

Seminar:

EMPLOYEE RIGHTS

IN A CHANGING ECONOMY

The Issue of Replacement Workers

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- **CHARLES CRAYPO**
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- **JULIUS GETMAN**
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- **RAY MARSHALL**
- **LAWRENCE MISHEL**
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EXECUTIVE SUMMARY

The American system of free collective bargaining—which has served the economy so well for over half a century—is threatened by the expanding management practice of *permanently* replacing workers who go out on strike. If allowed to continue, this practice will produce negative social and economic effects for America.

The National Labor Relations Act explicitly gives employees the right to strike; it does not explicitly or implicitly give employers the right to permanently replace striking workers. But as a result of some tangential language (“dicta”) in a **1938** ruling that actually reinstated some striking workers (National *Labor Relations Board v. Mackay Radio and Telegraph Co.*), a legal argument has been constructed—reinforced by recent Supreme Court rulings—that permits employers to replace striking workers permanently, rather than just for the duration of the strike. This effectively punishes employees for exercising their rights within the law. The courts have thus abrogated legislative authority

Both the theory and practice of modern labor relations recognizes that the threat of a work stoppage is the motivating force for both employer and employee to come to an agreement. It is also the reason that the overwhelming majority of labor-management disputes do not reach that stage. But the threat has little meaning if both employer and employee know that the latter can be fired for striking. Thus, the right to get one’s job back after a strike is essential to collective bargaining. Without that right, the negotiating power of management becomes so strong that it precludes serious negotiation. The result—as we experienced in the earlier years of American industrialization—is that labor-management tension erupts into class conflict and violence, precisely the conditions that the Railway Labor Act and the National Labor Relations Act were designed to eliminate.

Among the economic consequences of permitting employers to fire striking workers is that it will encourage American business and government to respond to the new international competitive environment by attempting to lower wages and health benefits (almost four out of five strikes since 1980 were over health benefits) and safety and other workplace standards, rather than by raising innovation and increasing productivity and quality

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bargaining.***

Firms that use permanent replacements during strikes do not achieve higher rates of production than firms using temporary replacements or non-bargaining personnel.

Specific findings of the Conference participants included:

* Increased management hostility to collective bargaining, inspired by Ronald Reagan's firing of striking airtraffic controllers and recent court rulings on replacement workers, has led to a doubling of unfair labor practice cases before the National Labor Relations Board and an increase in the average time required to resolve them from 500 to 700 days.

* Management decisions to use permanent replacements often backfire, endangering the firm by depriving it of experienced workers and sometimes dragging the company into bankruptcy and causing financial loss for creditors and suppliers, their workers and dependents, and the nation (e.g., the recent cases of Eastern Airlines, Continental Airlines, and Greyhound).

* Where permanent replacements have been used, strikes have been longer.

* Firms that use permanent replacements during strikes do not achieve higher rates of production than firms using temporary replacements or non-bargaining personnel.

* Many claims that replacements can be hired only if they are assured of permanent status have been unfounded.

* Permitting striking employees to be rehired as vacancies occur slightly mitigates the problems created by the Mackay decision; the original workers may wait eight years or more to be offered jobs.

* The Mackay decision encourages employers to intimidate workers in both collective bargaining and union organizing situations by threatening permanent replacement if the conflict is not settled on the employers terms.

* Permanently replacing strikers promotes the spread of industrial conflict to third parties, as in "corporate campaigns" that exert pressure on the firms' investors, creditors, customers, and suppliers.

* With the exception of South Africa, no other Western industrialized nation allows employers to permanently replace striking workers. Our number one trading partner, Canada, adopted the U.S. National Labor Relations Act as its collective bargaining model, but explicitly rejected the *Mackay* dicta as inconsistent with basic employee rights in a free collective bargaining system.

PREFACE

Something is wrong in the relationship between workers and managers in America, and it is helping to weaken our national competitiveness.

A decade ago, when it became apparent that America's competitive strength in the world was slipping, the first to be blamed was the American worker. It was said that unions were too strong and that American workers were lazy, overpaid, and not as concerned with quality as were Japanese or European workers. That argument lost credibility with the awareness that America, with the *lowest* rate of unionization of any its major competitors, has had the *largest* trade deficits. Moreover, there are a host of specific cases where unionized American workers working for foreign managers are producing at above the productivity rates of equivalent foreign workers (Karier, 1990).

Some of the blame then shifted to American management, who were said to be lazy, greedy and unconcerned with the long term health of their firms. But here again, the evidence is contradictory. For example, American-managed multinational corporations, though often operating in heavily unionized foreign countries, continue to hold a steady share of world exports (Lipsev and Kravis, 1987).

These facts have raised the possibility that the problem may lie not so much in the personal characteristics of American workers or managers, but in the way in which their relationship is organized under American laws and practices.

There is a growing perception that in this highly competitive world, a key factor in success is the ability of labor and management to cooperate. Study after study has shown that where workers feel responsibility for the product and share a concern with the long-term survival of the firm, productivity and innovation have the best chance to flourish. Where workers are alienated and the workplace is pervaded with an "us vs. them" atmosphere, competitiveness will suffer. Great Britain is the classic example of what labor management warfare can do to national productivity.

In the last ten years, the United States appears to have started down the same path; a profound shift has occurred in the climate of labor-management relations. One of the most important causes was the breaking of the air traffic controllers union by Ronald Reagan in 1981. This event signalled that employers could rip up the informal post-World War II social contract under

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which management had generally honored the right of striking employees to return to their jobs when the strike is over. The growing management practice of permanently replacing striking workers results in punishing workers with loss of their jobs for exercising what most Americans believe is a fundamental civil right. The right to strike has become merely the right to *quit*. Not only does this dramatically tilt the labor-management negotiating table against workers, it undercuts the system of protected collective bargaining that brought U.S. labor-management relations out of the industrial dark ages of violence and class warfare. The destructive consequences of the increase in recent labor-management tension in the airline, bus, newspaper, and other industries could be a taste of things to come.

On November 1–2, 1990, the Economic Policy Institute sponsored a conference of academic experts to explore both the labor-management implications and the larger economic consequences of the increased use of permanent replacements. This volume is an edited transcript of that conference. It provides both the basic economic and legal information on the growing use of permanent replacement workers and a thoughtful discussion of its economic consequences. Taken as a whole, the report suggests that the use of permanent replacement workers and other such efforts to undercut the economic security of American workers in order to reduce labor costs will be counterproductive both for the firm and for the nation. The inevitable result will be a further weakening of the mutual trust between employer and employee, which is essential for the success of American business in an increasingly competitive global economy. As former Secretary of Labor Ray Marshall pointed out at the EPI conference, there cannot be effective cooperation and a sharing of responsibility between people or groups whose powers are vastly unequal.

Anyone concerned with the issues of democracy and fair play in the workplace and their consequences for national competitiveness should read the following pages carefully

Jeff Faux

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CONFERENCE OVERVIEW

Introduction

In recent years, the practice of permanently replacing-in effect, firing-workers who go out on strike has grown to the point where it is poisoning labor-management relations in America. This comes just at a time when labor-management cooperation in the workplace is proving essential to boost the productivity and competitiveness of the American economy.

Permanently replacing workers on strike has become a national problem because the practice undermines the American collective bargaining system by removing its cornerstone—the legally-protected right to strike. A moments reflection will tell you that if an employer can deny a worker the right to his or her job when the strike is over, the right to strike does not exist. The worker is left only with the “right” to quit.

The following discussion of the implications of denying legally striking workers their jobs back is based on the Economic Policy Institute Conference on Industrial Relations Practices and the Changing Economy on November 1 and 2, 1990.

*A moment's reflection will tell you that if an employer can deny a **worker** the right to his or her job **when the strike is over**, the right to strike does not exist. **The worker** is left only with the “right” to quit.*

Section 7 of the National Labor Relations Act states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. .

Section 2 (3) declares:

The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

Section 13 states:

Nothing in this Act shall be construed so as either to interfere with or impede or diminish in any way the right to strike..

*Uncontrolled strikes and industrial strife were **the** norm before the passage of America's basic labor laws.*

Strikes are **an Integral Part of Free Collective Bargaining**

"It **is** hereby declared to be **the** policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining. . ." **So** begins the National Labor Relations Act (NLRA, also known as the Wagner Act), which, along with the Railway Labor Act, spells out the basic rights of employees in the American system of collective bargaining. At the foundation of these rights is the right to strike. Indeed, the right to strike cannot be separated from the right to collective bargaining itself. The right to strike is the mechanism that resolves conflict. Strikes over economic issues impose costs on *both* sides, forcing each to strive for compromise.

It is important to keep in mind that outside the framework of legislatively protected collective bargaining, the free market for labor yielded destructive labor-management relations. Uncontrolled strikes and industrial strife were the norm before the passage of America's basic labor laws.

Animosity in those struggles ran so high that the term "scab," used to describe replacement workers, took on a pejorative meaning. Congress passed the National Labor Relations Act (**1935**) and its sister law, the Railway Labor Act (**1926**) (hereafter referred to as the Acts), in large measure to end the violent, uncontrolled, and economically crippling labor-management conflicts that pervaded the American economy

Prior to the passage of federal collective bargaining legislation, state governments often attempted to regulate labor relations through arbitration, but with stringent restrictions on the right to strike. The human suffering and social divisiveness of the period were a bleak chapter in American history, symbolized by infamous battles at such work sites as the Carnegie Steel Mills in Homestead, Pennsylvania in 1892 and the railroad yards of Chicago, Illinois in 1894. The use of police, state militia, and private armies to enforce court injunction orders to end strikes or stop violence over the use of replacement workers required a legislative response. Twenty-one states passed laws to arbitrate labor disputes before 1904. These included Pennsylvania in 1883 and 1883; Massachusetts, New York, Iowa, and Kansas all in 1886; Louisiana in 1894; and Illinois and Texas in 1895. Labor-management issues, however, proved too complex for state arbitration boards to handle effectively. After several decades of failure, the government arbitration model of labor relations was rejected in the collective bargaining Acts of 1926 and 1935.

Before the Acts, strikes were more violent because at their core—regardless of the economic issues at hand—was the question: Should workers be able to bargain collectively with management? On the issue of the employees' right to organize and bargain collectively with their employer there *is* no compromise position: either they have such a right or they do not. The refusal of management to recognize this right set up conflicts that could not be resolved through negotiations. The Acts brought collective action within the law by establishing the right to strike. This freed workers to organize by making management reprisals illegal. Under the Acts, work stoppages are over *economic* issues, not over the right of employees to bargain collectively.

The Supreme Court clearly expressed this rationale in its decision in the *Insurance Agents* case:

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 Wagner and Taft-Hartley Act have recognized ... [G]ood-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party inclined to agree on one's terms—exist side by side (*NLRB v. Insurance Agents International Union*, 361 U.S. 477 (1960)).

Along this line, Paul Weiler, professor at the Harvard Law School and a Conference participant, observed that the right to strike is in large part what makes the system of free collective bargaining superior to government arbitration. Weiler explains:

The spokesmen for the parties at the bargaining table know more than a remote government agency does about the needs and priorities of their constituents, and the prospect of a strike forces these negotiators to devise imaginative trade-offs when their interests conflict (Weiler, 1984).

The result is that under our system of legally sanctioned collective bargaining, strikes and lockouts are rare because they are more costly to workers and employers than compromise. The overwhelming majority of collective bargaining agreements are reached without a work stoppage. Since 1981, the Bureau of Labor Statistics (BLS) has kept records only on more significant strikes—those involving 1,000 or more workers. In 1988, there were only 40 such strikes in the entire nation. In his book, *What Do Unions Do?* (Freeman and Medoff, 1984), Conference participant Richard Freeman reports that during the 1970s—U.S. Department of Labor strike statistics were more complete than

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they were in the 1980s—just 0.18 percent of total working time was lost to strikes. The alternatives to the protected right to strike-anarchy or government-imposed collective agreements-would undoubtedly be more costly to our economy.

*The result is that under our system of legally sanctioned **collective bargaining**, strikes and lockouts are rare because they are more costly to **workers** and employers than compromise.*

The Mackay Decision

By the end of World War II, the basic wisdom of granting employees the right to choose collective bargaining as the fundamental framework for labor-management relations was well established. And for the most part, the right to strike—that is, the right of a worker to return to his or her job after the strike is over—was accepted by management. However, in a somewhat bizarre legal episode, the seed of the destruction of that right was sown in some tangential language included in a **1938** Supreme Court ruling, *NLRB v. Mackay Radio & Telegraph Co.* Although the decision itself was otherwise consistent with the Wagner Act, the language of a Court “aside” has been used to justify the permanent replacement of striking workers.

The use of *Mackay* for this purpose appears odd because the strike in question did not involve replacement workers, but the use of reassigned non-bargaining unit members.

The headquarters of the Mackay Radio Company were in San Francisco. Its union went on strike over a national contract. In response, Mackay Radio moved eleven nonstriking workers from their Los Angeles and Chicago offices to do the work of the striking employees in San Francisco. The company assured these transferred workers that they could choose to remain in San Francisco after the strike ended.

The strike lasted three days. When it was over, the striking employees requested reinstatement. Of the eleven relocated workers, five chose to remain at their new location. So, the company replaced five striking employees with those transferred employees. The union filed a complaint with the National Labor Relations Board (NLRB), contending that the five replaced strikers were being discriminated against because they were key union activists.

On that specific issue, the Supreme Court *upheld* a NLRB decision that Mackay Radio had unfairly discriminated against the employees because of their union activity. The Court ruled that under section 2(3) of the Act, the striking workers maintained their status as employees until they obtained “regular and substantially equivalent employment” (304 U.S. 333 (1938) at **345**). Despite those two important rulings, on its own initiative the Court further asserted as *dicta* (expressions in court opinion that go beyond the facts before the court and therefore are individual views of the author of the opinion and generally do not set precedents):

Although the decision itself was otherwise consistent with the Wagner Act, the language of a Court “aside” has been used to justify tie permanent replacement of striking workers.

The language in Mackay asserting that employers have a right to fire striking employees by permanently replacing them is clearly not consistent with the NLRA guarantee of the right to strike.

... [I]t does not follow that an employer, guilty of no act denounced by the statute, has lost 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 (304 U.S. 333 (1938) at 345).

This afterthought--having no direct bearing in the decision--is now used as precedent to justify permanently replacing striking workers. Yet the language in *Mackay* asserting that employers have a right to fire striking employees by permanently replacing them is clearly not consistent with the NLRA guarantee of the right to strike.

Neither is the economic reasoning implicit in *Mackay* consistent with the realities of employment and production. The Courts decision links the ability of a firm to operate during strikes to the use of *permanent* replacements. Both logic and empirical data indicate that there is no such linkage. The logic is clear: without *Mackay*, employers could still hire *temporary* replacements during a strike. Analysis of actual firm behavior shows that temporary replacements are sufficient. In her Conference presentation, Cynthia Gramm, a professor at the University of Alabama-Huntsville, shows that the vast majority of employers--from a low estimate of two out of three to a high of almost six out of seven--operate during strikes without using permanent replacements. Most firms--between a low of two out of three firms and a high of nine out of ten--react to a strike by reassigning struck work to non-bargaining unit personnel. More importantly, employers using permanent replacements do not operate at higher capacity levels than firms using other strategies to operate during strikes, which indicates that there is no direct efficiency advantage in using permanent replacement workers.

Further, the contention by some companies that replacements could be hired only if they are offered permanent status does not appear to be based on reality. Julius Getman, a law professor at the University of Texas-Austin, gave an example in his Conference presentation. The International Paper Company publicly asserted that it could only recruit replacements for its struck plant in Jay, Maine if they were offered permanent status. Yet, the contracts signed by the replacement workers specifically stated that they had only *temporary* status, and that they may have been replaced if **the** company agreed to sign a contract with the union. Thus, the company was able to use *Mackay* to sever responsibilities to

either striking or replacement workers. It appropriated to itself the option to permanently replace its striking workforce without incurring any obligation to the replacement workers should it later choose to return the striking employees' jobs to them.

The contention by some companies that replacements could be hired only if they are offered permanent status does not appear to be based on reality.

Observers contemporary to Mackay can be excused for not being immediately concerned with the dicta in Mackay, which contradicted the very Act upheld by the actual decision.

Why Overturn Mackay Now?

Mackay can only be understood in its historical context. When the case went to the lower courts, the NLRA itself was still a new idea. Indeed, the Supreme Court had not yet ruled on its constitutionality. Earlier decisions generally ruled federal labor laws unconstitutional. For instance, in 1908, in *Adair v. U.S.* (208 U.S. 161) the Supreme Court struck down Section 10 of the Erdman Act that had made it illegal for railroad companies to discharge an employee for belonging to a union or to refuse employment based on past union membership. Originally ruling on *Mackay* in 1936, the lower courts followed the earlier court decisions and at first declared the NLRA unconstitutional. The case was remanded to the lower courts after the Supreme Court narrowly ruled five to four in *NLRB v. Jones and Laughlin Steel* (301 U.S. 1) in 1937 that the NLRA was constitutional, which was the much larger political and legal issue.

Once the NLRA framework had been legally upheld, the next important issue was how the Act would be interpreted. In the new *Mackay* trial, the lower courts ruled for the firm, finding that striking workers were no longer employees protected by the Act. Clearly, this was an interpretation of the Act that would weaken its intent. The Supreme Court's decision on the specific issue of the case--discriminatory discharge for union activity--was a victory for the union. Also a victory was the Court's finding that the employment relationship was *not* severed by the act of striking so that striking workers were protected by the NLRA. The impact of this decision was dramatic; it rapidly ushered in the modern system of collective bargaining. Thus, observers contemporary to *Mackay* can be excused for not being immediately concerned with the *dicta* in *Mackay*, which contradicted the very Act upheld by the actual decision.

The NLRA explicitly gives employees the right to strike without losing their jobs; it does not give employers the right to replace striking workers. Yet, the *Mackay* dicta implicitly takes away the right of employees and creates an explicit right for the employers where none existed before.

Free collective bargaining serves America, its companies, and its working families well. The framework created by the NLRA had immediate benefits when World War II increased the need for labor-management cooperation. The government was able to encourage workers and managers to ensure that labor unrest would not interfere with the nation's war efforts.

The free collective bargaining system also served the wider interests of American business, having created a free independent labor movement that identified with the growth and prosperity of private enterprise. Whether or not a firm was unionized, the right of employees to choose collective bargaining set limits on the inevitably superior market power of employers. Post-World War II history shows that it was the prospect of unionization that motivated the nonunion employer to maintain wages, healthy working conditions, and stable labor relations. It must be remembered that the behavior of a firm that is nonunion in a nation that supports the right of employees to choose collective bargaining will not be the same as the behavior of a firm in a country that effectively extinguishes that right.

The hidden danger to labor-management relations became clear in **1981**, when historic support for the basic principles of the right of the employee to choose collective bargaining was broken by the Reagan Administration's decision to permanently replace 12,000 striking air traffic controllers. Although, as federal employees, the controllers were not protected by either the NLRA or the RLA, the Administration sent a signal that the Federal Government could end a collective bargaining relationship.

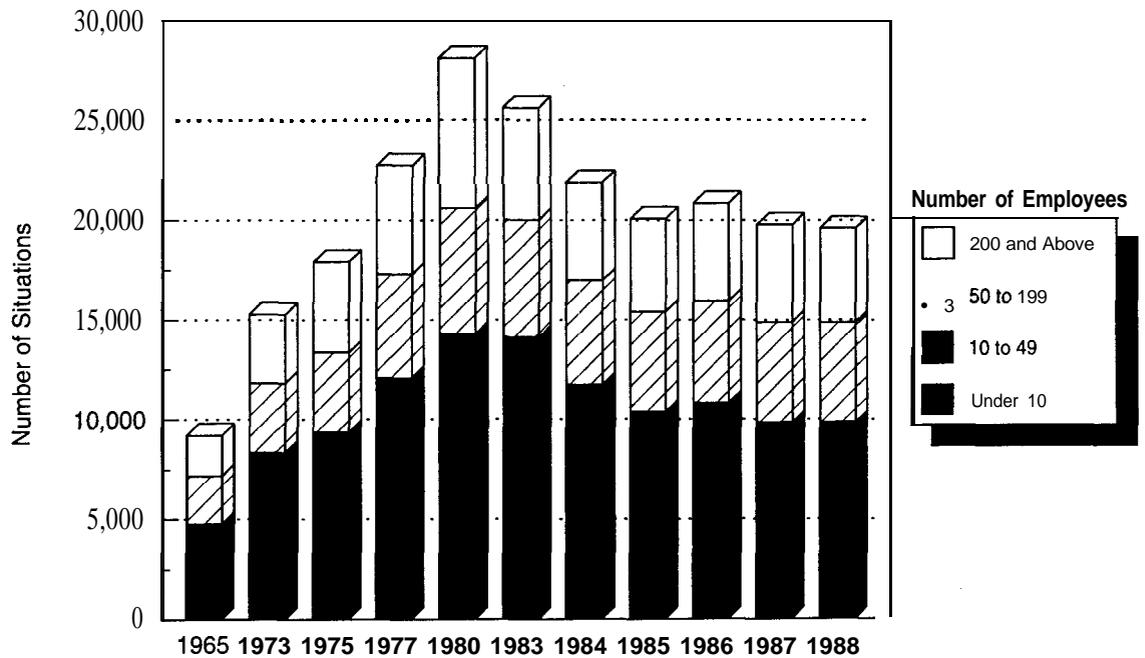
The Supreme Court also sent a message of a shifting bias toward management. Two 1980s Supreme Court cases extended employer power similar to *Mackay*. In *TWA v. ZFFA* (1989), the Court extended the Mackay doctrine to cover crossover workers (strikers who return to work before a dispute is settled) covered under the Railway Labor Act. In *Belknap v. Hale* (1983), the **Court** gave employers the option of keeping strike replacement workers or retaining the striking workers; but, if the company makes replacement workers an offer as permanent replacements, it can be sued for letting the replacements go to allow reinstatement of the striking workers. Companies can now say that they have a legal obligation to retain the replacement workers rather than return the jobs to their striking employees.

The behavior of a firm that is nonunion in a nation that supports the right of employees to choose collective bargaining will not be the same as the behavior of a firm in a country that effectively extinguishes that right.

Management groups hostile to unions have seized the opportunity created by these new limits on labor's ability to conduct strikes. The 1980s saw an explosion of attacks on the right of employees to bargain collectively.

The result has been an ominous rise in labor-management friction since the end of the 1970s. The number of unfair labor practice charges has more than doubled, from below 10,000 each year in the 1960s, to above 20,000 each year in the 1980s (see Figure i). The percentage and number of valid cases has

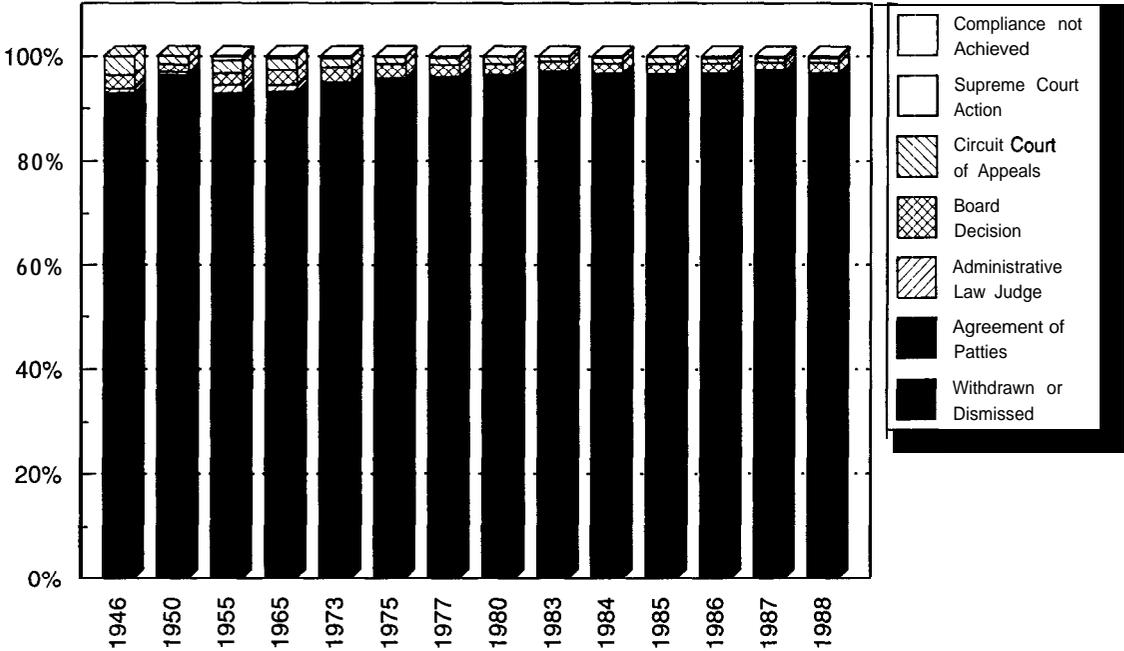
Figure i
Number of Section 8(a) Unfair Labor Practice Situations, by
Number of Employees in Establishments, 1965 to 1988



Source: National Labor Relations Board.

risen significantly. From 1946 to 1977, roughly 70 percent of cases were withdrawn or dismissed. For most of the 1980s, only 60 percent were so treated (see Figure ii). The number of workers who win reinstatement to remedy being fired by unfair labor practices has gone from a few thousand in the 1950s to several thousand in the 1970s and 1980s; in 1980 and 1985, workers so reinstated numbered in the tens of thousands (see Figure iii).

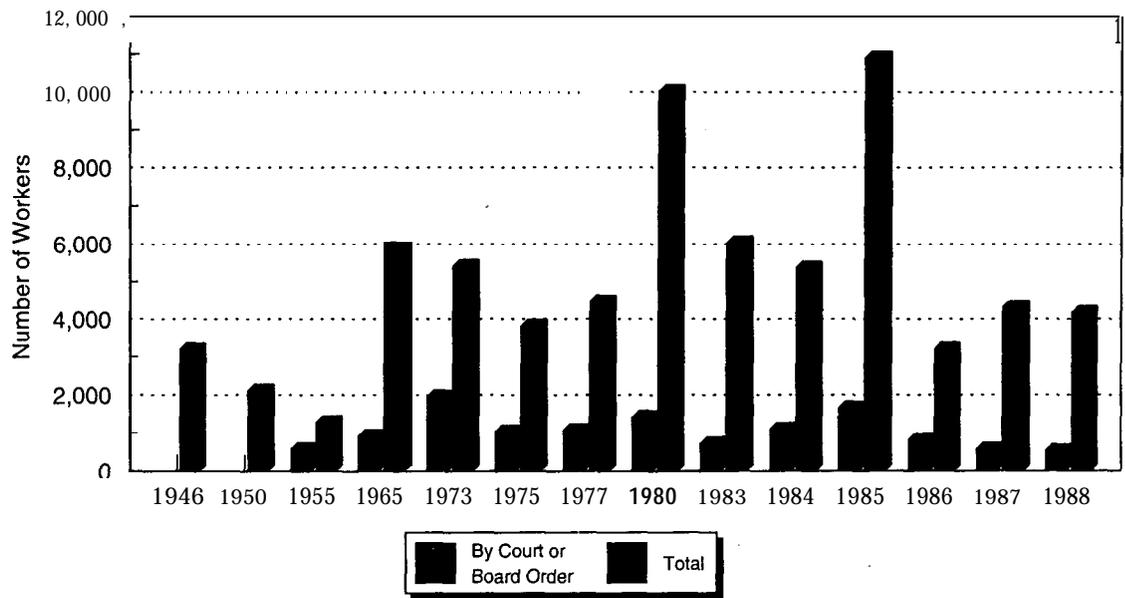
Figure ii
Distribution of the Methods of Disposition of
Section 8(a) Unfair Labor Practice Cases, 1946 to 1988



Source: National Labor Relations Board.

The NLRB has been overwhelmed by these increases. According to a recent General Accounting Office report, the median length of time required to resolve unfair labor practice cases increased from just over 500 days in 1980 to slightly over 700 days by 1988 (see Figure iv). This long period reduces the cost of violating the Act and delays justice. The contrast between the time for deciding cases in Canada as opposed to the United States was noted by Brian Shell, an Ontario labor attorney and Conference participant. In Ontario, for instance, unfair labor practice cases are settled in between 120 and 180 days (Bruce, 1990).

