness programs, assume an overriding union interest and ability to contribute to the company’s success in making such decisions.

Another example of the inclusiveness of jointness, is the approach of the Saturn Corporation in its dealings with the UAW. The Saturn project was developed by a team of high union and management officials known as “the Group of 99.”³⁰⁵ After investigating successful companies around the world, the group concluded there were “several commonalities in the successful companies” including the idea that “union and management were partners who

302. *Id.* at 893.

303. No. 6-CA-5524, 1991 WL 146795 (1991).

304. *Id.* at *9.

305. Richard G. Le Favre & Arnoldo C. Hex, *Managerial and Technological Innovators at Saturn Corp.*, MIT MGMT., Spring, 1992, at 8-9.

shared responsibility for ensuring the success of the enterprise.”³⁰⁶ The Group of 99 also concluded that “workers will support environments they help to create,” and that “the integration of technology and resources required a partnership of Saturn management people and UAW people on all levels of decision making.”³⁰⁷

As the experiences at the Otis and Scott mills and in the auto industry make clear, jointness involves unions in decisions that have traditionally been thought of as strictly management prerogatives. Relations with customers, decisions concerning new machinery, production methods and even product design, are all topics outside the scope of mandatory bargaining under the Act, but are routine matters of joint concern under jointness programs. Jointness also means giving the union greater access to information about the employer’s financial condition than the law mandates.

Currently, the establishment of jointness almost always requires management initiative because the law does not permit a union to bargain seriously about such items with a reluctant employer. If unions were given greater latitude about the subjects of bargaining, more such programs might well be instituted. The UPIU, for example, was interested in jointness before Scott and Otis suggested the establishment of such programs. While the new approach is to the credit of both companies, it is unfortunate that the turmoil and tragedy of the strikes of 1987-1988 were necessary to get them started. If the duty to bargain were less restrictive, Scott and the Otis might well have begun jointness earlier and with less employee suspicion. At present, jointness programs tend to come from management only when there is concern about labor relations or when management needs the union’s help in cutting costs and easing job protections. Programs inaugurated under such circumstances have aroused the suspicion of employees and made the programs less effective in many locations including some of the Scott mills in Maine.

The Act should be amended to remove from the permissive bargaining category efforts by unions to negotiate jointness programs and to make mandatory subjects previously deemed nonmandatory.³⁰⁸

c. *The Pool and the Board*

The most imaginative and original of the tactics UPIU employed during the IP strike was the pool system that joined the four striking locals together. The concept of the pool is that unless the company proposes terms that are

306. *Id.* at 9.

307. *Id.*

308. This would achieve the suggestion by Bluestone and Bluestone that quality of the product become “a ‘strikeable’ issue.” See BLUESTONE & BLUESTONE, *supra* note 6, at 227 (emphasis omitted). A similar result could be achieved by reinterpreting the NLRA. However, the mandatory-permissive distinction is by now so well settled that reinterpretation seems virtually impossible without congressional action.

acceptable to employees at all "pooled" locations, it will be faced with simultaneous strikes at those locations. Because multiplant employers will often try to maintain production during a strike by manning a striking plant with supervisors from other locations, simultaneous strikes put more economic pressure on employers than do single-plant strikes. Simultaneous strikes also make it more difficult for employers to make up for a striking plant's losses with profits from nonstriking plants. The pool system also affords employees emotional support from employees at other locations. Thus, the pool system gives the union both practical and psychological advantages. Successful use of the pool tactic might well give a union dealing with an employer with multiple operations a chance to correct the imbalance of bargaining power that might otherwise prevail.

However, the NLRB and the Sixth Circuit Court of Appeals have concluded that voting pools violate a union's duty to bargain in good faith. The rationale which the Board provided for this conclusion was that the pool system, by making ratification at one location turn on the approval of other units, constituted illegal insistence upon permissive subjects of bargaining.

