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Striker Replacements: A Law, Economics, and Negotiations Approach

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STRIKER REPLACEMENTS: A LAW, ECONOMICS, AND NEGOTIATIONS APPROACH

LEONARD BIERMAN* & RAFAEL GELY**

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I. INTRODUCTION

In the seminal 1938 case of *NLRB v. Mackay Radio and Telegraph Co.*,¹ the U.S. Supreme Court interpreted the National Labor Relations Act (“NLRA” or “Act”)² to generally permit employers to

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1. 304 U.S. 333 (1938).

2. 29 U.S.C. §§ 141-87 (1988).

hire permanent replacements for striking workers engaged in economic strikes. The so-called *Mackay* "doctrine" has always been controversial,³ and in the wake of recent strikes where employers have used permanent replacements on a large scale basis,⁴ it has become perhaps the most contentious labor issue on the current scene.⁵ The AFL-CIO has been forcefully sponsoring congressional legislation to overturn the *Mackay* decision,⁶ and the Clinton Administration is backing such legislative reform.⁷ At the same time, legislation

3. See generally Leonard B. Boudin, *The Rights of Strikers*, 35 ILL. L. REV. 817 (1941) (arguing that employers have an obligation to bargain with strikers, yet they have an incentive to hire striker replacements); Samuel Estreicher, *Strikers and Replacements*, 38 LAB. L.J. 287 (1987) (describing striker replacement doctrine as the troubled area of American labor law); Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803 (1993) (suggesting that labor law and industrial relations policy reinforce management's growing bargaining advantage over unions); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984) (discussing the uneven and unfair manner "in which the NLRA interferes with employees' exercise of economic freedom during a labor dispute").

4. See generally H.R. REP. NO. 116, 103d Cong., 1st Sess., pt. 1, at 20-21 (1993) (citing AFL-CIO DEPARTMENT OF EMPLOYEE BENEFITS, *THE PERMANENT REPLACEMENT OF WORKERS STRIKING OVER HEALTH CARE BENEFITS IN 1990* (1991)) (finding that of 243,000 workers participating in larger strikes in 1990, approximately 11% were permanently replaced); U.S. GENERAL ACCOUNTING OFFICE, *LABOR-MANAGEMENT RELATIONS: STRIKES AND THE USE OF PERMANENT STRIKE REPLACEMENTS IN THE 1970s AND 1980s* 15 (1991) (finding that permanent strike replacements were hired in about 17% of the strikes that occurred in 1985 and 1989); Cynthia L. Gramm, *Employers Decision to Operate During Strikes: Consequences and Policy Implications*, in *EMPLOYEE RIGHTS IN A CHANGING ECONOMY* 33-40 (W. Springs ed., 1991) (comparing pre- and post-1980 studies on the use of striker replacements and arguing that the willingness of employers to hire permanent replacements has increased in the 1980s).

5. See generally Clifford Krauss, *House Passes Bill to Ban Replacement of Strikers*, N.Y. TIMES, June 16, 1993, at A23 (illustrating the debate between liberals and conservatives regarding the role organized labor should play in American society).

6. See 7 Lab. Rel. Wk. (BNA) 571 (June 16, 1993). The AFL-CIO-supported legislation in this area was, however, successfully filibustered in the U.S. Senate during the 103d Congress. See Catherine S. Manegold, *Senators Block Bill to Bar Replacement Strikers*, N.Y. TIMES, July 14, 1994, at D23. The AFL-CIO and its congressional supporters have vowed, though, to continue pursuing this legislation. See Catherine S. Manegold, *For 2d Time, Senate Republicans Deal a Major Defeat to Labor*, N.Y. TIMES, July 13, 1994, at D18. This legislation is, however, unlikely to make much progress in the new Republican-controlled Congress elected in November, 1994. See Robert L. Rose, *Labor Loses With Defeat of Pro-Union Lawmakers*, WALL ST. J., Nov. 10, 1994, at A6.

7. Kevin G. Salwen, *Labor Secretary Tells Union Delegates Clinton Agenda Duplicates Their Goals*, WALL ST. J., Oct. 6, 1993, at A2; see also Letter from Secretary of Labor, Robert B. Reich, to Hon. William D. Ford, Chairman, Committee on Education and Labor, reprinted in H.R. REP. NO. 103-116, 103d Cong., 1st Sess., pt. 1, at 37-38 (1993) (endorsing H.R. 5, which would protect employees who "exercise their right" to strike from being replaced). Labor Secretary Robert Reich has reiterated the Clinton Administration's continued support for such reform even after the July 1994 Senate filibuster on the issue. See Interview with Robert Reich, Labor Secretary of the United States, *This Week With David Brinkley* (ABC television broadcast, Sept. 4, 1994) (transcript on file with the *Southern California Law Review*).

designed to achieve this purpose has been enacted in both the state of Minnesota⁸ and in the city of St. Louis,⁹ and proposals are pending in various other state and local jurisdictions.¹⁰ The issue came to the fore of public attention during the fall of 1993 when AMR Corporation, the parent company of American Airlines, threatened to permanently replace striking flight attendants.¹¹ This situation was avoided only because of direct intervention in the strike by President Clinton.¹²

The issue has also recently commanded considerable attention in academic circles, with commentators presenting a wide variety of arguments regarding the continued viability of the *Mackay* doctrine. Some scholars have advocated the outright overruling of *Mackay* and a ban on any employer hiring of permanent striker replacements, along the lines of the proposed Clinton Administration legislation on the subject.¹³ Others have advocated some modifications to the *Mackay* doctrine, but without an outright ban on employer hiring of permanent replacements.¹⁴ Finally, a number of scholars have simply argued that the *Mackay* doctrine should be left alone.¹⁵

8. See MINN. STAT. § 179.12(9) (1993). This Minnesota legislation has, however, been recently held by the U.S. Court of Appeals for the Eighth Circuit to be preempted by the National Labor Relations Act. *Employers Association Inc. v. United Steelworkers*, 32 F.3d 1297 (8th Cir. 1994).

9. See 5 Lab. Rel. Wk. (BNA) 153 (Feb. 13, 1991).

10. See Albert R. Karr, *A Special News Report on People and Their Jobs in Offices, Fields and Factories*, WALL ST. J., May 7, 1991, at 1.

11. See Terry Maxon, *Strike Hinders American Passenger Flights*, DALLAS MORNING NEWS, Nov. 19, 1993, at 1A, 24A; Bridget O'Brian, *American Air Strike Strands Thousands of Fliers*, WALL ST. J., Nov. 19, 1993, at B1.

12. See Bruce Ingersoll & Bridget O'Brian, *Clinton's Intervention Halts the Costly Strike at American Airlines*, WALL ST. J., Nov. 23, 1993, at A1.

13. See, e.g., Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547; Michael H. LeRoy, *Changing Paradigms in the Public Policy of Striker Replacements: Combination, Conspiracy, Concert, and Cartelization*, 34 B.C. L. REV. 257 (1993); Daniel Pollitt, *Mackay Radio: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295 (1991); David Radtke, Note, *Banning the Use of Permanent Replacements: Slaying Its Opponent's Trojan Horse*, 3 DET. C.L. REV. 881 (1992).

14. See, e.g., William R. Corbett, *A Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: 'A Far, Far Better Thing' Than the Workplace Fairness Act*, 72 N.C. L. REV. 813 (1994); Charles B. Craver, *The National Labor Relations Act Must be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397 (1992); George S. Roukis & Mamdouh I. Farid, *An Alternative Approach to the Permanent Striker Replacement Strategy*, 44 LAB. L.J. 80 (1993); Note, *One Strike and You're Out? Creating an Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669 (1993).

15. See, e.g., Brendan Dolan, *Mackay Radio: If It Isn't Broken, Don't Fix It*, 25 U.S.F. L. REV. 313 (1991); David Westfall, *Striker Replacements and Employee Freedom of Choice*, 7 LAB. LAW. 137 (1991); Matthew T. Golden, Student Article, *On Replacing the Replacement Worker Doctrine*, 25 COLUM. J.L. & SOC. PROBS. 51 (1991).

Among the more prominent scholars taking this final approach are Professors Michael L. Wachter and George M. Cohen of the University of Pennsylvania and the University of Pittsburgh Law Schools respectively, who have applied the economic theory of "internal" and "external" labor markets to striker replacement and other employment law issues.¹⁶ Professors Wachter and Cohen argue that the *Mackay* doctrine is economically "efficient" and should not be legislatively altered.¹⁷

In this Article, we directly attack Professors Wachter and Cohen's assertion regarding the economic efficiency of the *Mackay* doctrine. Applying internal and external labor market analysis, we argue that the *Mackay* doctrine is economically inefficient because it allows employers to behave "opportunistically" with respect to employees that have made "firm-specific" investments in their employing firms.¹⁸ To remedy this problem we propose a new "negotiations approach," the components of which are: (1) the statutory overruling of *Mackay*, and (2) the concomitant amendment of the NLRA to make the striker replacement issue a "mandatory" subject of collective bargaining.

The thrust of our proposal is on *negotiation*: on letting the parties themselves, without outside intervention, resolve this important and complex issue. Our analysis and proposal is developed in the context of (1) the fall of 1993's high-profile strike at American Airlines, and (2) a recently enacted Italian statute¹⁹ that deals with issues surrounding the conduct of labor strikes.