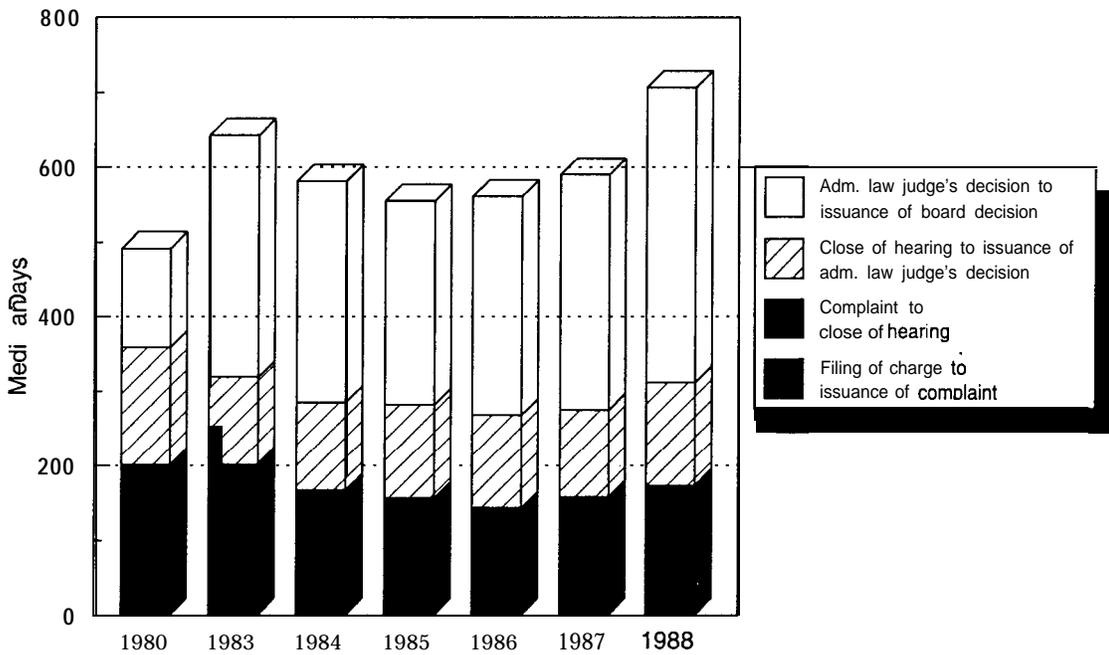
Figure iii.
Number of Workers Reinstated to Remedy Discriminatory Discharge from Unfair Labor Practices, 1946 to 1988



Source: National Labor Relations Board.
 Note: Court and board order breakdown not available for 1946 and 1950.

Largely because of these attacks by American firms on collective bargaining, the U.S. has the lowest union density of any democratic industrialized nation; also, the U.S. had one of the greatest declines in union density during the 1980s (see Figure v, next page).

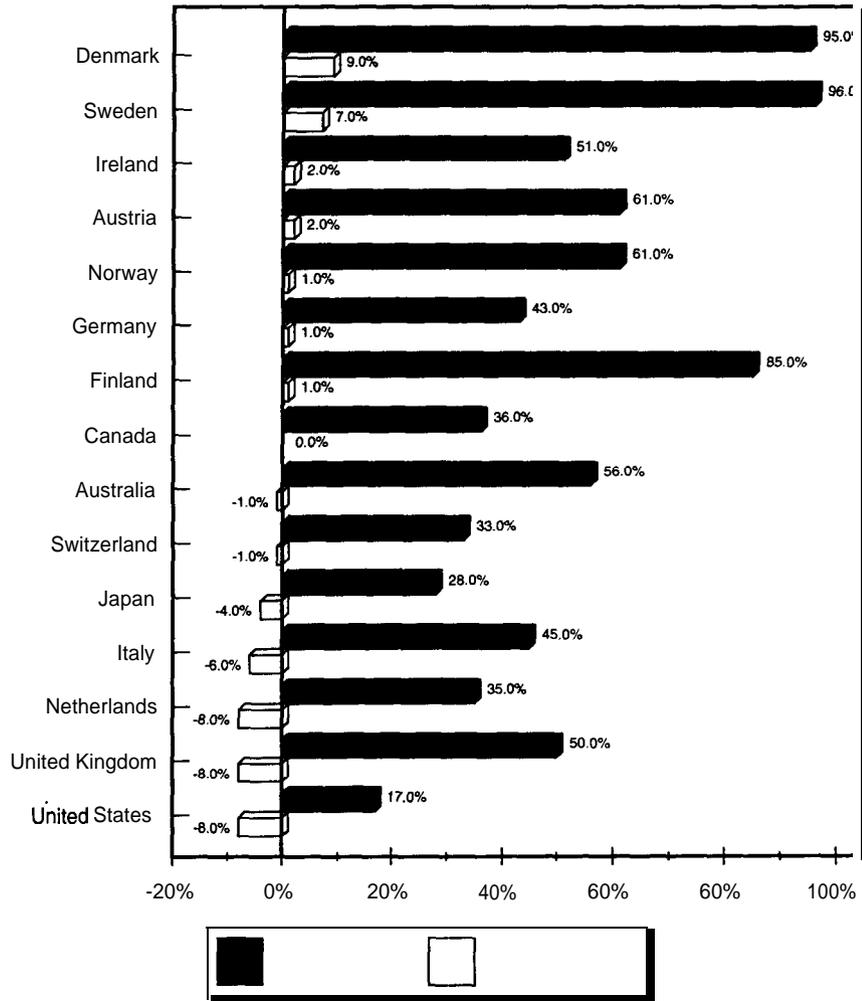
Figure iv
Median Days to Complete Major Stages of
Unfair Labor Practice Charges, 1980 to 1988



Source: National Labor Relations Board.

Figure v

Union Membership of Nonagricultural Workers as a Percentage of Nonagricultural Wage and Salary Employees, 1979 to 1986/87



Source: US Dept of Labor, Division of Foreign Labor Statistics, with additional figures from LSE, Center for Labor Economics and OECD data file.

The Impact of the Mackay Decision. Bad Economics? Bad Law?

The Conference participants-economists, lawyers, and labor-management experts-discussed a variety of issues emanating from *Mackay*. The major points included:

(A) THE PERMANENT REPLACEMENT OF STRIKERS HAS PERVERSE ECONOMIC EFFECTS

. *The permanent replacement of striking workers has multiple negative effects.*

- Cynthia Gramm presented data showing that strikes where workers are replaced permanently are longer than strikes where workers are not replaced, or are replaced only temporarily
- The use of permanent replacements appears to have accelerated since 1981. Carlotta Young, Assistant Director for Worker Protection Issues at the General Accounting Office, gave an account of a GAO report she supervised, noting that both union and management respondents to GAO's survey thought that more firms used permanent replacements, or the threat of permanent replacements, during the **1980s** than in the **1970s**.
- According to Charles Craypo, chair of Notre Dame University's economics department, the permanent replacement of striking workers is more likely among employees with low replacement costs: these are workers in small bargaining units, low skilled workers, and workers in industries where firms cannot relocate to other labor markets to cut labor costs. Thus, *Mackay* effectively denies the protection of the NLRA to workers with the least economic power
- *Mackay poisons labor relations.*
 - Being able to replace permanently striking workers encourages employers to attack the employees' right to collective bargaining. An employer wishing to withdraw unilaterally from collective bargaining only needs to provoke a strike by his employees and then replace the workforce. The futility of collective bargaining is impressed upon the new workers: any attempt to exercise their NLRA rights could meet the same fate.

Strikes where workers are replaced permanently are longer than strikes where workers are not replaced, or are replaced only temporarily.

Permanently replacing striking workers promotes the spread of industrial conflict to third parties,

- The available evidence suggests that unions are anywhere from two and one-half to almost eleven times more likely to be decertified in strikes where permanent replacements are used.
 - Employers use the threat of permanently replacing striking workers in union organizing campaigns to stop workers from participating in collective bargaining. Workers who want to exercise their rights to form employee organizations are sent the chilling message that a strike will be needed to get a first contract, but any such activity will result in the removal of the employees by permanent replacements.
- (B) *MACKAY CONTRAVENES NATIONAL LABOR RELATIONS POLICY*
- *Allowing striking employees who are replaced permanently to be rehired as vacancies occur (the Laidlaw list) does not solve the problems created by Mackay.*
 - *The delay in restoring the employment of the striking employee is indeterminant and can be excessive.*
 - *The permanent replacement of striking workers is contrary to the Court's decision in Erie Resistor that employer actions that foster discord among the employees should be discouraged. Discord must result when the striking employees are forced to work alongside replacement workers who are preventing the restoration of the remaining strikers.*
 - *Permanently replacing striking workers promotes the spread of industrial conflict to third parties.* Once the employer has announced the permanent replacement of the striking employees, the workers have lost all leverage with the firm. The only way that workers can coax management back to the bargaining table is to spread the conflict through strategies such as "corporate campaigns" that exert pressure on the firm's directors, investors, creditors, customers, and suppliers. Such campaigns are costly and for the most part create non-productive conflict.

(C) *MACKAY* VIOLATES BASIC EMPLOYEE RIGHTS

- *When striking employees are fired by being permanently replaced, they are punished for acting not only within the meaning of the law-but also the intent of the law.*

- *The NLRA encourages workers to act collectively, and to voice their concerns to management through their union. The *Mackay* decision protects the employer, allowing the firm to operate during a strike so that the employer who acts within the law is not punished. But an employee who acts within the law is punished.*
- *No other right granted by federal law is so stripped of meaning.*
- *Under *Mackay*, employers need not provide any justification for permanently replacing strikers. They do not need to provide information on the likely impact of their actions, or to justify their actions as economically necessary as is true in all other areas of labor law.*
- *Mackay puts the law on the side of management in collective bargaining disputes. An employer is now permitted to deny employees their federal rights, simply because the employer believes he might otherwise lose a strike.*
- *The employers' weapon, firing striking workers, lacks a union equivalent: secondary boycotts, which could be used to enforce "corporate campaigns," are not legal in the United States. The already unlevel playing field of collective bargaining is further tilted toward the employer.*

An employer is now permitted to deny employees their federal rights, simply because the employer believes he might otherwise lose a strike.

Use of the Mackay ruling allows employers to fire striking workers who are trying to maintain health benefits for current and retired workers and their families.

Economic Implications for the 90s

When the Wagner Act was passed, legislators understood that industrial relations outcomes were related to achieving macro-economic goals. In particular, they understood how wages could help maintain demand during an economic downturn, and, that workers were most vulnerable when they tried to prevent wage cuts during economic recessions. (Before the passage of the Wagner Act, about 60 percent of workers who struck to maintain their wages were replaced (Spriggs,1990).)

It was precisely the fear that employers could have the unfettered ability to lower wages that led the framers of the Wagner Act to find in Section 1 of the NLRA:

The inequality of bargaining power between employees who do not possess ... actual liberty of contract, and employers who are organized in the corporate ... [form] of ownership ... [tends] to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Today, a similar trend of falling wages and benefits has additional pitfalls. Unions have negotiated pension and health care benefits that lower tax payers' and extended family obligations to care for the elderly and the indigent. Almost four out of five strikes in the 1980s were to preserve the health benefits of workers and retirees; citizens who lack health coverage overburden America's health care system. Yet, use of the *Mackay* ruling allows employers to fire striking workers who are trying to maintain health benefits for current and retired workers and their families. That strategy would shift the costs of caring for the elderly and indigent back onto to the taxpayers.

An industrial relations system that allows employers to unilaterally impose their bargaining position by switching work forces has damaging results. Perhaps the most serious of these is its role in encouraging American business and government to respond to the new international competitive environment by attempting to lower wages rather than by raising innovation, productivity, and quality. According to the Commission on Skills of the American Work Force, only one in twenty American companies is trying to compete by improving quality and productivity. Instead, American firms seek to lower labor costs by lowering wages. In effect, the ability to replace permanently striking workers now

serves as a crutch for employers who are not interested in promoting productivity-led growth in the new economic order.

In the very short term, the low-wage strategy may increase the profits of a particular firm but it is not a strategy that helps the nation, or most firms, in the long term. At the Conference, former Secretary of Labor Ray Marshall noted that most economists are sensitive to the dangers of maintaining profits through a trade war based on retaliatory tariffs, but few are sensitive to the dangers of waging a trade war over wages. Yet, both strategies lower the standard of living of a nation's workers.

This is the reverse of the kinds of strategies pursued by America's most successful industrial competitors—such as firms in Japan and Germany—who attempt to compete by improving quality and productivity. The legal, social, and political climate do not permit them to attempt to solve their problems by destroying unions; they have to compete by improving their production and products. And because workers' rights are secure, workers are more able to take responsibility for improving the performance of the firm.

Logic and the historical record show that, in the long term, companies that permanently replace striking workers are not going to be competitive. By firing experienced workers and replacing them with less experienced workers, the firm loses its human capital resource. The very workers whose knowledge of the product and the production process could improve quality and productivity are replaced by workers whose virtue is that they can produce a cheap product. The results show in companies like Continental, Greyhound, and Eastern Airlines that have declared bankruptcy with their new cheaper workforces.

There is a growing understanding among Americans that we face a competitive crisis and that to maintain America's living conditions and economic power we need to invest more, work together better, and expand our long-term horizons. All this requires American business—and labor—to change habits and attitudes. As long as managers base their competitive strategies on low wages in an environment that makes breaking unions easy they will avoid the more positive and productive path. Competition based on lowering wages and benefits is not a step forward into the new economic order, but a step backward. And as long as workers are continually threatened with firing for exercising their rights, they too will avoid engaging in the hard process of working out productive labor-management cooperation.

Most economists are sensitive to the dangers of maintaining profits through a trade war based on retaliatory tariffs, but few are sensitive to the dangers of waging a trade war over wages.

The Mackay rule lets firms replace their union workforce permanently without regard to the effect on the economy of undermining collective bargaining.

The Permanent Replacement of Workers as Labor Policy

The *Mackay* rule lets firms replace their union workforce permanently without regard to the effect on the economy of undermining collective bargaining. Richard Freeman (professor of Economics at Harvard) and Larry Mishel (Director of Research at the Economic Policy Institute) argue in their Conference presentations that unions can help raise product quality and productivity-led growth. Updating his review of research that appeared in *What do Unions Do?*, Freeman reaches several conclusions:

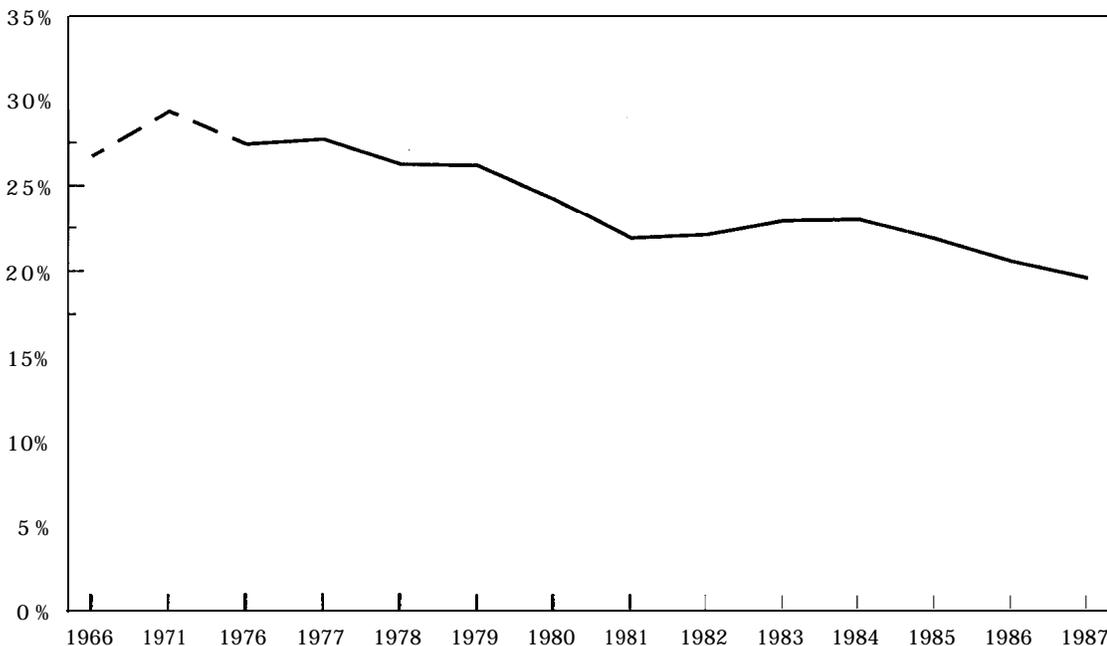
- Unions *lower employee quit rates*, achieving the workforce stability that many regard as a key feature of Japanese economic success. Such stability helps to insure the growth of firm- and industry-specific skills that workers need to innovate at the point of production.
- *Workplace innovations such as quality circles are more likely to occur in union settings than in nonunion settings.* As an example, the United Automobile Workers at Ford and General Motors are pioneers in adopting joint committees and progressive shop floor relations. So, not surprisingly Freeman found that most studies conclude that union firms are more productive.
- *Unions shift the composition of compensation packages toward fringe benefits.* Specifically, unions foster an increase in deferred compensation such as pension funds and health care for those on pensions. Union-created pension plans are the most common source of private pension benefits for blue collar workers. Because pension funds are a major part of the nations savings, unions have had a positive impact on the national savings rate. Declining union density contributes to the decreasing share of workers covered by pensions, and points to further declines in the savings rate and in investment. It also decreases the number of pensioners with health benefits, throwing those not eligible for Medicare into the uninsured health pool.

The Conference concluded that attacks on collective bargaining and unions thwart progress toward the path to quality and productivity-led growth. Protecting policies that threaten workers' economic survival will not increase productivity or foster work environments leading to innovation. Quality, productivity and flexibility are the key to new production systems. Management and workers must be partners in restructuring our produc-

tion systems. But, management and workers cannot be partners unless the interests of the workers are represented. Therefore, a key part of a national redevelopment program must be to strengthen workers' rights to organize and bargain collectively to achieve the higher level of worker participation needed for high performance systems.

Beyond economics, the permanent replacement of legally striking workers denies a fundamental right of democracy to individual workers. With the exception of South Africa, no other Western industrialized country allows employers to interfere with the exercise of workers' right to strike; they view it as a democratic right. Other countries do not view the denial of workers' rights by employers as necessary or desirable for competition. Discussion of the right to strike is most often found within the legal framework setting forth fundamental rights of employees, not in the legal context of industrial relations.

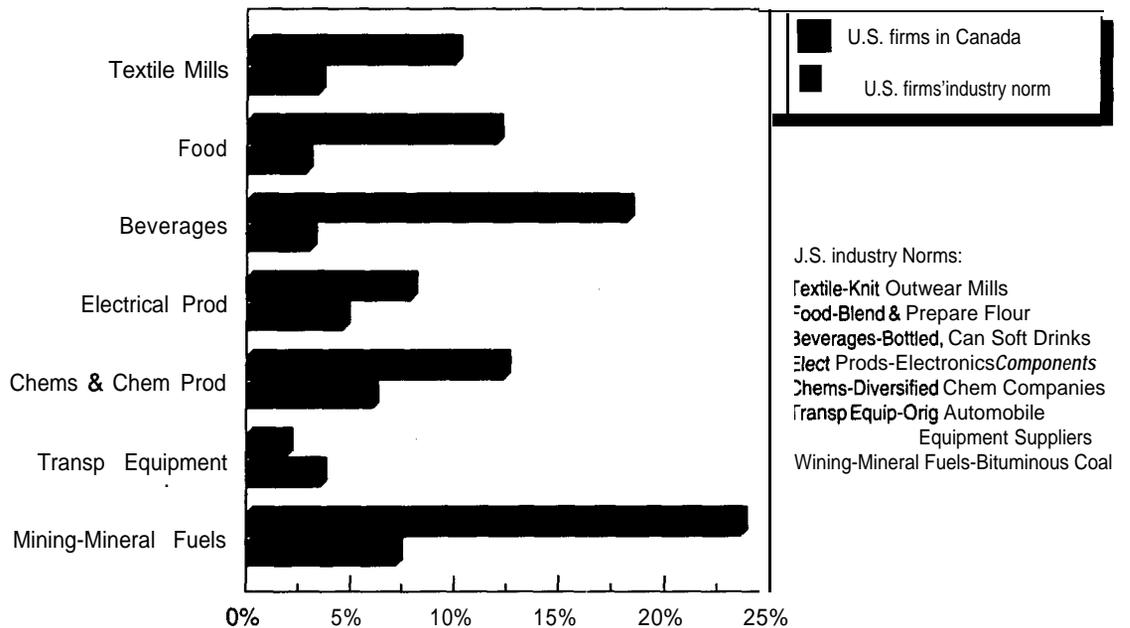
Figure vi.
U.S. Non-Financial Firms' Sales in Canada
as Percent of All Canadian Sales, 1966 to 1987



Source: Statistics Canada.

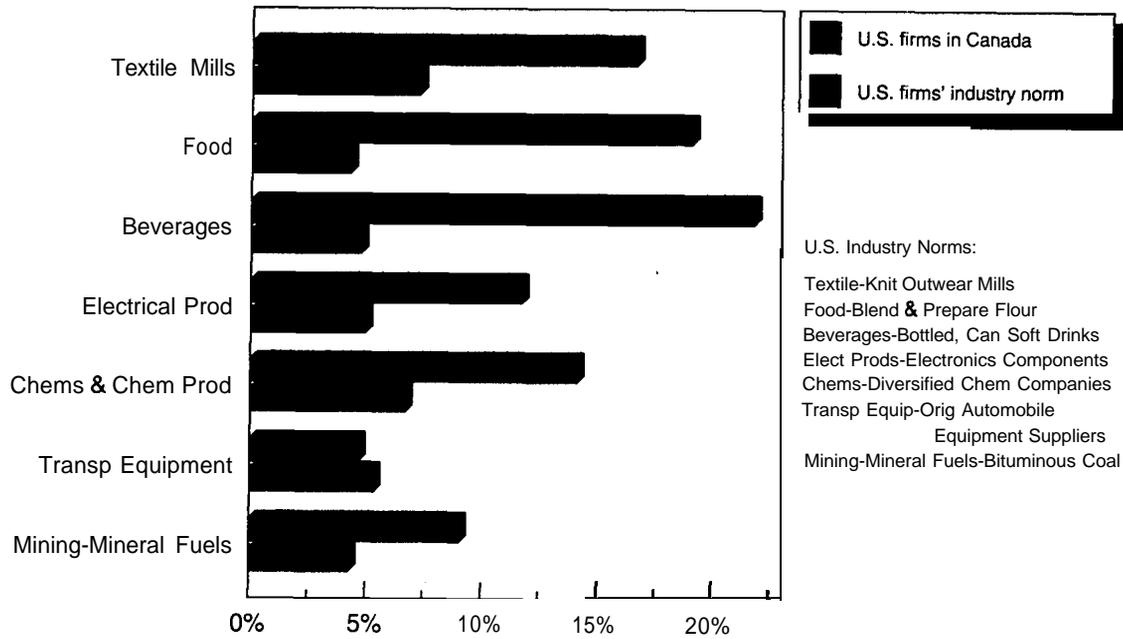
Most notably our number one trading partner-Canada-enshrines the rights of workers as essential to its democratic structure. U.S. firms who operate in Canada account for almost 20 percent of non-financial firms' sales in Canada (see Figure vi). Canada adopted the Wagner Act as a model for its labor laws, yet has rejected the *Mackay* rule as inconsistent with free collective bargaining. All Canadian provinces, through legislation or jurisprudence, require the reinstatement of striking employees to their jobs at the conclusion of a work stoppage. All measures of profitability show that comparable U.S. firms operating in Canada without the *Mackay* rule are as profitable as American firms operating under *Mackay* in the United States (see Figures vii, viii, and ix).

Figure vii
Profit Margin of US. Firms in Canada Relative to U.S. Industry Norms by Selected Industries, 1987



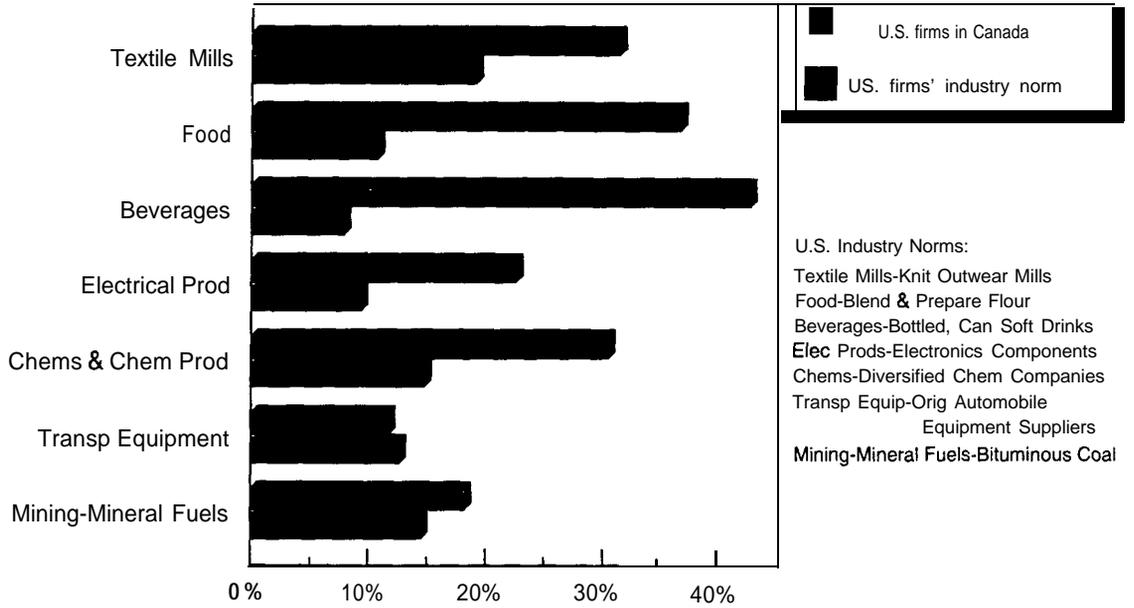
Source: Statistics Canada., Dun & Bradstreet Credit Services, Standard & Poor's.

Figure viii.
Return on Assets of U.S. Firms in Canada Relative to U.S. Industry Norms by Selected Industries, 1987



Source: Statistics Canada., Dun & Bradstreet
 Credit Services, Standard & Poor's

Figure ix.
Return on Net Worth of U.S. Firms in Canada Relative to U.S. Industry Norms by Selected Industries, 1987



Source: Statistics Canada, Dun & Bradstreet Credit Services, and Standard & Poors.

Conclusion

The dicta in the *Mackay* opinion has been allowed to take on value as precedent and seriously undermines the American free collective bargaining system. Unless the right to strike under the NLRA is restored, American labor law will be devoid of basic fairness.

Dismantling collective bargaining by permitting the right to strike to be eliminated threatens to return American industrial relations to the Dark Ages of the nineteenth century—a period hopelessly inadequate for the economic competition facing us as we move into the twenty-first century. If not restricted, the renewed power of management to permanently replace striking workers will deny America a chance to get the workplace cooperation needed to compete in the global economy.

William Spriggs
Economic Policy Institute

If not restricted, the renewed power of management to permanently replace striking workers will deny America a chance to get the workplace cooperation needed to compete in the global economy:

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Part I

Recent Evidence on the Permanent Replacement of Striking Workers



Section 1

Employers' Decisions to Operate During Strikes: Consequences and Policy Implications

Cynthia Gramm, University of Alabama-Huntsville

C. GRAMM: I'm going to focus on providing some empirical evidence comparing the use of replacement workers to other strike strategies that employers might pursue. I want to show the specific consequences of these different strategies. I've tried to pick consequences that are relevant to the current debate on whether we should amend our current labor law to limit employers' rights to hire permanent replacement workers.

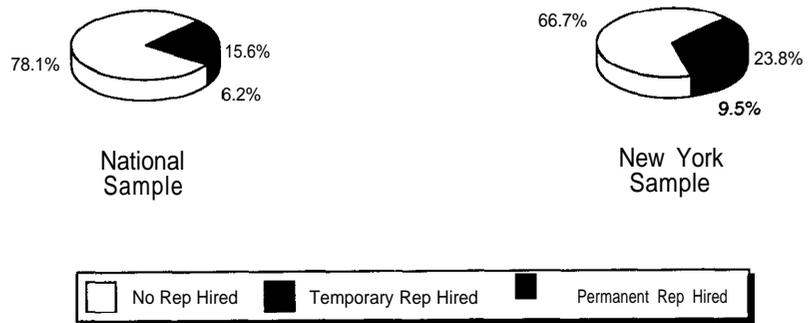
I won't go into a lot of detail about the data and methodology. More methodological information is available in an EPI working paper on this topic. But very briefly this research is based upon two randomly drawn samples of strikes during the period 1984 to 1988. The first is a national sample of strikes involving 1,000 or more workers, and the second is a New York sample of strikes which involves small strikes—strikes involving less than 1,000 workers—as well as large strikes. These data came from surveys of managers who were involved in these strikes. I'm currently surveying union representatives and adding data from news reports on the strikes in the sample. After eliminating strikes that did not occur during contract negotiations, I had thirty-five strikes in the U.S. sample and twenty-one strikes in the New York sample.

How widespread is the practice of hiring replacement workers during strikes? We have not had much information about the use of replacement workers, although there are a few other studies coming out now that provide some insights.

Permanent replacements were hired in about 16 percent of the U.S. sample, and about 24 percent of the New York sample (see Figure 1.1). Some of the difference may be caused by the inclusion of small strikes in the New York sample. Temporary replacements were used less frequently: in only about 6 percent of the U.S. sample and less than 10 percent of the New York sample. While using replacement workers is not the norm, it's certainly a very common strategy. Based upon these samples, employers seem to be using permanent replacements more frequently than temporary replacements as an operating strategy during strikes.