By this decision, the Board extended the reach of the mandatory-permissive distinction beyond the subjects of collective bargaining to which the distinction had been limited previously to the question of how a union goes about ratifying an agreement. It is undisputed that the pool system did not affect which issues participating locals discussed or how they conducted their negotiations. Union leaders conducted the negotiations at the pool locations in the same manner as they had prior to the implementation of the pools.³⁰⁹ Neither UPIU nor its locals proposed coordinating common expiration dates or combining units.³¹⁰ The members of each local voted only on their own agreement. No unit's bargaining or voting addressed non-unit issues. Thus, the Board's extension of the mandatory-permissive construct to the concept of ratification denies local unions the ability to withhold ratification as a technique for avoiding whipsawing and increasing their own bargaining power.³¹¹

The Board's decision ignored precedent favoring the legality of pool voting. In the "Lynchburg Foundry case,"³¹² the NLRB held that a voting

309. Transcript of Hearing at 268, 289, 585, 1141, United Paperworkers Int'l Union Local 620, No. 6-CB-8207, 1992 WL 281693 (N.L.R.B. Sept. 30, 1992).

310. *Id.* at 207, 267, 497, 577, 639, 864. Nor did the union demand that identical offers be submitted to all pooled locations. *Id.* at 265, 639. In addition, at no time during the meeting in which the pool voting procedure was developed, did the IP Union Council members deliberate on merging locals, forming a single unit, or having as its objective the attainment of a master contract. *Id.* at 994.

311. "Whipsawing" has been used to describe a tactic used by employers to undermine union solidarity by splintering employee loyalties into groups and leveraging these groups against one another. See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 39 (1988). In this context, the term refers to efforts by multi-plant employers to obtain concessions from unions by first obtaining concessions from the unions' weakest locals.

312. United Steelworkers of America, 192 N.L.R.B. 773 (1971).

pool was legal because the employees in the different units had an adequate common interest in the negotiations of other units in the pool.³¹³ The IP pool employees had a similar commonality of interest. IP had pursued an aggressive, companywide bargaining strategy in which it demanded concessions and hired permanent replacements wherever unions went on strike to protest such concessions. Concessions gained in one unit were used as leverage to force concessions in others. Each employee, therefore, had an interest in developing a bargaining system that would permit units to resist concessions by applying pressure to IP without risking their jobs. In addition, employees had a common interest in threatening a widespread strike that would make the hiring of replacements less useful to the company. The nature of the common interest across units was eloquently expressed by Tom Pratt when he explained why he voted to strike in 1987:

If we had accepted this contract or not voted to strike and worked without one, they could have squeezed 1200 workers in the South until they relented to the contract which was offered them then . . . they could have squeezed us and they could have done that to every plant . . . so we in essence would have been cutting our own throat anyway. This company was out to squeeze the worker and they were going to do it systematically throughout the U.S. I have no doubt in my mind. I sat on both sides and I could see it coming.³¹⁴

In the IP pool voting case, the Board did not address the question of whether the employees had a common interest, and it did not even cite "the Lynchburg Foundry case." Rather, the Board merely explained the way the pool functioned and then announced that the pool "is a system that allows for refusal to sign an agreement on the basis of a nonmandatory subject of bargaining, i.e., subjects that do not concern the wages, hours, and working conditions of the unit covered by the agreement."³¹⁵

The opinion also fails to explain why use of the ratification process to increase the overall bargaining power of local units in a pool is not legitimated under *NLRB v. Insurance Agents*, in which the Supreme Court held that the Board has not been afforded flexibility "in picking and choosing which

313. *Id.* at 777-79. The opinion lists five general factual criteria upon which the ruling was based. While the specific combination of factors discussed is deemed adequate, there is no suggestion that this combination is exclusive. Indeed, Judge Leff suggests that the same result might be reached in other situations even though he specifically declined to delineate such situations. *Id.* at 779.

314. Interview with Tom Pratt, Former Striker, in Livermore Falls, Me. (July, 1990); see also *Hearings on H.R. 5—The Striker Replacement Bill: Hearings Before the Subcomm. on Labor-Management Relations of the House of Representatives Comm. on Education and Labor*, 102d Cong., 1st Sess. 157 (1991) (report submitted by Julius G. Getman).

