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Roger I. Abrams

*Rutgers University School of Law-Newark*

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# COMMENTARY

## POST-MODERN LABOR-MANAGEMENT RELATIONS: THE SOUTHWESTERN BELL/COMMUNICATIONS WORKERS STRATEGIC ALLIANCE\*

*Roger I. Abrams\*\**

### I. INTRODUCTION

Labor relations in the United States has reached an important new stage, one that presents labor and management with a great challenge. The legal paradigm established in the United States by the National Labor Relations Act of 1935<sup>1</sup> envisioned adversarial labor relations.<sup>2</sup> The threat and, at times, the actual use of economic weapons — the strike and the corresponding use of permanent replacements — was considered the “prime motive power” for collective

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\*\* Dean and Professor of Law, Rutgers University School of Law-Newark; B.A., Cornell University; J.D., Harvard Law School. The author wishes to express his appreciation to his able research assistant, Kenneth Silverman, Rutgers University School of Law-Newark Class of 1995.

1. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1988)).

2. See ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 1-7 (1976); Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 391 (1950); Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 1004-05 (1989); Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 11 (1993) (noting that “the system is based on an adversarial model of labor-management relations”); Russell Smith, *The Evolution of the “Duty to Bargain” Concept in American Law*, 39 MICH. L. REV. 1065, 1065 (1941).

bargaining.<sup>3</sup> In times of plenty, especially when workers were not easily substitutable and labor's economic power was great, unions won profitable settlements at the bargaining table. When economic conditions deteriorated, unions suffered through concession bargaining. Modern labor relations in the post-war era was "a brute contest of economic power somewhat masked by polite manners and voluminous statistics,"<sup>4</sup> resulting in periodic confrontational negotiations.<sup>5</sup>

In the United States, labor unions lost members as plants closed and the economy shifted from heavy manufacturing to service and information industries. Today, barely 11% of private sector employees are in unions, and some suggest that this figure will fall to only 7% within the next decade.<sup>6</sup> Organizing efforts virtually stopped as non-unionized employers developed sophisticated union-avoidance techniques.<sup>7</sup> Modern labor relations was based on win/lose bargaining, and which side would win and which side would lose depended on the economic power of the parties. The modern labor relations system fostered conflict.<sup>8</sup>

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3. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 489 (1960).

4. Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1409 (1958).

5. There has been a series of different labor-management paradigms over the course of the past century. In the late 1900's, craft unionism developed as a skilled worker's defense against immigrant labor. From about 1890 until the late 1930's, management — assisted by court-issued injunctions and the police — aggressively fought industrial unionization. Beginning with the passage of the Norris-LaGuardia Act and the Wagner Act in the 1930's until World War II, labor unions organized broadly across the economy. Public policy favored unionization. See generally THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 40-58 (1991); GORMAN, *supra* note 2, at 1-7 (1976).

The modern period of conflict-based collective bargaining in organized industry began after World War II wage and price controls expired. Modern labor relations has prevailed into the last decade of the century. Only now have some companies and unions begun to realize that the American economy can no longer compete in the global marketplace following conflict strategies for setting labor costs and work place rules.

6. Barbara P. Noble, *At Work: At the Labor Board, New Vigor*, N.Y. TIMES, Sept. 4, 1994, § 3, at 21. See generally CHARLES CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT (1993); MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 19 (1987) (declaring that "[t]he bottom line is that union membership strength is eroding"); THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (1994) (noting the general trend and discussing its existence in specific industries).

7. See KOCHAN ET AL., *supra* note 6, at 47-80 (arguing that "the emergence of a large non-union sector in the United States since 1960 was a function of a changing [economic] environment, deep-seated managerial values opposed to unions, and increased opportunities and incentives to avoid unions resulting from changing competitive and cost conditions"). See generally Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921 (1993).