While using replacement workers is not the norm, it's certainly a very common strategy.

Figure 1.1
Number and Relative Frequency
of Strikes in Which
Replacements Were Hired



Source: 'Employers' Decisions to Operate During Strikes: Consequences and Policy Implications,' by Cynthia L. Gramm.

However, only one firm reported using permanent replacements exclusively. All the other firms that reported using permanent replacements also used other sources of substitute labor for the striking workers. Most frequently, they shifted struck work to non-bargaining unit personnel, either supervisors or other employees of the firm who were not members of the bargaining unit. That was clearly the most frequent tactic: it was used in 88 percent of the strikes. Firms are not resorting to the use of permanent replacements because it's the only option available that allows them to operate. They have other options, and are using the replacement worker strategy with those options.

Another issue in the policy debate is whether employers are hiring more replacement workers now than they did in the past. The time period covered in my study limits my evidence, but I do have a couple of pieces of indirect evidence.

I asked managers who indicated that there had been past strikes involving the same bargaining unit whether they had ever hired replacement workers during past strikes. Every single manager said that this particular strike was the first attempt to hire replacement workers. This strategy appears to be a new experi-

ence for the firms in the sample. The incidence of this strategy may be increasing relative to previous bargaining rounds.

Another study involving case studies of fifteen firms conducted by Perry, Kramer, and Schneider in the early 1980s found that managers in most of the firms explicitly chose not to hire replacement workers. If they felt they had to hire replacement workers in order to keep operating, they chose to hire temporary replacements. They did not want to hire permanent replacements. Comparing that finding with my finding that firms are hiring permanent replacements more frequently than temporary replacements suggests that the willingness of employers to hire permanent replacements has increased during the 1980s.

Does the use of permanent replacements affect the unions ability to survive? Does it affect the survival of the bargaining relationship?

Three kinds of events can essentially kill the union during the course of the strike: one, the union can be decertified; two, the union simply can fail to get a new collective bargaining agreement and—even without formal decertification—it withers away; and three, the struck facilities can be permanently shut down by the employer. As I said earlier, permanent replacements were hired relatively infrequently. Five firms in each sample hired permanent replacements, but in each of those samples two out of the five bargaining units failed to survive. In the permanent replacement sub-sample, the union survival rate was 60 percent, and the union death rate was 40 percent.

Only one firm in either sample failed to survive, and that was a firm that chose not to operate at all. It was a retail firm in a very highly unionized community that felt its customers would not cross the picket line to purchase the products it was selling. The inability to hire permanent replacements did not cause the death of the firm.

The 60 percent survival rate for unions in the permanent replacement sub-sample compares pretty unfavorably to a 98 to 100 percent survival rate for companies in the sub-sample where permanent replacements were not hired. The bargaining unit failed to survive in only one case from the sub-sample where permanent replacements were not hired. Although the evidence is based on small numbers, it strongly suggests that the use of permanent replacements hinders the survival of the bargaining relationship.

Only one firm in either sample failed to survive, and that was a firm that chose not to operate at all.

Strikes last substantially longer when permanent replacements are hired than when temporary replacements are hired.

Does the use of permanent replacements lead to longer strikes? There are two competing hypotheses about this question. One is that hiring permanent replacement workers reduces or eliminates the firm's incentive to bargain, because it reduces or eliminates the firm's strike costs. The cost of striking for both sides creates the reciprocal incentives to make concessions in bargaining. So hiring permanent replacements reduces or eliminates the firm's strike costs and chills the bargaining process, leading to longer strikes or even strikes that never end. However, Perry Kramer, and Schneider found that in the few cases where firms had eventually resorted to the use of permanent replacement workers, the union suddenly decreased its demands, leading to a very quick settlement. On one hand, this strategy may prolong strikes; on the other hand, this strategy may shorten strikes.

My results suggest that strikes last substantially longer when permanent replacements are hired than when temporary replacements are hired (see Figures 1.2 and 1.3). Strikes also last longer when temporary replacements are hired than when no replacements are hired. The differences are fairly substantial. For example, in the U.S. sample, the mean duration of strikes in which permanent replacements were hired is 363 days. The mean duration when temporary replacements were hired was 72 days. when no replacements were hired, it was 64 days.

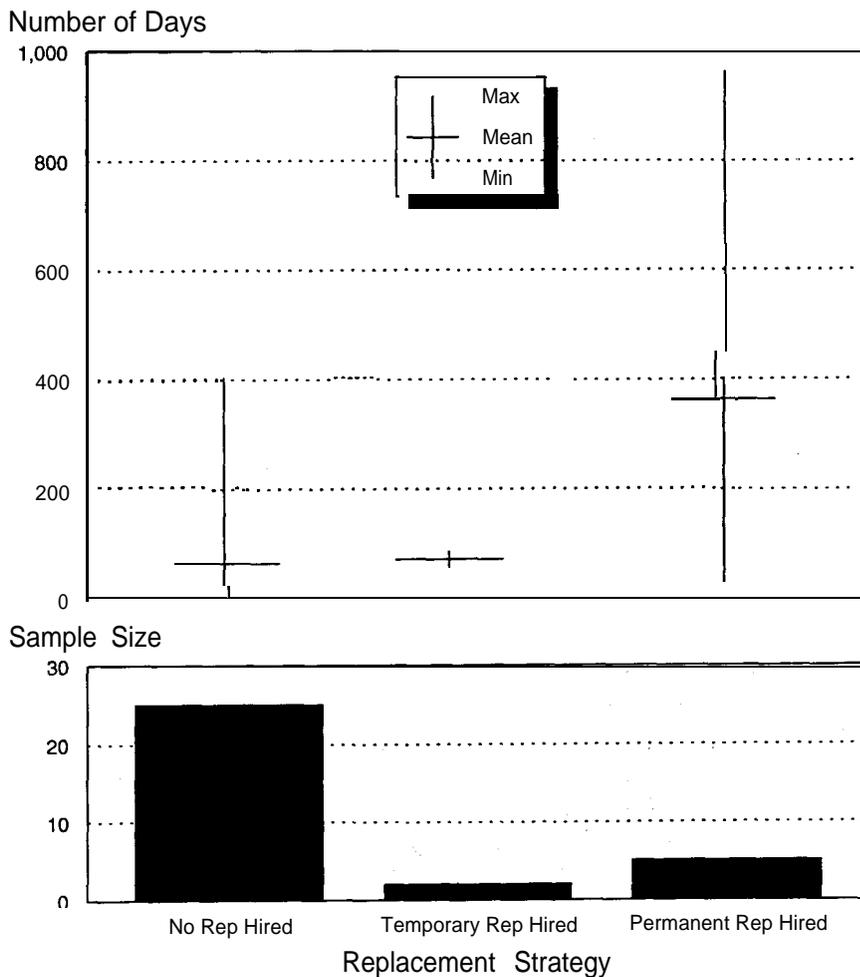
These results are consistent with Craig Olson's (1990) study that also found hiring replacement workers prolonged strike duration. However, his study did not distinguish between the use of permanent and temporary replacements. My results suggest that a big part of the difference in the length of strikes with and without replacements is attributable to the use of permanent replacements.

There are a couple of possible explanations for the observed relationship between the use of permanent replacements and strike duration. One is that the use of replacement workers (and particularly the use of permanent replacements) causes longer strike durations. The other possibility is that firms are more likely to hire replacement workers when they expect very long strikes. My gut feeling is that the first hypothesis accounts for much of the difference we observe, but we don't yet have studies that can separate out the magnitude of these two competing effects.

Is there a relationship between the choice of operating strategy and the capacity at which the employer is able to operate during a strike? My reading of the *Mackay* decision is that one of

the major justifications for allowing firms to hire permanent replacements is that some employers need to hire them to continue operations. I asked firms that attempted to operate, “At what percent of full capacity did sites involved in the stoppage operate?” (see Figures 1.4 and 1.5). In the US. sample, operating capacity was only slightly higher when firms used temporary replacements than when they hired permanent replacements.

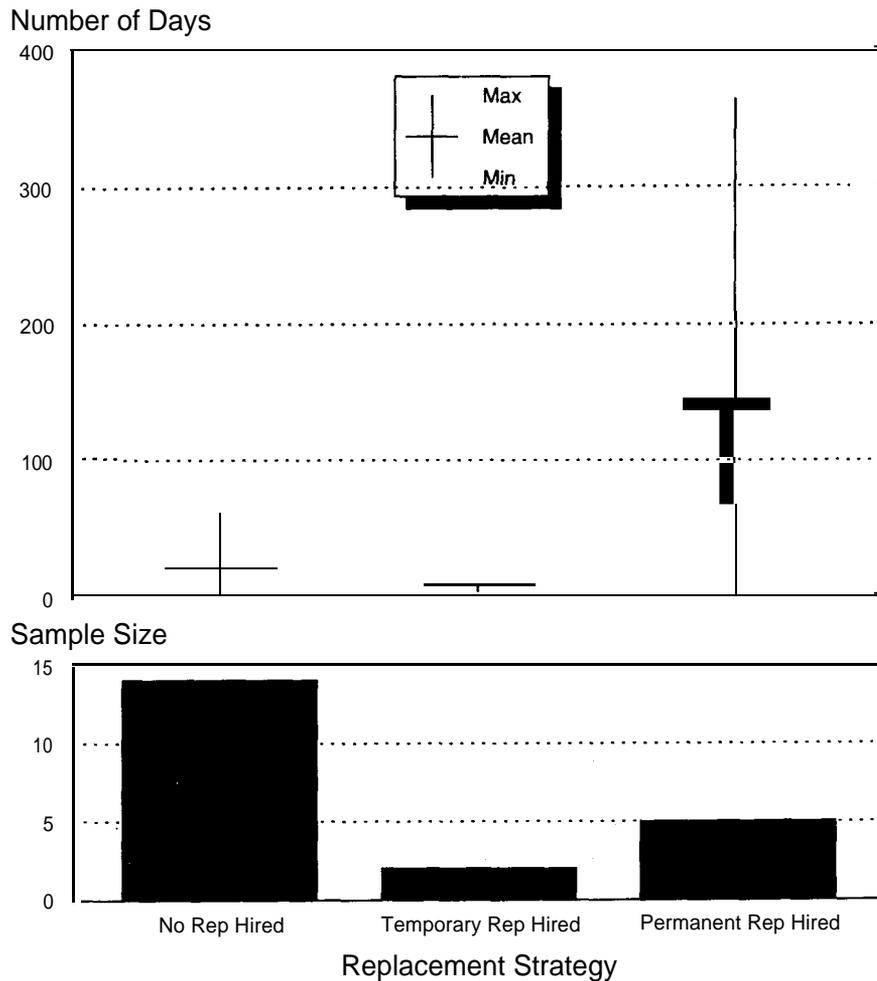
Figure 1.2
Strike Duration by Employer’s
Replacement Strategy, U.S. Sample



Source: “Employers’ Decisions to Operate During Strikes: Consequences and Policy Implications,” by Cynthia L. Gramm.

The mean operating capacity for employers hiring temporary replacements was 90 percent of full capacity. The mean in the sub-sample where permanent replacements were hired was 77 percent of full capacity. Where no replacements were hired, employers operated on average at 57 percent of full capacity. In the New York sample, there was virtually no difference in operat-

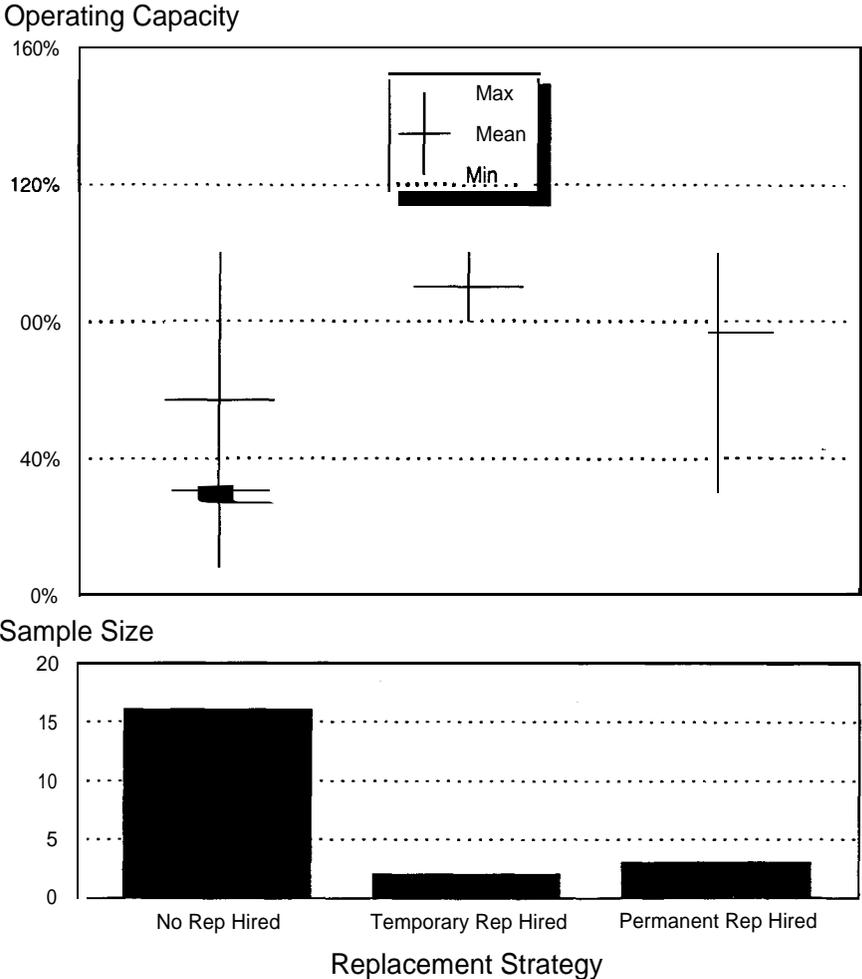
Figure 1.3
Strike Duration by Employer's
Replacement Strategy, New York Sample



Source: "Employers' Decisions to Operate During Strikes: Consequences and Policy Implications," by Cynthia L. Gramm.

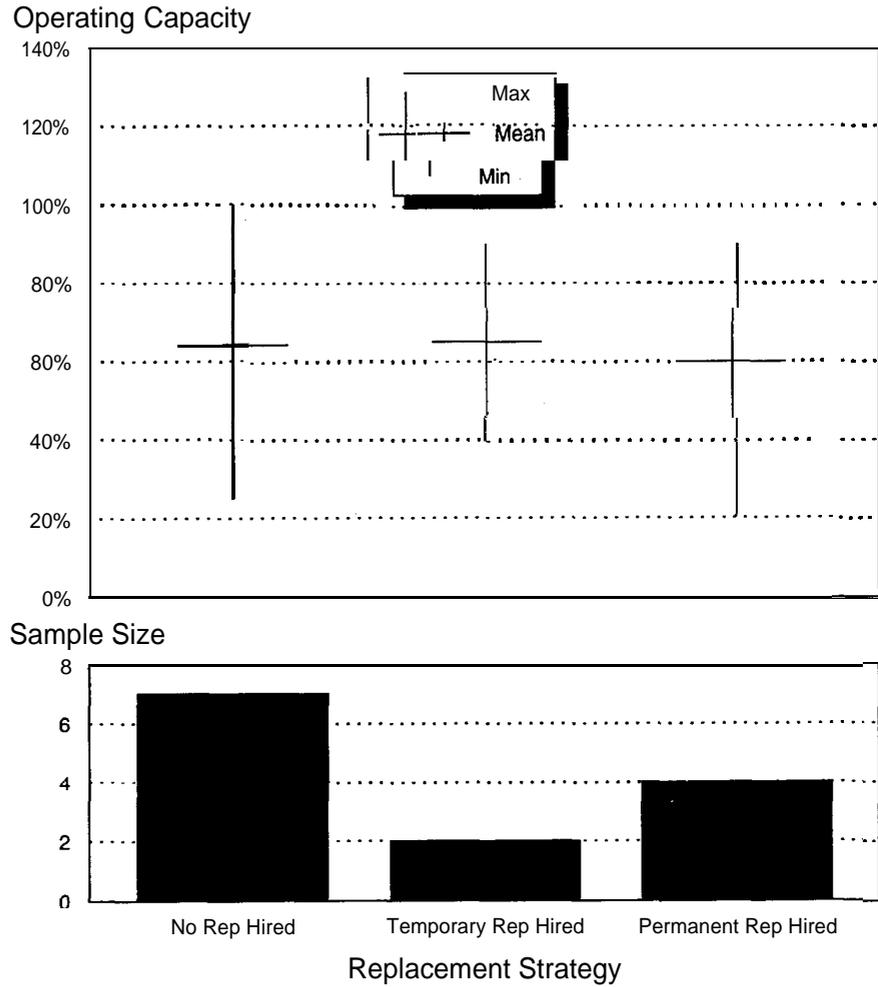
ing capacity across firms using any of the three strategies. This evidence suggests that most firms that attempt to operate are able to do so without using replacement workers at all and that it is not clear that using permanent replacements increases operating capacity for employers.

Figure 1.4
Operating Capacity by Employer's Replacement Strategy, U.S. Sample



Source: "Employers' Decisions to Operate During Strikes: Consequences and Policy Implications," by Cynthia L. Gramm.

Figure 1.5
Operating Capacity by Employer's
Replacement Strategy, New York Sample



Source: "Employers' Decisions to Operate During Strikes: Consequences and Policy Implications," by Cynthia L. Gramm.

Discussion:

C. **YOUNG:** The General Accounting Office (GAO) has done a very similar study. The method and results of your study can be contrasted with the GAO study. As you noted, your results are suggestive rather than conclusive, due to the size of the sample. I also appreciate your caution in assuming we know whether hiring replacement workers causes longer strikes, or whether anticipating longer strikes causes firms hire replacements.

At GAO, we got similar numbers (*Labor-Management Relations: Strikes and the Use of Permanent Strike Replacements in the 1970s and 1980s* (GAO/HRD-91-2, January 1991)). We found about 17 percent of the employers hired permanent replacements. Both the employers and the union representatives we interviewed felt very strongly that replacements were being **used** more in the late 1980s than in the late 1970s. We had information on about 375 strikes and interviewed over 650 people. Our results can be projected nationally.

It's interesting that these results are so similar, given that we used different methods and a different sample. Our data were drawn from the Federal Mediation and Conciliation Service (FMCS) and included not only strikes involving over 1,000 workers but those under 1,000 as well. Our data exclude workers not covered under the National Labor Relations Act (NLRA), but are representative of those strikes that began in 1985 and 1989.

We also asked about employers announcing that they would use replacements, because one could argue that that's extremely important whether or not replacements actually get used. About a third of the employers had announced that they would use replacements.

W. GOULD: [Cynthia] Gramm mentioned that the rationale behind *Mackay* is that the employer needs to hire replacements in order to produce. But that's wrong. In *Mackay*, the argument is made that the firm is the employers property, and he ought to be able to do with it as he sees fit. But, generally, labor cases articulate the need for a business justification for a practice which will impact upon employee rights, as this one does. Because *Mackay* does not articulate the need for a business justification, it's an aberration.

L. **MISHEL:** I want to pursue two empirical questions. What is the effect of the strike replacement strategy on non-strike situations? Are smaller bargaining units much more likely to face this employer strategy than the larger bargaining units?

Because Mackay does not articulate the need for a business justification, it's an aberration.

—William Gould

I did a study of 32 different organizing campaigns. In every campaign, the employer referred to the Mackay doctrine permitting employers to hire permanent replacements.

—Julius Getman

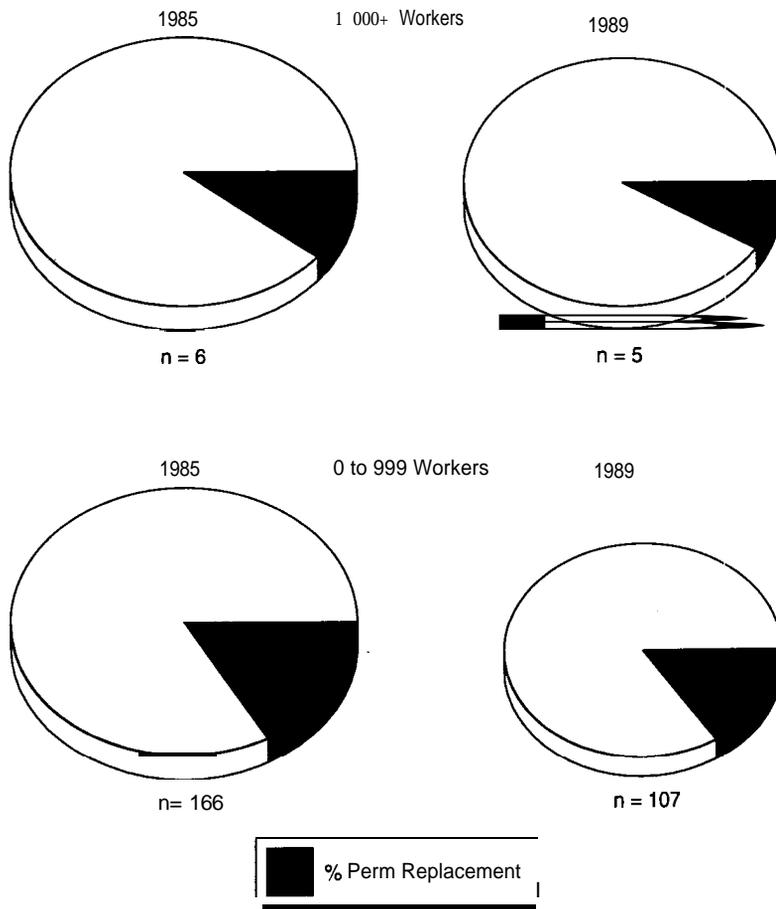
J. GETMAN: The *Mackay* case does affect organizing. I did a study of 32 different organizing campaigns. In every campaign, the employer referred to the *Mackay* doctrine permitting employers to hire permanent replacements. When employers first begin to talk about collective bargaining, they say things such as “I don’t have to make any concessions to the union; I’m not going to make any concessions. So the only way the union can get anything for you is to pull you out on strike. If you’re out on strike, you’re going to be vulnerable, and I have the right to permanently replace you. You can lose your job.” Our study found that the workers’ perceptions of threats by employers to discharge them were no different in campaigns which were legal under the NLRA from those that were illegal under the NLRA. The *Mackay* doctrine obscures any distinction, because the employees are being told in every campaign, “If you vote for the union, you’re going to be put in a position where your job is in jeopardy” Workers don’t draw a sharp distinction between “Well, that’s all right because I’m only going to be permanently replaced” and “I’m going to lose my job.”

w. KAMIAT: I had recently read [Julius] Getman’s work when I was preparing a talk to the New York University (NYU) Conference on Labor on the issue of strike replacement. At that time, I also checked with a number of union organizers to see what their experiences had been. Their uniform experience confirms Professor Getman’s conclusion that the threat of permanent placement. is always used by employees in organizing campaigns. I also checked a number of management manuals and how-to books. The speech Professor [Julius] Getman just described is repeatedly set out in those manuals. Indeed, one went even further The manual encouraged employers to ridicule the union for telling workers that under the law they have the right to unionize without fear of job loss, and suggested telling workers, “All this means is that you can’t be fired, but you can be permanently replaced. Ha, ha, isn’t that a meaningless distinction.”

C. YOUNG: In response to [Lawrence] Mishel’s other question, we generally found no significant statistical differences in the percentage of large (1,000 or more workers) and small strikes in 1985 and 1989 in which employers (1) announced the use of and hired permanent replacements (see Figure 1.6), and (2) announced replacements after, rather than before, the strike began. However, we did find some when we compared the percentage of strikes in which employers announced replacements in 1989 with the percentage in 1985, we found an increase for

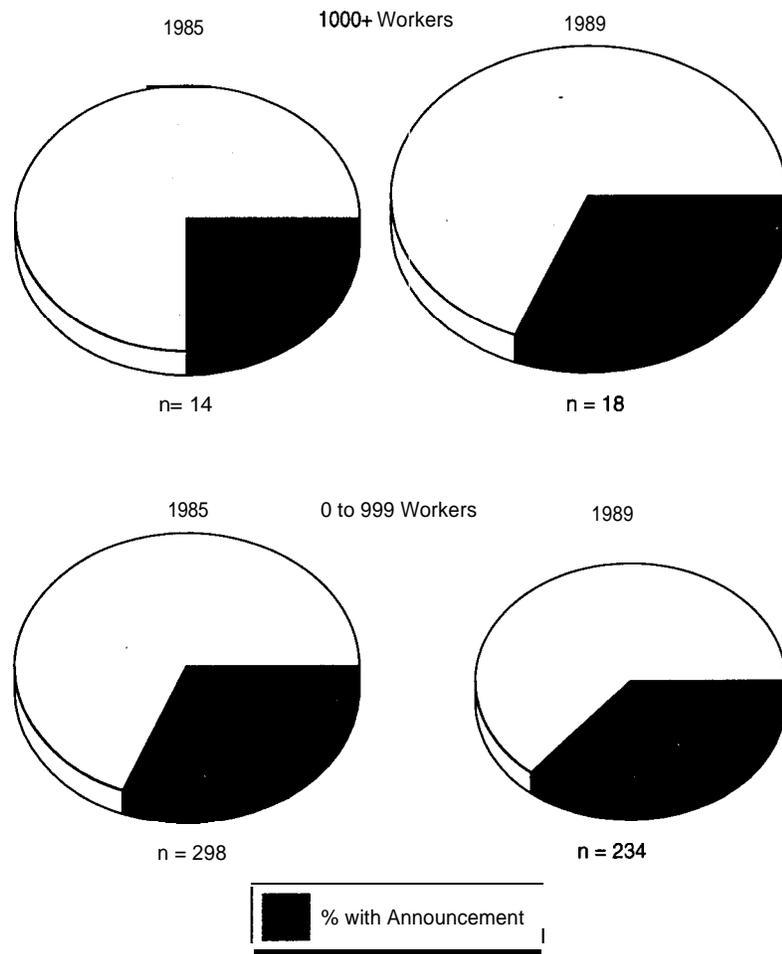
large strikes (31 percent in 1989 compared with 25 percent in 1985) (see Figure 1.7). There was no statistically significant difference for small strikes. Second, when we examined how often employers announced before the strike began that they would hire replacements, we found a decrease for small strikes from about 8 percent of the strikes in 1985 to about 1 percent in 1989.

Figure 1.6
Hiring of Permanent Replacements in
Large and Small Strikes, 1985 and 1989



Source: General Accounting Office.
 Note: Areas are proportionate to number of strikes in 1985.

Figure 1.7
Announcement of Permanent Replacements in
Large and Small Strikes, 1985 and 1989



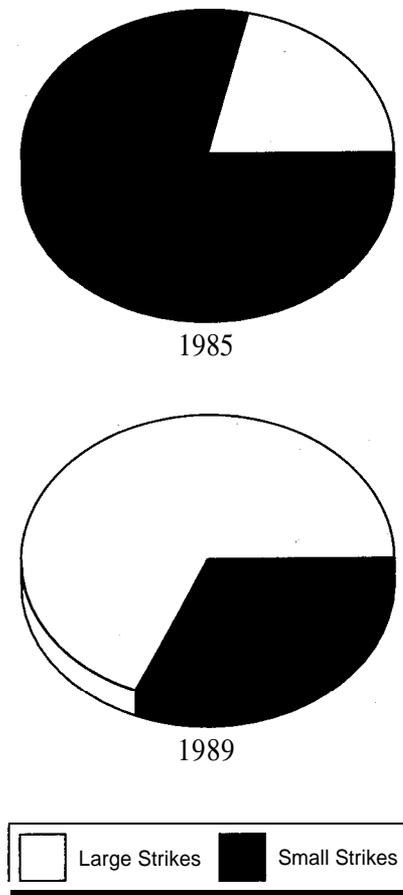
Source: General Accounting Office.

Note: Areas are proportionate to number of strikes in 1985.

We found no difference in large strikes. Third, in 1985, the majority of the striking workers replaced were in small strikes (about 80 percent), while in 1989 the majority of those replaced were in large strikes (about 70 percent) (see Figure 1.8).

R. **ROTHSTEIN:** My own feeling, based on experience, is that many of the problems that are ascribed to the use of permanent replacements are equally true of the use of temporary replace-

Figure 1.8
Percent of Workers Permanently Replaced
in Large and Small Strikes, 1985 and 1989



Source: General Accounting Office.
Note: Large Strikes involve 1000 or more workers.

Pending legislation will not do anything to eliminate temporary replacements.

-Richard Rothstein

ments. Pending legislation will not do anything to eliminate temporary replacements. If we're focusing on this issue in the context of the pending legislation, it's important to keep that distinction in mind. Strikes will still be broken by the use of replacements, regardless of whether those replacements are temporary or permanent. The difference only matters at the end of the strike, after the strike is lost.