315. *United Paperworkers Int'l Union Local 620*, No. 6-CB-8207, 1992 WL 281693, at *2 (N.L.R.B. Sept. 30, 1992).

economic devices of labor and management shall be branded as unlawful.”³¹⁶ The Board similarly ignores its own precedent, which stresses a union’s right to control its own ratification process.³¹⁷ Furthermore, the Board did not prohibit the technique used by the UPIU and many other unions of permitting the UPIU president to reject locally negotiated agreements for the sake of the entire organization.³¹⁸

The Board also did not distinguish the voting pool from the process of “coordinated bargaining” held to be legal in *General Electric Co.*³¹⁹ Coordinated bargaining involves employees from different units joining together to form a single negotiating committee. The Board held the practice to be legal over the dissent of one member who argued that “the inclusion of non[unit] representatives would ‘by necessity encumber and disrupt the bargaining process.’”³²⁰ In rejecting this argument, the Board majority stated: “We find no basis . . . for a rule of law which would impose a blanket prohibition on this kind of interunion cooperation, regardless of whether such collaboration can actually be shown to have obstructed negotiations to any substantial degree.”³²¹

By ignoring relevant precedent, the Board’s opinion in the pool voting case creates confusion about the current state of the law. In future cases raising similar issues of inter-unit cooperation, the Board will inevitably have to confront the contradictions inherent in its holdings. Unfortunately, based on

316. *NLRB v. Insurance Agents Nat’l Union*, 361 U.S. 477, 498 (1960) (requiring greater congressional authority for Board to find specific activity unlawful).

317. See, e.g., *United Steelworkers of America*, 192 N.L.R.B. 773, 776-77 (1971) (agreeing that precedent supports assertion that union ratifying procedures are matters solely for union concern); *North Country Motors*, 146 N.L.R.B. 671, 674 (1964) (stating that “[w]hether the one-vote ratification . . . was enough to satisfy the Union’s bylaw requirement . . . was a matter for the Union to decide.”)

318. The Administrative Law Judge’s opinion recognizes the legitimacy of this procedure. See *United Paperworkers Int’l Union Local 620*, No. 6-CB-8207, 1992 WL 281693, at *17-18 (N.L.R.B. Sept. 30, 1992) (attaching decision of Itkin, A.L.J., Dec. 17, 1991).

319. 173 N.L.R.B. 253, 255 (1968).

320. *Id.*

321. *Id.* at 256. The discussion of *General Electric Co.* by Stephen Goldberg in his oft-cited article on coordinated bargaining applies with equal force to pool voting:

[I]t was the judgement of all the unions . . . that the pursuit of individual, short-term advantage by one union on behalf of employees represented by it would, in the long run, be harmful to the long-term common interests of all GE unions and employees. It would hardly be appropriate for the Board to substitute its judgment for that of the employees’ chosen representative Primary responsibility for advancing employee economic interest . . . unquestionably rests with the union, not with the Labor Board.

The presence of representatives of other unions, by discouraging an individual settlement on terms favorable to [the unit] but not to the other unions, might also encourage economic confrontation, and such confrontation might be substantially broader than it would be if each union bargained individually. Indeed, it would seem clear that it was primarily to present GE with the specter of several strikes at the same time that the several unions dealing with GE decided to utilize a system of coordinated bargaining. The resulting threat to industrial peace, however, would not have justified the Board in proscribing the presence of the non-[unit] representatives. Industrial peace is not normally to be purchased by depriving a party of a valuable bargaining tactic.

Stephen B. Goldberg, *Coordinated Bargaining Tactics of Unions*, 54 CORNELL L. REV. 897, 900-01 (1969) (footnotes omitted).

past performance, it is likely that the Board will make more technical distinctions rather than explaining the analytic confusion thus created.³²²

The outcome of the voting pool case also suggests that the NLRB has learned very little about the realities of labor relations over the years. Members of the Board rarely have been experts, and the Board's opinions almost never refer to the vast body of industrial relations literature from which informed judgments might be made.³²³ The Board's pool voting opinion is typical of the Board's inward focus on its own doctrine. Neither the Board nor the Court of Appeals considered the context in which the pool was formed or the problems of unequal bargaining power and aggressive employer bargaining tactics to which it was meant to respond. They merely found that UPIU locals violated the duty to bargain because they chose to band together to avoid certain concessions, despite the fact that the locals would have happily signed agreements that did not include such concessions.