Part II below outlines the current approach to the striker replacement issue, while in Part III we present our economic analysis of the issue and our attack on the Wachter and Cohen assertion that the *Mackay* doctrine is economically efficient. We present this analysis against the backdrop of the fall of 1993 American Airlines strike. In Part IV we develop our proposed negotiations approach, drawing in

16. See Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349 (1988); George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, in PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR 109 (Bruno Stein ed., 1990) [hereinafter NEW YORK PROCEEDINGS].

17. See NEW YORK PROCEEDINGS, *supra* note 16, at 118-19.

18. See *infra* part III.

19. See Act No. 146 of June 12, 1990, 137 Gazz. Uff. 6 (June 14, 1990), translated in I.L.O. Legislative Services, ITA 1, at 93 (1990).

part on the new Italian statute. Finally, in Part V we present our conclusion.

II. THE CURRENT APPROACH

The right to strike²⁰ is a statutory right granted by the NLRA.²¹ Section 7 of the NLRA provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”²² Section 8(a)(1) of the Act makes it an unfair labor practice for the employer to interfere with the exercise of that right.²³

In addition, the right to strike is directly mentioned in section 13 of the Act which provides that nothing in the Act, except as otherwise provided, “shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”²⁴ Moreover, section 2(3) of the Act provides that workers that are on strike still retain their status as “employees” of the given firm.²⁵

During the past fifty-plus years, the legal rights of striking employees and their employers have been in large measure defined by

20. A strike can be defined as a cessation of work as a means of forcing compliance with some demand upon the employer. See Jeffrey A. Spector, Comment, *Replacement and Reinstatement of Strikers in the United States, Great Britain, and Canada*, 13 *COMP. LAB. L.J.* 184 (1992).

21. Strikes can be first categorized as legal or illegal. An illegal strike is one that uses illegal means or one that is in violation of a strike agreement. Illegal strikes are not protected activities under the NLRA and employers may discharge employees participating in these kind of strikes without violating the Act. Legal strikes can be in turn classified as unfair labor practice strikes or economic strikes. Unfair labor practice strikes occur in response to an employer's alleged unfair labor practice. Unfair labor practice strikers are protected under the NLRA to a greater extent than any other kind of striker, and unfair labor practice strikers cannot be permanently replaced. Economic strikes are defined as any strike other than illegal or unfair labor practice strikes. They occur when the union strikes with the objective of forcing the employer to agree to a union's bargaining demand. See generally ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 341-52 (1976) (explaining the basic distinctions between the economic striker and the unfair labor practice striker); Corbett, *supra* note 14 (arguing that while the current law regarding striker replacements should be changed, the distinction between economic striker and unfair labor practice striker should remain).

22. 29 U.S.C. § 157 (1988).

23. *Id.* § 158(a)(1).

24. *Id.* § 163.

25. *Id.* § 152(3).

the Supreme Court's 1938 *Mackay* decision.²⁶ In *Mackay*, the employer, a corporation engaged in the transmission and receipt of telegraph, radio, cable, and other messages, was struck in the San Francisco area by the American Radio Telegraphists Association.²⁷ In order to maintain operations, the employer, who had offices in several other parts of the country, brought employees from other offices to fill the strikers' places.²⁸ When the strike was over, the employer refused to reinstate some of the strikers, arguing that some of the replacements had decided to stay in the San Francisco area and therefore would not be discharged in order to reinstate the strikers.²⁹

The union filed charges with the National Labor Relations Board ("NLRB" or "Board"), arguing that the employer had violated the Act by (1) hiring permanent replacements, and (2) discriminatorily failing to reinstate several strike activists because of their union activities.³⁰ The NLRB held that the employer had indeed discriminated against the strike activists. As to the issue of the striker replacements, however, the NLRB held that the NLRA did not forbid the employer from hiring permanent striker replacements.³¹ The Supreme Court upheld the Board on both counts, holding that the employer had discriminated against the strike activists,³² but that it was not a violation of the Act for the employer to hire striker replacements and to offer those replacements permanent positions.³³

Mackay thus appears to grant employers broad authority to permanently replace economic strikers, and consequently gives little protection to many striking employees with regard to their jobs. The *Mackay* doctrine, however, has been limited in several respects. First, the Court has limited the terms of employment that firms can offer striker replacements. In particular, the Supreme Court has held that employers cannot, in order to attract replacement workers, offer these replacements super seniority or higher rates of pay than that received by the strikers.³⁴ Second, once the strike is over, and the strikers have

26. NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333 (1938).

27. *Id.* at 336-37.

28. *Id.*

29. *Id.* at 337-39.

30. *Id.* at 340.

31. "Instead, we assume merely for the sake of argument that the respondent was entitled to retain these strikebreakers and that such retention was not a discrimination within the meaning of Section 8, subdivision (3)." *Mackay Radio and Tel. Co.*, 1 N.L.R.B. 201, 216-17 (1936).

32. *See Mackay*, 304 U.S. at 343-51.

33. *Id.* at 345-46.

34. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

indicated an unconditional desire to be reinstated, the employer must reinstate the strikers to the same or substantially similar jobs as soon as openings occur.³⁵

Finally, the Court has directly limited the use of *Mackay* as an anti-union device. It has frequently been asserted that the hiring of permanent replacements under the *Mackay* doctrine is simply a way for employers to engage in “union-busting”—that is, to get rid of the union.³⁶ The idea, of course, is that by replacing union adherents with permanent new employees, support for the union will be undermined,³⁷ precipitating a “good faith doubt” on the part of the employer that the union continues to enjoy the support of a majority of employees. Employers have in the past been able to lawfully withdraw their recognition of a given union and stop bargaining with it under such circumstances.³⁸

In the 1990 case of *NLRB v. Curtin Matheson Scientific, Inc.*,³⁹ however, the Supreme Court ruled that there is no automatic presumption that strike replacement workers are opposed to an incumbent union. According to the Court, employers must have clear proof that newly hired replacement workers oppose union representation before assuming any “good faith doubt” as to the desire for union representation on the part of these workers.⁴⁰ In a strong dissent, though, Justice Antonin Scalia wrote that

[s]ince the principal employment-related interest of strike replacements (to retain their jobs) is almost invariably opposed to the principal interest of the striking union (to replace them with its striking members) it seems . . . impossible to conclude . . . that the employer did not have a reasonable, good-faith doubt regarding the union’s majority status.⁴¹

35. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), enforcing 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

36. See generally *Legislative Hearing on H.R. 3936 Before the Subcomm. on Labor Management Relations of the House Comm. on Education and Labor*, 101st Cong., 2d Sess. 37-49 (1990) (testimony of Lynn R. Williams, President, United States Steelworkers of America; arguing for the enactment of H.R. 3936); *id.* at 9-15 (testimony of Thomas R. Donahue, Secretary-Treasurer, AFL-CIO; arguing in favor of overthrowing the “permanent” striker replacement doctrine of *Mackay*).

37. See H.R. REP. NO. 116, *supra* note 4, at 26-28 (discussing the detrimental effect of the *Mackay* doctrine on the collective bargaining process).

38. See, e.g., *S & M Mfg. Co.*, 172 N.L.R.B. 1008 (1968); *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196 (1962); *Stoner Rubber Co.*, 123 N.L.R.B. 1440 (1959).

39. 494 U.S. 775 (1990).

40. *Id.* at 786-96.

41. *Id.* at 801.

In sum, employers may hire replacement workers to help them operate during a strike. However, while workers striking over unfair labor practices have an automatic right to reinstatement at the end of the work stoppage, economic strikers have very limited reinstatement rights. If permanent replacements have not been hired, economic strikers may claim their former jobs. Where permanent replacements have been hired, however, economic strikers are generally entitled to reinstatement only as vacancies occur.

III. THE FIRM SPECIFIC INVESTMENTS PROBLEM

A. OVERVIEW

A major drawback that seems to exist under the current striker replacement law is its failure to minimize "opportunistic behavior" between the employers and unions. Providing employers with the blanket right to hire permanent replacements for economic strikers makes it very difficult to differentiate between those situations where the employer really needs to hire such workers in order to continue operations, and those cases where the employer is engaging in arguably opportunistic behavior. However, if the *Mackay* doctrine was overturned and unions were given total protection against the hiring of permanent replacements, employers might well be subject to some form of opportunistic behavior on the part of unions.

A key distinction that should be made to deal with this issue is the level of firm-specific investments the workers involved in the strike have made. In order to understand how distinguishing the level of worker firm-specific investments sheds some light on the striker replacements policy debate, we need to first develop the concepts of external and internal labor markets.

Professors Wachter and Cohen have, as noted above,⁴² recently developed a preliminary analysis of the striker replacements issue from an internal and external labor markets perspective. They argue that the current rules governing the replacement of striking workers "promote economic efficiency" by diminishing the likelihood of opportunistic behavior by both unions and employers.⁴³ Although we agree with Professors Wachter and Cohen that limiting opportunistic behavior should be a major focus of striker replacement policy, we

42. See *supra* notes 16-17 and accompanying text.

43. See NEW YORK PROCEEDINGS, *supra* note 16, at 118-19.

take issue with their approach. Unlike them, we believe that the current rules governing striker replacements need to be reformed.