C. GRAMM: Intuitively, I'm not sure that I completely agree with **you** that the two situations are identical. On one hand, there are a lot of employers who hire replacements, and they just don't say whether they're permanent or temporary. In those circumstances, it may very well be like hiring permanent replacements. You don't know the outcome. But there certainly appear to be employers who explicitly chose not to hire permanent replacements. To the extent that you can trust what they were saying, they did not seem to be trying to get rid of their unions.

J. GETMAN: I've been doing a study on the International Paper strike at Jay, and contrasting it with the Mobile Strike. The bargaining positions of the parties were very similar, but the Mobile Company locked out the workers which meant they could only be temporarily replaced, and at Jay, they permanently replaced the workers. The difference to the individuals involved is enormous. The people at Mobile are still working, and they're working under far better conditions than the people at Jay. Those people's lives have been ruined. The difference in the lives of the employees involved is very substantial.

R. EISENBREY: Is it clear that an employer, after locking out, can't permanently replace? It's clear that the employer can temporarily lock out and temporarily replace, but is it clear that an employer cannot permanently replace?

W. GOULD: No.

P. WEILER: It has never been held that an employer can permanently replace its employees following a lock-out. There's never been an authoritative ruling on the point from the U.S. Supreme Court, and there has not any suggestion from the National Labor Relations Board (NLRB) that employers can do this.

W. KAMIAT: [Cynthia] Gramm, given your conclusions regarding the production capacity and strike duration when permanent replacements are hired, do you think employers expected better results and were disappointed, or were employers just trying to get rid of the union and were thus quite satisfied?

C. **GRAMM:** I don't know, It depends on answers to open-ended questions that I asked but have not analyzed. Some employers called me because they wanted to tell me more about the situation. A few employers, who called me before returning the survey, said "We really don't think this survey applies to us, because you're talking about strategies that we just would never consider using. We generally have a good relationship with the union, and we don't want to jeopardize that relationship during a strike." Some employers questioned whether to operate at all.

I think it's important to get information about the timing of hiring replacements. My impression is that some employers planned in advance to hire permanent replacements. They were going to hire them as soon as the strike began, or as soon as the work stoppage began. Other employers were using a replacement strategy as a last resort, and only implemented it after the strike had been going on for a long period of time. Instead of replacing everyone, they implemented it very, very gradually. To me, that difference in timing suggests a difference in motivation.

B. **SHELL:** In Canada, we approach these problems from a rights perspective and not from an economic competitiveness perspective. We also have preambles stating that people are free to exercise their protected rights under the statute. In most Canadian jurisdictions, the rights to join together and form a union and engage in a lawful strike are protected. If an employer said, "But if you join the union and engage in a lawful strike, we'll permanently replace you," my knee-jerk reaction-coming from north of the border with very little understanding of how *Mackay Radio* arose-is just that there's something wrong with that threat. In Canada, that threat is viewed as a threat. It is viewed as an attempt to prevent workers from exercising their rights under the statute-to join the union, to engage in a strike, and to stay out on strike. In every Canadian jurisdiction, it's illegal to do what appears to be done in every U.S. organizing campaign-to threaten workers that if they join a union and go out on strike, they can be permanently replaced.

I don't know how the *Mackay Radio* case got into American labor law. Up in Canada, we all bow to the parent Wagner Act all the time, and thank God for it. It seems to work, to some extent. Unfortunately, the imbalance of bargaining power that *Mackay Radio* enshrines seem to me to be reparable only by statutory intervention.

"You're talking about strategies that we just would never consider using. We generally have a good relationship with the union, and we don't want to jeopardize that relationship during a strike."

It's very important in the policy debate to look at the long-term history of replacement workers. The use of replacements historically rises and falls with the degree to which labor relations is regulated.

-Charles Craypo

R. OSWALD: [Cynthia] Gramm, your study focused on the small minority of cases that used replacements. Do we need another study or report that states that in the vast majority of cases, employers were able to deal with strikes without permanently replacing workers?

Also, you asked employers what their strategy was going into the strike. If 82 percent of employers thought of using permanent replacements as a contingency, even in your sample, why did so few actually use replacements?

C. GRAMM: I guess I took those more as comments and suggestions for what to do next. I did not ask specifically why employers chose not to use replacements but chose other strategies. I did ask questions so I could look at what kinds of characteristics might be associated with those choices.

So I think I can provide some simple correlations about what kinds of firms were making one choice relative to other choices.

C. CRAYPO: We're all pretty sure that the use of replacement workers is increasing. It's very important in the policy debate to look at the long-term history of replacement workers. The use of replacements historically rises and falls with the degree to which labor relations is regulated. Ultimately, the issue is to regulate or not regulate.

Immigrant workers in New York were used before the Civil War to replace striking artisans. The robber barons made great use of strike breakers. Jay Gould even forced railroad telegraphers to replace his striking Western Union telegraphers. Around the turn of the century, the oligopolies in meat packing and steel effectively used strike breakers. The regulation of labor markets and the changes in the social, political, and economic environment effectively stopped the use of strike breakers after the 1930s. After World War II, *Mackay* was on the books, but it was used infrequently. It simply was too risky and dangerous to try to replace workers during those times.

Then the "rogue elephant" companies began to emerge. The conglomerates, in individual plant situations in the 1960s, began to use strike breakers. Now we are seeing important major strikes involving the use of strike breakers. In order to address the policy issues, I think we need case studies of those important strikes.

I want to borrow very heavily from the comments made last night by Ray Marshall (see Section 7). I see the revival of strikes involving replacement workers as simply one part of the larger labor relations and labor market trends in the United States: it is simply another strategy to drive down wages instead of using productivity and technology strategies to gain a competitive edge. Using replacements has wider economic and social implications; it affects wage levels, income inequalities, and polarization. I think a strong case can be made for this rather modest legislative proposal. In my view, we are seeing a repeat of the 1930s, as progressive forces in the country try, once again, to save American employers from themselves.

The *revival of strikes involving replacement workers ... is simply another strategy to drive down wages instead of using productivity and technology strategies to gain a competitive edge.*

—Charles Craypo

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Section 2

The Strike at Jay

Julius Gettnan, University of Texas-Austin

J. **GETMAN:** Investigating the strike at the Androscoggin mill in Jay made me feel more strongly than I ever did the injustice of the *Mackay* doctrine. Speaking with people who were victims of the strike, I felt the way I do when I hear testimony from Amnesty International on the way political prisoners are treated. Taking people's jobs is a powerful human rights issue. I will give you my conclusions, but I hope you will look at my paper. There the story is told in the words of the people who experienced it. Their words give the story power.

My conclusions are not surprising, nor are they very controversial. The first significant point is that where permanent replacements are hired, employees are punished for doing what the system encourages them to do. The system insists that people work exclusively through the union. In *Emporium Capwell*, Justice Marshall stated that our system encourages the employees to work through the union in accordance with the principle of majority rule. The employees who were replaced did exactly that.

At Jay, there were two groups of employees. Those who did what the system encourages them to do—accepting the group decision and supporting the union—ended up losing their jobs and suffering other consequences. The other much smaller group was made up of people who said, “Forget majority rule, I’m going to make this decision in terms of what’s good for me,” and they went back to work. Thus, under *Mackay* the law says in effect, “This is the way employees should behave; however, if you do it, you will lose your job.”

Second, there is an inconsistency between *Mackay* and a policy favoring greater cooperation between labor and management, because those who are replaced tend to be the people best able to subordinate their own interests to those of the group. It is well recognized that the employees most capable of developing a positive relationship with management are those people who are willing to act in terms of the interests of the group. The people at Jay were extraordinary in this respect. Theirs was a close-knit community. They had ties for many, many generations to each other and to the company. There were strong cooperative

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In theory, Mackay is offset under our law, because employees who are permanently replaced take priority in filling the next jobs that come open.

relationships within the workforce, and between the employees and the company

Third, once permanent replacement takes place, productive negotiations are largely over. Regaining jobs becomes the issue and everything else becomes secondary. There were several well-publicized meetings during the strike where the company said that they had new proposals. Nothing of course resulted. Company proposals on other issues lost their meaning, once the employees were permanently replaced. The replacement issue dominated everything else. Can you imagine the union leaders taking a proposal back to the members that does not include going back to work? Can you imagine any politician or anybody who is politically responsible to a group trying to convince them to accept such a proposal?

A union that had originally been battling about keeping premium pay for overtime and, for some odd reason, keeping their Christmas holidays, shifted to wanting their jobs back. The slogan of the union became “Scabs out, Union in.” Their reaction is understandable, given that they were facing the loss of jobs that were a significant part of their identity—jobs that had been held by their grandfathers and their fathers before them.

Another conclusion that struck me very strongly was the inadequacy of the *Laidlaw* rights of the employees as a corrective for *Mackay*. In theory *Mackay* is offset under our law, because employees who are permanently replaced take priority in filling the next jobs that come open. Right now, around 200 of the 1,200 people who were permanently replaced at Jay are back at work. In my interviews with various people, I found that the ones who are the most miserable are the people who are back working under their *Laidlaw* rights. They are working beside the people who took their jobs.

One of the people I interviewed, Maurice Metevier, is a former striker now back at the Mill. He had once been a strong company supporter. When asked, “Are you a company man?“, he would say, “Yes, and I’m proud of it. They pay my salary and they’re entitled to the best labor I have to give them.” He’s a very admirable fellow, very likeable. He teaches Christian ethics at the Catholic school. But at this point, he’s in a fury and he hates his life. He simply cannot be friends with his new coworkers. As he puts it, “I go in every day with the same thought: just because I’ve got my job doesn’t mean it’s over. I’ve still got 600 to 800 friends on the outside and, until they are back, I refuse to socialize with these people.” He adds, “I moved in as a trainee. Then I moved

up. Now, I basically work for the guy who has my old job. It sucks. It's difficult to deal with on a daily basis. I'm sitting there watching this guy making \$2.50 an hour more than I make, doing a job that's a hell of a lot better than the one that I've got, I worked that job for seventeen years and, basically, I've gone back to being a janitor" Then he adds, "I look at 'these people. They stole our jobs, and I look at a buddy of mine socializing with one of them, and I can't comprehend it. But after you're there for a while, you feel a tension going on. You realize that it's necessary to survive." He concludes, "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 would our kids end up? What's going to happen to them? Is some corporate giant going to squelch them the same way?"

Every part of Metevier's life has been affected negatively Even though he's got a job back under *Laidlaw* rights, he's unhappy with that job. He's unhappy with the people. He's angry with virtually everybody

A legal analyst would claim *Mackay* is offset by *Laidlaw*, but I think the people who have exercised their *Laidlaw* rights at other places are also miserably unhappy and angry In fact, James Melican, Senior V&President and General Counsel of International Paper (IP), admitted to me that labor relations are now horrible at Jay Among the different groups, the greatest animosity is between the former strikers and the people who crossed over the picket lines and went back to work. One striker said to me, "Well, the permanent replacements may have had different principles, but the crossovers sold out for money, and that I can't understand." One striker I interviewed, Tom Pratt, had eight children. If he could stay out on strike and lose all of the money he had saved for his children over the years, he couldn't understand why other people sold out for money So there's continual anger

Fifth, without *Mackay*, it would be easier to develop a cooperative relationship. The proposals that the company put forward before the strike were actually advertised as efforts to develop a team concept, that would provide greater cooperation and flexibility And if these programs had been put into place and worked out together with the union, they might have helped to develop a more positive relationship.

There is a very fine line between proposals that are exploitative and proposals that will encourage the development of a more cooperative relationship. We can see that in every industry In the auto industry, for example, one can sometimes understand the frustration of the opponents of greater cooperation. Cooper-

Without Mackay, it would be easier to develop a cooperative relationship

I discovered that the contract signed with the so-called “permanent replacements” at Androscoggin and Jay actually permitted the company to treat them as temporary replacements.

ation has aspects that are reminiscent of a speed up-asking people to work harder for the same or sometimes-even less money Protections for job rights that have been built up over the years may be taken away Such proposals are always going to be controversial for employees. For these proposals to be accepted, the employer needs a cooperative relationship with the union.

At Jay, there was a democratic union that really represented its rank and file, indeed was of the rank and file. There was no real division. Before the change in leadership at IP, they basically had a cooperative and positive attitude toward the company An even more cooperative relationship could have developed which would have achieved some of the objectives that Ray Marshall described. Instead, the company adopted a strategy of unilaterally imposing change, telling the workers that if they did not like it, they would be permanently replaced.

It all may have been a sham to get rid of them, as most of the employees and some of the floor level supervisors thought, but—based on the work that Adrienne Birecree has done-I think the company really wanted greater flexibility. If the bargaining situation had been different, they would have worked it out in a way that would have acknowledged the rights of the union. I am convinced that without *Mackay*, there would have been a much more positive outcome to the collective bargaining.

Melican has stated that employers could not bargain effectively without *Mackay*. Yet their own experience refutes this claim. At Mobile, they had essentially the same bargaining positions in a well-organized bargaining unit of similar size. The company did not permanently replace workers, because they had locked them out, and could not legally hire permanent replacements. They hired temporary replacements instead, and they were successful. After impasse, they had the right to unilaterally impose their own bargaining proposals, and they did so. The result hardly suggests the employer was unable to bargain effectively as claimed by IP’s General Counsel.

Similarly at Jay, the company was in a very powerful position. Temporary replacements were available and could easily have been used. Indeed, I discovered that the contract signed with the so-called “permanent replacements” at Androscoggin and Jay actually permitted the company to treat them as temporary replacements: the contracts stated that the rights of the replacements would be governed by any agreement negotiated with the

union. The company could have signed an agreement with the union, which would have recognized the superior seniority rights of the strikers (who had an average of sixteen years of seniority).

If the final agreement had provided that “At the end of the strike, jobs would be allocated on the basis of seniority,” the strikers would have come back. The replacements would have been temporary. Legally IP played it both ways, but it was a matter of policy, not necessity, to treat the replacements at Jay as permanent replacements.

Much of what went on suggested that the company really was looking for a chance, if not to destroy the union, at least to control it. It is impossible to tell whether the company was out to kill or just out to severely wound the union. Several of the company’s own supervisors were not sure. The legal concept of bad faith cannot be used to protect a union from employer abuse as this negotiation shows. At best, International Paper was greedy and insensitive to the rights of employees who had worked for them for many, many years loyally and faithfully. They were arrogant in the way they treated the employees. They did not explain and they were insistent upon having their way.

Now does that mean that IP was legally at risk? Well, no, Can we even be sure they wanted to bust the union? Not quite. Not quite, because that motivation is so hard to reconstruct from events. I’ve really been working very diligently at this case study for about five or six months. I can’t tell what the company’s motive was. I’m not sure they had a clear, definable goal. I cannot imagine a government agency being able to tell. In these situations, an employer using replacements to get rid of the union can do so with impunity.

It is impossible to distinguish between the state of mind that says, “I want to be rid of the union,” and one that says, “Well, I insist on having my own way and running this plant in an arbitrary fashion and, if the union gets in our way we’re going to get rid of them”? I think there really is no psychological difference between the two states of mind. One former supervisor said to me, the company wanted an agreement, but *their* agreement! The company ran a massive television campaign. They had ads of old Maine farmers-actors, of course, playing the role—saying “I work on Sundays. I don’t see why these people don’t want to work on Sundays without overtime. We’ve got to all work together to keep Maine working,” and so forth. Every day, people would come home and see these ads.

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the interests of the strikers were outweighed by the shadowy interests of unknown parties in some moral calculus undertaken by the company.

The people in the Jay community were enormously supportive of the union. However, other people in Maine were convinced that this was a strike by a greedy union that was making a lot of money and keeping the employer from being competitive internationally. They thought that if the strikers at Jay had won, all of the paper work would shift from Maine to Japan or someplace else.

The true issues of the strike were largely buried. If the company really was in economic trouble, the union would have been happy to support it. All the employees that I interviewed were perfectly clear about their willingness to make concessions if the company had really needed it. The union went out of its way to signal that it really didn't want a battle.

However, the company was making record profits. The head of the company had managed to get himself a mere 38 percent raise at the same time he was asking the employees to take a 5 percent cut in pay. He was asking them to sign onto a program that was advertised as an effort to create flexibility that they knew was going to get rid of jobs.

In that community one of the things that gave people a sense of continuity and security was their belief that the next generation was going to continue living and working in the same way. It was very important to the employees to protect these jobs. The productivity of the plant was very high. But without any real explanation, the company announced that it was going to take away these jobs—this when they were making record profits. I have really spent a lot of time thinking about the justification the company gave through Melican, its General Counsel. He testified as follows, "The union has a responsibility only to its own members. The management of the company has to take into account the interests of shareholders, suppliers, distributors, customers, and the communities in which its facilities are located as well as all current employees, not simply those who happen to be on strike."

This claim is profoundly disturbing. It suggests that the interests of the strikers were outweighed by the shadowy interests of unknown parties in some moral calculus undertaken by the company. The assumptions employed in this calculus are far from obvious. Why wouldn't the interests of the shareholders have been served by continuing the existing contract—or by directing more attention to better relations with the union? It's difficult to believe that shareholders are better off now while the Androscoggin mill remains a battlefield. Will they be better off if

the dispute spreads to other locations in which the employees are represented by the same union?

Even if the shareholders are better off now, why are they entitled to profit through tactics inflicting such pain on employees who have worked loyally and successfully for the company? If the shareholders had **benefitted** from torturing the employees, no one would have thought it justified. Yet the current system really permits the employer to profit from the pain of employees.

How different is this from the sorts of abuse involved in human rights cases? People's lives were made miserable over several years. Some people died from the stress. Families were broken up. Alcoholism increased. All these effects are very common in situations where employees are permanently replaced. Can we say "Well, its true, we are going to have to inflict enormous pain on these employees, but the shareholders are entitled to that, even at a time when they're making record profits"? That assertion suggests a mixed financial-moral calculus which seems to me outrageous. The company claims it has the right to make that calculation on the strength of its greater responsibilities and information. But, its calculations seem erroneous at best. For example, the company claims it permanently replaced workers with a view to the interests of other groups including "the community" But what they did was incredibly destructive of the community They brought in outsiders, replaced lifelong residents, and ended the patterns of sons and daughters following in their parents' footsteps. They made it inevitable that one part of the community would despise another

Jay is a rural, working class community The setting is not picturesque. The homes are old and modest. There is no large city or other cultural center. There isn't a movie house, or a good restaurant Yet its inhabitants have thought of it as a good place to live. They applied to work at IP so they could stay there. Roland Sampson, one of the people I interviewed, described it as "a closer, friendlier community than any city" The company destroyed much of what made life in Jay seem special to its inhabitants. I can at least recognize the claim that management defeated the union on behalf of the shareholders, but for them to claim that they did it to help the community really strikes me as amazing.

Another important point is that the company had enormous resources. Someone on television described it as, "1,200 guys going up against a multi-billion dollar corporation." That was not quite true, but close enough. It should have been obvious who

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was going to win. The company had the resources. It had the equipment to carry the scabs through the picket line. It had the type of automated machinery that could be used fairly easily by management people.

After a while, being on the picket line was a horrible experience for the union people. One of them told me, “It was sickening: we just stayed there, and watched the scabs coming through.” On payday the replacement workers would wave their paychecks in the air, taunting the strikers. It was understandable, given that the strikers were not being particularly complimentary to them as they went by. But part of the torture that the employees endured was being on the picket line watching the replacements coming through.

Inevitably, the union undertook a corporate campaign. Corporate campaigns grow out of the type of bargaining that was going on in Jay, because unions need to find other tactics to replace the strike. Although arguments can be made for the corporate campaign, it runs counter to a basic tenet in our national labor policy, which is to avoid spreading disputes to other locations and employers. The corporate campaign is valuable to unions and employees because it moves the dispute from the picket line—where the employees feel helpless and really impotent—to situations where they may be more effective, at least in getting attention. The move away from the picket line and the effort to spread the strike is an inevitable outgrowth of *Mackay*. That result also leads to the conclusion that *Mackay* is inconsistent with our basic national labor policy.

This strike was a battle between the international union and International Paper. There were two really large forces contending over a long period. Adrienne Birecree, who also has studied this case, points out that this struggle went beyond these local employees. Many strategic decisions were made by the international union. In the struggle between the international union and the national company, the workers at Jay were the victims. They were the foot soldiers in this battle. They did not make the mistakes; they did exactly what was asked of them. They did it in an admirable rather indeed moving fashion, but they are the ones who lost their jobs.

The legislative bills (HR. 5 and S. 55) need to be seen, not as legislation to help unions, but as legislation to protect employees. If mistakes are made by the international union, people in the international union are not going to lose their jobs. The employees are. Employers frequently make this point in organizing campaigns—that this bill helps unions, not employees. I think the point can be turned around: if anyone should suffer as a result of mistakes in collective bargaining, it shouldn't be the rank and file employees who have worked loyally for a company for so many years.

Indeed, when I asked Melican, “Didn't anybody think that it **WAS** unfair to fire these people after twenty years of work and three generations?”, he said, “A lot of people said it's too bad it had to be Androscoggin.” That line really struck me. It's as though he admitted, “We were going to have to get rid of somebody, and it's a shame it had to be them.” This statement makes clear that the basic dispute was not just about Androscoggin. It was about relationships generally between the company and the union. The company figured they had to demonstrate their seriousness somewhere, and the foot soldiers in the war suffered as a result.

My study of the strike at Jay reminded me what unions really do, and do right. The point may not be directly related to the proposed legislation, but I can't help but make it. The union gave many of the employees a sense of their own ability. When they moved away from the picket line, many employees discovered that they could speak effectively to the press, to students and to the general public. Before the strike, Roland Sampson was too shy to go into a crowded grocery store—he'd send his wife in. The union sent him out, and he became a wonderful advocate. During the strike, workers discovered abilities the union valued, but that the company had never required they use.

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(H.R. 5 and S. 55)
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This [International Paper] case has very important implications for cost competitiveness.

-Adrienne Blrecree

Discussion:

A. BIRECREE: One issue that was brought up concerns the effect of hiring permanent replacements on union strategy. That year, the unions strategy was to resist particular concessionary demands by pooling ratification votes on contracts and using a coordinated bargaining strategy. That strategy did not work in the long run, as it had a year before with the Champion International Paper Company. Several UPIU locals that were slated to join the pool refused, because the company had hired permanent replacements at the plants on strike. They simply refused and instead stayed in the plants, working under implemented concessions. The demonstration effects were very strong in that particular area, and were very significant in terms of strategy.

This case has very important implications for cost competitiveness. The company did indeed have problems in the years preceding 1987. However, these problems were not caused by exceptionally high labor costs or declining labor productivity. The rate of increase in labor costs had been falling off. Labor productivity was actually increasing. The union had cooperated with a massive capital investment program begun in 1979. By the end of 1986, the company had invested about \$7 billion in modernizing and automating its mills.

The union agreed to help implement flexibility in exchange for the modernization of the plants. The understanding earlier in the bargaining history was that jobs, wages, and benefits for the remaining union members would be kept intact. Later, that very technology made it easier for the company to replace people, and to operate the plants during the strikes.

Company resistance began in 1986 and '87, when markets were much stronger. In 1984 and '85, and even as early as 1982 and '83, the relatively high value of the dollar seriously affected certain producers in this industry. The commodity producers were the hardest hit in 1984 and '85. Even though American papermakers were more efficient producers, they still were undersold by foreign producers who were importing U.S. pulp, producing in less efficient mills, and shipping it back to the United States. IP's solution has been to reduce wages, eliminate premium pay and eliminate holiday shutdowns to improve the rate of return on its very rapidly growing equity base.

Only about 20 percent of the companies in this industry have been following the very aggressive strategy of using permanent replacements. Many of the major paper producers still have cooperative relationships with the UPIU. However, they produce in significantly different product lines.

One impetus for IP's continuing demands for concessions was that IP's assets were undervalued in financial markets. It was one of a number of companies that was feeling the pressures of hostile takeovers at this time. IP's stock price was very low and management began to look at a number of *different* ways to fend off hostile takeover attempts. Financial analysts were telling them that they should be able to produce a 15 percent rate of return on equity which would improve their stock price. So, that became management's target

The strategy then became one of weakening the union-if not removing it altogether-if its members resisted concessions to eliminate premium pay, reduce labor costs, and improve the rate of return on equity. In more recent negotiations, management has even been looking at reducing health benefits. Presently there's a dispute going on at Kaukauna in Wisconsin, and IP will move these operations into the South shortly as a result.

One last point is that IP's policy had been to operate during strikes using nonunion personnel. Given the technology in the industry temporary replacements are costly to train. IP may have concluded that permanent replacements were cheaper in the long run than operating during the strike with temporary replacements.

J. BRUDNEY: Melican testified [June 6, 1990 before the U.S. Senate Subcommittee on Labor] and explained why replacements had to be permanent. He offered one main legal argument-that state laws governing strike breakers essentially precluded hiring temporary replacements in a lot of places. Is it true that companies are better off hiring permanent replacements and not running afoul of state law, than they would be if they hired temporary replacements and were prosecuted or fined under state law? And if it is true, is there some preemption argument?

J. GETMAN: Oh, yes I think those laws are in fact preempted by the National Labor Relations Act (NLRA). There were local ordinances that he also cited, which were passed by the town of Jay I don't think those legal arguments are at all persuasive, largely because the laws that he cites were never enforced.

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-Adrienne Bl recree

It is important to remember that the replacements were given a contract which stated essentially that they could be replaced at the end of the strike. They still took the jobs.

—Julius Getman

P. WEILER: There are some state laws that prohibit labor contracting during strikes, and labor contracting is one mode of supplying temporary replacements. Its a very narrow exception and the state laws are likely preempted in any event.

J. GETMAN: I think these laws are almost definitely preempted.

J. BRUDNEY: He also argued that in a rural area, with little housing and no other job opportunities, nobody would have an incentive to come to take a temporary job.

J. GETMAN: It is important to remember that the replacements were given a contract which stated essentially that they could be replaced at the end of the strike. They still took the jobs.

When I interviewed Melican, he didn't make the argument that they couldn't have gotten people to come. He claimed temporary replacements were less satisfactory because they were more likely to leave. He said that many replacement workers of Mobile left and took other jobs. They had a problem at Mobile keeping replacements on the job. But in a rural setting this position is less powerful: People at Jay don't have places they can go to find other jobs. There may be other jobs in Mobile, but there's nothing else around in Jay. Finally, the BE&K Company really is in the business of supplying replacements. They could have provided either temporary or permanent replacements. In rural areas, temporary replacements are easy to get and keep, because they can be shipped out later, and meanwhile, they're not going anywhere.

A. BIRECREE: Why would IP give up a skilled workforce, especially when they're concerned about competitiveness? [Julius] Getman's work shows that even the people that are being brought back in, who have years of experience, are not being put back into comparable positions. So how concerned can they be about productivity? I think their productivity problems will begin to appear just as paper markets start to weaken. They have been able to camouflage some of the productivity problems that come with less experienced workers. Markets were so strong that they could sell just about anything they could produce in 1987, '88, and even '89. Now markets are starting to weaken once again.

The union expects forty bargaining units to be following "in-plant" strategies by the end of **1991**. We can expect to see more long term effects of this hostile battle between the union and the company

J. GETMAN: Yesterday, Ray Marshall was talking about getting workers to go all out. The replaced strikers at Jay had a very strong work ethic. Many said they had a problem with “in-plant” strategy because they would find it hard not to do their best. One returned worker said to me, “I’ll haul ass for eight hours a day, but I’m not going to think. I know shortcuts, but I’m not using them. I’m giving them my body but not my brain.” He added, “Under no circumstances am I going to teach the scabs any of the things I know, to help them to become more productive. I’d like to see them all fired.”

Note that this antagonistic posture is taken by somebody who is really struggling with the moral dimensions of his own position: he believes that it’s immoral not to work hard, but it’s also immoral to help the company use permanent replacements. He’s caught between these two imperatives, but he’s worked it out so that he can work hard and still do the company the least possible good. I suspect his reaction is common.

A. **BIRECREE:** Until Georgia Pacific and Great Northern merged, IP was the largest paper-producing company in the world. Yet historically, it never performed near the top of the heap. So the quality of its management over time has been questioned. Basically, IP has relied on its vast size. It certainly helped in this particular dispute.

M. **SQUIRE:** Could we compile a profile of companies that would be more likely to replace workers permanently than other companies?

A. **BIRECREE:** Well, initially there appears to be a clear distinction between the companies that have been pursuing this permanent replacement strategy very aggressively and other companies that have not. For instance, Kimberly-Clark has a joint labor-management council. Their contract now states that they will not ask their workers for these kinds of concessions. They produce very different product lines than does IP.

I? **GREENFIELD:** The company’s position—that the union is responsible only to its members, but that management represents these larger interests—rang a bell for me. The company policy tracks the language in the Supreme Court’s decision, *First National Maintenance*, handed down in the early 1980s. The moral calculus engaged in by the company is exactly the moral and the legal calculus that the Supreme Court used in that particular case. In that opinion, the Court held that a decision to partially close the plant was not a mandatory subject of bargaining.

There appears to be a clear distinction between the companies that have been pursuing this permanent replacement strategy very aggressively and other companies that have not.