It is a sign of the law's favoritism for employers that the Board and the court found that IP—which initiated the struggle by seeking concessions at a time of high profit, continued the struggle through tough, "in-your-face" bargaining,³²⁴ and then permanently replaced all of the striking workers—had not violated the law, while the union had acted illegally by developing a voting pool for the sole purpose of avoiding concessions. UPIU developed the voting pool after the loss of strikes in 1987 and 1988, in response to the IP's insistence on further concessions. The union's president, Wayne Glenn, recognized that UPIU, unlike the UAW, could not win a traditional strike. He and other union leaders chose the pool arrangement as the least destructive alternative to strikes.

Given that the pool was a mild response by a weakened union to an aggressive company bargaining strategy, it is remarkable that the Board, the Administrative Law Judge and the 6th Circuit Court of Appeals all concluded that it was inconsistent with the union's duty to bargain in good faith.³²⁵ The

322. See Julius G. Getman & Stephen B. Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681, 683 (1972) (noting that "the Board constantly rationalizes its rules in terms of the policies, language, and legislative history of the NLRA" without testing the assumptions upon which the rules rest).

323. See *id.* at 682-83.

324. Employers who bargain in this manner attempt to demonstrate their superiority over labor by humiliating labor unions in the process of collective bargaining.

325. The opinions of the administrative law judge and the court illustrate the problems with the enforcement of the NLRA. International Paper came to the Board rather than making the bargaining concessions that were necessary to avoid a possible strike. It is perhaps understandable that the company would seek to use the Board to avoid negotiating with the unions, but it is inappropriate for the Board (and the courts) to be used in this fashion.

In addition, the legal standard employed by the administrative law judge was vague. He stated that the voting pool "impermissibly burdens and delays the collective bargaining process," United Paperworkers Int'l Union Local 620, No. 6-CB-8207, 1992 WL 281693, at *18 (N.L.R.B. Sept. 30, 1992) (attaching decision of Itkin, A.L.J., Dec. 17, 1991), and in setting forth his conclusions of law, he found that the "pooled voting contract ratification procedure . . . inherently delays the completion of the collective bargaining process." *Id.* at *22. The court of appeals agreed.

pool permitted the union to apply economic pressure against IP without requiring a strike or a job action in which employees' jobs would have been at stake. UPIU, aware that the first pool failed because IP was able to separate key locals from those in the pool, made an effort to develop the new pool before it was necessary to come to the aid of a striking local. It also attempted to explain to the employees that different locals had common interests. Union officials marketed the pool as a grass-roots effort to coordinate union bargaining pressure. Due to the Board's invalidation of pool voting, however, the pool has been replaced by a system in which coordination is provided not locally, but by UPIU's Department of Special Projects, thereby replacing a democratically-oriented approach with a more hierarchical one.³²⁶

The Administrative Law Judge's opinion, like that of the Board, failed to take into account the reality of the bargaining relationship between the parties. The opinion, replete with long quotes from IP Director of Employee Relations James Gilliland, paints a picture of a successful collective bargaining relationship being replaced by one that is confusing, disorderly, and contains the threat of massive strikes.³²⁷ The Administrative Law Judge's conclusion

For this conclusion to be consistent with the law and the general policies discussed above, the terms "inherently" and "impermissibly" must provide a standard that distinguishes the impact of pooled voting from other, legally acceptable, tough bargaining tactics. When addressing "harassing tactics in light of the duty to bargain" in *Insurance Agents*, the Supreme Court noted that "the Board's approach . . . unless it can be defended, in terms of § 8(b)(3), as resting on some unique character of the union tactics involved here—must be taken as proceeding from an erroneous view of collective bargaining." 361 U.S. at 488.