B. SKILL SPECIFICITY AND OPPORTUNISTIC BEHAVIOR

In their analysis, Professors Wachter and Cohen develop at length the differences between internal and external labor markets.⁴⁴ They point out that the external market is where workers seek new jobs, searching among different firms for the best conditions.⁴⁵ They deem this market to be generally efficient and assert that any government intervention is likely to decrease efficiency.⁴⁶

Efficiency in the external labor market arguably breaks down, however, when there is a need for firm-specific training; that is, the learning of skills clearly specific to a given firm.⁴⁷ In such situations, Professors Wachter and Cohen point out that internal labor markets provide an alternative to exclusive reliance on the use of external labor market analysis.⁴⁸ By "internalizing" parts of the employment relationship, firms can potentially encourage workers to make long-term investments with them, which in turn produces technological and cost efficiencies for the firm.⁴⁹ However, internal labor markets can themselves be inefficient⁵⁰ because of the highly "specific" nature of the investments that workers and employers may be making in each other.⁵¹ More precisely, firms frequently invest heavily in the training of workers while workers invest heavily in learning skills that may be applicable only to the given firm.⁵² This creates a situation of "sunk investments" on both sides, investments that may be lost if either workers switch jobs or firms discharge workers.⁵³ In order to protect

44. See Wachter & Cohen, *supra* note 16, at 1355-85.

45. *Id.* at 1353.

46. *Id.*

47. Firm-specific skills can be defined as skills that are idiosyncratic to the particular firm, and thus not easily transferable to other firms. General skills, on the other hand, are skills that are easily transferable across firms in the same industry. *Id.* at 1355-64; see also GARY BECKER, HUMAN CAPITAL 29-30 (1964) (explaining that skills can be acquired through schooling and on-the-job training).

48. See Wachter & Cohen, *supra* note 16, at 1357.

49. *Id.* at 1358.

50. See NEW YORK PROCEEDINGS, *supra* note 16, at 114; see also Michael L. Wachter & Randall D. Wright, *The Economics of Internal Labor Markets*, in THE ECONOMICS OF HUMAN RESOURCE MANAGEMENT 86-108 (Daniel J.B. Mitchell & Mahmood A. Zaidi eds., 1990) (discussing the economics of the internal labor market).

51. See NEW YORK PROCEEDINGS, *supra* note 16, at 114.

52. *Id.*

53. "Sunk investments are investments that have already occurred and cannot be recalled." Wachter & Cohen, *supra* note 16, at 1360 n.43.

these sunk investments, employers and workers generally enter into implicit or explicit contracts.

“Opportunistic” behavior appears when one party or the other attempts to breach these implicit or explicit contracts.⁵⁴ In such situations, one party can be seen as trying to “expropriate” the returns that the other party expects out of its investments.⁵⁵ In this regard, Professors Wachter and Cohen argue that workers generally make firm-specific investments early in their careers and then recoup such investments “as they age.”⁵⁶ Employees arguably invest by agreeing to a below-market wage early in their careers, with the expectation that later on they will receive above-market compensation.⁵⁷ For example, employees may, early in their careers, engage in learning a skill that is specific to a particular employer. While doing this, they will likely agree to receive a below-market wage with the implicit contract or expectation that later on they will be permitted to stay in the firm and recover their investments in the form of above-market compensation. Thus, if the employer terminates the employment relationship with their employees after the employees have learned the firm-specific skill and the employer has recovered its investment, but before the employees are able to recover their investments, the employees’ investments will be lost.⁵⁸

Similarly, an employer may invest in employees’ careers by paying them more than their marginal productivity at a very early or later stage of their careers, with the expectation that the employer will recover its investments during the employees’ mid-career years.⁵⁹ During this middle period, these employees could potentially behave “opportunistically” and make it difficult for their employer to recover its investment.⁶⁰

As Professors Wachter and Cohen point out, labor law can be seen as helping create efficient contracts that lend towards the prevention of opportunistic behavior.⁶¹ They state that labor law should

54. *Id.* at 1360.

55. *Id.*

56. In particular, Wachter and Cohen argue that “[w]orkers make sunk investments in their jobs by agreeing to long-term implicit contracts that provide for ‘deferred compensation,’ that is, below-market wages at early stages of employment and above-market wages at later stages.” *Id.*

57. *Id.*

58. *Id.* at 1361.

59. *Id.*

60. *Id.*

61. *Id.* at 1364-77.

“create incentives under which the lower cost party automatically loses profits whenever it acts strategically, so that the contract is partially self-enforcing.”⁶² Seniority and other sorts of “tenure” provisions,⁶³ for example, protect workers from the potential opportunistic behavior of firms that have recouped their investments and who would be willing to fire older workers.⁶⁴ In academia, for example, younger professors may invest time serving on idiosyncratic university committees and engage in other firm-specific endeavors with the assurance that if they earn tenure, the university cannot simply turn around and fire them when they are sixty-three years old and less professionally active.⁶⁵

Professors Wachter and Cohen view the NLRA’s striker replacements doctrine as deterring opportunistic behavior by firms and workers with respect to the efficient operation of internal labor markets.⁶⁶ Their line of analysis is that if an employer is trying to cut worker wages below market levels, workers will go on strike. These workers would have little to fear because potential replacement workers hired pursuant to *Mackay* “would not accept jobs that offer a stream of future wages below competitive levels.”⁶⁷ Moreover, any replacement workers who did accept jobs would be reluctant to make sunk or firm-specific investments in a firm that had developed a “reputation for opportunistic behavior.”⁶⁸

Conversely, however, if union workers are receiving, or trying to receive, above-market wages, they will have to face the reality that replacement workers will be eager to take these jobs. Thus, if they engage in an economic strike under such conditions, it is likely that they will be permanently replaced pursuant to *Mackay*.⁶⁹ However, under Supreme Court interpretations of the NLRA, firms, as noted above,⁷⁰ are not able to offer replacements wages or seniority beyond

62. *Id.* at 1361.

63. *See* NEW YORK PROCEEDINGS, *supra* note 16, at 115-16.

64. *See* Wachter & Wright, *supra* note 50, at 96.

65. *See generally* RICHARD P. CHAIT & ANDREW T. FORD, *BEYOND TRADITIONAL TENURE* (1982) (examining the changes taking place in the traditional concept of tenure); BARDWELL L. SMITH, *THE TENURE DEBATE* (1973) (explaining the different perspectives in the debate over tenure). For some cases discussing this, see *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (discussing tenure as a “property” right).

66. *See* NEW YORK PROCEEDINGS, *supra* note 16, at 118.

67. *Id.*

68. *Id.*

69. *Id.* at 119.

70. *See supra* notes 34-41 and accompanying text.

what the striking workers receive,⁷¹ a fact that Professors Wachter and Cohen note reduces possible opportunistic behavior on the part of firms and promotes internal labor market efficiency.⁷²

We believe that Professors Wachter and Cohen are precisely correct in pointing out that the underlying conflict involved in the striker replacement decision can be properly characterized as the problem of opportunistic or strategic behavior. We argue, however, that the efficiency model as currently developed by them fails to capture several important dimensions of the industrial relations process.

There are two major problems with the *Mackay* doctrine that are not addressed by Professors Wachter and Cohen's line of analysis. First, there is a potential problem with relying on the external labor market as a check on opportunistic behavior. Second, if the specificity of training (that is, sunk investment) is the key element in creating a situation that is ripe for opportunistic behavior, it seems that the governing legal doctrine should distinguish between those situations in which this kind of an investment has been made, and those where it has not.

C. RELIANCE ON THE EXTERNAL LABOR MARKET

1. *Background*

A key element in the Wachter and Cohen model is the use of the external labor market as a check on the occurrence of opportunistic behavior by both unions and employers. The notion is that the external labor market will prevent employers from "cheating" by making it impossible for them to hire replacements if they have developed a reputation of behaving opportunistically. Similarly, unions will not be able to push for above-market wages because employers can hire replacements in the external labor market at the market wage. As Professor Wachter has argued elsewhere:

The external labor market is the benchmark for any analysis of the [internal labor markets]. It provides the opportunity costs of alternative employment for workers, and of alternative workers for firms. Workers in the [internal labor markets] always have opportunities to find jobs with other firms, and these external opportunities provide limits below which their rewards cannot fall. Similarly, firms can hire new workers from the [external labor market] and discharge workers who fail to meet work standards. Although the

71. See NEW YORK PROCEEDINGS, *supra* note 16, at 119.

72. *Id.* at 119-20.

wages and other terms and conditions of employment are set administratively by the firm, they must ultimately rest on the opportunities for hiring new workers into port-of-entry [internal labor market] jobs from the external market[s].⁷³

The problem with reliance on the external market is twofold. First, conceptually it is troubling that Professors Wachter and Cohen rely on the external labor market when it is the inability of the external labor market to deal with firm specificity that is the main factor underlying the creation of internal labor markets.⁷⁴ Were it not for the need for firm-specific training, firms would be better off making *all* employment transactions in the external labor market.⁷⁵ However, the external labor market is unable to manage the problems associated with increasing transaction costs and information asymmetry due to the increasing need for firm-specific training. It thus seems unrealistic to expect the external labor market to provide an adequate check on the employer's opportunistic behavior.