8. Not all industrial conflict takes the form of full-fledged strikes. See, e.g., GORMAN,

In recent years, we have seen the advent of what might be termed "post-modern labor-management relations," with labor organizations and employers seeking cooperation instead of conflict.<sup>9</sup> Pressed by economic conditions, an increasingly global marketplace and rapid technological change, labor and management in some industries have been forced to seek a new strategy.<sup>10</sup> Only a few companies and unions have moved into the post-modern era, and it is not at all clear that the change is permanent. Cooperation might last only as long as necessary. In other instances, it appears that cooperative bargaining has created a genuine partnership, with parties seeking, and finding, win/win bargaining solutions.<sup>11</sup>

The evolution to post-modern labor-management relations is crucial to the survival of the North American economic base. Times of change are not easy, however. There have been successes and failures both of purpose and execution. Post-modern unions understand that they must join with management where cooperation is possible, while continuing to protect the legitimate concerns of their membership. Post-modern labor relations is not an abdication of the representative role of unions, but rather, its development to a new level. Post-modern employers appreciate that unions may be helpful and necessary allies in addressing the issues of productivity, technological change, and global competition.

Post-modern labor relations has evolved within the existing labor law structure in the United States. The last major change in national labor policy was embodied in the Taft-Hartley Amendments to the Labor Management Relations Act in 1947.<sup>12</sup> If we are to encourage post-modern cooperative labor relations and discourage conflict bargaining, we must revisit the issues raised by American labor law.

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*supra* note 2, at 318-22 (discussing work slowdowns and stoppages).

9. See KOCHAN ET AL., *supra* note 6, at 146-77 (commenting on the phenomenon of work place changes cooperatively implemented by labor and management which are specifically geared to increase employee participation in the company).

10. The American automobile industry is a good example of this. See KOCHAN ET AL., *supra* note 6, at 159 (noting that industry's economic problems as well as its Japanese competition).

11. For a thorough discussion of mutual benefit bargaining, see ROGER FISHER ET AL., *NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1991) (describing the process of interest-based bargaining that focuses on the merits and looks for mutual gains).

12. Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-187 (1988 & Supp. V 1993)).

## II. THE ORIGIN OF A POST-MODERN LABOR RELATIONSHIP

A good example of post-modern labor relations is the development of the Strategic Alliance between the Southwestern Bell Company and the Communications Workers of America, District 6. In the early 1980's, the United States government negotiated a settlement of its antitrust case with AT&T.<sup>13</sup> As a result, "Ma Bell's" regional communications entities, the seven new "Baby Bell" systems, became independent of their former corporate parent.<sup>14</sup>

The break-up of AT&T had a dramatic effect on labor relations throughout the telecommunications industry. During the last comprehensive nationwide labor negotiations between AT&T and the Communications Workers in 1983, the labor-management relationship disintegrated. The result was the most serious labor stoppage in the post-war era. One-half million workers went on strike for 21 days before a settlement was reached.<sup>15</sup>

Southwestern Bell Company and the Communications Workers of America, District 6 inherited that poor labor-management relationship. In addition, the parties faced new problems. Telecommunications technology was evolving at an exponential rate. The industry, while still government regulated, faced competition from entities in related fields, as information, communications, and entertainment technologies converged. Finally, the industry began to play in an international marketplace that further fostered the competitive environment.<sup>16</sup>

Southwestern Bell Company and the Communications Workers Union addressed those challenges, creating a post-modern labor relationship which serves as a model for all North American companies and unions faced with complex problems, a history of adversarial

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13. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

14. For an extensive discussion of AT&T's divestiture and its effects, see ALAN STONE, *WRONG NUMBER, THE BREAKUP OF AT&T* (1989).

15. William Hall, *AT&T Workers End Strike*, *FIN. TIMES*, Aug. 30, 1983, § 1, at 2.

16. Andrew C. Barrett, *Shifting Foundations: The Regulation of Telecommunications in an Era of Change*, 46 *FED. COMM. L.J.* 39 (1993) (describing recent merger negotiations and proposing changes in the regulatory scheme); Jonathan D. Blake & Lee J. Tiedrich, *The National Information Infrastructure Initiative and the Emergence of the Electronic Superhighway*, 46 *FED. COMM. L.J.* 397 (1994) (describing industry and government roles in developing the information superhighway and proposing a new regulatory structure); Fred H. Cate, *Communications Policy Making, Competition, and the Public Interest: The New Dialogue*, 68 *IND. L.J.* 665 (1993) (suggesting a reevaluation of regulating in the "public interest").

labor relations, and a changing marketplace. After a discussion of how these parties moved to cooperative labor relations, this paper will examine American labor law policy and suggest how the American legal system facilitates or inhibits the development of post-modern labor relationships.