As the Board itself noted, the very concept of tough bargaining entails refusing to make desired concessions and thereby risking delay. Strikes and lockouts themselves are likely to cause further delay in the process as the parties devote themselves to winning the economic struggle rather than to the relatively calm "give and take" of the bargaining table. It is customary for a strike to involve a cessation of negotiations for a prolonged period of time. If the employer further exercises its rights to apply economic pressure and to hire permanent replacement workers, these acts are likely to add considerable delay to the process, as well. Such acts increase tensions, create suspicion among employees that the employer is seeking to destroy the union, and add a new emotional and divisive issue to the negotiations regarding the allocation of jobs between replacement workers and strikers after the strike is settled. It is not surprising that Cynthia Gramm's study concluded that the hiring of strike replacements lengthened the period of negotiations. See Cynthia Gramm, *Employer Decisions to Operate During Strikes: Consequences and Policy Implications*, in *EMPLOYEE RIGHTS IN A CHANGING ECONOMY* 33, 36 (William Spriggs et al. eds., 1991).

Although the pool approach is relatively novel, the *Insurance Agents* opinion makes clear that forms of bargaining pressure may not be held illegal because they are unusual. The Court specifically rejected the Board's attempt to distinguish "traditional or normal" tactics from others, stating "we fail to see the relevance of whether the practice in question is time-honored." 361 U.S. at 495-96.

326. The law has pushed the union in exactly the wrong direction, from a system where authority rested with the locals and their members, to one where coordinating authority resides in the staff of the International Union. In its article on the pool, the June 1992 edition of *Labor Notes* quotes a local leader as arguing that the loss of the pool did serious harm to those seeking to foster democratic control of the union: "The pool movement called for union democracy, grass roots activity, and union militancy . . . This concerned [UPIU President Wayne] Glenn and the other officers." Phill Kwik, *Bargaining Pool Collapses at International Paper; 'The Fight Isn't Over,' Activists Declare*, *LABOR NOTES*, June 1992, at 1, 14.

327. See, e.g., *United Paperworkers Int'l Union Local 620*, No. 6-CB-8207, 1992 WL 281693, at *9 (N.L.R.B. Sept. 30, 1992) (attaching decision of Itkin, A.L.J., Dec. 17, 1991) ("In a pool location, . . . once the offer has been put on the table . . . [i]n some situations we don't know whether the contract was ratified or rejected. In some situations we are told that the contract was ratified but the contract was not executed. . . . [W]hat happens in any of those situations is that the bargaining process comes to a screeching halt . . ."). The administrative law judge's concern with the pool seems to echo that of IP Vice President

that the traditional collective bargaining process "works well"³²⁸ is far removed from the experience of the union and the employees it represents.

It is perverse to hold that bargaining pressure that involves neither lost production, lost wages, lost jobs, nor the destruction of community is nevertheless unlawful because of some assumed harm to the process of negotiation. Such a conclusion gives greater protection to the bargaining process than to the employees themselves.

The process does not provide goods or services. It does not have a family to feed or children to educate. It does not feel the pain of lost wages or the humiliation of losing one's job to a replacement. The decision in the pool case illustrates much of what is wrong with current enforcement of the NLRA. The Board's opinions are technical, one-sided, and ignorant of the realities of labor relations. At best, these opinions are indifferent to the interests of the employees for whom the Act was written. Such problems have prevented the Act from having its intended effect on labor relations. The NLRA has become increasingly unimportant to the existing industrial relations system in the United States, as has the system of collective bargaining that the Act was meant to foster. Yet, without collective bargaining there can be no jointness in any meaningful sense. This problem cannot be resolved in a single article. But the need for comprehensive labor law reform and a systematic study of the Board's performance is clear.

d. *The Division Between Labor and Management*

Current labor law also hinders cooperative labor-management relations by excluding employees who perform what would traditionally be called "managerial" or "supervisory" functions from collective bargaining protection under the NLRA. This problem has two dimensions.