Second, the argument for reliance on the external labor market as a check on opportunistic behavior is, in practice,⁷⁶ refutable. The main argument in the Wachter and Cohen efficiency model is that the *Mackay* doctrine controls opportunistic behavior in two ways. First, when an employer tries to cut worker wages below market levels, and workers respond by going on strike, the employer will find it difficult to find replacements who will accept jobs that offer a compensation package below competitive levels.⁷⁷ Second, if the firm develops a reputation for opportunistic behavior, replacement workers will be reluctant to make sunk or firm-specific investments.⁷⁸ We submit that both of these propositions are questionable.

2. *Replacement Worker Willingness to Accept Below-Market Wages*

There appear to be several conditions in which workers might be willing to take jobs that offer below-market compensation. Although agreeing to take a job that pays below-market wages might not be the "rational" decision for a worker moving within the same industry, it

73. See Wachter & Wright, *supra* note 50, at 89-90.

74. See *supra* notes 47-53 and accompanying text.

75. As Wachter and Cohen point out, "these markets (external labor markets) approach allocative efficiency because of the mobility of workers and competition among firms for these workers." Wachter & Cohen, *supra* note 16, at 1353.

76. See *infra* notes 79-95 and accompanying text.

77. See NEW YORK PROCEEDINGS, *supra* note 16, at 118.

78. *Id.*

might be an acceptable decision for workers moving across industries, as the wages individuals find acceptable vary considerably among industries.⁷⁹ Given this variation in reservation wages, individuals in low-wage industries might be willing to move to a new industry, even if they are not being paid market wages in that new industry, because at least their wages will be above their previous employment. Similarly, individuals may be willing to accept below-market wages in order to gain entry to a field or industry that is generally hard to enter, or in other words, an industry that has high barriers to entry.⁸⁰

Moreover, we could also see workers being paid below-market wages in situations where workers implicitly agree to “pay” in order to receive some specialized training from the employer. As Professors Wachter and Cohen point out, this is the nature of implicit labor contracts.⁸¹

The assertion that workers will not accept below-market compensation is a characterization of an equilibrium and long-term situation in an otherwise competitive market.⁸² Strikes, however, are not a sustained long-term phenomenon, but finite, short-term events. Thus, an employer might find it possible to pay below-market wages to its replacements only for the duration of the strike, and if necessary, after the strike is over and the union defeated, the employer can increase wages to more accurately reflect the market.⁸³

Finally, the below-market-wage argument is likely to truly hold only in a competitive market.⁸⁴ Any deviations from this construct or characterization, such as high unemployment rates or other market distortions, will challenge this proposition.⁸⁵

79. The reservation, or acceptance, wage is that wage below which no employment offer will be accepted. See RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS* 445-50 (1982).

80. Indeed, anything that increases individuals' need for current income as compared to future income (their “discount rates”) is likely to lead to a lowering of reservation wages. See *id.* at 449.

81. See Wachter & Cohen, *supra* note 16, at 1361-64.

82. In the long run, we should expect that as information is exchanged the parties will arrive at equilibrium solutions.

83. What we argue here is that the employer can attract striker replacements by offering them more than what their best alternative will be (for example, the employer's final offer to the union), but slightly less than what the union's final demand was. This strategy, although not sustainable in the long run, can be successfully used during the duration of a strike.

84. See generally DOUGLAS LESLIE, *CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY* 54-57 (1985) (discussing the labor law implications of failures in the competitive market model).

85. *Id.*

3. *Replacement Worker Willingness to Accept Positions Despite Bad Employer "Reputation"*

Second, we argue that "reputation" issues are not necessarily as significant in the striker replacement setting as they might be in other economic and social transactions. Indeed, replacement workers may be quite willing to accept positions despite a given employer's bad reputation.

When an employer hires striker replacements, the argument could be made that the employer is abrogating a sort of implied contract with the union.⁸⁶ The reputation that the employer is purportedly damaging is the reputation it has established with *unionized* employees. This reputation, we argue, is not necessarily transferable to the employer's dealings with nonunionized employees.

Labor relations in the 1970s and beyond have been characterized by increasing employer resistance towards unions⁸⁷ and a sharp decline in the percentage of workers who are members of private sector unions to a recent low of about fifteen percent.⁸⁸ A fairly common practice is for employers to move existing production facilities, and plan expansions, to nonunionized settings.⁸⁹ This practice, although not "per se" illegal, clearly parallels the striker replacement situation. In both cases it can be argued that the employers are abrogating a sort of implied contract with given unions and are thus acquiring a certain type of negative reputation.⁹⁰

However, there do not appear to be any documented reputational problems for employers engaged in this "greenfield" type of

86. See Wachter & Cohen, *supra* note 16, at 1386-1414.

87. THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 67-80* (1986) (discussing the emergence during the 1970s of alternative nonunion systems in several major U.S. industries).

88. See MONTHLY LAB. REV. (U.S. Dept. of Lab.), Mar. 1993, at 2.

89. See KOCHAN ET AL., *supra* note 87, at 47-80. Professors Kochan, Katz, and McKersie provide ample evidence of the occurrence of this "greenfield" strategy. They note that some firms adopted a complete nonunion strategy, such as consolidating all their operations in their nonunion plants, while others left currently unionized plants undisturbed, but were increasingly reluctant to let new plants unionize.

90. In *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), the Court held that there is no duty to bargain over the decision to terminate operation of an entire business, regardless of the reasons motivating the decision. *But see* *Dubuque Packing Co.*, 303 N.L.R.B. 386, 393 (1991) (stating that employers in some circumstances may be required to bargain over plant relocation).

strategy, and such employers have not had any major problems in attracting new workers.⁹¹ New employees believe that they will be better off in the new situation and are willing to make whatever investments are called for in the new employment relationship.⁹²

In addition to the fact that the reputation that an employer acquires when replacing strikers does not necessarily translate into that employer's relationship with nonunion employees, reputational effects are reduced in the striker replacement setting because of the strong protection replacement workers receive under the NLRA. In *Belknap, Inc. v. Hale*,⁹³ for example, the Supreme Court recently held that the NLRA does not preempt state court actions where employers renege on promises to give striker replacements permanent jobs. The Supreme Court emphasized the grievous harm that misrepresentations of this kind can cause innocent workers who thought the replacement positions were of a permanent nature.⁹⁴ Moreover, in the *Curtin Matheson Scientific* case, as noted above,⁹⁵ the Supreme Court ruled that there is no automatic presumption that striker replacement workers are opposed to an incumbent union. Both of these decisions send the signal to replacement workers that even if their new employer behaves opportunistically with respect to future employment decisions, they retain considerable protection.

D. GENERAL AND SPECIFIC SKILLS

1. *Theoretical Framework*

If our argument above is correct, then the *Mackay* rule ultimately leaves employees that have invested in firm-specific training unprotected and more vulnerable to opportunistic employer behavior than

91. Judging on the basis of the positive outcomes achieved by these firms in terms of employee involvement and motivation, firms adopting these strategies do not appear to show signs of a negative reputational effect.

92. Firms adopting the "greenfield" strategy usually accompanied it with the adoption of new innovations in human resource management, such as participatory systems, teamwork, and quality circles. The expectation is thus created that the whole atmosphere of employer-employee relations will be different in the new workplace. See generally KOCHAN ET AL., *supra* note 87, at 81-108 (citing the emergence of new management techniques in nonunion workplaces). But see *Electromation, Inc.*, 309 N.L.R.B. 990 (1992) (placing limits on such participatory systems under the NLRA).

93. 463 U.S. 491 (1983).

94. *Id.* It is true, however, that the *Belknap* decision also instructed employers on how to insulate themselves from liability through use of "correct" language in the offer of permanent replacement. *Belknap*, 463 U.S. at 503; see Burr E. Anderson, "Permanent" Replacements of Strikers After *Belknap*: The Employer's Quandary, 18 JOHN MARSHALL L. REV. 321, 336 (1985).

95. See *supra* notes 39-41 and accompanying text.

employees that have not invested in firm-specific training. Simply put, the ability of employers to behave opportunistically is directly affected by the type of investments striking workers have made. The critical distinction here is between employees that have heavily invested in firm-specific skills and those that acquired mainly general skills.

Skill specificity and investment makes it possible under alternative legal standards for both the union and the employer to behave opportunistically or strategically. As discussed above,⁹⁶ the motivation for either party to behave strategically is grounded on the investment made by the other party. Once the investment is made, the opposing party can extract the rents due to the investing party. Investment occurs only in situations where employees are required to learn skills specific to the firm. When learning firm-specific skills employees must partially pay for their training by accepting a below-market wage during the training period. Having invested in the firm-specific skills, employees are then very vulnerable to the employer because the employees' investment in the firm-specific skills has given the employer the opportunity to behave strategically.⁹⁷

On the other hand, if employees have not invested in firm-specific skills, but instead have acquired mainly general training, employees are less vulnerable to the employer's strategic behavior.⁹⁸ In cases where employees are mainly required to perform tasks that require skills that are easily transferable in the external labor market, employees do not have to invest in the form of below-market wages early in their careers.⁹⁹ Thus, even if the employees' employment is terminated, as in the case of being permanently replaced while on strike, employees have not suffered a significant loss on their investment.¹⁰⁰ As compared to the case of firm-specific investments, the employer is not in any strategic position to expropriate the employees' rents.