### III. THE HISTORY OF THE RELATIONSHIP

#### A. THE EARLY 1980'S AND CONFRONTATIONAL ATTITUDES

The relationship between Southwestern Bell and the Communications Workers in the mid-1980s was antagonistic and volatile.<sup>17</sup> Prior to commencing their first negotiations in 1986, Southwestern Bell's representatives made it very plain that they saw no good use for the union. The Communications Workers Union, in turn, announced a strike threat as its first order of business. In response, Southwestern Bell warned its employees that their health benefits would be terminated if they walked out. The employees did not strike, and a contract was reached under most unsatisfactory conditions. It was a win/lose situation, with the company winning in the short run and the union losing. Later developments showed that the parties worked hard to avoid repeating the distasteful 1986 conflict-filled bargaining experience.

Between 1986 and 1992, there was a remarkable change in attitude at the very top of the two organizations. Two men working together — Victor Crawley, the Vice President of District 6 of the Communications Workers of America, and Gary Lucas, Assistant Vice President for Labor-Relations and Human Resources at Southwestern Bell Company — altered the course of the parties' labor relationship. They decided that cooperation was preferable to confrontation and worked to create a post-modern labor relationship.<sup>18</sup> Crawley and Lucas respected and trusted one another. Their challenge was to con-

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17. This discussion of the history and development of the Southwestern Bell/Communications Workers labor relationship is based upon a presentation given at a workshop the author moderated in La Jolla, California. Victor Crawley & Gary Lucas, Presentation at the Department of Labor-Management Relations Conference on the Development of the Southwestern Bell/Communications Workers Labor Relationship (June 28, 1994) (transcript on file at the United States Department of Labor, Washington, D.C., not available to the public).

18. The term "post-modern labor relationship" describes a cooperative bargaining relationship divorced from the paradigm of conflict. This term is the author's, and was not used by the parties.

vert this leadership attitude into a new labor relations culture across a vast business enterprise that operated in six Midwestern and Southwestern states.

#### B. THE JOINT COMMITTEES AND THE BEGINNINGS OF COOPERATION

Crawley and Lucas began institutionalizing their principles by establishing joint labor-management committees that focused on particular issues of mutual concern,<sup>19</sup> the first of which addressed safety questions. The federal Occupational Safety and Health Act<sup>20</sup> mandated certain minimum safety precautions.<sup>21</sup> Workers and management found the required transition to a safer working environment to be difficult. For example, employees were not pleased that they were forced to wear safety glasses. Management and labor had no choice, however, but to find ways to meet the requirements of federal law. They did so through the joint safety committee.

The joint committee approach was then expanded to examine a broad variety of issues: quality of work life, impact of technological change, training, health care cost containment, and other related issues. In each instance, Crawley and Lucas led the way towards cooperation, involving many people within their respective organizations.

#### C. THE 1992 NEGOTIATIONS: THE NO-STRIKE NORM AND THE CREATION OF THE STRATEGIC ALLIANCE

The real test of the new post-modern labor relationship came at the parties' 1992 comprehensive collective bargaining negotiations. Prior to the commencement of formal negotiations, however, the parties separately addressed the pressing issue of "surplus" employees, a result of technological and operational changes. Both parties agreed that Southwestern Bell would encourage senior employees to retire by enhancing pension benefits. The company would also increase severance pay for surplus employees not yet at retirement age. This eco-

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19. Of course, Lucas and Crawley did not invent the use of joint committees, a traditional labor-management cooperative mechanism for addressing work place issues. *See, e.g.*, KOCHAN ET AL., *supra* note 6, at 182-87 (citing examples of joint labor-management committees in different industries). What is noteworthy about the use of joint committees by Southwestern Bell and the Communications Workers Union was that it covered numerous issues and became their standard approach for addressing new concerns.

20. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (current version at 29 U.S.C. §§ 651-678 (1988 & Supp. V 1993)).

21. *See id.*

conomic strategy was broadened by the parties' decision to offer extensive retraining, thereby allowing surplus employees to maintain their employment status by developing additional skills. The training was to be accomplished by joint union-management teams, a most unusual undertaking in American business. By addressing these potentially divisive issues mid-contract and not leaving them for the main bargaining table, Southwestern Bell and the Communications Workers removed some difficult matters from the agenda and facilitated the move to a more positive bargaining relationship.