First, the NLRA draws a fairly sharp distinction between employees who are covered by the Act and have the right to unionize and to bargain collectively, and supervisors, who do not. The definition of supervisor contained in section 2(11) of the Act is quite broad, and includes "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 responsibility to direct them, or to adjust their grievances, or effectively to recommend such action . . . [by] the use of independent

Gilliland, based on the notion that the pool gives the union an unfair bargaining advantage. This is an impermissible concern under the Supreme Court's *Insurance Agents* decision and an astonishing one for a company that has aggressively pursued concessions, replaced employees, disrupted communities, and defeated the union in a series of bitter strikes growing out of the company's demands for concessions at a time of record profits.

328. *Id.* at *18.

judgment.”³²⁹ This definition presents two subsidiary problems. First, because of the breadth of this definition, it is not uncommon for employees to be declared supervisors and thus outside the protection of the Act, even though their basic identification is with other employees. This could rob jointness initiatives of the input of relatively senior employees who might have a great deal to contribute to labor-management cooperation. Second, as indicated by the Otis and the Scott jointness programs, low-level managers are most likely to feel alienated by jointness programs, which create new ways of doing things that may greatly reduce or eliminate the managers’ traditional roles. Both the management and union officials at Scott’s Mobile facility agree that the interests of low-level management were not properly recognized. Had these managers been included in the union or represented by a union of their own, it is likely that their concerns and interests would have been better taken into account. At the moment, however, both employers and unions run a legal risk if supervisors become active in union affairs.³³⁰

If low-level supervisors were permitted to form or be included in unions that were protected by the Act, as is frequently true of public employee unions, the process of establishing jointness programs would likely be fairer to all employees and the programs themselves would benefit from supervisors’ cooperation rather than suffer under their opposition.

Second, the definition of supervisor, though broad, does not necessarily include everyone in management. Because it focuses on relations between employees, the definition does not include those whose role involves planning, articulating, or carrying out crucial company decisions, but whose work does not include managing or directing other employees. In *Ford Motor Company*,³³¹ the Board defined this group as those who “formulate, determine, and effectuate management policies.”³³² In *NLRB v. Bell Aerospace Co.*,³³³ the Supreme Court adopted the Board’s definition and concluded that such employees, like supervisors, are excluded from the Act’s protection.³³⁴ Most remarkably, in *NLRB v. Yeshiva University*,³³⁵ the Supreme Court held that in the academic environment the traditional role of faculty in academic governance made faculty members at Yeshiva, and by implication at most other universities, managers who were not entitled to choose representation under the Act.³³⁶ The faculty powers that the Court

329. 29 U.S.C. § 152(11).

330. In particular, both parties risk that the Board will find a violation of Section 8(a) (2) of the NLRA as a result of supervisor involvement, in which case the employer will be ordered to stop recognizing the union. See GETMAN & POGREBIN, *supra* note 2, at 307-309 (describing the breadth and consequences of section 8(a)(2)’s prohibition on illegal employer support for unions).

331. 66 N.L.R.B. 1317 (1946).

332. *Id.* at 1322.

333. 416 U.S. 267 (1974).

334. *Id.* at 288-90.

335. 444 U.S. 672 (1980).

336. *Id.* at 686-90.

noted in *Yeshiva*—taking part in hiring, formulating policy and advising with respect to expenditures—are common attributes of jointness programs.

If applied to the programs at Scott, Otis, or Saturn, the reasoning used in *Yeshiva* might make all or some of the union's members managers and, hence, outside the Act's protection. As the Pennsylvania Labor Relations Board stated when it declined to apply the *Yeshiva* decision to the University of Pittsburgh:

We must consider this case in light of the increased trend toward employee involvement in matters which have been historically regarded exclusively within the control of management. Increasingly, private and public employers are involving their employees in matters which have historically been regarded as beyond the participation of employees in the normal course of performance of their duties. Instances where employees are involved in providing suggestions to management concerning matters normally regarded as managerial and where management does not generally follow the recommendations pose grave danger for an overly broad exclusion of employees as managerial.³³⁷