The skill specificity distinction also affects the union's ability to behave opportunistically.¹⁰¹ The union will be in a position to impose serious damage on employers in situations where the skills required to perform work tasks are specific to the firm and require a substantial training period. In contrast, if the skills required to perform work

96. See *supra* part III.A-B.

97. See generally Wachter & Cohen, *supra* note 16, at 1358-64 (discussing workers' investments in firm-specific skills).

98. *Id.*

99. *Id.*

100. *Id.*

101. See NEW YORK PROCEEDINGS, *supra* note 16, at 113-19.

tasks are mainly of a general nature, the employer will be able to continue operating by hiring essentially untrained temporary help.¹⁰² In this situation, the union is not able to expropriate any rents. The flight attendants' strike in the fall of 1993 at American Airlines provides a good example of these theoretical concepts in operation.

2. *American Airlines Case Example*

On November 18, 1993, at the beginning of the Thanksgiving travel season, American Airline's flight attendants went on strike.¹⁰³ At the heart of the dispute was the issue of pay, particularly the ramifications of American's "two-tier" wage scale that the airline had instituted about a decade earlier.¹⁰⁴ Under the two-tier pay structure, newly-hired flight attendants and other employees were paid markedly less than employees that were already working at the airline prior to the airline's enactment of the new salary structure.¹⁰⁵ Commenting on the problems that had arisen under the two-tier pay structure, one striking flight attendant stated that "[t]en years ago, [Mr. Crandall, American's CEO] lit a fuse, and now the keg is going off."¹⁰⁶ In terms of our analysis above,¹⁰⁷ it could be asserted that because of the two-tier wage program, newly hired flight attendants had made firm-specific investments in American Airlines. They had accepted arguably below-market wages in the hope of a long-term future with the carrier.¹⁰⁸ All the flight attendants had also participated in at least ten

102. *Id.*

103. See Maxon, *supra* note 11; O'Brian, *supra* note 11.

104. The 1983 negotiations between American Airlines and its employees were noteworthy in that American succeeded in achieving major labor concessions at a time when the airline was neither under the threat of bankruptcy nor in serious financial difficulty. The negotiations are also noteworthy because of the two-tier wage agreement that was immediately copied by others within the airline industry and elsewhere. Peter Cappelli, *Airlines*, in *COLLECTIVE BARGAINING IN AMERICAN INDUSTRY 135-86* (David B. Lipsky & Clifford B. Donn eds., 1987). See generally Note, *Two-Tier Wage Discrimination and the Duty of Fair Representation*, 98 HARV. L. REV. 631 (1985) (explaining the processes behind the two-tier wage system).

105. Two-tier pay agreements became increasingly popular during the 1980s. By 1988 about forty-two percent of all labor contracts had some variation of a two-tier system. See Peter Cappelli & Peter D. Scherer, *Assessing Worker Attitudes Under a Two-Tier Wage Plan*, 43 INDUS. & LAB. REL. REV. 225, 226 (1990).

106. James S. Hirsch, *AMR Is Hurt, but Stays Aloft Despite Strike*, WALL ST. J., Nov. 22, 1993, at A3 (quoting striking flight attendant).

107. See *supra* part III.B.

108. Of course, some of the flight attendants on strike in 1993 may have been employed by American Airlines prior to the 1983 institution of the two-tier pay system, and thus not directly impacted by its "lower-tier" pay scale. Nevertheless, it appears that the whole thrust of the 1983 negotiations was on asking these employees to forgo wage increases and other benefits in return for a strong assurance of job security from the airline. See Cappelli, *supra* note 104, at 157.

days of firm-specific airline training as required by Federal Aviation Administration ("FAA") regulations.¹⁰⁹

When the flight attendants went on strike, though, they certainly had every reason to expect the airline to hire temporary help to keep operating.¹¹⁰ The airline, however, forcefully emphasized its rights under *Mackay* to permanently replace the striking workers.¹¹¹ A taped telephone hotline told workers that "[a]ny flight attendant who chooses to strike, whether it is for 20 minutes or for 20 days, may be permanently replaced."¹¹² An airline spokesman stated even more directly that strikers were "operating on the assumption that they [had] a job to come back to," but that they were "being misled by the union" and were "sadly mistaken."¹¹³ The airline clearly intended to exercise its rights under *Mackay* to hire not temporary, but permanent replacements for the striking workers.

Moreover, even though the strike ended up lasting only five days, numerous potential replacement workers had already expressed interest in permanently filling these positions.¹¹⁴ Indeed, because of the thousands of airline jobs lost¹¹⁵ in the wake of the Airline Deregulation Act of 1978,¹¹⁶ even virulently "anti-union/worker" executives such as Frank Lorenzo¹¹⁷ (a man one union president once said has "a mind that would make Machiavelli look like Gomer Pyle"¹¹⁸) have had relatively little trouble attracting permanent replacement workers for their airlines.¹¹⁹

Consequently, it could be argued that these employees have also made firm-specific investments in American Airlines.

109. See Maxon, *supra* note 11, at 24A.

110. See generally CHARLES R. PERRY ET AL., OPERATING DURING STRIKES: COMPANY EXPERIENCE, NLRB POLICIES, AND GOVERNMENTAL REGULATIONS (1982) (outlining strategies for companies wishing to operate during strikes and discussing experiences of companies which have done this).

111. See Maxon *supra* note 11, at 24A.

112. *Id.*

113. *Id.*

114. *Id.* (discussing scheduled classes for 300 replacement workers that had already signed on).

115. See Hon. Bob Graham, *Protecting Airline Employees, Protecting the Public Interest*, 10 HOFSTRA LAB. L.J. 1, 2, 6-10 (1992).

116. Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C. §§ 1301-1557 (1988)).

117. See ARTHUR A. SLOANE & FRED WITNEY, LABOR RELATIONS 254-55 (1994).

118. *Id.* at 254 (citing NEWSWEEK, Mar. 25, 1989, at 20).

119. See generally *id.* at 146 (citing hiring of replacements at Continental and Eastern Airlines, both controlled by Mr. Lorenzo). This, of course, is not to imply that it wasn't at times a "bumpy" ride for these airlines even though they continued operating for significant periods of

In sum, the *Mackay* doctrine appears, as we developed above,¹²⁰ to give employers the upper hand with respect to workers, like the flight attendants at American Airlines, that have made firm-specific investments who later strike. Despite the employees' investments in the firm, *Mackay* permits employers to hire not temporary, but permanent striker replacements. Moreover, it appears that many employers will have little difficulty attracting such replacements despite the employers' nonstellar employee relations reputation.

Conversely, however, the American Airlines scenario also illustrates the opportunistic leverage potentially open to unions if the *Mackay* doctrine is simply overturned without more. Because of White House involvement in the strike,¹²¹ ultimately culminating in President Clinton's direct intervention,¹²² and a FAA requirement that airlines must train flight attendants for at least ten days,¹²³ the airline was essentially operating during the beginning of the strike in an environment where the actual deployment of permanent striker replacements was extremely difficult.¹²⁴ In essence, it could be argued that during this period American Airlines was "de facto" operating as if the *Mackay* doctrine had been repealed, a situation that enabled the union to arguably behave opportunistically. Responding to airline threats to permanently replace workers, flight attendants union president Denise Hedges called for an eleven-day strike, knowing that training takes ten days. She stated that she wondered "how they can replace 90 percent of our workers in eleven days."¹²⁵ Given these circumstances and the President's intervention, the airline acceded to union demands after the strike's fifth day.¹²⁶ Even so, the airline suffered tremendous financial losses, attributing the vast majority of a 1993 fourth quarter loss of \$253 million to the strike.¹²⁷

time during strikes. See Bridget O'Brian, *In the Wake of Eastern Airlines' Demise, Rival Carriers Swoop In for the Pieces*, WALL ST. J., Jan. 21, 1991, at B1 (chronology of events).

120. See *supra* part III.C.2-D.1.

121. Because of its potentially disruptive effect on the general public during the Thanksgiving holiday, White House officials were involved with, and monitoring, the strike almost from its onset. See Ingersoll & O'Brian, *supra* note 12.

122. *Id.*

123. See Maxon, *supra* note 11, at 24A.

124. See generally *id.* (discussing the FAA requirements and the number of workers needing replacement).

125. *Id.*

126. See Ingersoll & O'Brian, *supra* note 12.

127. Bridget O'Brian, *AMR Posts Widened Fourth-Period Loss Largely on Effects of Attendant's Strike*, WALL ST. J., Jan. 20, 1994, at A2.

Most interestingly, and consistent with the theme of this Article,¹²⁸ in early 1994 American Airlines and its pilot's union announced a new so-called "Fresh Approach" to labor relations.¹²⁹ The thrust of this new approach, specifically designed to avoid the "messy denouement" of American's contract talks with the flight attendants, is on very wide ranging *negotiations* between the parties.¹³⁰

3. Summary

In sum, we assert that the key distinction that should be made in the law of striker replacements is one based on the degree of firm-specific investments made by the workers involved in the strike. By focusing on that feature, the law could prevent the use of a strike or the hiring of permanent replacements as an opportunistic behavior weapon designed to expropriate the other party's rents.

A major obstacle to the implementation of a scheme such as the one we propose is obviously how to make distinctions of this kind. Although several proxies could potentially be available to the courts or the NLRB, there are no clear guidelines or definitions that facilitate such distinctions. In Part IV below we argue that unions and employers are, through broad-scale negotiations of the general type currently being engaged in by American Airlines and its pilot's union, in the best position to make such distinctions. We further argue that if courts or Congress make the decision of whether to hire striker replacements a mandatory issue of bargaining, unions and employers could make the distinction between firm-specific and general investments made by workers and thus enforce the contract so as to minimize strategic behavior.