Prior to the commencement of the 1992 negotiations, Lucas and Crawley held a fateful luncheon. During a half-hour discussion, they agreed to conduct their negotiations without a strike or lockout threat. Although the union retained the right to declare an end to the no-strike promise with thirty days' notice, both sides knew that revoking this promise would constitute a failure of post-modern bargaining even if the contract were reached without an actual work stoppage. Additionally, Southwestern Bell promised not to renew its 1986 threat to remove the health benefits of strikers.

This preliminary understanding — an agreement to check their economic weapons at the door to the negotiation room — set a positive tone for the general negotiations. As a result, the pre-negotiation protocol allowed the negotiators to concentrate on the issues at the bargaining table and to agree upon ways to address those real concerns.<sup>22</sup> The no-strike promise was made immediately prior to the 1992 National Republican Party Convention in Houston, which is located within the area served by Southwestern Bell, thus alleviating the company's concern that it would be embarrassed nationwide by being unable to supply adequate telecommunications services to the Convention. The company's promise with regard to health benefits, in turn, relieved the fear of union members that a strike would jeopardize the health of their families.

During the 1992 negotiations, the parties broadened their cooperative relationship into what they referred to as a "Strategic Alliance." Under the Strategic Alliance, union and management promised to establish ad hoc teams to work through problems that impacted on

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22. Other parties have used a similar "no-strike norm" to facilitate bargaining. The Experimental Negotiating Agreement (ENA), agreed upon in the early 1970s between the United Steelworkers and the Big Steel employers, is one example. In the ENA, the Steelworkers agreed not to strike in return for automatic wage-rate escalation. For a thorough description of the ENA, see Charles J. Morris, *The Role of Interest Arbitration in a Collective Bargaining System*, 1 INDUS. REL. L.J. 427, 498-503 (1976).

the company and its workers during the term of the agreement. Joint union-management teams would continue the retraining of employees. In addition, the parties created a "success sharing" program under which employees benefitted as the company's stock price increased.

The parties also addressed some thorny issues left over from the mid-1980s. After the creation of the Baby Bells, the union lost a substantial number of members as AT&T spun off subsidiaries. Southwestern Bell also created subsidiaries for new sectors of the telecommunications industry, such as mobile phone service. It was important to the union to be able to organize these workers.

At the bargaining table in 1992, the union secured from the company a promise of neutrality in any organizing campaigns.<sup>23</sup> In return, Southwestern Bell sought the union's help in its efforts in legislative and regulatory forums. Since these negotiations, union leaders have testified in support of the company's positions on various issues.

Both Southwestern Bell and the Communications Workers realized that the telecommunications industry was changing dramatically. In the past, a telephone company on strike could rely on a continuing flow of income during a work stoppage, but this was no longer the case. Regulated companies now faced competition, and those competitors could capture the struck company's customers. The union realized that a strike could result in the permanent loss of jobs if the company lost part of its market share. The converging technologies in the competitive marketplace meant that the company would have to maintain its status and grow if it was going to succeed in a national and world economy. With the no-strike norm in place, the parties in 1992 proceeded to demonstrate the effectiveness of cooperative, post-modern labor relations.

#### IV. THE EFFECT OF THE LAW

The process used by Southwestern Bell and the Communications Workers Union to change the culture of their labor-management relationship and to reform the governance system of the enterprise is truly noteworthy.<sup>24</sup>

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23. I suggest later in this paper that neutrality with regard to whether employees want a union is an essential component in establishing post-modern labor relations systems. See text accompanying notes 33-35.

24. Of course, this process was not unprecedented. See, e.g., Scott Kasker, *Exploring Saturn: An Examination of the Philosophy of "Total" Labor-Management Cooperation and*

Was this evolution to post-modern labor relations the result of American labor law? Or did it occur *despite* national labor policy?

It is beyond doubt that the legal system played a role in these developments. After all, the government-instigated breakup of AT&T created the imperative to change. Other national labor laws, such as the Occupational Safety and Health Act of 1970<sup>25</sup> and pension reform legislation,<sup>26</sup> were the stimuli for the creation of the joint committees. These national laws created challenges that the parties had to address, which in turn led to post-modern solutions.

The National Labor Relations Act<sup>27</sup> — the basic charter of federal rights and obligations — established legal support for the structure that facilitated innovation through collective bargaining. Yet it also fostered conflict. The statute protected a union's right to strike, and, as interpreted by the United States Supreme Court,<sup>28</sup> management retained the right to permanently replace striking workers.<sup>29</sup>

There were many other problems for which the federal government was not responsible. The economic conditions, the competitive environment, technological change, and the growing importance of the global economy all combined to make post-modern labor relations necessary for these parties.