Not only does *Yeshiva* pose the problem of employees bargaining their way out of the Act's protection through the establishment of jointness programs, it also deprives faculty unions of the opportunity to take part in a movement in which they have historically been in the vanguard. The decision has the effect of cutting off from the protection of the Act one of the few areas in American life where shared authority in basic decisionmaking was already a tradition³³⁸—an area that was in the process of being expanded through negotiation between academic administrators and faculty unions.³³⁹ The decision in *Yeshiva* also exacerbates the separation of low-level managerial employees from rank-and-file employees, a separation that does neither the parties nor the concept of jointness any good. Thus, the Act should be amended to provide that participation in programs of joint governance do not exclude employees from the Act's coverage. The definition of employee should also be expanded to include low-level supervisors.

D. *The Need for Further Study*

The paper industry experience described here raises a variety of fundamental questions that have not yet been answered. For example, should the law seek to encourage labor-management cooperation more directly,

337. University of Pittsburgh, 21 Pa. Lab. Rel. Bd. ¶ 21203 (1990).

338. See JULIUS G. GETMAN, IN THE COMPANY OF SCHOLARS 91-104 (1992).

339. See David M. Rabban, *Is Unionization Compatible With Professionalism*, 45 INDUS. & LAB. REL. REV. 97 (1991).

perhaps by mandating the European system of works councils? Is the U.S. reliance on the strike outmoded and, if so, should some other form of dispute resolution, such as interest arbitration, be adopted?

The strike at Jay certainly illustrates the long-lasting destructive potential of strikes, as well as the difficulty an employer faces in negotiating with a union that feels compelled to utilize this method of conflict resolution. One of the reasons for the failure of the strike at Jay was the limited help the strikers received from other unions. Although the Jay strikers were, for a time, the heroes of the labor movement, at crucial points, other local unions either refused to join the pool or rejected contracts to support them.

A number of legal doctrines have contributed to the fragmentation of the U.S. labor movement. These include the Secondary Boycott Laws³⁴⁰ and the rules supporting individual unit bargaining.³⁴¹ The desirability of such legal rules and doctrines should be reconsidered. In retrospect, the assumptions upon which the NLRA was based all seem to be highly questionable, including the Act's commitment to exclusive and adversarial collective bargaining, its rigid separation of labor and management, its labor amendments restricting union economic pressure, its reliance on the Labor Board's special role, and its assumption that the courts would defer to the Board. In addition, the drafters of the NLRA did not foresee the current globally interdependent economy. In short, the time to consider fundamental change is at hand. Effective change, however, like effective jointness, requires cooperation and mutual understanding. The needs of unions, management and customers must be considered. Scholars, together with labor, management, and government officials should try to develop a broad consensus concerning the type of change required. A broadly inclusive, nonpartisan commission to study existing labor law and suggest fundamental change should be established.³⁴²

340. A "secondary boycott" generally refers to a strike or other pressure which is applied to a neutral employer in order to pressure the primary employer with which the union has a dispute. *See* 29 U.S.C. § 158(b)(4) (making it an unfair labor practice for a union to engage in, encourage, or coerce employees to refuse, in the course of their employment, to handle or work on another employer's goods or services); 29 U.S.C. § 158(e) (making it an unfair labor practice for any labor organization and employer to agree that the employer will refrain from dealing in any of the products of or doing any business with any other employer).

341. *See, e.g.*, 29 U.S.C. § 159(b) (instructing the NLRB to determine the employee unit which is appropriate for collective bargaining in order to assure employees the fullest freedom in negotiating with employers). This section has been interpreted to prevent one collective bargaining party from insisting that negotiations with the other party must include other units. *See, e.g.*, *General Drivers and Helpers Local 554 v. Young & Hay Transp. Co.*, 522 F.2d 562, 566 (8th Cir. 1975).

342. It is not clear to us whether this should be an official commission appointed by the Secretary of Labor or whether the study should be undertaken by a private commission funded by private resources.