128. See *infra* part IV (outlining our proposed "negotiations approach").

129. See *American Air, Pilots Agree to Timetable for Contract Talks*, WALL ST. J., Jan 19, 1994, at A4.

130. *Id.* To date, however, these negotiations have not been going well. See *Future of American Airlines Depends on Negotiations With Unions, Official Says*, 1994 DAILY LAB. REP. (BNA) No. 184, at D14 (Sept. 26, 1994).

IV. AN ALTERNATIVE MODEL: A NEGOTIATIONS APPROACH

A. BACKGROUND

Among the goals of the NLRA was the promotion and encouragement of collective bargaining.¹³¹ The sponsors of the NLRA viewed collective bargaining as the means to promote a new labor policy without having to directly regulate the terms of the employment relationship.¹³² In enacting the NLRA, Congress rejected a more interventionist approach¹³³ and opted instead for a system that emphasized the distinct roles of labor and management in which outcomes were to be determined by the ability of the parties to impose economic pressure on each other through the negotiation process.¹³⁴

It is somewhat paradoxical that among the several alternatives that have been advanced to deal with the striker replacements issue,¹³⁵ there has been no attempt to use the collective bargaining process as a possible solution. We argue that by incorporating the striker replacement decision into the bargaining process a non-zero-sum situation can be created which makes both parties better off,¹³⁶ while at the same time advancing the NLRA's objectives of industrial peace and collective bargaining.

B. THE ADVANTAGES OF NEGOTIATION

So far, this Article has argued that the main problem with the current state of striker replacement public policy is the inability of the

131. The Act provides:

It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1988).

132. See Leo Troy, *Will a More Interventionist NLRA Revive Organized Labor?*, 13 HARV. J.L. & PUB. POL. 583 (1991). See generally Getman & Marshall, *supra* note 3, at 1807-08 (discussing the traditional collective bargaining model of industrial relations).

133. See Troy, *supra* note 132.

134. *Id.*

135. See *supra* notes 13-16 and accompanying text.

136. In the game theory parlance, we contend that bargaining over the striker replacements issue creates a cooperative solution. See generally ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 92-94 (1988) (arguing that in the cooperative game theory of bargaining, the parties can both benefit by cooperating with each other).

Mackay doctrine to distinguish between “opportunistic behavior” by either the union or the employer, and behavior that is “non-opportunistic.” Therefore, whatever reform proposal is introduced should be measured by its ability to redress this problem.

The proposal we advance is based on the assumption that through the negotiation process the parties themselves will be best able to resolve disputes concerning the hiring of striker replacements by making the necessary trade-offs and establishing rules that commit them to mutually enforce the contract. In the law and economics parlance, “[i]f someone values an asset . . . more than its owner, then there is scope for mutual gain by exchange.”¹³⁷ Public policy should then focus on providing the proper framework in which negotiations or mutual exchange should take place. In this sense, the role of the law is threefold. First, the legal framework should allocate the initial rights or entitlements in a way that increases the likelihood of successful bargaining.¹³⁸ Second, the law should seek to minimize the transaction costs associated with bargaining.¹³⁹ Finally, the legal framework should provide adequate enforcement mechanisms for cases in which bargaining fails.¹⁴⁰ Our proposal, we submit, addresses all of these issues.

The “Coase theorem”¹⁴¹ recognizes the fact that in the absence of transaction costs, parties will bargain over the efficient allocations of resources regardless of their initial legal entitlement.¹⁴² As Coase himself has pointed out, however, bargaining situations characterized by zero transaction costs are rare.¹⁴³

137. *Id.* at 6.

138. *See infra* notes 141-55 and accompanying text.

139. *See infra* notes 141-55 and accompanying text.

140. *See infra* notes 141-55 and accompanying text.

141. The theorem was first suggested in Ronald H. Coase, *The Problem of Social Costs*, 3 J. L. & ECON. 1 (1960). Among the various formulations of the Coase theorem are the following: “[I]f there are no obstacles to exchanging legal entitlements, they will be allocated efficiently by private agreement, so the initial allocation by the courts does not influence the efficiency of the final allocation”; and “the assignment of property rights does not matter when the transaction costs are zero.” COOTER & ULEN, *supra* note 136, at 101 n.11 (quoting Robert Cooter, *The Coase Theorem*, in THE NEW PALGRAVE (1985)).

142. Note that the theorem states that allocation will be efficient regardless of the initial entitlement, not that it will be invariant to the assignment of rights. *See* COOTER & ULEN, *supra* note 136, at 105 n.15.

143. *See* RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988).

In the presence of transaction costs, efficient allocation is increasingly difficult.¹⁴⁴ Transaction costs can be in the form of communication costs,¹⁴⁵ monitoring costs,¹⁴⁶ or strategic costs.¹⁴⁷ In the presence of transaction costs, an important consideration will be the way in which we define rights. They must be defined in a way that minimizes the transaction costs associated with fixing, by means of private contracts, inefficient allocations.¹⁴⁸

We submit that under the *Mackay* approach to striker replacements, the decision to hire striker replacements is not amenable to resolution through the collective bargaining process because the rule makes bargaining over this decision too costly for a union and makes it easy for an employer to behave opportunistically. In this sense the *Mackay* rule does not minimize transaction costs.

Given that there are transaction costs in the collective bargaining process, the initial allocation of rights could affect the achievement of efficient outcomes. The initial allocation of rights will affect the likelihood of achieving a bargaining solution.¹⁴⁹ For example, under *Mackay* the employer can hire permanent replacements without consulting the union. That is, the legal entitlement lies with the employer. As has been developed above,¹⁵⁰ this arguably allows the employer to get

144. "In the presence of transaction costs, the default settings established by legal rules have economic consequences. In setting default entitlements, therefore, the Board and courts often implicitly, if not explicitly, consider the economic consequences." Wachter & Cohen, *supra* note 16, at 1366; see also Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245 (1987) (discussing the application of the Coase Theorem to collective bargaining).

145. "Communication costs" refers to the ability or inability of parties to a negotiation to clearly define their threat (or "bottom line" bargaining) positions. "The rights of the parties define their positions or threat points in legal disputes." COOTER & ULEN, *supra* note 136, at 100. This type of cost is particularly critical to the striker replacement debate. Contrary to what Professor Michael H. LeRoy (LeRoy, *supra* note 13, at 269-70, 301-07), argues, it is difficult to reconcile within the same paradigm or conceptual framework the *Mackay* ruling with the limitations imposed by the courts on the use of striker replacements and the arguable right of employees to strike under the NLRA. This uncertainty is likely to increase communication costs and make it more difficult to achieve efficient solutions under the present scheme.

146. Monitoring costs relate to the ability of the parties to enforce their bargain. See COOTER & ULEN, *supra* note 136, at 100.

147. Strategic costs include the costs associated with miscalculating the response of the other party to a given strategic move. These costs are likely to be low when the parties are engaged in a long and continuing bargaining relationship. *Id.* at 101.

148. For a brief, but excellent description of some of the implications of the Coase theorem, see David D. Friedman, *The World According to Coase*, 38 LAW SCH. REC. 4 (1992).

149. See, e.g., LESLIE, *supra* note 84, at 369-73 (pointing out that initial allocation of entitlements in labor law could completely prevent bargaining due to the complexities of the collective bargaining process).

150. See *supra* notes 26-41 and accompanying text.

rid of the union by negotiating to an impasse and then hiring permanent replacements. The employer has no real incentive to negotiate over the striker replacement issue because any negotiation will by definition make the employer worse off. Even if the union places a high value on protecting at least those employees that are subject to opportunistic behavior, and even if the union is willing to compromise on the protection of other (less-skilled) employees or on any other issue, no bargaining is likely to ever take place under the *Mackay* rule. In this sense, and using the language of bargaining theory, the *Mackay* doctrine makes it less likely that bargaining will take place and in that sense it is inefficient. It is necessary, therefore, that any reform proposal start by changing the initial allocation of rights—in this case, by granting union protection against the hiring of permanent striker replacements.

On the other hand, giving unions protection against the hiring of permanent replacements, without anything more, will also result, as developed above,¹⁵¹ in the likelihood of opportunistic behavior by the union. Recall that under the internal labor market model, employees that have received firm-specific training can expropriate the employer's rents by engaging in behavior, such as withholding their job effort, that increases monitoring costs of the firm. Thus, if unions are allowed to strike, knowing that their members cannot be permanently replaced, they will be free to engage in strikes and in that way expropriate rents due to the employer under their agreement.¹⁵²

The solution we propose involves first providing unions and striking workers with the protection against permanent replacements by changing the initial legal right, and second, making the striker replacement issue a mandatory subject of bargaining. By providing this protection, we will make it more costly for employers to force a strike in the hope of getting rid of the union. The employer will only be able to accomplish this by paying a fairly high price: closing operations.¹⁵³ By making it a mandatory subject of bargaining, we minimize transaction costs by giving the union, the party which probably values this right

151. See *supra* notes 59-60, 121-27 and accompanying text.

152. See Peter G. Nash & Jonathan R. Mook, *Strike Replacement Legislation: If It Ain't Broke, Don't Fix It*, 16 EMPLOYEE REL. L.J. 317 (1990-91).