Adrienne Birecree

A major thread running through the law is the belief that if decisions were left to employers, the results would be more positive than if they were decided as labor-management concerns. There's very little reason to believe that is true.

~Julius Getman

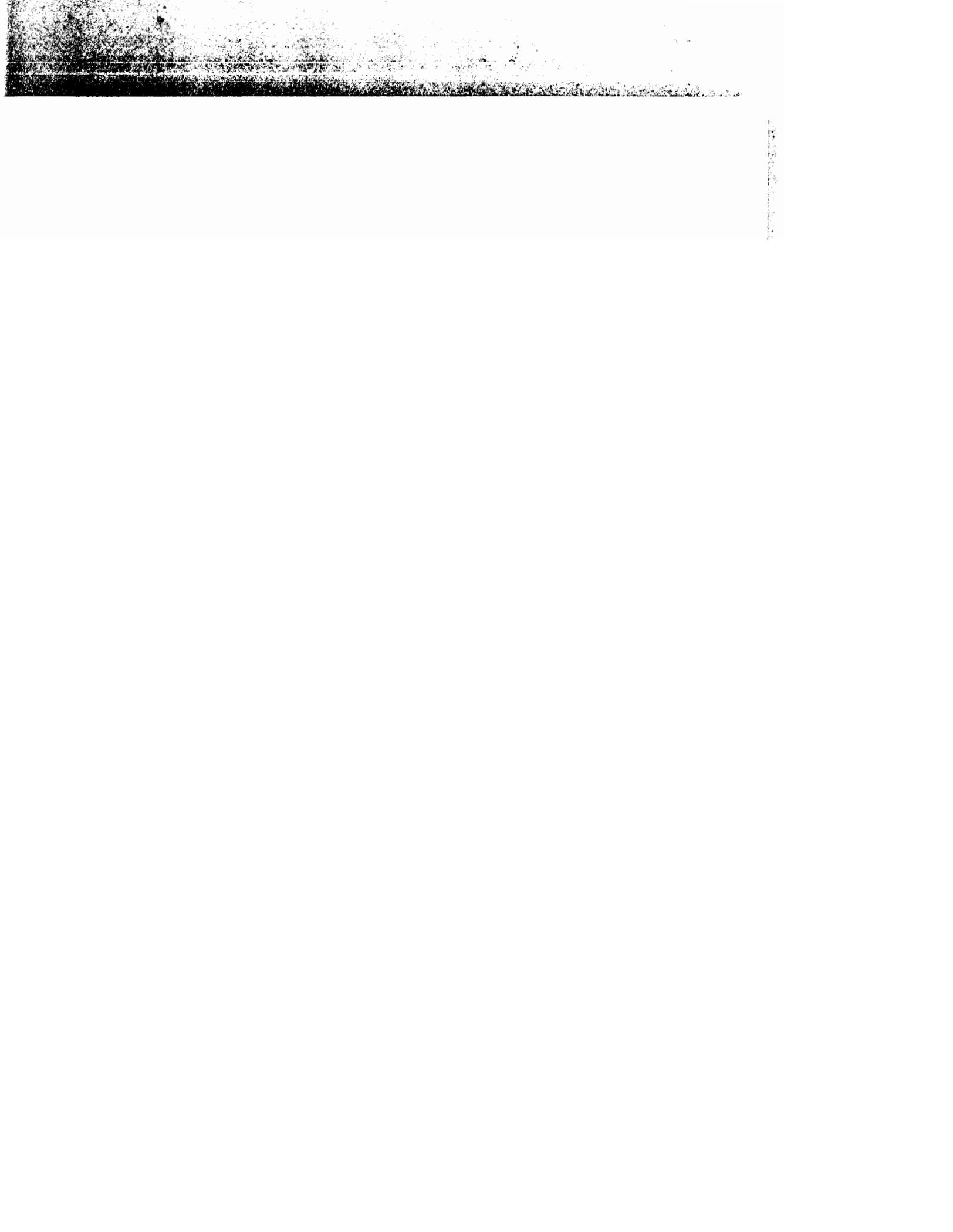
When that company justification is reflected again and again in a number of Court and Board decisions, it shows that we are not dealing with just a specific problem. We are dealing with an underlying ideology that permeates Court decisions.

We may get the strike replacement issue resolved, but if a partial closing issue cannot be the basis for a strike because it is not a mandatory subject of bargaining under the moral and legal calculus we have been discussing, our problem continues.

J. **GETMAN:** In teaching my labor law course, I always teach what I call “the capitalist exemption”—the law as drafted is clearly in favor of unions and the language of the Act is clear but the courts build in the notion that it’s the employer’s property and use that notion to abrogate union rights. A major thread running through the law is the belief that if decisions were left to employers, the results would be more thoughtful and more positive than if they were decided as labor-management concerns. There’s very little reason to believe that is true. As Ray Marshall said yesterday, it’s true that anybody who ever works with unions knows how much of the true expertise resides in the workforce. But the law is really based on this other notion: “Leave it to management; they know what’s right.”

Part II

**American and Canadian
Legal Perspectives
on Strikers' Rights**



Section 3

The Permanent Replacement of Strikers

William Gould, Stanford University

W. GOULD: I want to talk about two subjects today. One is an examination, with a comparative perspective, of the right to strike and employer rights to permanently replace. I will examine this issue both in the context of legislative ideas for this country, both at a federal and state level. As you will see, I am of the view that this subject must be considered in the context of a country's treatment of the wrongful dismissal issue as a general matter.

Secondly, I will address the permanent replacement decisions since *Mackay* in 1938 and other related Supreme Court decisions which have been handed down since then. The flight attendants' case, *TWA v. ZFFA*, gives crossovers preferential seniority rights, at least to the job that they held at the end of a strike. In *Hale v. Belknap*, the Court held that an employee who is a permanent replacement could maintain a wrongful discharge action under a number of theories of state law. The court reached this result even though the rights of strikers vis à vis replacements are governed by federal law, and the preemption doctrine normally excludes state jurisdiction in this area. Finally, a recent Supreme Court decision, *NLRB v. Curtin Matheson Scientific*, deals with the post-*Mackay* question: will the union continue to have representative status after the permanent replacement weapon is used?

When I came here this morning, I saw the *Wall Street Journal*. The headlines are, "Extra! Extra! How the Daily News did it," and the story described how they planned for this particular dispute. The Daily News was trying to figure out how to get the union to strike. That was the whole game. They wanted desperately to lock those workers out, but they were uncertain whether or not they could use the permanent replacement tactic after a lock-out.

The logic of the seminal cases on the lock-out, the *American Ship Building* and the *Brown Food Stows cases*, suggests that the employer can indeed use the permanent replacement weapon. The thrust of those cases says, "Go at it, fellows; engage in hands-off, robust collective bargaining. We are not going to intervene, because we don't want to tip the scales. We'll only intervene after terrible things happen." In *Brown Food Stores*, a case involving a

I am of the view that this subject must be considered in the context of a country's treatment of the wrongful dismissal issue as a general matter.

One consequence—the one Daily News has in mind—is that the employer is not only going to replace the strikers, but be able to avoid dealing with the union at all by creating a nonunion environment.

multi-employer lock-out, the Court said that the employers' bargaining weapon was appropriate, because the union continued to function after he locked the workers out. These lock-out cases suggest a course of action that is completely contrary to *Mackay*: they will allow parties to **u.se** tactics, but attempt to see what impact those tactics had. However, *Mackay* allows the employer to hire permanent replacements, regardless of the consequences.

One consequence--the one Daily News has in mind--is that the employer is not only going to replace the strikers, but be able to avoid dealing with the union at all by creating a nonunion environment. Whether the union continues to have representative status is the issue in the Supreme Court's *Curtin Matheson* case.

The legal debate about this issue is very curious, because the outcomes turn on semantics. The employer who doesn't hire counsel, the employer who says the wrong words, the employer who says "Get out of here, I don't want you here because you're on strike"--that employer is in trouble. The employer who has the foresight and financial ability to hire a top-flight lawyer is okay under this rule.

Mackay is an aberration: it's inconsistent with the modern cases dealing with the use of bargaining tactics, and particularly the lockout cases. So, interesting tensions are developing between *Mackay* and other evolving case law. The rationale the Supreme Court used in *Erie Resistor* is basically inconsistent with *Mackay*. In *Erie Resistor*, the Court held that super seniority cannot be awarded to non-strikers over strikers. Why? Awarding super seniority to non-strikers will create divisiveness and tension and bitterness, which will disrupt the workforce. The union then will have difficulty functioning as a collective bargaining representative.

In another group of cases, which I call "the waiting line cases," the National Labor Relations Board (NLRB) and the courts have begun to say that even though the employer can permanently replace, the employment relationship itself is not severed. In these cases, they rely on language in Section 2 of the National Labor Relations Act (NLRA) stating that an individual involved in a labor dispute still remains an employee. They asked, "What business justification could there be for refusing to let these employees who are not working fill vacancies as they become available in the future?" *Laidlaw* promotes rehiring those who have been displaced as a result of having engaged in the strike, even though they have to wait for vacancies to come open. As

[Julius] Getman suggested, the confluence of the preferential waiting list cases with some other cases has recreated the divisiveness inherent in super seniority that *Erie Resistor* precludes. Before, employers could claim “there’s no divisiveness of the kind that’s involved in the seniority cases, because all these strikers are gone.” Now, as a result of these preferential hiring cases, they’re less likely to be gone.

Most of these cases can be explained as Justice Brennan did in his dissent in the flight attendants’ case: “These rules can only be understood in light of a basic hostility to the right to strike, on the part of the judiciary” There simply is no other way to reconcile these rules with the right to strike. They can only be understood in terms of a hostility to the strike. When these rules are put together, they undermine the philosophy that we are urged to follow: to promote cooperation between labor and management.

I have been interested in labor law reform concerning rules existing in other areas of the NLRA that impede dialogue between labor and management. These rules impede a more cooperative model which could replace the conflict model promoted by the NLRA. In 1960 in the *Insurance Agents’* case, Justice Brennan said that the Act proceeds upon the assumption that the parties are antagonistic to one another and that they act in their own self-interest, independent of one another. That should not be the last word on the relationship between labor and management.

From a comparative perspective, one of the most remarkable aspects of *Mackay* and its progeny is that the United States really stands alone in the industrialized world. It is truly remarkable that people can have their jobs taken from them for engaging in conduct which itself is lawful. In Britain, they’ve just concluded a big debate about the 1990 employment act Thatcher has promoted a series of five major labor statute laws in Britain. Immunities have been available in connection with trade disputes in Britain for most of the century, even for unlawful conduct. The 1990 statute limits the applicability of immunities: some strikes are impermissible or unlawful. The Trades Union Council (TUC) rightfully is upset about the impact of the new statute, which will give management the right to selectively dismiss unofficial strikers. But it only gives management the right to selectively dismiss strikers who engage in procedures which are not designated by the statute. This is done through withdrawal of the jurisdiction of industrial tribunals over dismissals arising out of such unofficial stoppages.

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The Japanese simply find this argument-in the United States about permanent replacement—incomprehensible because, like much of Europe, Japan handles this matter through rules of general application protecting employees against dismissal.

The issue is not analytically comparable to the one before us. Under the British statute, sanctions are being imposed on strikers for actions which are impermissible. The fight concerns whether these actions should be permissible or not. The unions are particularly concerned, because employers will have discretion to pick and choose which strikers will be dismissed and which will not. That discretion did not exist as a matter of law in Britain until this year.

One of the most interesting things about comparative labor law is the difference in the questions that are asked. In all other industrialized countries, the idea that those who engage in conduct which is itself lawful can be dismissed is completely alien to their system. Generally, the law relating to strikers is a subset of broader laws concerning job security and unfair dismissal. Whether strike issues are resolved by labor courts (as in much of Western Europe), or by industrial tribunals (as in Britain), or by courts of general jurisdiction (as in Japan), they are treated as part of unfair dismissal law.

Japan is a particularly instructive lesson in this regard. It is extremely difficult to dismiss an employee in that country whether the dispute involves strikes or not. The Japanese simply find this argument-in the United States about permanent replacement-incomprehensible because, like much of Europe, Japan handles this matter through rules of general application protecting employees against dismissal.

Moreover, in Japan--and France and Sweden have clearer protection-the right to engage in collective activity, including the right-to-strike, is protected not only by statutes but by the Constitution itself. One of the great ironies of modern history is that this was placed in the Japanese constitution as a result of the MacArthur occupation. Of course, in the United States the right to strike or act collectively is not in the Constitution except insofar as some decisions provide constitutional protection for the right to organize under the First Amendment's implied freedom of association.

A number of people have suggested that we should focus on individual employee rights. My sense is that they are correct and that we need to consider the strike replacement issue in the broader context: under which circumstances may employees be deprived of their jobs? We have no comprehensive unfair dismissal legislation in the United States, except of the plant closing variety such as that enacted by Congress in **1988**.

In contrast to every major industrialized country, we haven't had job security legislation in the United States. The reasons are too numerous, it seems to me, to discuss here. It's unlikely that we will have legislation of this kind at the federal level in the foreseeable future, if at all.

However, evolving case law based on common law at the state level is beginning to have an impact on the unionized sector. In **1988** in *Lingle v. Norge*, the Supreme Court held that an employee may maintain a wrongful discharge action in a state which recognizes the so-called "public policy theory." Under this theory employees are permitted to sue when their dismissal is inconsistent with public policy, even though they are covered by a collective bargaining agreement containing its own grievance-arbitration machinery. Employees get a second bite at the apple. This decision suggests that it may be possible to address job security and unlawful dismissal through state legislation, as well as through federal legislation. I admit the Constitutional issues are extremely close. Would state legislation that spells out employees' job rights be constitutional? Would it be preempted?

I first began thinking about state unfair dismissal law and the preemption doctrine about seven or eight years ago. I was chairman of a California state bar committee that issued a report in 1984 advocating wrongful discharge legislation in California. I was interested in finding an alternate forum for the resolution of dismissals of workers arising out of union organizing activity especially given the ineffectiveness of the NLRB in enforcing Section 7 rights. In some instances, the NLRB was hostile to Section 7 rights.

Could the states exercise jurisdiction in this area? There is a line of preemption cases which suggests that, if the state has broad detailed comprehensive legislation, the states may have jurisdiction even though some union activity is affected by the legislation. The preemption doctrine is viewed as inapplicable because only a small part of the legislation affects union activity.

Another approach is to advocate legislation to redress wrongful discharge of employees covered by collective bargaining agreements that have inadequate grievance machinery or no machinery at all. Admittedly, only the small percentage of the employees covered by collective bargaining agreements with little or no arbitration would be protected. Would that legislation be constitutional?

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The Daily News dispute and many other disputes do not simply concern whether or not the strikers get to come back to their jobs, but whether there's going to be a union at all.

Finally, legislation might be enacted which affects only those who are replaced forengaging in the right to strike, ignoring the preemption doctrine. Despite the strong preemption considerations in *Hale v. Belknap*, states still were able to maintain jurisdiction. That case involved a wrongful discharge action brought by a replacement worker who lost his job to a striker. The Supreme Court held that wrongful discharge may arise in a wide variety of cases, and that although the case arose in the context of a dispute between strikers and non-strikers, that fact did not place it under the jurisdiction of the NLRB and out of state control.

Yet state regulation of the hiring of permanent replacements is part of the broader issue of the rights of workers in the workplace, from in the union and non-union sector, from the policy and constitutional perspective. The Daily News dispute and many other disputes do not simply concern whether or not the strikers get to come back to their jobs, but whether there's going to be a union at all. This is why regulation at some level, federal or state, is vital.

Employers have been arguing for years before the NLRB that once replacements come across the line, they should be presumed to be hostile to the union. Therefore, the employer should be permitted to refuse to bargain with the union.

In the *Curtin Matheson* decision earlier in 1990, the Supreme Court adopted a so-called "no presumption" rule, which will not presume that replacements are hostile to the union, but rather require the Board to take into account the circumstances surrounding the strike and the hiring of replacements. The Court gave a number of reasons why a replacement worker who came across the picket line could nonetheless support the union. The employer is required to come forward with some objective evidence to substantiate the doubts about the unions majority representative status.

This decision (by five-four vote) is a victory for unions in this area, but a relatively unimportant victory. It is unlikely to attain much practical significance for four reasons. First, the environment is likely to be one of conflict and tension after the strike. It won't take much time for the non-strikers to come forward with specific examples that will permit the employer to say, "Look, I wasn't simply inferring this hostility"

Second, the employer can always tell the non-strikers the facts of life. I advocated that some kind of accommodation be found that would respect the rights of workers to band together in the interest of solidarity, and provide reasonable rules to protect the union in the midst of a strike (against resignations or other conduct that was hostile to the unions interest) and at the same time, respect the individuals rights to resign from the union and to refrain from union activity Five years ago, the Supreme Court held that no accommodation need be found under the NLRA. Any kind of restraint upon the right of a union member to resign from the union, whether it takes place in the midst of a strike or not, is a violation of the law The employer can tell workers, “By the way, there’s this lawyer down the street who would be glad to represent you if the union comes after you for exercising your right to resign. You have that right. I’m not telling you to see him, I’m not requiring you to resign from the union, but here it is. These are the facts of life.” It doesn’t take too much imagination to see what the realities are likely to produce in the *Curtin Matheson* context

Third, I think *Curtin Matheson* is likely to be of limited significance because the fifth vote was provided by Chief Justice Rehnquist. While employers cannot infer that the replacement workers are hostile to the union and, therefore, refuse to bargain with the union, he suggested that the employer ought to be able to poll the workers about their interest in continued union representation, even when there is no reasonable doubt about the unions majority status,

Finally, if employers are uncertain about exercising their rights under *Curtin Matheson* by simply refusing to bargain, they may file a decertification petition with the NLRB. They’ve been able to file decertification petitions since 1947. Theoretically, they must have reasonable grounds to doubt the unions majority status when they file the petition, but whether they do is an administrative matter for the Regional Director to determine. Whether or not the employers’ doubts are reasonable, the Regional Directors determination cannot be challenged. Thus, the *Curtin Matheson* case does not alter the basic dynamics that have been described this morning, even though the union won.

Any kind of restraint upon the right of a union member to resign from the union is a violation of the law.

When we tell our labor law students that lawyers draw this distinction between losing your job by dismissal and losing your job by permanent replacement, they begin to laugh.

-Paul Weller

Discussion:

P. WELLER: How could the Supreme Court of the United States have produced *Mackay*, which is probably the most heavily criticized decision in all of labor relations? It's hard to find any labor law scholar, at least one who believes in the National Labor Relations Act, who would argue to retain that rule. Yet the U.S. Supreme Court, without dissent, produced it back in the late 1930s.

In the 1930s, legal intervention in the labor market—any regulation of the employment relationship, such as intrusion upon employment at will—was not only considered very dubious within the political culture, but felt to be unconstitutional as well. Franklin Delano Roosevelt seriously entertained the idea of vetoing the Wagner Act, though Frances Perkins, his Secretary of Labor, vigorously advocated signing it. Some people say that Roosevelt held his nose and signed the bill, because he thought it was unconstitutional. Considering the mindset of the Judges at that time, it may well have been held unconstitutional. Even prohibiting the discriminatory dismissal of union organizers was unacceptable during that era of jurisprudence, and thus prohibiting the discriminatory dismissal or discriminatory treatment of strikers was clearly considered to be unconstitutional.

In 1937, *Jones and Laughlin* held for the first time that such regulation of the employment market was acceptable. On appeal, *Mackay Radio* went to the U.S. Supreme Court after they had decided *Jones and Laughlin*. The lower courts had held that it was unconstitutional for the NLRB to try to force employers to reinstate strikers, even when there were no replacements. There still was grave doubt about the statute, and it was in that setting that the brief of the Solicitor General, representing the NLRB, conceded this key aspect of the *Mackay Radio* decision.

Many things that Ray Marshall mentioned last night—such as the weakness of NLRB remedies in 8(a)(3) cases involving the discriminatory discharge of union organizers—come from that period when the U.S. Supreme Court was trying to integrate this radical-looking statute into the legal mainstream.

Fifty years later, that point of view appears anachronistic. We have a very different attitude in part because we have developed so many forms of employment legislation. As [William] Gould pointed out, we have a growing body of litigation in state courts about wrongful dismissal. The best established line of cases are those concerning wrongful dismissal in violation of some public policy. Thus, when we tell our labor law students that lawyers

draw this distinction between losing your job by dismissal and losing your job by permanent replacement, they begin to laugh. Imagine what the reaction would be, if the lawyer for the employer who has fired somebody for whistleblowing, or for filing a workers compensation claim (i.e., the *Linge-Norge case*) argued, “No, that employee was not fired, but was simply permanently replaced.” Undoubtedly that contention would be laughed out of court.

Ironically, then, the National Labor Relations Act (NLRA), which was the pace setter in establishing the legitimacy of legal regulation of the labor market, has now produced the weakest form of protection of employee rights. Some fifty years later, we see far stronger alternatives enacted in other legal programs.

One good thing that Congress might do is actually to take another look at the preemption doctrine. To my mind the NLRA should operate like the Civil Rights Act and the Occupational Safety and Health Act, and *not* preempt the right of states to create complementary legal remedies. We should permit discharged union supporters to bring tort suits in front of juries, using plaintiffs lawyers. Winning a few large damage awards would send a message to firms who want to discharge organizers or discriminate against strikers.

Contrary to [William] Gould, I have grave doubts that the states can unilaterally overturn the preemption doctrine. But Congress could overturn it, and thus permit the state’s political process to work out the appropriate legislative or judicial policies.

Turning now to *Mackay Radio*, there is a revealing sentiment expressed two or three times in Justice O’Connor’s decision in the *TWA* case dealing with employees who “crossover” during a strike. Fifty years ago, the NLRA supposedly created an employee *right* to go on strike in pursuit of the public policy of free collective bargaining. Ironically, one of the really great statements of the desirability of a system of free collective bargaining with this accompanying right to strike, was by Senator Taft defending the Taft-Hartley bill. In particular, the part of Taft-Hartley that rejects strongly compulsory arbitration. That sentiment was the original Congressional view of the NLRA.

Now, in *TWA*, Justice O’Connor states to employees: “When you go on strike, you gamble. You bet your job, and now don’t come back complaining to us that you’ve lost the bet.” She uses that word “gamble” two or three times. But only in the context of the NLRA is that view taken of public policy dismissals. From an individual rights perspective, *Mackay Radio* is an incredible

From an individual rights perspective, Mackay Radio is an incredible anomaly.

-Paul Weller

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—Julius Getman

anomaly Eliminating the permanent replacement feature of *Mackay Radio* will help repair the damage that it does to the collective bargaining process.

J. GETMAN: At one time, it was a revolutionary idea that jobs were legally protected against employer action. *Jones and Laughlin* agrees that employers can discharge for any reason, whether a good reason or no reason at all and presents its own ruling as not taking the employers' prerogative away but allowing a very limited exception. As the law dealing with unjust discharge has developed, the first and most powerful and important protection—that of the NLRA—has become the least. Tactically it is a valuable point to make as part of the debate. In *Mackay*, the lower court stated workers vacated the employment relationship when they went out on strike. That assertion is contrary to the waiting line cases, but it reappears in O'Connor's opinion. One of the scabs told a striker at Jay, "Well, as a rule of law, you know, you left your job; we took it. We didn't take anything away from you; you walked out." He replied, "Well, I leave my house, too. I come back the next evening, and there you are with my wife and kids."

W. GOULD: I agree with Paul Weiler that O'Connor's opinion reveals how she and others on the Court regard the right to strike. Interestingly enough, the public debate on this subject is infected with this thinking. Some young kid from either the National Association of Manufacturers (NAM) or the Chamber of Commerce made the same point: "Hey, look, you roll the dice, and you take a chance, and this is what happens," in a debate with Lynn Williams [President, United Steelworkers]. This argument ignores the economic pain and suffering being thrust upon workers who engage in the strike, whether they have the right to go back to work or not.

L. MISHEL: We need to examine the issue of what it means to be punished or suffer reprisal for exercising a legally protected right. A comparison can be made to the rights of free speech under the Soviet constitution: for seventy years, they were there in black and white, but if anyone tried to exercise them, he got thrown into a mental hospital, into jail, or sent to Siberia. In America, workers have the right to strike. "Nothing shall be construed so as to diminish in any way the right to strike," says the NLRA, but when someone exercises that right, he loses his job. **Are there other areas of protected activity that lead to sanctions under U.S. law? Is this unique?**

W. GOULD: When I teach labor law to students I say “Well, if an act you engage in has protected status, because as a matter of policy we wish to encourage such acts, then the employer cannot discharge you or alter your terms and conditions of employment adversely because you engaged in these acts.” Then I tell them the other things—that they *can* be permanently replaced. Either they laugh, or become even more confused, or maybe both simultaneously I can’t think of any other area of the law where people are punished for exercising a legal right. The Board has sometimes, with judicial approval, refused to provide certain kinds of relief for specific violations of the law But affirmatively providing relief for violations is a different issue.

J. GETMAN: I’m looking for examples of the reverse of this argument. I’m looking for examples where the courts say, “This is such a serious penalty, that even though you’ve done wrong, we won’t punish you.” One example that occurred to me is landlord-tenant law That is, it’s very hard to oust somebody from possession even when he violated the terms of the lease, but you can oust somebody from his job when he followed the procedures that you’ve required.

H. HARTMANN: Speaking of examples of protecting rights, I recall an article by Charles Reich at Yale Law School regarding the expansion of the definition of private property (Reich, 1990). For example, a drivers license cannot be removed without due process. The right to drive could be treated as a property right because it is so basic to the ability to survive in this economy Another example is the Pregnancy Discrimination Act (PDA), a federal law passed in 1978 designed to overturn a 1976 Supreme Court decision, *Gilbert v G.E.*. Recently, the Supreme Court held in a California case that the California state law, which gave workers more than the PDA required, was not preempted by the PDA. Those examples might be useful.

The Family and Medical Leave Act just passed both houses, only to be vetoed by President Bush. Quite a bit of progress has been made in the states with family and medical leave legislation; laws guaranteeing workers the right to keep their jobs, despite taking leave for sickness or pregnancy or childbirth. Many people predicted just five or ten years ago that these laws would not get through state legislatures.

W. GOULD: I would be foolish to predict what the Supreme Court will do with the preemption doctrine and the NLRA. When we wrote our 1984 report on wrongful discharge, we relied on a New York case that concerned giving unemployment

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—William Gould

Making clear how illusory is the distinction between replacement and discharge can and should be part of the case in favor of the proposed legislation banning permanent replacements.

-Paul Weiler

compensation to strikers. The employers attacked that as unconstitutional: the state was coming in and propping one side up. A plurality of the Supreme Court rejected that attack upon the unemployment compensation system. It would be foolish to predict the outcome of a future case, but it seems to me a plausible argument can be made.

P. WEILER: [William] Gould's notion of discrimination in terms of the existing law is an interesting idea. Under the current state common law, roughly forty-five states allow a tort action for wrongful dismissal in violation of some public policy. To my mind it is discriminatory to treat one kind of public policy differently from another one. Making clear how illusory is the distinction between replacement and discharge can and should be part of the case in favor of the proposed legislation banning permanent replacements.

R. ROTHSTEIN: As people have been speaking, I've asked myself whether it makes a difference whether they talked about temporary or permanent replacements. In most cases, it doesn't. In most cases, the points that are being made would be equally valid if permanent replacements were prohibited and temporary replacements were permitted. The Daily News is a very good example. In the Daily News strike, they are hiring people permanently in the blue collar crafts. But they're flying in people from around the country who are clearly temporary replacements to fill the editorial and the white collar positions. In either case, the damage is just as great. The ability to persevere and the bargaining power of the unions that are on strike are damaged by both permanent and temporary replacements. If the Daily News is successful in filling up the plant and the editorial room with replacements, the unions are going to be in a long term struggle and eventually will be faced with a decision to surrender. The unions will not have been able to keep the operation from functioning.

I don't think the outcome hinges on whether replacements are temporary or permanent. I think that the reform is, in many ways, being oversold. A lot of expectations are being raised which are not going to be fulfilled.

P. WEILER: I disagree with Richard Rothstein's point that there is no difference between permanent and temporary replacement in terms of the dynamic of the bargaining relationship. I do agree that it is only one piece of the puzzle. But certainly restrictions on permanent replacement, like those now existing under Canadian law, could ease the employees' and their unions decision about whether or not to go on strike. Read-

ing the stories about the Daily News strike, I saw how people were agonizing, day to day, in the early days of the strike, about whether to cross over: As Justice O'Connor said, they were being forced to bet their jobs that the union was at least going to be able to get their jobs back, if not to win a victory bargaining.

It is very important to provide employees with a safety net beneath that strike decision, if we want workers to exercise a right granted by Congress because it thought this public policy of free collective bargaining was valuable. It is important to provide the safety net, even if it does not guarantee unions' success in winning wage settlements. At the same time, such a safety net might help contribute to a higher-wage, higher-productivity economy, as Secretary Marshall has said.

F. FEINSTEIN: Not everyone will agree that permanent replacements hurt the economy. For example, if we head into a shakier economy, some members of Congress may be very reluctant to make a fundamental change in labor law that will be characterized by employers as having dire economic consequences: more strikes; more instability; and more unrest.