Many employers and unions have faced the same legal and economic environment as Southwestern Bell and the Communications Workers Union, but they have yet to respond in the same positive, post-modern manner to similar challenges.<sup>30</sup> Cooperative labor rela-

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*the Limitations Presented by the NLRA*, 5 LAB. LAW. 703 (1989) (discussing the agreement between General Motors and the United Auto Workers to build the Saturn line of automobiles). For an extensive discussion of labor-management cooperation, see Joseph B. Ryan, Comment, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act*, 40 UCLA L. REV. 571 (1992).

25. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (current version at 29 U.S.C. §§ 651-678 (1988 & Supp. V 1993)).

26. Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 832 (current version at 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993)).

27. 29 U.S.C. §§ 151-169 (1988).

28. *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938).

29. *Id.* at 345-46.

30. Some companies and unions have now adopted a similar comprehensive cooperative approach. See Louis Uchitelle, *A New Labor Design at Levi Strauss*, N.Y. TIMES, Oct. 13, 1994, at D1. Other labor relationships retain the old conflict mentality. I serve as the permanent panel labor arbitrator for national automotive transport companies and the Teamsters Union. I only see that relationship in periodic arbitrations. See, e.g., *Allied Sys. and Teamsters, Local 89*, 102 Lab. Arb. (BNA) 964 (1994) (Abrams, Arb.). It is obvious, however, that the parties have not progressed beyond the paradigm of conflict. Even the arbitration process is infused with adversariness and mistrust. It does not have to be that way. See

tions may be necessary, but it is not yet the norm. What then distinguishes the Southwestern Bell/Communications Workers relationship?

In part, the success here was the result of the efforts of two enlightened individuals. Crawley and Lucas established the conditions under which their principles of trust and mutual respect became infused throughout the labor-management relationship. Each bargaining session and joint committee opportunity broadened and deepened the scope of the cooperation.

The success of the American business and union movement is based on the accomplishments of individuals — brilliant, progressive union leaders, managerial geniuses, and far-sighted leaders of industry. We should not be surprised then to find that the Southwestern Bell/Communications Workers model depended on unique individuals. Other industries faced with systemic problems — a changing marketplace and labor relations based on conflict — could also work wonders with a similar team of leaders with the same commitment to change.

## V. THE FUTURE OF THE PARTNERSHIP

Southwestern Bell and the Communications Workers Union may have progressed enough to avoid slipping back into modern adversarial labor relations. However, their partnership will continue to be tested by external forces.<sup>31</sup> We have yet to see whether the cooperative attitude has been fully institutionalized as part of the culture

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Roger I. Abrams et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751 (1994). One can only hope that individual leaders will see the benefits of partnership in an industry where non-unionized competition presents an ever-present challenge.

I also serve as the permanent umpire to the city of Hialeah, Florida, and I see its relationship with the city workers' union moving towards a post-modern model. See *City of Hialeah and American Federation of State, County & Municipal Employees Local 3032*, 97 Lab. Arb. (BNA) 1027 (1991) (Abrams, Arb.). Over the past five years, the relationship has matured through the use of a win/win arbitration process. In any given case, one side may prevail, but the other finds benefit in knowing the process worked and will be available to protect its rights or prerogatives in the future. Contested cases are fought out in a fair manner by two skilled advocates. Despite the problems inherent in city politics and budget constraints, the parties have moved towards mutual respect, trust, and cooperation in lieu of confrontation.

31. The telecommunications industry is about to undergo another revolution as telephone companies merge with cable and entertainment companies to provide a broad range of services to consumers. The next generation of wireless services will link information, communications, and entertainment products. Southwestern Bell, now renamed SBC Communications, is seeking corporate partners for this new business world. Edmund L. Andrews, *Sweeping Revision in Communication is on the Horizon*, N.Y. TIMES, Oct. 26, 1994, at A1.

of the relationship. Undoubtedly, there are some management executives not involved with human resources who do not appreciate the benefits of post-modern labor relations. It is safe to assume that there are those on the union side at the local level who might object as well, claiming the union has been co-opted.