153. As Wachter and Cohen point out, this sunk cost should deter illegal behavior. See Wachter & Cohen, *supra* note 16, at 1378-85.

the most,¹⁵⁴ the opportunity to exchange the protection against permanent replacements for other bargaining demands they might value more highly. In this sense, the proposal facilitates bargaining by making more explicit the types of exchanges the union has to make.

Our proposal will also allow the union and the employer, themselves, to make a distinction between the skill level of their workers and therefore mutually enforce implicit contracts concerning human capital investments. Finally, leaving the resolution of the striker replacement issue to the parties themselves, through the collective bargaining process, allows for a non-zero-sum solution.¹⁵⁵ Implementation of this approach, though, raises a number of issues concerning other provisions of the NLRA which we discuss below.

C. STRIKER REPLACEMENTS: MANDATORY OR PERMISSIVE ISSUE?

The NLRA imposes on the employer and the union a duty to bargain in good faith.¹⁵⁶ This duty requires the parties to bargain in passé over mandatory issues.¹⁵⁷ Permissive issues can be brought to the bargaining table, but neither party is required to bargain over them.¹⁵⁸

A question that is raised by the proposal suggested in this Article is whether the duty to bargain over the decision to hire permanent

154. The rationale for arguing that unions will, as opposed to the employer, be more likely to bargain over the striker replacement issue if given the initial legal entitlement, is based on the realities of the industrial relations process. First, the protection against striker replacement does not make the strike a "risk free" venture for the union. "The hardship of doing without a paycheck and health insurance puts enormous pressure on the strikers to settle a dispute as soon as possible. Most American workers have no cushion, no money socked away to make house payments and car payments, to buy food or to pay doctors' bills." H.R. REP. NO. 103-116, *supra* note 7, at 33. Second, unreasonable pressures or unwillingness to bargain over this issue could represent a matter of survival for the union. "[W]orkers have no incentive to make demands that will throw their employers into bankruptcy or otherwise cause permanent economic harm to their employers. The worker, after all, is dependent on the employer's long-term economic health. Workers realize this, and this realization significantly moderates worker demands." *Id.*

155. See *infra* part IV.F.

156. 29 U.S.C. §§ 158(a)(5), (b)(3) (1988). 29 U.S.C. § 158(d) defines the scope of this duty: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment"

157. Bargaining subjects have been classified by the Supreme Court as mandatory, permissive, or illegal. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Mandatory subjects are defined as those that "regulate wages, hours, and other conditions of the relationship between employer and employees." GORMAN, *supra* note 21, at 498.

158. Permissive issues are those dealing with subjects other than wages, hours, and working conditions. See GORMAN, *supra* note 21, at 498.

replacements can be characterized as a mandatory issue of bargaining. We submit that bargaining during contract negotiations over the utilization of striker replacements in the case of a strike should clearly be considered a mandatory topic.

Although there do not appear to be any cases directly on point,¹⁵⁹ we submit that the striker replacement issue could be considered a mandatory subject based on several grounds. First, like a no-strike provision,¹⁶⁰ bargaining over the use of striker replacements involves a critical aspect of the relationship between the employer and the union, and should on these grounds be seen as a mandatory bargaining topic.¹⁶¹ Second, similar to work rules such as attendance and absenteeism policies, the striker replacements decision deals with the obligation of the employees to report to work under the employment contract.¹⁶² As such, they regulate an issue central to the day-to-day employer-employee relationship.¹⁶³ Finally, making the striker replacements provision a mandatory issue of bargaining could be supported as a means of advancing the objectives of the NLRA in avoiding industrial strife.¹⁶⁴

The NLRB and the federal courts have consistently held, however, that interest arbitration provisions, in which the parties agree to have an arbitration hearing in the case of a bargaining impasse, are nonmandatory topics of bargaining.¹⁶⁵ In *NLRB v. Columbus Printing Pressmen Assistants' Union No. 252*,¹⁶⁶ the Fifth Circuit upheld the Board's holding that a union that bargained to impasse on a provision that required the parties to submit to arbitration disputes over the

159. Professors Cox, Bok, Gorman, and Finkin do raise the issue rhetorically in their leading labor law casebook, but without any specific discussion or explanation. See ARCHIBALD COX ET AL., *CASES AND MATERIALS ON LABOR LAW* 498 (1991).

160. No-strike clauses are provisions in the collective bargaining agreement in which the union agrees not to call a work stoppage during the term of the collective bargaining agreement. See GORMAN, *supra* note 21, at 604-20.

161. See *Shell Oil Co.*, 77 N.L.R.B. 1306 (1948) (holding that employer's insistence upon including a no-strike clause was not a refusal to bargain).

162. See GORMAN, *supra* note 21, at 507.

163. See, e.g., *NLRB v. Gulf Power Co.*, 384 F.2d 822 (5th Cir. 1967) (holding that negotiation over safety rules is mandatory); *Beacon Piece Dyeing & Finishing Co., Inc.*, 121 N.L.R.B. 953 (1958) (holding that employer must bargain over workload).

164. See *Bethlehem Steel*, 89 N.L.R.B. 341 (1950); see also GORMAN, *supra* note 21, at 507 (stating that making striker replacement a mandatory topic would "advance the basic statutory policy of avoidance of industrial strife").

165. GORMAN, *supra* note 21, at 508.

166. 543 F.2d 1161 (5th Cir. 1976).

negotiation of terms of a contract in subsequent agreements, was bargaining in bad faith. The rationale for holding that the interest arbitration clause was a nonmandatory issue was that the effect of such a provision on the terms and conditions of employment during the contract period is at best remote.¹⁶⁷ Moreover, the D.C. Circuit, in the recent case of *Land Air Delivery, Inc. v. NLRB*,¹⁶⁸ held that an employer's decision to permanently subcontract work during a strike is a mandatory subject of bargaining. This holding seems to imply that the hiring of permanent strike replacements is not a mandatory issue of bargaining. The court of appeals noted that it perceived a distinction "between replacing strikers with permanent employees and replacing them with permanent subcontractors,"¹⁶⁹ in that permanent subcontracting more directly impinges on the scope of the bargaining unit.¹⁷⁰

Thus, statutory reform may be necessary in order to clearly make the issue of striker replacements a mandatory subject of bargaining under the NLRA. The issue seems to be quite ripe for consideration by President Clinton's commission studying labor law reform.¹⁷¹

D. SURVIVAL OF THE STRIKER REPLACEMENT CLAUSE

The proposal we advance here raises a second issue: Could a negotiated provision dealing with the issue of striker replacements survive the expiration of an existing labor contract? Certain provisions of collective bargaining agreements have been held to survive the expiration of the contract. For example, in *Nolde Brothers Inc. v. Local 358, Bakery & Confectionery Workers Union*,¹⁷² the Supreme Court held that the expiration of a contract did not terminate the parties' obligation to arbitrate a dispute that arose under the contract. In *Nolde*, the Court stated that "[t]he contracting parties' confidence in the arbitration process and an arbitrator's presumed special competence in matters concerning bargaining agreements does not terminate with the contract."¹⁷³

167. In its decision, the NLRB emphasized that contrary to the overall policy of the NLRA, the interest arbitration provision constituted interference with collective bargaining and the unfettered availability of economic weapons. The Columbus Printing Pressmen & Assistants' Union No. 252, 219 N.L.R.B. 268, 272 (1975).

168. 862 F.2d 354 (D.C. Cir. 1988).

169. *Id.* at 357.

170. *Id.* at 357-58.

171. See generally 7 Lab. Rel. Wk. (BNA) 309 (Mar. 31, 1993) (discussing President Clinton's Workplace Cooperation Commission).

172. 430 U.S. 243 (1977).

173. *Id.* at 254.

Although arbitration clauses appear to survive the termination of collective bargaining agreements, obligations under no-strike clauses do not appear to survive. Thus, for example, in *United Steelworkers v. Fort Pitt Steel Casting Div.*,¹⁷⁴ the Third Circuit held that a no-strike clause did not prevent the union from engaging in an economic strike following the termination of the contract.

Thus, it does not appear to be clear whether a provision dealing with the use of striker replacements will survive the termination of an agreement. We submit that such survival must be made clear as part of any statutory reforms that implement our “negotiations approach.”

E. DUTY OF FAIR REPRESENTATION

Under a “negotiations approach” of the type we propose, unions may seek different treatment of different employees in the bargaining unit they represent. This different treatment potentially raises questions regarding the requirement that unions fairly represent all employees in the given bargaining unit. The “duty of fair representation” is a judicially created obligation on the part of the union to represent fairly all employees in the bargaining unit. The duty was developed by the courts because of the union’s role as the exclusive bargaining agent for the bargaining unit. This duty was first announced in a Railway Labor Act case, *Steele v. Louisville & Nashville Railroad*,¹⁷⁵ where the Supreme Court struck down a bargaining agreement that discriminated against black members of the bargaining unit. The Court found embedded in the principle of exclusive representation an implied obligation to represent all employees fairly, and without hostile discrimination.¹⁷⁶ The duty is based on the same principles that underlie the duty the Constitution imposes upon a legislature to give equal protection to those for whom it legislates.¹⁷⁷

The duty of fair representation clearly applies to the negotiations process, and a union would be clearly held to violate this duty if it negotiated a provision in a contract that did not benefit all covered employees in the same manner, or a provision that benefitted some employees in the bargaining unit to the detriment of other covered

174. 635 F.2d 1071 (3d Cir. 1980), *cert. denied*, 451 U.S. 985 (1981).