C. CRAYPO: I observe that replacement workers are used predominantly in strike situations in certain industrial structures and industries. Specifically, replacements are used where employers cannot easily relocate production. We don't see replacement workers used in heavy industries, such as metal manufacturing, or in multi-plant corporations, or in cases where the employers can relocate production. For example, Bendix Allied just announced that an automotive brake unit in southern Michigan will be closed, and the work will be relocated to a newly constructed plant in Virginia. When asked why, the company said "Because we think it's in the best interest of the company not to deal with third parties." Now six years ago, when they closed a similar plant in South Bend, they said that they had to compete with Brazilian wages. Now they make a more open statement: "We don't want to engage in collective bargaining. We're going to go where we probably won't have to bargain."

Why go through this process of substituting workers, dealing with violence and so on, when you can simply wait until the existing facility has aged and then move somewhere else? But, by contrast, Greyhound couldn't move. Iowa Beef couldn't move: all the cattle are next to the plant. Continental and Eastern Airlines can't move. They can't set up shop somewhere else. So if they've adopted an anti-union or low-wage strategy, they have to fight. They have to take on the union.

Replacement workers are used predominantly in strike situations in certain industrial structures and industries where employers cannot easily relocate production.

-Charles Craypo

Mackay not only permits but actually encourages an employer to fight the union in those situations where the employer can't easily move or has a single plant operation and doesn't have the resources to move.

J. GETMAN: Currently, strikes are being provoked by employers. IP provoked a strike because they saw a chance to get rid of or tame the union. The legislation would reduce that temptation.

Currently, strikes are being provoked by employers. IP provoked a strike because they saw a chance to get rid of or tame the union.

—Julius Getman

Secondly and most importantly the legislation would encourage employers to be more forthcoming with the union-to provide unions with greater information in order to get the unions not to strike. The response of organized labor when employers have come and said, "Look, we need help," has been overwhelmingly positive. Employers who no longer have the option of beating the union into the ground try to cooperate. This bill would increase employer efforts to cooperate with unions because they wouldn't have the same option to go for the kill.

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In the United States, the median period of time spent seeking a remedy for an unfair labor practice is over 700 days.

Suffice it to say, we are much less a unitary nation than is the United States. In the political domain, our unity is subject to question every three to six months. Our leadership can be replaced quickly when it loses popular support

Early on in the development of Canadian labor law, we embraced the *Wagner Act*. We adapted the *Wagner Act* province by province. As Professor Weiler has argued (Weiler, 1980) we have experimented in these little incubators, and in doing so, certain general trends have emerged. Provincial laws may differ from province to province, but there are certain broad similarities.

Although there are some major exceptions, generally union certification is automatic—without a vote—after a check of membership cards, if the union received the requisite percentage of employees support within an appropriate bargaining unit. In general, we do not have so-called “representation votes” as a matter of course. If the union does not obtain the required percentage, there will be representation voting as long as a lower level of support is reached.

I should note that automatic certification has disappeared in British Columbia, Nova Scotia, and elsewhere. In some places, we go directly to representation voting.

When the laws are broken in Canada—when an employer discharges for improper reasons, or bargains without the intention of entering into a collective agreement, or a union engages in unfair representation—a complaint can be lodged with the Board by the complainant. That complaint will be litigated promptly. In the United States, the median period of time spent seeking a remedy for an unfair labor practice is over 700 days. I find that to be an interesting phenomenon about the commitment to labor relations harmony

In Ontario, a worker who is fired on Monday can have his union file a complaint immediately. A settlement officer will be assigned within approximately fourteen days. If the matter does not settle, there will be a hearing before the Board about five weeks later

Apart from the speed to reach litigation, there are important substantive and procedural advantages, as well. The onus is on the employer in the case of an unfair labor practice discharge. In most Canadian jurisdictions, the employer must proceed first. He must establish that he did not fire the worker for any anti-union motive, though he may have had any number of other good reasons. If any part of his reasoning included an anti-union motive, the worker will be reinstated within months.

Litigation about bargaining is a much more confusing process. The kind of evidence needed and the process a tribunal follows cannot be summarized so simply. But in any event, in Canada it happens relatively quickly. In most jurisdictions, complaints are settled quickly.

I emphasize the speed with which the statute is enforced, because enforcement affects people's protected rights under the statute. It is a little hollow, it seems to me, to legislate a statutory amendment that would provide workers with certain options during the course of a strike, and yet refuse to provide them with an effective remedy to implement those options. The hallmark, in my view, of the Canadian system of labor relations is the effectiveness of the process. Workers' rights are only valuable if they are effectively protected.

How our procedures should be replicated in the United States is beyond me. Under the current circumstances, there appear to be a lot of people in the United States who like delays of up to 700 days. Those long delays suit some purposes just fine.

Turning to the question of strikers and strike replacements, I'd like to clarify some misconceptions. In Canada, the question of strikers and strike replacements must not be considered in a vacuum, but within a context of labor relation statutes which develop in a political environment.

Many Canadian jurisdictions provide that first agreements are arbitrated. The union gets certified, and goes and bargains. Perhaps bargaining doesn't work for one reason or another. The employer may refuse to recognize the union, or he won't meet with the union, or he doesn't adequately explain what it is that he wants, or his explanation is unreasonable or ridiculous or false or illegal. The union makes an application to the Labor Board. Upon the arbitration of a first agreement, any ongoing strike is over, and the strikers return to work.

Sometimes, there is no strike. Generally a first agreement is reached without a strike. The ability to obtain a first agreement without a strike is one major difference between Canadian and U.S. labor law that affects permanent replacements. In Canada, workers generally do not have to strike to obtain a first agreement; and if they do, their seniority (and their jobs) are protected in many jurisdictions. For example, in Ontario we have enshrined in our statute the right of workers to return to work in accordance with the seniority they had when they went out, provided that the Board orders that the first agreement be settled by arbitration. This is significant. The codification of senior-

It is a little hollow, it seems to me, to legislate a statutory amendment that would provide workers with certain options during the course of a strike, and yet refuse to provide them with an effective remedy to implement those options.

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ity in the labor statute is an important advance in a post-Wagner Act statute.

Moreover, many Canadian jurisdictions have mandatory strike votes and mandatory ratification votes. These votes apply a certain amount of pressure to the trade union, but they also provide information to the employer. Employers know what they face. If the employer believes that the bargaining committee was completely out to lunch, the votes indicate whether this was true.

Some Canadian jurisdictions, notably Ontario, permit the employer to run the risk of requiring that there be a vote on the employer's last offer received. If it is accepted, the last offer will become the collective agreement, subject to some exceptions. If it is rejected, it will probably be the new bottom line for the next meeting.

Within the Canadian context, we seek to deter the parties from engaging in strike actions. Certain levers can be pulled to stop parties from engaging in strike actions. From coast to coast in Canada, strikes are illegal during the life of a collective agreement. Canadian collective agreements generally do not need clauses precluding strikes during the life of the agreement because it is mandated by statute. Arbitration also is mandated during the term of a collective agreement to resolve any dispute that can arise during a collective agreement.

Another key difference concerns the way unions are decertified. There is a general recognition that employers involve themselves in the decertification of unions. Such employer involvement in the decertification of unions is illegal, because it turns an otherwise voluntary expression of employee wishes into a nonvoluntary expression of employee wishes. Each provincial statute has a different time frame during which the union can be decertified. These statutes specify the circumstances under which the union may be decertified. In general, however, it is somewhat difficult to decertify a union and the employer's role is carefully scrutinized.

When strikes occur, we do not, generally speaking, permit the twelve month rule, "bye-bye" union decertifications that are used in the U.S.. In some Canadian jurisdictions, the union can only be decertified after the strike has begun and, even then, the strikers are entitled to cast ballots. So strikers, as well as replacements, will be entitled to vote in most jurisdictions. Ironically, the law in Ontario is quite unclear as to whether or not *replacements* can vote in a decertification election. I am not aware of any reported Ontario case which holds that replacements can vote to decertify

There's no question. that strikers can vote. After all, they are employees in the bargaining unit; they are across the street with their union. But there is some question as to whether those people who are employed on the other side of the street are in fact in the bargaining unit at the time of the application to decertify

Why aren't there any reported cases? Why don't we see, in Canada, cases about tragedies like Phelps Dodge or the New York Daily News or others?

There are a number of explanations, I think, that I can suggest. First, it is not politically acceptable in Canada to replace strikers. It doesn't fall within the acceptable political culture of any Canadian province. Using replacements or scabs is not an acceptable way to defeat a union. When I say that, I don't mean it flippantly. We have political parties in Canada that strongly support strike-related behavior. We have political parties on the left that are closely affiliated with the labor movement. And even when in power, the parties of the right have had to broker support from the trade union movement.

In Canada, some provinces have two dominant political parties, but many have three. In a multi-party system, there is bargaining and brokering between the parties for support, so certain kinds of behavior simply fall off the table.

I agree that whether or not an employer can pick up the plant and move has a very significant impact on labor negotiations strategy and the use of replacements. For example, where an employer in Ontario operates a gold mine, he has some difficulty planning a move. Gold does not move easily, but it also doesn't rot. The ore stays for a very long time, and the owner of the gold mine knows that very well.

In Ontario, we have a special six-month rule. The rule states that there is a six-month window of opportunity once a strike begins, during which an employee on strike has the right to make an unconditional application in writing to the employer to return to work, on terms negotiated between the employer and the employee. There are some limits that govern those terms, although there are few cases on this section under the Ontario Labour Relations Act. Presumably, those terms have to at least equal what the employer has offered at the bargaining table, and they can't be any worse than those offered by the employer to replacements now employed.

Any striker who offers to return gets to return. He has a right to employment with the employer even though he left his job to

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In my experience, the six-month rule has only been used rarely. It is not a valuable tactic or strategy.

participate in the strike. The striker who crosses over does not have a trade union representing him, nor does he pay union dues. There is no collective agreement, and if enough strikers cross over, these crossovers completely replace the replacements. The strike is ongoing, but the replacements have been replaced by the crossovers.

Some people argue that giving the crossovers the opportunity to replace the replacements is the solution to the problem of *Mackay*. In Ontario, we find that a union very rarely recommends to workers that they unconditionally apply to work within six months. The effect of a massive crossover is that the people who used to be across the road on strike are now working on terms and conditions which they negotiated individually with the employer. The unions economic leverage and its ability to get a collective agreement is now zero; the union has been effectively decertified.

In my experience, the six-month rule has only been used rarely. It is not a valuable tactic or strategy. It is not an acceptable method to lose a strike from the perspective of the union. It is a way to kill the union.

In any event, going back to the gold mine and a real example, the mine owner sent a video presentation to every worker's home, to all 600 workers, two weeks before the first six months of the strike ran out. In that video, he told them "Hello. I am your Chief Executive Officer. We just can't accept the unions proposal, so we propose that you come back to work. If you come back to work within two weeks, you'll be able to get your job back at such and such a rate. If you don't come back to work within two weeks, then we're going to shut the mine on November 16th. **Go talk** to your union, and ask whether you're on the recall list if the union accepts the final offer that we made this morning. Bye." Fade out. Music in the background.

All disabled workers, all workers who had ever had worker's compensation claims, all workers over fifty-five years old who had ten years of service-were on the layoff list. Only 300 people would be returned out of an original workforce of 600, and those 300 were on the recall list. These were the young, healthy workers-in the employer's language, "the better and fewer workers." Those over fifty-five with ten years of service were entitled to an early retirement package that was quite generous. The employer knew who was going to go on early retirement and who was going to be on the recall list. He counted votes. He knew that 350 of the 600 people would vote yes, and that 250 people would vote no. He refused to request a vote, because the

employer can only do so once. Instead, he asked the workers to demand that the union convene a vote to accept or reject the contract

Now, a number of aspects of the employers proposal were clearly unlawful. There were many ways to challenge that proposal. After two or three years of litigation, a challenge probably would have been successful. But by then, the mine would have been closed for two or three years.

The employer was running a significant risk. A mining operation is similar to a construction contractor: In three years, the company might have ceased to exist.

This incident occurred in Ontario, under the most progressive legislation that exists. The Canadian legislation couldn't stop this particular mining company from engaging in this kind of behavior. The mining company was stopped when a new government, allied with workers, was sworn into office in Ontario. The new government informed the employer that it didn't look kindly on this particular bargaining position. It recommended to the Association of Mining that it reel in its renegade. The employer's bargaining position mysteriously changed, and the recall to work was revised to accord with seniority

A political solution to the problem was found. Otherwise, it would have been difficult to resolve the dispute. This particular union had been on strike for a long time. It wasn't going to win this strike. It was not even a strike over money. It was a strike over seniority and health and safety issues. The economic elements had all been resolved.

How to approach the issue of recalling striking workers is another important question. The *Shaw-Almex* case was decided in 1986 by the Ontario Labour Relations Board and affirmed by the Ontario Divisional Court. It governs how to deal with an employer that insists on defending its replacements. When the only issue still in dispute is who gets recalled, *Shaw-Almex* holds that it is unlawful for the employer to insist on keeping replacements at work, letting the strikers return only as vacancies occur.

An American case, *Laidlaw*, holds that employers may choose to keep replacements and, as vacancies occur, take strikers back. That was the employers position at the bargaining table.

That position was found to be unlawful, contrary to the Ontario Labour Relations Act, not only because it amounted to bad faith bargaining but, more importantly, because it was discriminatory and thus interfered in the formation and administration

How to approach the issue of recalling striking workers is another important question.

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tion of the union. It discriminated between strikers and replacements simply on the basis of participation in the strike. The employers preference for its replacements was discriminatory

The Ontario Board said, in effect, "From that moment, employer, you turned an otherwise lawful economic strike into an unlawful, unfair labor practice strike." The damage award came to \$1.5 million. The strike lasted for five years until the litigation ended, and the law in Ontario on replacements was changed by the decision.

Why wasn't the issue litigated until 1986? I don't know It's hard to tell. In an earlier case, *Mini-Skools*, where the issue was the employers insistence on keeping its preferred crossovers, the Labour Board came to the opposite conclusion: it had no trouble with the employer defending its crossovers. Crossovers, after all, were in the bargaining unit at the time the strike began, and then had decided to cross over and came to work. So the law in Ontario distinguishes between crossovers and so called "replacements." Crossovers can be preferred and retained, even though they may be retained out of the order dictated by seniority Replacements could not be preferred over strikers seeking to return to work.

The reasoning is that crossovers continued to be employees, and were not different from anybody else in the bargaining unit who was an employee. However, allowing replacements to continue to work, in preference to bargaining unit members, was different. The nature of the discrimination was different. In the crossover case, it was not discrimination solely because one person engaged in the strike and another person didn't engage in the strike.

In *Mini-Skool Ltd.*, there were significant numbers of crossovers. The union said, "We want the people to return to work in accordance with the seniority system in place prior to the commencement of the strike." The employer said, "No. Those people who worked during the strike who are crossovers will not be turfed out, so that people who had seniority at the commencement of the strike can return first." The Board did not find that to be an unfair labor practice. That was a reasonable position consistent with the theory that both were employees before the strike commenced.

In *Shaw-Almex*, the group that the employer preferred were not employees of the employer before the strike began. Arguably, when the next case emerges, *Shaw-Almex* will be used to argue that you can't prefer the strikers who crossed over to the ones who stayed out.

Discussion:

J. **GETMAN:** But you do recognize that *Mini-Skool Ltd.* permits discrimination against people on the basis of their participation in the strike?

B. **SHELL:** Yes, I appreciate that and I do not agree with the Boards reasoning in that case.

P. **WEILER:** It is true that the Ontario legislature decided to create a right of return and to ban permanent replacements for a period of six months. The six-month rule gives employees an unconditional right to apply to get their jobs back, on terms and conditions negotiated individually

In *Shaw-Almex*, the replacements were outsiders, rather than crossovers who had been inside the unit. In effect, *Shaw-Almex* gave strikers an unlimited duration to their unconditional right to their jobs. In either case, that right becomes protected.

You suggested earlier that the six-month rule—the legislation that incorporated that kind of permanent reinstatement right—was useless. You're not suggesting that *Shaw-Almex* was useless?

B. **SHELL:** No. In *Shaw-Almex*, there was one outstanding issue in bargaining: who returns. The employer said, "We want to keep our people; we have a moral obligation." The union said, "We can't agree that you keep your people. We like our people. After all, our people were your long term employees two-and-a-half years before the strike commenced."

When the Board said, "Cease and desist, company, from maintaining your position on the return of replacements," a collective agreement resulted. All other issues had been resolved.

The union knew it could not sign a collective agreement that provided that replacements got to continue to work under the terms of the collective agreement. This result would not have been popular with strikers engaged in a threeyear strike. So the union agreed to the employer's terms on three issues that were unresolved (some monetary issues and some language questions), and refused to agree on the recall question. After the Boards ruling, all issues were resolved, and the collective agreement was signed.

The difference between the *Shaw-Almex* situation and the unconditional individual employees return to work on the employer's terms (the six-month rule), is that under *Shaw-Almex* there is a collective agreement. There is a grievance procedure.

The difference between the Shaw-Almex situation and the unconditional individual employees return to work on the employer's terms (the six-month rule), is that under Shaw-Almex there is a collective agreement.

-Brian Shell

There will be union representation—admittedly on the employer's terms—but the people still will go back to work. So, the length of time that elapses is irrelevant. The employer can still exert that pressure.

-Paul Weller

There is a union check-off There will be negotiations. Indeed, there have been two subsequent rounds of contract negotiations since the *Shaw-Almex* decision in 1986.

P. WEILER: That's the accidental effect only of that situation. If within six months, for example, the union decides to get the people back to work, it will take the employer's last offer. Then it will have a collective agreement under which the employees go back to work.

If there is no six-month limit and it's only eighteen months later that the union feels that it can't move the employer, the union will decide to sign the agreement. There will be union representation--admittedly on the employer's terms-but the people still will go back to work. So, the length of time that elapses is irrelevant. The employer can still exert that pressure.

B. SHELL: The employer can put on that kind of pressure within six months, but it doesn't result in the signing of a collective agreement: it recalls the strikers to work on terms to be determined by the employer in the absence of representation or bargaining by the union. It's simply based upon the employer's bargaining position as it stood when the employee applied to come back.

Section 73 of the Ontario Labour Relations Act is the key section that addresses this issue, and there is no role in Section 73 for the trade union. Section 73 gives the employee the right to make an unconditional application in writing to return to work within six months of the beginning of the strike. The terms of employment are then set by the employer and the employee. These are individual master and servant contracts, not collectively bargained agreements.

The trade union may continue to engage in collective bargaining, no matter how many strikers have gone back to work under this provision. If the trade union subsequently signed a collective agreement with the employer, that collective agreement would supersede the provisions of the individual master and servant contracts. But how could the union extract a collective agreement from the employer when the strikers have already gone back to work on different terms of employment? It's not likely

R. EISENBREY: What turns on six months for the employee? If he's been on strike for a year and says that he's going to cross over, does the employer have to take him?

B. SHELL: In Ontario and in most Canadian jurisdictions, the employer may not have to take him back.

P. WEILER: Whether or not that is true in other jurisdictions is debatable. In Ontario, there is a right to go back within six months. Brian Langille has testified in Congressional hearings [July 14, 1988 before the U.S. House Subcommittee on Labor-Management Relations] that the jurisprudence does make it illegal for an employer to refuse to take people back. It rarely happens.

B. SHELL: There is not a lot of guidance in the case law, but there's no statutory provision that says you can return to work at anytime when you're out on strike. Only the Ontario Act gives the individual an unconditional right to apply and to be returned to work.

In most of the Canadian jurisdictions, once the union agrees to the terms of a collective agreement and says, "Now take back the strikers," and the employer says, "No, we won't take back the strikers," *Shaw-Almex* applies, and it would be unlawful for the employer to refuse to take back the strikers.

J. GETMAN: But if the union and employer have not yet come to an agreement on other issues, can the employees say that they want to come back to work and get their jobs back?

B. SHELL: Only within the first six months, if it's Ontario. The union is entitled to sign a collective agreement, cave in, and accept the employer's position, and then *Shaw-Almex* applies. For example, the employer may propose that the seniority clause be eliminated, and the union does not want to sign such an agreement. If the union refuses to sign, there is a seniority issue outstanding, as well as a recall outstanding. In that case, *Shaw-Almex* may not apply and strikers may not get their jobs back. Quebec is the exception. In Quebec, replacements cannot be hired and unions cannot be decertified during a strike.

W. KAMIAT: After six months, Canadian law as described is similar to the U.S. law that would exist, if legislation barring permanent replacements passed?

B. SHELL: That's right.

W. KAMIAT: So *Shaw-Almex* precludes permanent replacements, before or after six months?

B. SHELL: In Ontario and in the rest of Canada, *Shaw-Almex* would be followed. In Canada, the Mackay decision would not be followed.

One jurisdiction in Canada (Quebec) has had a ban on strike breaking since 1977. It's the so-called "anti-scab legislation." This bill has had three effects.

In most of the Canadian jurisdictions, once the union agrees to the terms of a collective agreement and says, "Now take back the strikers," and the employer says, "No, we won't take back the strikers," it would be unlawful for the employer to refuse to take back the strikers.

-Brian Shell

Since the [anti-scab] law passed and was revised, violence has decreased in Quebec.

—Carla Lipsig-Mummé

First, it eliminates picket line violence, because scabs do not cross the picket line. Canadian picket lines are not very pleasant places to be: we have an extensive jurisprudence dealing with injunctions, injunctive relief, and criminal charges.

Second, collective bargaining is encouraged. The process of collective bargaining is encouraged, because everyone understands that, if there is a strike, the employer will not produce and the employees will not earn an income. The employer will move products as it can and employees will earn the small amount of strike pay that they're entitled to earn.

Third, those strikes that do occur cannot be beaten by replacing the workforce, and that has had the effect, we think, of shortening the strikes.

Laws in a number of Canadian provinces prohibit the use of so-called "professional strike breakers," but they do not apply to replacements. Professional strike breaking is a different concept in Canadian law from that of replacements.

C. LIPSIG-MUMMÉ: The anti-scab law prohibits the transfer of production to a nonstruck unit of the struck employer, as well as the use of managers, contractors, subcontractors, and replacements in production. The law passed in 1977, and employers found ways around it. The law was revised a couple of years later.

The law was passed in response to a series of big, long, violent strikes involving multinational companies. One was United Aircraft; another was Robin Hood Multi-Food. These were meant to be union-busting strikes, and they were perceived as such. The law is part of a package that included mandatory arbitration of the first collective agreement and banning of decertification during a legal strike, as well as the anti-scab law.

The effect has been simply to introduce a new code of industrial conflict. Since the law passed and was revised, violence has decreased in Quebec, and strikes are generally shorter. I think that civilizing industrial conflict is in everybody's interest. A union that goes out on strike does not have to assume that it is facing its own demise. The employers know that a provoked strike is not a way of getting rid of a union.

There are a large number of case studies of the big strikes that preceded the anti-scab law and some that have followed it.

J. O'GRADY: While comparisons with the Canadian situation can sometimes be flattering—certainly, there are many provisions in our labor act which are markedly superior, and the

enforcement is noticeably superior—one must bear in mind that the rate of union density in the private sector in Canada is declining. It is declining at the same rate that it's declining in the United States, though admittedly from a higher level. Even the more articulated Wagner Act model that we enjoy in Canada is insufficient to arrest, let alone reverse, a decline of collective bargaining.

In the Ontario trade union movement, we have been looking very closely at grafting onto our labor relations act another model of collective bargaining—one which structures the bargaining relationship on a mandatory basis at the level of the sector, rather than at the level of the employer or the plant, which is the Wagner Act model.

W. GOULD: Is the reason for this decline the shift in employment in the Canadian economy from the manufacturing sector to the service sector?

J. O'GRADY: The causes are much more complex. The structural change that you mentioned accounts for at most about one half of the decline in private sector union density. The other half is explained by shifts in the size of workplaces and a variety of other factors which we're still trying to identify.

Just last year, levels of manufacturing employment equaled the level of manufacturing employment in the prerecession periods. By 1988, manufacturing employment was equal to what it had been in 1979-80. The level of unionization in the manufacturing sector, however, has not come back to the level in the prerecession period. Employment recovered in absolute terms, but union membership did not.

C. LIPSIG-MUMMÉ: Employment contracts (what you call contracting out), part-time work, and other types of work arrangements, which are less likely to involve union workers, are really flourishing in the manufacturing sector. The service sector has always had them.

L. MISHEL: Is anti-scab legislation contested? Are businesses waging a movement to reverse these laws? Are the basic rights of strikers under Canadian law settled?

B. SHELL: First, we should remember the anti-scab legislation applies only in Quebec. It's on the political agenda now in Ontario, British Columbia, Saskatchewan, and elsewhere. Extending the model elsewhere is being widely discussed.

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remember the
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—Brian Shell

In Quebec, there's a general consensus that the law is effective. The law works. The law keeps peace. The law does not discourage investment, or impede economic growth.

-Brian Shell

The anti-scab legislation followed some very violent strikes where there were deaths on the picket line. The *Partie Québécois* government, elected in 1976, was a social democratic government. It had a close alliance with both central labor bodies in Quebec.

The legislation was introduced and was passed. There was some controversy, but no terrible, huge, horrible controversy. By the time the *Partie Québécois* government was defeated, the legislation was off the political agenda. The replacement government apparently has not been under severe pressure by the business community (or anyone else) to roll back the law. In Quebec, there's a general consensus that the law is effective. The law works. The law keeps peace. The law does not discourage investment, or impede economic growth. The Quebec economy took off in the 1980s in the fastest growth we've ever seen, with the anti-scab law in place.

Litigation about the anti-scab law in Quebec did not attack its central operative features, but sort of nibbled around the edges. Was this person hired before the strike began? Was he hired before notice to bargain was given or after? If he was hired before notice to bargain was given, then he can be used to do work within the bargaining unit. The litigation has been very soft and gentle, basically.

There is some resistance to be sure. Employers want to do everything they can do during a strike. This makes sense; but there has been no intense hostility toward the law.

As the debate has emerged in the rest of Canada, the focus is upon the incidence of scabbing. In Canada, we are not experiencing very much replacement work being done during lawful strikes. This is just a fact of labor relations life and is due to the impact on the bargaining unit and the labor movement when an employer experiments with scabbing. There is a very negative public reaction: injunctions, arrests, lots of lawlessness, and mass demonstrations are the results. We have an active labor movement that doesn't like scabbing.

Secondly, large businesses would not consider operating with the assistance of replacement labor. Automobiles cannot readily be made with replacement labor. Steel is not made with replacement labor. Uranium is not mined with replacement labor, unless the mine owner is planning to do it permanently. We've already discussed what happens then.

F. FEINSTEIN: The difference between the employer community in Canada on labor legislation, and the business community in this country is vast. Its just like night and day The Canadian equivalent to the Chamber of Commerce sometimes sounds like the Executive Committee of the AFL.-CIO. How do you account for the seemingly far greater acceptance of the business community in Canada to the Quebec anti-scab legislation?

B. SHELL: A very substantial portion of the Canadian business community is in fact American owned. These wonderful warm attitudes of the Canadian business community reflect also the attitudes of transplanted American businessmen engaged in branch plant operations in Canada Americans seem to be capable of crossing the border, moving into Canadian operations, and functioning in the context of a different labor legislative regime. Our labor legislation differs due to differences between Canadian history and American history, and in particular, differing features of the Canadian party structure and the American party structure. We have our own social democratic traditions. We have had the Canadian Commonwealth Federation (CCF), and now the New Democratic Party (NDP), which is growing at the federal level and in many provinces. Social democracy is also becoming more popular in the Province of Quebec. Canadian nationalism and Quebec nationalism, which promotes a powerful desire to decentralize the Canadian federal state, have also influenced the development of our labor laws.

We are not a less litigious society Current trendy ideas about cooperation, quality circles, participation modes, etc., have not obtained general acceptance in Canada. Many sectors of the Canadian labor movement are very skeptical about moving away from the adversarial model of labor relations.

The Canadian labor movement has an ever-watchful attitude toward its American counterparts General Motors, Ford, and Chrysler all operate in Canada Bendix, which has been mentioned here, operates automobile parts subsidiaries in Canada. Major steel fabricators operate in Canada and have operations in the U.S. Almost all the mining companies in Canada have American partners engaged in mining. Frequently, the same people producing steel in, for example, Sault Ste. Marie, are producing iron ore in the iron ore ranges in the northern section of the United States.

Your major producers are familiar to us, and trade unions in Canada bargain with them. Sometimes we are bargaining with Chicago; the Canadian management is taking instructions

Americans seem to be capable of crossing the border, moving into Canadian operations, and functioning in the context of a different labor legislative regime.

—Brian Shell

directly from Chicago or elsewhere in the U.S. But we are able to mix Canadian Law and the particular environment in the plant, and produce a different result. There does not appear to me to be any reason why the U.S. mix cannot be friendlier to unions and to their members who engage in strike action. Our approach and our legislative framework should serve as a model or at least as an example for American legislators.