Through recognition of common interests and the establishment of joint committees, the creation of the Strategic Alliance is a most promising change from an adversarial relationship. These parties have learned to reach a fair agreement in a mature manner. The work place at Southwestern Bell is not heaven, however. Problems arise on a day-to-day basis that the parties address using traditional grievance and arbitration procedures. They do so, however, within a system based on respect and trust, not hostility and personality conflicts. They do so in a manner that bodes well for their future, and their success stands as a remarkable model for other North American enterprises.

#### VI. THE ROLE OF PUBLIC POLICY AND THE DEVELOPMENT OF POST-MODERN LABOR RELATIONS

The labor laws of the United States do not mandate the cooperative bargaining model adopted by Southwestern Bell and the Communications Workers. In fact, American labor law embodies the conflict norm and not a cooperative model. Administrative and judicial interpretation and enforcement of the provisions of the National Labor Relations Act has encouraged adversarial relationships. The good faith aspect of the duty to bargain, for example, is a toothless tiger, hardly a "duty" in any sense of the word. It certainly does not require the parties to seek cooperation.<sup>32</sup> Under current law, parties such as Southwestern Bell and the Communications Workers themselves must have the will to find the way to develop a cooperative relationship.

National labor law policy must be reexamined if we are to move to a universal post-modern labor relations era.<sup>33</sup> In the first instance, the decision whether to unionize should be one made by the employ-

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32. See GORMAN, *supra* note 2, at 399-495 (discussing management's duty to bargain in good faith).

33. The Commission on the Future of Worker-Management Relations, better known as the Dunlop Commission, issued its preliminary Fact Finding Report in May 1994. *Fact Finding Report Issued By The Commission on the Future of Worker-Management Relations*, Daily Lab. Rep. (BNA) No. 105 (June 3, 1994). The Report called for further study of methods to enhance work place productivity through labor-management cooperation, including changes in the present legal framework. *See id.*

ees, without management interference.<sup>34</sup> The typical management campaign against unionization poisons the relationship from its initiation. After management has explained how bad unionization would be for its employees, how could one expect labor and management to form a partnership?

National labor policy should favor the peaceful resolution of differences. With regard to grievances arising during the terms of collective bargaining agreements, national law favors the use of binding arbitration, now the favored method for resolving mid-term disputes in virtually every collective bargaining agreement.<sup>35</sup> In the 1950s and 1960s, the Supreme Court, building on a provision of the Taft-Hartley Amendments, created strong support for modern labor arbitration,<sup>36</sup> although neither Congress nor the Supreme Court mandated arbitration.<sup>37</sup> Yet, by supplying institutional support for the arbitral process, they fostered the peaceful and private resolution of disputes. Arbitration should not be the preferred method for writing contracts, but rather, is best used to interpret agreements for parties unable to resolve a grievance. A broad national policy favoring peace over industrial warfare, however, should be carried over to the writing

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34. Canada's provinces prevent employer interference with the unionization process and allow a union to prove majority status by signed authorization cards. See JOHN C. ANDERSON ET AL., *UNION-MANAGEMENT RELATIONS IN CANADA* (2d ed. 1989); David L. Gregory, *The Right to Unionize in the United States, Canada, and Mexico: A Comparative Assessment*, 10 HOFSTRA LAB. L.J. 537, 550-51 (1993); Terry Thomason, *The Effect of Accelerated Certification Procedures on Union Organizing Success in Ontario*, 47 INDUS. & LAB. REL. REV. 207 (1994) (discussing the effect unfair labor practices have on employee support of union certification and how accelerated election procedures weaken such an effect).

35. In its survey of major collective bargaining agreements, the Bureau of National Affairs reported that 98% of its sample of contracts contained arbitration provisions. *Basic Patterns in Union Contracts*, 2 Collective Bargaining Negot. & Cont. (BNA) 51:5 (Mar. 2, 1995).

36. See, e.g., *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) (collectively known as the *Steelworkers Trilogy*); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). Briefly, the Court ruled that when enforcing contractual promises to arbitrate, a court should apply a presumption of arbitrability. It should order arbitration without considering the merits of the grievances. After arbitration, the court should not substitute its views for that of the arbitrator and should enforce an arbitration award as long as it has "drawn its essence" from the terms of the agreement. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Much has been written on the *Steelworkers Trilogy's* meaning and its effect on labor-management relations. See, e.g., Benjamin Aaron, *Judicial Intervention in Labor Arbitration*, 20 STAN. L. REV. 41 (1967); Bernard Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427 (1969); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137 (1977).