175. 323 U.S. 192 (1944).

176. *Id.* at 204.

177. *Id.* In *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955), the Court in a *per curiam* decision reversed a ruling below that proclaimed that federal courts generally had no jurisdiction over breach of duty of fair representation claims, thus extending the duty of fair representation also to unions granted bargaining agent status under Section 9(a) of the NLRA.

employees.¹⁷⁸ Thus, a union negotiating over the striker replacement provision could potentially get involved in a duty of fair representation problem if, for example, the union were to allow permanent striker replacements for certain workers such as general skill workers, but not for others, such as firm-specific skill workers.

In *Ford Motor Co. v. Huffman*,¹⁷⁹ the Supreme Court held, however, that the duty of fair representation ensures only that a union operates in "good faith and honesty of purpose in the exercise of its discretion."¹⁸⁰ In reviewing duty of fair representation charges against a union concerning contract negotiations, courts apply a "relevancy" test. Under the relevancy test, unions can distinguish among their constituencies if the distinctions are based on grounds *relevant* to the union's statutory purposes.¹⁸¹ For example, courts have found that seniority-based patterns of discrimination are within the "wide range of reasonableness"¹⁸² that union negotiators are permitted in service of statutory purposes.¹⁸³ What is relevant includes the ability to consider the different expectations of various employees. That is, there is nothing wrong with having a union negotiate a contract provision that is designed to reward the expectations of a group of employees already within the bargaining unit, even if the union ignores the interests of other employees within the same unit.

In *Seaboard World Airlines v. Transport Workers Union*,¹⁸⁴ the Second Circuit considered the validity of a collective bargaining agreement that provided displacement benefits to a limited group of incumbent flight navigators, but did not guarantee the same kind of benefits to new hires. Relying on the expectations analysis, the Second Circuit held that the union had in fact performed its duty of fair representation by affording displacement benefits to only those navigators who had entered the bargaining unit with the expectation of permanent employment.¹⁸⁵ According to the court, the new hires entered the unit knowing that their jobs might not last, and thus were not unjustifiably discriminated against by the union's actions.

178. See, e.g., *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

179. *Id.*

180. *Id.* at 338.

181. *Id.* at 341-43; see also Note, *supra* note 104 (discussing the validity of two-tier wage structures under the NLRA's duty of fair representation).

182. *Ford Motor*, 345 U.S. at 338.

183. See *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 203 (1944).

184. 443 F.2d 437 (2d Cir. 1971).

185. See Note, *supra* note 104, at 639.

Thus, it appears that unions will not necessarily be subjected to duty of fair representation violations when negotiating contracts that allow for different treatment of unit members in terms of the permanency of their replacements in case of a strike. This is true so long as the union conducts such negotiations "in good faith."

F. WHAT IF NEGOTIATIONS FAIL?: THE ITALIAN MODEL AND BEYOND

It could be argued that our proposal will not, in practice, produce results any different than could be accomplished by merely overruling the *Mackay* doctrine.¹⁸⁶ That is, under our proposal unions could arguably bargain to impasse over the striker replacement issue, call a strike, and then behave opportunistically, because employers will not be allowed to replace economic strikers. We argue from both a practical and theoretical perspective that a contrary dynamic will likely prevail.

As discussed above,¹⁸⁷ our proposal facilitates the bargaining process by distributing the initial allocation of rights in a way that is conducive to mutual gain exchange. Bargaining over the striker replacement issue is not likely to occur under current law because employers are given the right to permanently replace strikers and the general issue is not clearly defined as a mandatory topic of bargaining. Thus, under the current scheme of things, there is almost no incentive for employers to bargain with respect to this issue. By overruling *Mackay*, while at the same time making the striker replacement issue a mandatory topic of bargaining, our proposal facilitates exchange and thus increases the likelihood that the two parties will reach an agreement.

Going beyond this theoretical construct, it is also important to note that negotiations of this kind are feasible from a practical perspective. For example, they could, as discussed above,¹⁸⁸ easily be incorporated into the broad-scale "Fresh Approach" type of negotiations currently being conducted between American Airlines and its pilots' union. Indeed, provisions similar to what our proposal

186. We are indebted to Professor William Corbett of Louisiana State University Law Center for extensive discussions on this issue.

187. See *supra* part IV.A-B.

188. See *supra* notes 129-30 and accompanying text.

envisions have in fact already been negotiated by unions and companies, albeit on a more limited scale. The collective bargaining agreement between the International Brotherhood of Electrical Workers and the Olin Corporation, for example, provides: "The [e]mployees as well as the Union shall cross all picket lines for the performance of work which is essential to the maintenance of the Company's plant and equipment for standby operations."¹⁸⁹ Similarly, the agreement between the Steelworkers and Harbison-Walker Refractories, provides that:

No strike or lockout shall occur at the establishment covered by this Agreement during the life of this Agreement, and continuous kilns shall be maintained at all times at a temperature which will result in no loss of ware or damage to the kilns, and periodic kilns under fire shall be burned off. Pumping operations shall also be continued during any strike or work stoppage that may occur as stated above.¹⁹⁰

These two labor contracts clearly indicate the ability of unions and employers to, through the collective negotiations process, devise rules governing behavior in the event of, and during, strikes.

An instructive example can also be found in recent labor legislation enacted in Italy which regulates strike activity involving essential public services.¹⁹¹ Act 146 of the Italian Labor Code, enacted in 1990,¹⁹² follows the recent trend in Italian labor law towards consensual regulation. It relies in part on collective bargaining as the means of regulating the impact of strikes on the provision of "essential services."¹⁹³

189. See THE BUREAU OF NATIONAL AFFAIRS, 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS: BASIC PATTERNS 77:376 (1991).

190. *Id.*

191. *Id.* at 77:377.

192. Act No. 146 of June 12, 1990, 137 Gazz. Uff. 6, June 14, 1990, translated in I.L.O. Legislative Series, ITA 1, at 93 (1990).

193. *Id.* at 94. Act 146 also relies on a variety of regulatory sources such as constitutional principles, administrative agencies, public executive orders, and court decisions. *Id.* at 96, 98-101.

Indeed, collective bargaining agreements have proven to be the main source of strike regulation under the new Italian law.¹⁹⁴ Agreements have been negotiated with respect to most of the so-called essential services covered under the Act.¹⁹⁵ Bargaining has occurred at both the national and local levels, with local agreements being used as a means of tailoring the rules to the specific needs of the participants. For example, the national agreement covering urban and suburban transportation establishes the principle that during a strike, service must be guaranteed for six hours a day at "peak times." The local agreements then specify the definition of peak times and indicate the number of employees required to guarantee the service, as well as the way of selecting those employees.¹⁹⁶

The Italian experience demonstrates, albeit in a different setting, that bargaining is likely to occur on the issue of the regulation of strike activity when and if the proper legal framework and structure is provided to the parties. Although we do not advocate the adoption of the Italian model in the United States, we believe that it provides some hope that a negotiations approach to the striker replacement issue of the kind we propose could bring positive net outcomes to unions, employees, employers, and the general public.

V. CONCLUSION

The striker replacement issue and the proposed legislative overruling of the *Mackay* doctrine are highly controversial and command considerable attention. The issue is, as exemplified in the strike during the fall of 1993 at American Airlines, fraught with emotion, with one side decrying the "union-busting hiring of scabs" and the other pronouncing the right to hire permanent striker replacements as "essential to the preservation of free enterprise and a free society."

Professors Wachter and Cohen and other scholars have stressed the "economic efficiency" of the *Mackay* doctrine as it currently operates. We, however, dispute the contention that the *Mackay* doctrine

194. See Tiziano Treu, *Strikes in Essential Services in Italy: An Extreme Case of Pluralistic Regulation*, in *THE CHANGING FACE OF LABOUR LAW AND INDUSTRIAL RELATIONS: LIBER AMIROCUM FOR CLYDE W. SUMMERS* 332-53 (Roger Blanpain & Manfred Weiss eds., 1993).

195. These include: schools, telecommunications, banking, railroads, urban and suburban transport, hospitals, and others. *Id.* at 343.

196. Other provisions that have been successfully negotiated under Act 146 include: the fixing of certain days or periods of time during which the strikes are excluded, and the exclusion or limitation of certain kinds of strikes. *Id.* at 341.

promotes “economic efficiency.” In particular, we believe that employees that have made firm-specific investments are “inefficiently” vulnerable to an employer’s opportunistic behavior given the ability of employers to permanently replace such workers during a strike.

To reform this situation we advocate: (1) the repeal of the *MacKay* doctrine, thereby granting unions protection against the hiring of permanent replacements; and (2) requiring that the issue of striker replacements be explicitly made a “mandatory” bargaining subject under the NLRA, with any agreements regarding this issue clearly surviving contract expiration. With the 1990 Italian strike regulation statute serving as a general model, the idea is that the resolution of this controversial issue can be most efficiently accomplished through negotiations between the parties themselves. We recommend these proposed statutory reforms to legislators and others currently studying reforms of the NLRA.