There does not appear to me to be any reason why the U.S. mix cannot be friendlier to unions and to their members who engage in strike action.

-Brian Shell

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Part III

Collective Bargaining and American Competitiveness



Section 5

Unions and American Economic Competitiveness

Lawrence Mishel, Economic Policy Institute

L. MISHEL: Opponents of change in social and labor legislation invariably contend that it will damage U.S. competitiveness. To evaluate this claim, we need to identify the symptoms of our lagging competitiveness and to examine the possible contributions of collective bargaining and other factors.

A variety of factors in the mid-1980s left the impression that unions were contributing to our trade deficits. The sectors that seemed to be most affected by imports were mature, high wage, unionized industries such as auto and steel: the frequent and massive layoffs in these industries reinforced the association of unionization with job losses due to increased imports. Highly publicized Bureau of Labor Statistics (BLS) data suggested that wages in the U.S. far exceeded those of other countries. In addition, the success of nonunion, high-tech industries such as the computer industry reinforced the association of unions with economic decline.

Looking back, we can see how misleading these stylized facts were. The trade deficits are still substantial, but our trading position has deteriorated in both high-tech, nonunion sectors (such as computers and semiconductors) as well as in unionized, mature industries. As the dollar's international value has fallen, U.S. wages have become comparable to or even below wage levels in other advanced countries. Clearly, unions and union wage levels have little, if anything, to do with our lagging competitiveness. In fact, giving workers greater power and participation through collective bargaining is an important avenue for increasing our competitiveness.

Most analysts, including the Reagan Administration's Commission on Industrial Competitiveness (1985), define competitiveness as the ability to compete in international markets while maintaining or improving living standards over time. Under this definition, both our burgeoning trade deficits and declining living standards signal that our competitiveness has fallen relative to our competitors. This definition recognizes that improvements in trade balances achieved by eroding wages and working conditions and by busting unions would adversely impact living

U.S. wages have become comparable to or even below wage levels in other advanced countries.

***Giving workers
greater power and
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through collective
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important avenue
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competitiveness.***

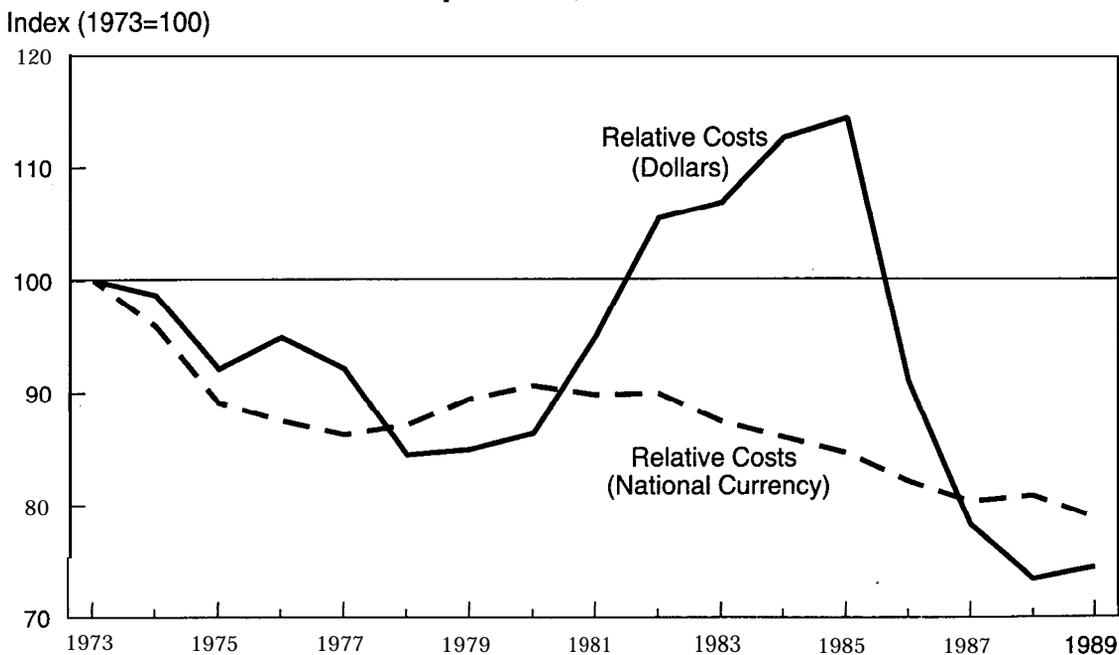
standards. This paper employs an alternative, more narrow definition of competitiveness - the ability of domestic producers to succeed in international markets - that is implicit in the statements of many business analysts. Even by this narrow definition, which countenances declining living standards, collective bargaining and unionization have had little, if any, effect on our total competitiveness.

Cost Competitiveness versus Total Competitiveness

A rising trade deficit can be driven not only by direct firm-level cost factors such as wages and productivity but also by “non-cost” factors such as exchange rates, product design, and product quality. Because unions arguably affect trade primarily through cost factors, the relative contributions of cost and “non-cost” factors to our total competitiveness problem are of interest. Our cost competitiveness has, if anything, improved; non-cost factors have been problematic.

In Figure 5.1, BLS data show the trend since 1973 in U.S. unit labor costs relative to those of other industrialized countries (including Korea and Taiwan). The dotted line shows the indexed ratio of U.S. manufacturing labor costs (hourly compensation and productivity combined as unit labor costs) to the unit labor costs of other industrial countries as expressed in national currencies. This line portrays trends in our cost competitiveness—how changes in U.S. and foreign manufacturing hourly compensation and productivity have differed since 1973. The

Figure 5.1
U.S. Manufacturing Labor Costs Relative to
12 Competitors, 1973 to 1989



Source: Bureau of Labor Statistics.

The recent report from the MIT Commission on Industrial Productivity (1989), found that relative cost factors have not been the driving force behind our lagging competitiveness.

solid line presents the same indexed ratio, with both terms expressed in dollars, and thus allows the rise and fall of the dollars value to affect our relative cost competitiveness.

These data show that our underlying cost competitiveness has **improved** steadily over this time period. Unfortunately, our improved relative cost competitiveness was not due to relatively faster manufacturing productivity growth. In fact, U.S. manufacturing productivity growth has actually been below average. Rather, our cost position has improved because real hourly compensation has been rising in other countries, but falling in the U.S..

By 1989, our unit labor costs were more than 20 percent lower relative to our competitors than they were in 1973. As the solid line shows, however, the sharp rise in the dollars value in the early 1980s meant that our competitiveness (measured in dollars) drastically eroded. Between 1980 and 1985, changes in the value of the dollar made our goods much more costly than those produced in other countries. The divergence between these trends suggests that the macroeconomic imbalances of the 1980s (slower growth and tight monetary policy abroad, high interest rates and large fiscal deficits at home) played a critical role in the rising trade deficit.

Our competitiveness problems, however, go far beyond any macro-economic imbalance and the associated high value of the dollar. Even after the exchange rate was no longer problematic (as in 1988 and 1989), and given our lower unit labor costs, the merchandise trade deficit was still a sizeable \$115 billion in 1989. The intractability of the deficits suggests that non-cost factors fed the burgeoning deficits of the early 1980s and persisted in driving deficits through the late 1980s.

The recent report from the MIT Commission on Industrial Productivity (1989), also found that relative cost factors have not been the driving force behind our lagging competitiveness:

The firm's response time may be as important as the cost and quality of its products. Competitiveness may hinge on the speed at which new concepts are converted into manufacturable products and brought to market, on the flexibility with which the firm can shift from one product line to another in response to changing market conditions, or on the time it takes to deliver a product after the customer places an order. There is also the crucial question of how well the company has chosen its markets; all the efficiency, quality, and speed in the world will count for little unless the firm is producing goods that the customer wants (p. 32).

Unions, Wages, **and Cost** Competitiveness

Have high union wages and collective bargaining adversely affected our trade position? As we have seen, the combined effect of productivity and wage changes since 1973 have been favorable to the U.S. Moreover, current pay levels should not disadvantage U.S. producers. In 1989, the compensation of American production workers was 19 percent below the compensation of German workers, 2 percent below those of European workers in general, and only about 10 percent above Japanese pay levels (see U.S. Department of Labor, 1990).

American workers are paid far more than those of the newly industrialized countries (NICs) such as Korea, Mexico, Brazil, or Taiwan: workers in these countries are paid less than 25 percent as much as U.S. production workers. The combination of these low wages and growing productivity in the NICs is associated with a third of our total trade deficit. However, both union and nonunion domestic producers are equally vulnerable to the competitive challenge from the NICs. That is, the pay gap between the U.S. and the NICs has very little if anything to do with union wage premiums in the U.S. since American workers would have to be paid less than the minimum wage to be on par with the pay levels of the NICs.

An examination of the geographic distribution of our 1989 trade deficits with other advanced countries offers further evidence that wages are not the problem (see Table 5.1). With the fall in the exchange rate since 1985, we have nearly balanced our trade with the Western European countries. The exception is the still sizeable trade deficit with Germany, a country with significantly higher wages. We also have a significant deficit with Canada, another country with higher wages.

Our trade deficit with Japan of roughly \$50 billion dollars represents 43 percent of our total trade deficit. Our trade problems with Japan have been widely recognized to be different from our trade problems with other countries. No knowledgeable observer has cited U.S. wage levels as the cause of our competitive disadvantage with the Japanese.

Even if aggregate U.S. wage levels are not a significant disadvantage in international competition, it still may be true that union wages disadvantage firms. It is well known that union workers are paid more than equivalent nonunion workers. Common sense seems to imply that higher union wages mean higher prices and lost customers.

With the fall in the exchange rate since 1985, we have nearly balanced our trade with the Western European countries. The exception is the still sizeable trade deficit with Germany, a country with significantly higher wages.

TABLE 5.1
The **U.S. Trade Deficit By Geographic Origin**, 1989

	<i>\$Billions</i>	<i>Percent**</i>
Total Merchandise	\$114.8	100.0%
Trade Deficit		
NICs*	- 37.3	32.5
Western Europe	-3.8	3.3
Germany	- 8.3	7.2
Other European	4.5	(3.9)
Japan	- 49.8	43.4
Canada	- 9.7	8.4
OPEC	- 17.6	15.3
Other Countries	3.4	(3.0)

* China, Hong Kong, Korea, Singapore, Taiwan, Mexico, Brazil

** Parentheses indicate a trade surplus.

Source: US. Department of Commerce. *Survey of Current Business*, June 1990, p. 88

Direct econometric evidence shows that unionization is not a cause of our deteriorating trade balance.

But to the contrary, direct econometric evidence shows that unionization is not a cause of our deteriorating trade balance. Tom Karier (1990) examined imports and exports in three hundred and sixty manufacturing industries and found no statistical justification for the claim that more heavily unionized industries either attract imports or deter exports.

There are many other reasons to be skeptical of the claim that unions are associated with our competitiveness problems. Although unions do raise wages, they also have other effects. As Richard Freeman (1991) shows, unions affect employment relations and firm performance—by raising productivity, for instance—in ways that partially offset the effect of higher union wages on employer costs. To the extent that union wage gains have come at the expense of higher profits—particularly within firms with significant market power—union wage gains do not cause higher prices.

The impact of unions on firm costs thus depends upon the magnitudes of union wage premiums and productivity improvements, and the extent to which wage gains are translated into higher prices rather than lower profits. Belman (1991) concludes his review of the existing studies on the affect of unions on firm profits and productivity:

The negative consequences [of unions] cited by most economists, higher prices and lower employment, are largely miti-

gated by higher union productivity and lower rates of profit. .. This should be heartening to those who have always seen the gain from unions, greater democracy in everyday life, purchased at the expense of reduced economic efficiency. The cost of economic democracy appears smaller than previously believed.

Keefe (1991) shows that union firms are as likely or more likely to modernize and adopt new technologies as nonunion firms. Work rules are as evident in nonunion as in union workplaces. Voos and Eaton (1991) show that unions are, if anything, more likely to be involved in workplace innovations, especially those such as team production and productivity gainsharing plans that are most likely to yield greater efficiency. Nonunion firms tend to focus on profit-sharing plans, which do not have much impact on productivity.

Unionization is neither a necessary nor sufficient condition for the competitive disadvantages we observe. If unionization alone were sufficient, competitors with more heavily unionized workforces should also be suffering competitive disadvantages. However, unionization rates are far higher in other advanced countries which are thriving in international competition. Union representation has been stable-or even rising-in successful exporting countries such as Germany.

If unionization were a necessary condition for our declining competitiveness, then nonunion industries should be unaffected. The declining competitive position of nonunion high-tech industries in the late 1980s makes it clear that there is no necessary connection. The sun has been setting on our so-called "sunrise" industries. According to the Office of Technology Assessment (U.S. Congress, 1988), the competitive position of 15 out of 20 high-tech industries eroded between 1972 and 1984. The computer and semiconductor industries are prime examples. The U.S. market share of the computer industry fell from 81 percent to 61 percent between 1983 and 1989. According to a recent commission report (National Advisory Committee on Semiconductors, 1989), Japan has taken over the lead in the semiconductor industry in the past ten years. Even the leading-edge semiconductor markets are now dominated by the Japanese. Japanese firms' gains in chip manufacturing have created a "serious loss of market share for U.S. semiconductors, materials and equipment firms," with attendant losses for the suppliers of "common tools and materials used by all chip manufacturers." Clearly, our loss of competitiveness is not limited to the union sector.

Unionization rates are far higher in other advanced countries which are thriving in international competition.

All of the evidence suggests a system based on collective bargaining and a strong independent voice for workers is not only important to our democratic institutions, but is also a key to our economic future.

Unions and the Future

Unions and other mechanisms to *empower* and involve workers need to be enhanced, rather than hindered. The MIT Commission (1989), for instance, recommended that business leaders should

... support diffusion of cooperative industrial relations by accepting labor representatives as legitimate and valued partners in the innovation process. American managers must recognize that unions are a valued institution in any democratic society. Resources traditionally devoted to avoiding unionization need to be reallocated toward promoting and sustaining union-management cooperation (p. 150).

As Ray Marshall (1991) has argued, unions are a positive force for change by providing a key ingredient of a high-performance business system—a secure, motivated, and participative workforce. Moreover, research by Kelly and Harrison (1991) shows that by providing a collective voice for workers, unions are more likely to yield productivity gains than a comparable nonunion workplace using labor-management committees.

Conclusion

All of the evidence suggests a system based on collective bargaining and a strong independent voice for workers is not only important to our democratic institutions, but is also a key to our economic future. We have a choice as to the industrial relations system we want. We should strengthen, not weaken, our collective bargaining system and let management and labor together turn their attention to improving productivity and making the production choices that will enable this country to compete on world markets without lowering living standards.

Endnotes

- ¹ Of course, these factors are also cost factors. The distinction is that they are either not controlled by the firm (i.e., exchange rates) or they are not captured in productivity statistics.
- ² The manufacturing productivity trends in this BLS series is overstated (see Mishel, 1989). But even with a “corrected” series, our relative position has improved considerably.
- ³ It should also be noted that a significant part of the payroll of unionized firms is not covered by a union contract, i.e., the white collar workforce.

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Section 6

What is Declining Unionization Doing to the U.S. Labor Market?

Richard B. Freeman, Harvard University

One way to judge proposed labor laws and policies is whether they help or hinder the current declining unionization of the private sector workforce in the United States. If unionization adversely affects the economy, laws that weaken unions in their conflicts with management may be desirable. If unionization improves economic outcomes, laws and policies that further weaken unions are undesirable: we should view positively legal changes that restore union power.

In *What Do Unions Do?* (written with James Medoff) I argued that trade unions have two faces: a monopoly face, associated with their power to raise wages; and a “collective voice” face, associated with their representation of organized workers within firms. Individuals respond to a divergence between actual and desired conditions either by expressing their preferences and changing their current conditions, or by leaving and going in search of existing situations that better meet their needs. Unions provide a collective voice that expresses all workers preferences, which is more efficient than the market mechanism that directs employer behavior to the employee most likely to quit. The book concluded that the socially beneficial effects of unions on the economy—longer job tenure, more desirable compensation packages with better fringe benefits, greater equality in earnings, and improved productivity—outweighed the potentially adverse effects of union wage gains.

Reviewing recent studies assessing the economic effects of unionization, I found that these results continued to be accurate in the economic environment of the 1980s, and withstood further scholarly scrutiny. I conclude that the country should look more favorably on policies that strengthen unions than on those that further weaken the institution.

The country should look more favorably on policies that strengthen unions than on those that further weaken the institution.

The striking decline in pension coverage among U.S. male workers in the 1980s would appear to be in large part due to the drop in union density.

Collective Voice Benefits of Unionization

The evidence of the 1980s supports the collective voice view that unionization alters labor outcomes and benefits the economy. The collective voice face of unionization favorably influences quit rates, work force stability, the composition of compensation, and lowers wage inequality.

Unionization produces the long-term attachment of workers to firms that many regard as one of the key features of Japanese economic success, thereby reducing the probability that workers will quit their jobs and increasing the tenure of workers with firms. Virtually all modern studies of turnover and mobility, including those concerned with nonunion issues, contain union variables as controls. These studies invariably find that unionization reduces quit rates or raises job tenure. Research on turnover in Japan, Canada, the United Kingdom, and Australia also shows lower quit rates and greater job tenure among union than among nonunion workers.

Unions alter the composition of the compensation package toward fringe benefits, particularly deferred benefits such as pensions, and life, accident, and health insurance, which are favored by senior workers. This finding has also been confirmed in ensuing research on the U.S. and on other developed countries. As a consequence of union-created pension plans, the vast majority of unionized blue collar workers are covered by pensions, whereas most nonunion blue collar workers are not. Indeed, the striking decline in pension coverage among U.S. male workers in the 1980s would appear to be in large part due to the drop in union density.

It is no accident that earnings have become more unequal in the country during a period of union decline. Unions reduce the dispersion of wages among workers with measurably similar skills. They encourage payment through wage scales for specified jobs, limiting managerial discretion in compensation. Union wage policies increase the equality of wages within establishments and encourage equal pay for equal work across establishments. Because unions also raise the wages of lower paid blue-collar workers relative to those of higher paid white-collar workers, the overall inequality of wages is lower under unionization. In *What Do Unions Do?*, we reported that union wage policies reduced inequality by 15 to 20 percent among otherwise comparable blue-collar workers. More recent findings, based on usual hourly earnings in 1988–89, confirm that unions still reduce inequality among male workers by 15 to 20 percent. Although

the difference in wage dispersion between union and nonunion women is smaller, unions still noticeably reduce inequality. Personal characteristics that influence wages (such as schooling and age) continue to be less important in union settings than in non-union ones.

Unions positively influence personnel and labor relations practices. Rules in union workplaces are more explicit than those in nonunion workplaces. Personnel decisions in union settings depend more on seniority rules and grievance-arbitration procedures than on managerial discretion (or whim). In establishments that became unionized in the 1980s, for instance, research shows that unions obtained only modest compensation gains for members in first contracts but substantially altered the rules of the work place, introducing stronger seniority, additional fringe benefits, and grievance and arbitration procedures. The implication is that these “voice” effects are more fundamental to the union institution than the monopoly wage effects of unions.

In addition, research has rejected the myth that unions limit experimentation in new and improved methods of work organization. Some innovations in labor relations—quality circles, for instance—are more likely to occur in union settings. Others like the opportunity to participate in an employee stock ownership plan (ESOP), are equally likely to appear in union and nonunion settings. Profit-sharing is less common in union settings. These results should come as no surprise to observers of the automobile and steel industries, where unions have been in the forefront of innovations in work relations ranging from joint committees (United Automobile Workers in Ford and General Motors), to Japanese style shopfloor relations (NUMMI), to workers ownership of companies (United Steelworkers).

Research has rejected the myth that unions limit experimentation in new and improved methods of work organization.

Unions bargain over employment as well as wages, shifting profits to labor while maintaining competitive levels of employment.

The Economic Cost of Union-Wage Gains

What Do Unions Do? argued that the union wage differential varied among sectors depending on the elasticity of demand for labor: unions won greater wage gains where they organized a high percentage of the work force and smaller gains when union employment was at risk. The book found only a small loss in social welfare caused by the union wage premium.

Classic economic theory suggests that unions' monopoly wage gains result in resource misallocation. By raising members' compensation, unions cause higher prices and induce employers to substitute machinery for labor. Employment in the union sector falls, forcing more workers to look for jobs in the nonunion sector, and increasing competition for work lowers wages in this sector. Thus, according to classic theory, union wage gains come at the expense of nonunion low-wage workers. This misallocation of resources results in a loss of social welfare. The size of this loss depends on the size of the union wage premium, the decline in employment in the union sector, the fraction of the labor force in unions, and the fraction of total costs associated with labor.

In *What Do Unions Do?*, the loss in social welfare was estimated to be about 0.3 percent of the gross national product (GNP). This estimate was based on partial equilibrium rather than general equilibrium analysis. Thus, the estimate failed to account for the possibility that union-induced misallocations of labor in one sector affected other sectors as well. However, recent work using a full general equilibrium model produced the same results.

Indeed, it has even been suggested that estimates of the costs of the monopoly face of unionization are too high. These estimates ignored the possibility that unions bargain over employment as well as wages, shifting profits to labor while maintaining competitive levels of employment. If so, the union wage premium does not create a social welfare loss. In any case, no analyst has argued, much less demonstrated empirically, that this welfare loss is large.

Recent research has confirmed that union wages respond to market conditions when jobs are threatened. Union wages have been found to be generally more responsive to the rising tide of imports and to changes in industry sales than nonunion wages. Unionized workers have the flexibility to give wage reductions in hard times because their wages already are above competitive levels. Workers in other markets cannot reduce wages because they receive the competitive wage.

Union wages have been found to be generally more responsive to the rising tide of imports and to changes in industry sales than nonunion wages.

Some blame our slow aggregate growth on a low national savings rate. The evidence that unions increase the provision of private pensions implies that, far from being part of the problem, unions are part of the cure.

Do Unions Cause Macro-economic Problems?

Unions have been blamed for the trade deficit, wage inflation, unemployment, and slow productivity growth. *What Do Unions Do?* rejected all of these charges, saying unions *do not* create the nation's macro-economic problems. The developments of the 1980s have supported this assessment.

The massive trade deficit of the 1980s developed while union density was plummeting. Industries with high unionization rates and those with low unionization rates ran deficits. Even in industries such as autos and steel—where high union wages have been blamed for the strength of imports—unions had only slight adverse effects on the trade balance.

Since aggregate wage inflation decelerated in the 1980s when union density fell, there is an *a priori* case for arguing that falling union density reduced wage pressures and inflation. But econometric evidence rejects this linkage, showing that while declining density held down union wages (as one would expect since high union density produces greater wage settlements), the spillovers from union to nonunion wages were too small in relation to aggregate wage movements to be explained by declining union strength.

Neither theory nor evidence tell a decisive story about the relation between unionization and unemployment. Although competitive economic analysis predicts that union wage increases will reduce employment in unionized sectors, the workers who might have gotten union jobs may find jobs elsewhere. If so, there is no net effect on aggregate unemployment. In fact, national unemployment rates increased from the 1950s to the 1980s as union density fell, and peaked in the 1980s when union density was low. Given these conflicting trends, blaming unions for rising unemployment is unfair and unfounded. Although comparisons of unemployment rates across states find higher unemployment in more unionized areas, changes in union density are not related to changes in unemployment rates across states. Finally, states with a higher proportion of unionized workers also have higher shares of their labor force working.

Some blame our slow aggregate growth on a low national savings rate. Here, the evidence that unions increase the provision of private pensions implies that, far from being part of the problem, unions are part of the cure. Pension funds, after all, are a major part of the nation's savings. The annual contributions of organized labor are a continual addition to savings and ultimately to investment as well.

Productivity

One of the most controversial conclusions of *What Do Unions Do?* was that unionization did not harm productivity, despite horror stories about union work rules. The book reported varying estimates of union effects on productivity, but most studies reviewed showed that union firms were more productive. Still, research found unionization to be associated with reduced productivity in underground mining during the chaotic period of industrial relations in the coal industry during the 1970s, and found negligible union productivity effects in some other cases. This implied that the most sensible conclusion was that “unionism per se is neither a plus nor a minus to productivity. What matters is how the unions and management interact at the workplace” (Freeman and Medoff, 1984:179). The response of management to unions, the industrial relations climate the workplace, and the competitiveness of the product market, all affect productivity.

Recent studies of union effects on productivity confirm this assessment. The majority of studies found that union firms were more productive than nonunion ones. These studies analyzed diverse industries and firms, including the construction industry, surface coal mining, machine tool manufacturing, and firms in the Columbia University industrial relations data set. Different studies of firms on the Compustat data file have produced conflicting results. At the same time, there are well-documented exceptions using data from analysis of business lines.

No knowledgeable analyst currently endorses the pre-*What Do Unions Do?* view that unions substantially lower productivity. Some would argue that the union effect on productivity is negligible, but almost all now recognize that technical production functions relating output to capital and labor—including labor skills, but excluding labor relations—misses a major determinant of economic efficiency, and thus can lead to erroneous analyses of the reasons for poor productivity performance. Studies that categorize workplaces by the labor relations climate invariably find higher productivity where that climate is better. Studies examining related aspects of workplace labor relations, such as worker participation in enterprise decision making or profit sharing, yield similar results.

Recent work has pursued the union-productivity link by exploring how unionization affects productivity growth. The research directs attention at three effects of unionization on productivity growth:

The majority of studies found that union firms were more productive than nonunion ones.

Studies of the relation of unionization to the introduction of specific new technologies show union plants investing in advanced technology at least as rapidly as nonunion plants.

- by raising wages, unions can induce management to introduce new technologies more quickly than they otherwise might do;
- by capturing the quasi-rents from productivity increasing investments, unions reduce the incentive of firms to invest in research and development (R&D) and other long-lived forms of capital; and
- by negotiating work rules or related labor relations policies, unions can encourage or discourage the introduction of new technologies.

Analyses of the relation between union density and productivity growth generally confirm the result reported in *What Do Unions Do?* that productivity growth is lower (although not statistically significantly) in unionized sectors (see Belman, Table 4; Allen, Table 1). In construction, nonunion contractors have raised productivity toward union levels, often with union workers “working with their card in their shoe.” Comparisons of productivity growth between union and nonunion companies also show union firms had slower productivity growth. However, unions are found disproportionately in older industries and plants that may have slower growth for reasons independent of unionization.

The strongest body of evidence that unionization may harm economic growth comes from analyses of the relations between unionization and investments in R&D and physical capital. In the United States, R&D expenditures are lower in more highly unionized industries or firms, though again, this fact may simply reflect the concentration of unions in older plants and “mature” industries. There is more limited evidence that investment in physical capital is lower in unionized settings. In contrast, studies of the relation of unionization to the introduction of specific new technologies show union plants investing in advanced technology at least as rapidly as nonunion plants. While evidence causally relating unionization to investment in productivity-advancing activities is thus ambiguous, it is undoubtedly true that in some situations union-induced reductions in profits will deter firms from investing. In the long run, deferring investment results in losses of output and jobs. This result leads far-sighted union leaders to conclude that to be effective, a trade union cannot leave key decisions regarding investment—including long-run investment in R&D—to management.

Profits and Management Opposition

Unions substantially reduce profits. Study after study finds that the presence of a union lowers various measures of profitability: price-cost margins, net revenues per unit of capital, Tobin's q , and the stock market value of firms. Activities associated with unionism—strikes and union wage settlements—also affect the stock market valuation of firms. Because estimated union wage effects invariably exceed productivity effects, the union wage premium must cut into profits. Researchers have not fully determined whether unions reduce profitability largely in sectors or firms with excess returns (redistributing monopoly rents), or whether they reduce profitability regardless of the market conditions facing a firm. If unions give workers a share of the firm's monopoly returns and flexibly adjust settlements when the firm is in economic trouble, the redistribution of economic rents is potentially efficient. A substantial number of studies have confirmed this claim, but other studies have produced conflicting results. At any rate, the adverse effects of unionization on profits provides an explanation for the extreme management opposition to unionism in the U.S. that is one of the prime causes of falling union density.

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Assessing Declining Unionization

Without specifying what the optimal degree of U.S. unionization might be, I believe that the current trend has brought union density far below the level needed for a healthy economy. In a well-functioning labor market, there should be a sufficient number of union and nonunion firms to compete in the market and offer alternative work environments to workers. Union competition is needed to limit management's power over workers and to give workers a voice in the economic system. Nonunion competition is needed to limit union monopoly power. With only "ghetto unionism" in the U.S. private sector (pockets of organized workers in a sea of nonunion labor) we can expect to see higher labor turnover; lower employee benefits (particularly pensions); less protection for workers against arbitrary management decisions; greater inequality in earnings; and lower productivity in many industries than would otherwise be obtained. Currently, we need laws and regulations that strengthen, rather than weaken, the union movement.

Section 7

The Future Role of Government in Industrial Relations

Ray Marshall, University of Texas-Austin

Inequality and Growth

R. MARSHALL: The fundamental issue that we need to address is how can we be a full employment, high-wage, just economy. Without any one of those terms, we've got a deficient goal. It's not hard to have full employment if you ignore wages and economic justice.