37. *Lincoln Mills*, 353 U.S. at 458-59.

of contracts.

For mature collective relationships, the paradigm of conflict embodied in national labor law should be jettisoned in favor of a paradigm of cooperation. National policy can facilitate private alliances between labor and management by rewarding those relationships that move towards cooperation. One example is the federal government's power to make countless discretionary purchase decisions such as encouraging equal employment opportunity through procurement and tax policy.<sup>38</sup> The adoption of the post-modern cooperative labor relations model can be encouraged through these policies as well.<sup>39</sup>

This call for cooperation may appear to some to be quite naive. How can unions, fighting for their very survival, be told to relinquish their economic power? The question assumes that unions presently retain the power to protect themselves and advance the interests of their members by using traditional threats of imposing a cost of disagreement on management. It is not at all clear that unions still have that power today in many sectors of the economy.

Similarly, how can we trust that management will accept real power-sharing with increasingly weak unions? That trust will grow out of success in working together, with enhanced productivity and improved efficiency in the face of a changing economy. Continuation of the conflict paradigm is the road to economic ruin. The real question is: "What is the alternative?"

I do not suggest, at least at this point, revision of the National Labor Relations Act to mandate a change in attitude and approach, in part because I do not yet have a clear sense of the particulars.<sup>40</sup> "The devil is in the details,"<sup>41</sup> it is often said. Prohibiting adversarial labor relations does not mean that cooperative labor relations have been created. The modern national paradigm of approved and protect-

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38. See, e.g., Mary L. Heen, *An Alternative Approach to the Taxation of Employment Discrimination Recoveries Under Federal Civil Rights Statutes: Income from Human Capital, Realization and Nonrecognition*, 72 N.C. L. REV. 549, 553 (1994) (commenting that "[a] theory focusing on the taxation of human capital" is consistent with antidiscrimination statutes).

39. See Estreicher, *supra* note 2, at 24-25.

40. Others, however, are more confident. See, e.g., Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97 (1993). In any case, the Republican landslide in the 1994 mid-term elections suggests that pro-union labor law reform is not likely in the near future.

41. See, e.g., Colloquy, *Constitutional Implications of Campaign Finance Reform*, 8 ADMIN. L.J. AM. U. 161, 162 (1994).

ed conflict, after all, supplanted the prior norm of regulating labor through use of injunctions sought by management to suppress unionization.<sup>42</sup> For the present, I suggest using the "public benefit" carrot and not the legislative stick in an effort to encourage the voluntary adoption of post-modern attitudes and tactics.<sup>43</sup>

For the same reason, I do not agree with those who would broaden union economic power by banning employers from hiring permanent replacements during a strike or allowing secondary boycotts.<sup>44</sup> Both suggestions envision conflict bargaining with a tip of the scales in labor's favor. While that approach may be beneficial to American workers in the short run, and to unions seeking to establish their legitimacy in some industries, it is bound to fail the American economy in the long run. There is no real substitute for cooperative bargaining.

The real issues in the American work place today and for the foreseeable future are productivity, technological change, global competition, job security, adequate terms and conditions of employment, and labor peace. A national labor policy that encourages post-modern, cooperative labor-management relations will foster an environment within which these issues can be addressed. In the final analysis, however, labor and management themselves will determine whether to join together in partnership when facing these serious challenges. Academics and governmental officials can only try to help them make the correct choice.

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42. See Cox, *supra* note 4, at 1404-09.

43. There may be a need to clarify § 8(a)(2) of the National Labor Relations Act that prohibits management domination or support of labor organizations. 29 U.S.C. § 158(a)(2) (1988). The Labor Board in *Electromation* found a statutory violation when a company formed employee "action committees" to address work place issues such as absenteeism, pay progression, and no-smoking policies. 309 N.L.R.B. 990, 999 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994). Such collaborative efforts must not be discouraged. See Samuel Estreicher, *Employee Involvement and the Company Union Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125 (1994).

44. 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) (distinguishing economic strikes from unfair labor practice strikes and proposing a new statutory scheme that would limit employers' ability to hire permanent replacements for striking workers to economic strikes only); Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 421-37 (1992) (advocating changes that would restrict employers' ability to hire permanent replacements, allow secondary boycotts, and broaden the use of union dues).