Without full employment, wages are declining and polarizing. The Chinese have a saying I like: "If you don't change your direction, then where you are headed is where you are going to wind up." We have the most unequal distribution of income of any major industrial country. Not only does that create political and social problems, it creates serious economic problems. Andrew Berg and Jeffrey Sachs' work on the relationship between the distribution of income and economic policy is compelling: countries with relatively unequal distributions of income have great difficulties solving any of their problems (Berg and Sachs, 1988). It's hard to get the high-income people to tax themselves to pay the country's bills, and, therefore, the only way to pay bills is to borrow. There is a strong relationship between the distribution of income and external debt. We are the only major industrial country that has a serious problem with external debt. We join ranks with countries like Mexico and Brazil. Many Third World countries, like Korea and the Pacific Rim countries, have relatively equal distribution of income; they have been able to deal with their problems.

Our basic objective should be to be a just, full employment, high-income country. The only institution in our society that has consistently tried to achieve that objective is the labor movement. If we accept that objective, we need to be very concerned about what's happening to the American labor movement. We've lost more union membership and union density relative to the workforce than any other industrial country. According to the latest Organization Economic Cooperation and Development (OECD) numbers, unions have gained membership absolutely and relative to the work force in most of the OECD countries since the 1960s. For example, the U.S. and Canada both had

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about the same level of union density towards the end of the 1960s. But the Canadians went to almost 40 percent of the workforce unionized, and we've gone to less than 20 percent. Our problems are due to unique features in the United States.

We need to rearticulate the arguments that created so much public support for unions in this country from the 1930s through the 1950s. In Mississippi in the 1930s and 1940s I was taught that unions were good for the country for a number of different reasons. Those reasons were all credible during the Great Depression.

The first argument was that in a democratic society somebody has to represent the interests of the workers. All the evidence shows people still believe the "voice" argument. Oddly enough, the struggles in Eastern Europe have helped: it's hard to argue that there should be a free and democratic labor movement in Poland, but not here. We need to recognize that principle everywhere. Our own international trade laws require that workers have the right to organize and bargain collectively. We should not be international outlaws.

Historically, the second main argument was that nothing is more unjust than the equal treatment of unequals. That "balanced power" idea caused people to support unions in industrial plants, because it is unfair to have an individual worker bargaining with a corporation. Until the 1930s, the government helped companies to form corporations, but did not help workers organize. Corporations can't get along without the government, but unions can. Until recently, the unions' main objective was to get the government off their backs, because the government had used its power through injunctions and other restrictions to prevent workers from organizing. We therefore encouraged the growth of a labor movement in the 1930s in order to help balance the scales. The third argument was that rules made by a participatory democracy are better than those unilaterally imposed. That industrial democracy argument has been strengthened by concern about increasing worker participation in order to improve production.

A fourth argument—used more in the industrial states than in the rest of the U.S. and more in Europe than in the U.S.—was the fundamental principle of trade unionism, that competition in labor markets is bad for countries. Not even neoclassical economists will argue that the market does a good job developing people. The natural tendency of the market is to generate ine-

quality. That competition in labor markets was not good was evident earlier when we saw child labor, long hours, and the abuse of workers.

Sidney and Beatrice Webb, in their book *Industrial Democracy*, argued that permitting competition in labor markets destroys human resources. Taking labor out of competition—to prevent sweat shops, child labor, abuses of workers, and long hours—was a very powerful early idea that got a lot of public support. We need to push the argument that human resources are critical in building a healthy economy.

The Webbs also argued that companies should not be subsidized directly or indirectly. Subsidizing companies through inadequate labor protections generates economic inefficiency, because it allows companies to compete by paying low wages and lowering working conditions, rather than managing better. If a company can't pay the living wage, it ought to go out of business. If it doesn't go out of business, then somebody is subsidizing it. My European friends say "You celebrate all these lousy jobs you've gained, but we wouldn't have them." Sweden, Germany, and even Japan do not want marginal, low-wage jobs that can only compete with the Third World.

In the Commission on Skills of the American Work Force, we found other countries will not let companies pursue a low-wage strategy. The Swedes will give you the same argument: to be a high-wage country, improve productivity. But how can productivity be improved if marginal companies continue to compete by cutting wages and lowering working conditions? The Swedes closed down a ship builder, shifted those workers into automobiles, and put them to work at Volvo. Another example is IBM's Austin plant. In Austin, Texas, IBM discovered that they could buy the components they were making for \$60 million a year less than it cost them to make them. Most U.S. companies would lay off those workers, close down, and buy the parts. However, IBM has a "no-layoff" strategy. That strategy is a self-imposed constraint. IBM asked the workers, "Do you think we can save this work?" The workers said, "Give us more education and training. We know these machines you've got are lousy—we could have better machines. We could organize the work better. We'd get rid of a lot of managers, because you've got more managers and supervisors than you need." IBM-Austin reorganized the work and gave workers more control and therefore is now able to compete.

In the Commission on Skills of the American Work Force, we found other countries will not let companies pursue a low-wage strategy.

The final argument in support of unions is high-wage purchasing power. The idea was more Beveridge than Keynes, but people called it Keynesian. It was a powerful response to the main economic imperative of that day: how do you prevent depressions? How do you keep this industrial economy going? They actually included language in the Preamble of the National Labor Relations Act (NLRA) to state that the purpose of the NLRA is to encourage collective bargaining in order to prevent "periodic recession and depression." That idea made it possible to pass the NLRA, one of the most controversial laws ever enacted.

The purpose of the NLRA is to encourage collective bargaining in order to prevent "periodic recession and depression."

The Labor Compact Unglued

Now, the question is, what happened? What made all that come unglued? The answers are pretty obvious. We no longer can take labor out of competition by enacting rules and regulations in our own country. To take labor out of competition between workers requires the common rule, equal pay for equal work. To take it out between companies requires pattern bargaining and multi-employer bargaining. To take labor out of competition between industries requires wage regulations, such as the Webbs' "national minimum." "Legal enactment" was the term that they used. Well, in an international environment those strategies don't work. The question then becomes, what's your next strategy?

It's pretty clear that within an open economy, Keynes is dead. The Kennedy-Johnson tax cut was the last hurrah of Keynesian economics. We panicked: our unemployment rate got to be 5.2 percent, and we said "We can't have that." So we had this big tax cut and got it down to three or so—that's the way we used to define full employment—and it worked beautifully and reduced unemployment.

In 1981, we had the biggest tax cut in history and didn't get much reduction in unemployment. Why not? Well, in an international environment, all the Keynesian connections are broken up: stimulating consumption does not stimulate investment. The multiplier and acceleration principle do not work. As a result of the 1981 tax cut, 95 percent of the increased demand for capital goods was met by imports. Given that leakage, unions are no longer considered to be necessary to sustain purchasing power. That's not perceived as an economic imperative, because we are world champion consumers.

The real imperative now is competitiveness. How can we compete in an international economy? Unions like the International Ladies Garment Workers Union and the Amalgamated Clothing Textile Workers always gave heavy weight to productivity, to flexibility, to the ability to adjust to change. They knew that the only way they could get a wage premium over the nonunion sector was to have a productivity premium. The construction unions knew that as well. Every study of the construction industry that compared productivity in the union and nonunion sectors showed the union sector had a substantial productivity advantage.

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Why wasn't a strategy emphasizing productivity increases, flexibility, and adaptability a viable option in the mass production system? The United States became the world's leading economy by 1926, due to abundant natural resources and the mass production system which gave economies of scale. Economies of scale gave easy improvements in productivity. After Ford reduced the cost of a touring car from \$850 to \$360 over about six years, there were 60,000 people under one roof at the Rouge in Detroit. That kind of organization has been upset by changes in technology and the breakdown of oligopolistic pricing. In other words, Ford and Chrysler and General Motors all have to worry about a lot of other companies now, and not just the other two.

Inter-industry shifts out of low-wage agriculture into high-wage manufacturing improved the average level of productivity. Now, the inter-industry shifts are in the opposite direction, out of high-wage manufacturing, into low-wage services. The average level of productivity has gone down a little bit. I don't think that's a major factor, but I think it nevertheless is a factor. International competition has changed the rules of the game and cut into economies of scale and oligopolistic pricing in the mass production system. Therefore, the bargaining arrangements permitting unions to extract part of the oligopolistic profits are no longer possible.

The Way Forward

So, what happens to unions and collective bargaining? Well, we have to pay attention to quality, productivity, and flexibility. We have to organize the work differently from the traditional Tayloristic system, put together for the mass production system. Frederick Taylor treated workers as appendages to machines. It was an inhumane system, and it made us see that equity required that we counterbalance that system with collective bargaining.

Trying to be a high-wage competitor requires a very different kind of organization. The real question is, what is the role of unions in that new organization? There are several arguments. Some people look at IBM and Hewlett-Packard and say, "These high-performance companies don't have unions, so unions are obsolete. The union is an institution that was unique to a particular point in history, that is, early industrialization in mass production plants."

Well, let's examine that claim. Let me define a high-performance organization as one that tries to compete, not by cutting wages, which is one option, but by improving quality and productivity. Only improving quality and productivity makes us a high-wage competitor.

In the Commission on Skills, we found that 5 percent of American companies are trying to compete by improving quality and productivity. Most are still using Taylorism and competing by trying to reduce wages. We asked them, "Do you perceive a skill shortage?" 20 percent of the 450 American companies that we surveyed said that they perceived a skill shortage. When we pressed them, three-fourths of those who perceived a skill shortage, said "We want people who can read, and write, and are polite, and dress right, and show up on time." They didn't mention people who had to think. Only 5 percent said "We think there's a shortage of people who know how to think, and that we need them to be able to make a company work."

In every other country, a majority of the 2,000 firms we surveyed are trying to compete by improving quality and productivity, rather than by cutting wages. Why is that? Well, I think the story is straightforward. No industrialized country wants to get into a wage-cutting contest, because it doesn't want to win it. There is a lot of fear of retaliatory trade policies leading to depression, like we had in the 1930s, but few economists seem to recognize the damages of wage cutting contests. There is no way to win competing with Mexico, and Sri Lanka, and the Third

5 percent of American companies are trying to compete by improving quality and productivity. Most are still using Taylorism and competing by trying to reduce wages.

High-wage strategy competitors have highly participative management systems with a high level of worker involvement in the work process.

World by trying to cut wages. In Sweden, Germany, Japan, and even Singapore, we were told “We don’t want to be a low-wage country, so we are not going to try to compete that way.”

So, what kind of organization do you need if you are going to compete without lowering wages? Well, the first point is to pay heavy attention to quality. Why pay heavy attention to quality? Quality production means meeting customers’ needs. Mass production was a producer-driven system, but now the more competitive system is consumer driven. If consumers drive the system, the objectives and the organization of work changes.

After World War II, we taught the Japanese that quality costs you less, not more, and that improving quality improves productivity. We had great trouble convincing American companies that that was, in fact, the case. Now the Japanese are demonstrating to us that is, in fact, the case. Productivity, flexibility, market share, and morale are all bound up in quality.

High-wage strategy competitors have highly participative management systems with a high level of worker involvement in the work process. Quality, productivity, and flexibility are all enhanced when production decisions are made as close as possible to the point of production. I think that’s a fairly clear proposition.

Productivity and quality improve because workers are constantly involved in trying to prevent defects. In the old system, inspectors at the end of the line tried to catch defects. In a quality-driven system, everybody is responsible for preventing defects, not just trying to catch those that get through. For example, just-in-time inventory improves productivity and quality, because inventories can hide a lot of defects. A quality-driven system tries to find defects and make them visible. Roger Smith said, “If you don’t pay attention to the production system before you automate, you will pile up scrap faster.” As General Motors (GM) is learning from the New United Motor Manufacturing Co., Inc. (NUMMI) experience, workers are not the problem and technology is not the answer. Now both General Motors Shreveport and Saturn outstrip NUMMI on productivity, quality, and most other standards.

As Frederick Taylor emphasized, a lot of managers are needed to boss people who aren’t trusted, and companies didn’t trust workers. He said, “If workers aren’t watched they will loaf”—soldier was his term—“and, therefore, they have to be monitored all the time to see what they do” (Taylor, 1947). In a participative system, getting rid of a lot of managers can improve

productivity. Blue collar workers' productivity has been rising at a substantial level all through the 1960s and 1970s. Lester Thurow's (1985) work shows that white collar productivity has been going down. We tend to be top heavy with white collar and managerial people in the United States.

Roles have to change as well. Under Taylorism, managers behaved like military commanders. A modern high-performance system is more like a symphony orchestra than a military unit; therefore, the manager's role becomes teacher, consensus builder, and conductor, rather than commander. Changes in managerial roles are much more advanced in other countries than they are here.

Another characteristic of a high-performance organization is a positive incentive system. It's amazing how often we forget about the importance of incentives. A positive incentive system means an organization rewards what it wants to get. Now, most American incentive systems are either negative or perverse. A negative system uses fear. For example, a company tells workers "We'll lay you off or fire you if you don't perform." Neither excellence nor quality can be compelled with a negative incentive system. People will not go all out under compulsion through fear.

What's a perverse incentive? Well, I had a very controversial newspaper editor friend down in Mississippi. We were riding along once in the car, and the fellow in the car next to us says, "Pull over to the curb. I want to beat hell out of you." And, my friend, very quick, said, "Now look, friend, if you want me to pull over, you've got to give me a whole lot more incentive than that." A perverse incentive system is one that tells workers "If you improve productivity, we'll fire you." The Public Agenda study in 1985 (Marshall, 1987) asked Japanese and American workers, "How many of you believe that improving productivity would improve your welfare?" 9 percent of American workers said they saw a connection. 53 percent said their managers weren't even interested in improving productivity. Why not? Well, because that's the reality. American workers know cases where workers have gone all out and improved productivity, and then were fired. Well, that's what you call perverse.

So, how do we eliminate those kind of incentives? One of the most important steps is to do away with fear. Job security guarantees at NUMMI helped create a powerful positive incentive. NUMMI entered into a contract with workers saying, "As long as there's a NUMMI, you've got a job. We'll cut our own pay, cut out everything else before we ever lay anybody off." They went

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Another aspect of a positive incentive system is building internal unity, which takes fairness and equity.

through a period where they, in fact, had a market slump and didn't lay people off.

Another aspect of a positive incentive system is building internal unity, which takes fairness and equity. American companies seem to have great trouble understanding how important that is. Lee Iacocca still doesn't understand why people thought that it was not such a good idea to vote himself a \$21 million salary, after he had asked the workers to take a wage cut. It's hard to convince people that we are all in this together after you do that. Fairness and equity, and doing away with the elitist trappings of American management, as they did at NUMMI and at IBM, convince people that we are all in this together.

High-performance organizations pay attention to flexibility, both internally and externally. Throughout the industrialized world, labor movements have considered flexibility to be a negative concept, because it often means that companies are going to lay off workers. Flexibility can conflict with fairness, depending on how it's negotiated and implemented.

High-wage strategy competitors train and educate all workers, not just a few workers, as we do in this country. In the Commission on Skills, we found that very few front-line workers get much education and training in the United States. In most other major industrial countries, they do.

Finally, high-wage, high-performance organizations develop and use leading-edge technology. That's a very important concept. Technology is best defined as how things are done. The ideas, skills, and knowledge built into machines are important; the machines are not. Technology becomes standardized when the rate at which ideas, skills, and knowledge can be built into a machine or structure becomes very small. Standardized technology therefore adjusts more slowly than leading edge technology.

Now, what happens in an international economy is pretty straightforward, isn't it? Once the technology becomes standardized, it will seek out low wages. In the South, we have always had a lot of industry that was on its way to the Third World, because it was moving on to still lower wages. American workers will not be paid \$15 an hour to do work that can be done in Korea or some other place for \$2 or \$3 an hour.

So how do we compete with low-wage competitors? General Motors and the military tried to solve that problem by automating. They kept the relatively unskilled labor and went to high tech machines. It was a disaster everywhere. Why? Because, as

the Japanese put it, "Workers have to give wisdom to the machines." Every machine is idiosyncratic. Workers need skill to make them work well. Increasingly, technological innovation takes place in the workplace, not in laboratories. Innovations are not simply thrown over the wall into the workplace.

The only way to deal with low-wage competition is to use leading-edge technology and high-wage, highly skilled workers. In this case, workers need very different skills than they did in the mass production system. They now do more indirect work, which means they do more data analysis. They have to learn more to communicate and to work in groups. Indirect work is inherently group work, as opposed to just putting bolt number 35 on a rear left wheel—that's pretty individualistic.

The only way to deal with low-wage competition is to use leading-edge technology and high-wage, highly skilled workers.

Workers will not go all out unless they have independent representation in the process. Labor history will confirm that point.

Union Role

What is the role of unions in such companies? Within the United States, some Japanese companies, IBM, and Hewlett-Packard may argue that a union has no role in such an institution. The West European response to that argument is that those systems will not work very long without a union. Why not? There are several main arguments. One is that a high-performance system gives the workers a lot of discretion. Shoshona Zuboff, in her book *Managing In The Age of Smart Machines*, tells a story about a paper company where they introduced a participative system and productivity skyrocketed. Then they couldn't work out the pay for the new system. When they couldn't work out the pay, productivity went back down again. No member of that management team, she tells us, could tell you why it went down. Workers cannot be forced to think, to impose order on chaotic information, and to prevent defects. They were all coming to work, and appeared to be doing the same thing they always did, but nothing was happening. They worked out the pay scale, productivity resumed its upward course, and no member of that management team could explain what had happened.

Workers will not go all out unless they have independent representation in the process. Labor history will confirm that point. The Employee Representation Plan (ERP) was invented by a Canadian, former Prime Minister Mackenzie King. We had it all over this country, and it worked well—when everything was going well. The ERP is organized as though the workers were in the House of Representatives, the foremen were in the Senate, and management was the Executive. They would cooperate and pass legislation. When they got into trouble, the Executive proposed a wage cut, and it passed the Senate and failed in the House. But management put it in anyway. When they did that, the workers went out and built a union. They call it the Steelworkers now. The Communications Workers of America also grew out of that kind of conflict.

Another proposition, also borne out by history, is that it's very hard to have a cooperative relationship between parties with unequal power. Sooner or later the party with more power will exert it, and then there is no cooperative relationship anymore.

A final reason is that adversarial relationships are both inevitable and functional. The trick, of course, is to prevent them from becoming functionless—that is, making the pie smaller for everybody, so everybody will lose. It need not be that. I don't see any inconsistency between cooperating to make the pie bigger and bargaining to split it. If we articulate that kind of proposition, then there is a very important role for unions.

Given these objectives, we can specify the role of government in industrial relations. If we want to develop high performance production systems we must strengthen workers' rights to organize, bargain collectively, and participate.

We can strengthen the right to organize and bargain collectively by correcting the pro-employer biases in current U.S. industrial relations policies. We should prohibit companies from permanently replacing striking workers (an act which greatly weakens the right to strike and therefore the effectiveness of collective bargaining). We should strengthen the penalties for employers' violations of workers' collective bargaining rights which are currently too weak to deter employers. We should give unions equal access to employees during organizing campaigns. Finally, we should streamline NLRB processes to prevent tactical delays in both representation and unfair labor practice cases.

Above all, we must recognize the need to integrate economic, labor market, human resource development, and industrial relations policies. The keys to our economic future are an educated, healthy, motivated work force and high performance production systems. Passive policies and market forces alone will not help us achieve our objectives. Markets are necessary institutions for economic efficiency, but under present conditions, market forces and unrestrained managerial choices will produce lower wages and more unequal income distributions. Without public strategies to alter these outcomes, the United States is unlikely to remain a world class, high-wage country.

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—Ray Marshall

Discussion:

R. MARSHALL: The question is what happened when Japanese managers took over companies whose managers thought they needed to be nonunion to compete? Well, as you know, some Japanese companies want to work with unions and some do not. These companies will come in and talk to U.S. managers, who tell them that they need to fight the unions. We have the most anti-union employers of any democratic industrial country. I don't understand it: we've got the only labor movement in the world that embraces the capitalist free enterprise system, and companies are trying to do away with it. In fact, the Germans and others would say they'd kill to get a labor movement like ours.

Some companies built up so much hostility between management and the workers they never could get to this high-performance system. They needed the workers to go all out, but the workers were suspicious. Some had hired consultants to try to fight the unions. One of the companies was asked "Why don't you get rid of that outfit and start working with the union?" So they did, and productivity just skyrocketed.

In the NUMMI case, General Motors had a company that it couldn't make work, so GM closed it in 1982. Toyota came along, wanted to buy it, and they finally opened it as a joint venture. The only thing that changed was the management. There's no such thing as good managers and lousy workers. Who hired those lousy workers? Who created the incentive system within which they work? So, Toyota told GM, "We interviewed the workers, we think they are pretty good, and we don't see them as a problem." They had the same workers, they still had the same union, the United Auto Workers (UAW), same plant, and same technology. But they did away with all the elitist trappings of American management—no private dining rooms, no private parking lots, and all the rest—and within 11 months, it was the most productive automobile plant in the United States.

NUMMI still doesn't meet all my standards of a high-performance system, because I don't think that workers have as much control at NUMMI as they have at Volvo or at Saturn. They only went part-way. Japanese companies do the right thing because they think it's good business, and that's all right for a while. Swedish employers do the right thing because they have to. In one place, the workers really are empowered; in another, they aren't. The Japanese system applies to 15-20 percent of the workers, but the Swedish system applies to 100 percent of the

workers. The workers have more control at more levels in the Swedish system. Without the union at NUMMI I'd be scared to death about it, because it looks like Taylorism: They are picking the workers' brains, and it looks like a speed up. With a strong union, we can prevent exploitation and go on and build to the next stage.

Japanese companies have come to the conclusion that we need to get the workers to go all out, and we need the union to help us. We do better with a union here, in spite of what American employers say, then if we don't have a union.

J. FAUX: Ray, let me ask you why the IBM/Hewlett-Packard model, the nonunion high-tech option, has such a powerful hold on the media?

R. MARSHALL: I'd ask the media, "Do you think if IBM workers didn't have the right to organize and bargain collectively that IBM would treat them as well as they do?" I've had people at IBM tell me, "Oh, you are absolutely right."

Workers at IBM and Hewlett Packard are free riders. They benefit from those companies' strategy to pay higher wages than the union wage, in order to try to keep the union out. Well, did the union have anything to do with that wage? If we keep on going the way we are, the labor movement will be so weak that it won't be a viable option in the private sector. The public sector is a different matter, so we'll have public sector unions. I get asked "Why are you trying to help the unions with labor law reform?" Workers need to have the right to organize and bargain collectively, which they do not now have. I think that American labor law, and particularly the NLRA, does more to protect employers than it does the right of workers to organize and bargain collectively.

In Quinn Mills' (1988) book on IBM, he makes it clear that IBM does very arbitrary things. IBM may be starting down the road to causing rebellion by the workers. They don't share information with them. The traditional mass production system is not a good learning system. Most American companies use a military intelligence doctrine on sharing information with workers: we'll give it to you if you need to know. That's not the way to share information with people to empower them to be able to do better work. The key to economic progress these days is learning. That's what innovation is all about.

"Do you think if IBM workers didn't have the right to organize and bargain collectively that IBM would treat them as well as they do?"

-Ray Marshall

Why do employers get to pay wages a family can't live on, while we, the taxpayers, subsidize these low-wage employers?

—Heidi Hartmann

H. HARTMANN: I wanted to comment on competing from a high-wage position, because I think the average American believes high wages are bad. It's contradictory, because wages are the major source of income for most people. But we've seen so many jobs lost, and we're told it's because wages are too high and the companies have to move. So, because we lack public policy, we let them move, and they go abroad. It is essential to argue that we really need wage-led productivity growth and wage-led international competition. We have to argue we will do better, not worse, with higher wages.

The \$12 billion just spent on the Earned Income Tax Credit is a wage subsidy. We don't ask the deeper question: Why do employers get to pay wages a family can't live on, while we, the taxpayers, subsidize these low-wage employers? We have seven million children in poverty with at least one working parent, even some who are working year-round, full-time.

R. MARSHALL: It's important to make it explicit that we are subsidizing low-wage companies, and to ask why would we want to do that? When Europeans are told that a higher minimum wage, will close down some of these low-wage businesses, they say "You got it, that's exactly what we hope will happen." If we had a full employment strategy, we wouldn't get unemployment. We would shift people into doing other work.

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GLOSSARY OF LEGAL CASES DISCUSSED

During many of the presentations, references are made to court cases. This glossary provides an annotated list of the cases mentioned.

American Ship Building "Lock-Out Cases"

American Ship Building Co. v. NLRB, 380 U.S. 300 (1965). The Supreme Court upheld an employer's right under Section 8(a)(3) to use a lock-out either defensively or offensively to support their bargaining position.

Some related "Lock-Out" Cases:

Movers and Warehousemen's Association, 224 NLRB No. 64 (1976).

Globe Business Furniture Inc., 290 NLRB No. 94 (1988).

NLRB v. Brown, 380 U.S. 278 (1965).

Johns-Manville Products Corp., 557 F2d 1126 (1976).

Harter Equipment Inc., 293 NLRB No. 79 (1986).

Belknap v. Hale

Belknap v. Hale, 463 U.S. 491 (1983). The employer promised replacement workers permanent positions, but entered into an agreement with the union to settle the strike and reinstate the strikers. The replacements were then discharged to make way for the returning strikers. The Supreme Court held that the discharged replacements had the right to file suit in state court against the employer to recover damages for misrepresentation and breach of the employer's agreement as to their permanent status.

Brown Food Stores

NLRB v. Brown, 380 U.S. 278 (1965). The Supreme Court upheld an employer's right to continue operations during an offensive lock-out using temporary replacements. See *American Ship Building*, above, for a related list of lock-out cases.

Curtin Matheson

NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542 (1990). The Supreme Court ruled that an employer cannot withdraw recognition from a striking union on the presumption that replacements do not favor union representation.

Emporium Capwell

Emporium Capwell Co. v. WACO, 420 U.S. 50 (1975). Once duly certified, or lawfully recognized voluntarily by the employer, a union is entitled to exclusive representation. Con-

certed activities by employees to bargain directly with the employer are not protected activity if the employees are represented by a union.

Erie Resistor

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963). The Supreme Court held that an employer had engaged in an unfair labor practice when they offered and granted twenty additional years of seniority (“superseniority”) to replacement workers and crossovers. The Supreme Court held that such an act was inherently discriminatory of the employees’ right to strike.

First National Maintenance

First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). The Supreme Court held that a company only has a duty to bargain over the effect of an economically-motivated decision to close part of a business. The Court balanced the harm likely to an employer’s need to operate freely with the benefits that might be gained by the union’s participation in the decision-making process.

Insurance Agents

NLRB v. Insurance Agents International Union, 361 U.S. 477 (1960). The Supreme Court ruled that a work slowdown was a legitimate economic weapon and not an unfair labor practice by the union.

Jones and Laughlin

NLRB v. Jones and Laughlin Steel Co., 301 U.S. 1 (1937). The Supreme Court ruled that the Wagner Act (The National Labor Relations Act) was constitutional.

Laidlaw “Waiting Line Cases”

Laidlaw Corp., 414 F.2d 99 (7th Cir. 1969). The NLRB ruled that an economic striker who offers to return to work is considered to have a continuing application for reinstatement and must be rehired when vacancies occur. If the union has negotiated a contract, the employee’s offer is in accordance with the contract’s terms; and, if there is no contract, then the offer for reinstatement must be unconditional.

Some related “Waiting Line” Cases:

NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

New Galax Mirror Corp., 273 NLRB No. 155 (1984).

Delta-Macon Brick, 297 NLRB No. 178 (1990).

Lingle v. Norge

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988). The Supreme Court held that even though a worker was covered by a collective bargaining agreement with a grievance procedure, she had the right to use the state tort law to sue over wrongful discharge resulting from the filing of a workmen's compensation claim.

New York Case

New York Telephone Co. v. New York Dept. of Labor, 440 U.S. 519 (1979). The Supreme Court held that a state law allowing striking workers to receive unemployment benefits was not preempted by the National Labor Relations Act because the unemployment benefits program was a general law—and not part of a statute expressly regulating labor-management relations.

Pattern Makers

Pattern Makers League v. NLRB, 473 U.S. 95 (1985). The Supreme Court ruled that an employee has an absolute right to resign from a union, even during a strike.

Trilogy Cases

United Steelworkers of America v. American Manufacturing Company Co., 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior and Gulf Navigation Co.* 363 U.S. 574 (1960), *United Steelworkers of America v. Enterprise Wheel and Car Corp.* 363 U.S. 593 (1960). These cases clarified the role of grievance arbitration in the U.S. and insulated the process from the review of the courts.

TWA "Flight Attendants"

Trans World Airlines v. Independent Federation of Flight Attendants, 489 U.S. 426 (1989). The Supreme Court ruled that the Railway Labor Act did not require an employer to lay off junior crossover employees in order to reinstate more senior full-term strikers at the conclusion of an economic strike.

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*Briefing Papers from the Economic Policy Institute that are the basis for these participants' comments are available.

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