

The Teamsters' Union Attempt To Organize Overnite Transportation Company: A Study of a Major Union Failure

Herbert R. Northrup*

On October 24, 2002, three years to the day after it ordered a strike at Overnite Transportation Company, the International Brotherhood of Teamsters ("IBT" or "Teamsters") made an unconditional offer to the company to return employees to work.¹ Earlier that day, the company had noticed that picketers at the few company facilities that had maintained the strike had withdrawn.² The union offer, which the company gladly accepted, was made without any claim for back pay or other considerations, despite the IBT's assertions throughout the strike that it was caused by company unfair labor practices, which, if endorsed by the National Labor Relations Board ("NLRB") and the courts,³ might have en-

* Professor Emeritus of Management and formerly Director, Industrial Research Unit, Chairman, Labor Relations Council, and Chairman, Department of Industry, The Wharton School, University of Pennsylvania. B.A., 1939, Duke University, A.M., 1941, Ph.D., 1942 (Economics), Harvard University.

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1. *Teamster's Union Calls End to Strike Against Overnite After Three Years*, DAILY LAB. REP. (BNA) No. 208 (Oct. 28, 2002), at AA-1 [hereinafter *Teamster's Union Calls End to Strike*].

2. *Id.*

3. This claim has been continuously accepted by the associate editor and principal writer of TRAFFIC WORLD, the major weekly journal in the field, but not endorsed by the courts and certainly denied by Overnite management. TRAFFIC WORLD even went so far as to state in its

titled some strikers to back pay. At the time of the strike's conclusion, the company put the number of strikers at about 300, the union at more than 500.⁴ The company immediately contacted the union and an agreement was reached that strikers requesting reinstatement should notify the company within approximately one month if they wished to be reinstated.⁵ Only ninety-five strikers made a reemployment request, and only one was disqualified by the company because the company alleged that he participated in serious violence.⁶ All returnees were accorded full seniority once back on the job.⁷ The IBT did not appeal the barred striker ruling.

This article describes and analyzes the strike, why the IBT initiated it, and why it was unsuccessful. To lay a foundation, the trucking industry's structure is first examined, particularly the less-than-truckload ("LTL") sector in which Overnite is a major participant. Likewise recounted is the history of Overnite under its founder, Harwood Cochrane, whose method of operation set the company apart from its competitors before he sold it to the Union Pacific Corporation in 1986.⁸ Both the policies of Cochrane and the sale of the company played a role in the attempts of the IBT to unionize the company and the outcome of the strike.

I. THE STRUCTURE OF THE OVER-THE-ROAD TRUCKING INDUSTRY

The over-the-road-trucking industry is composed of two types of common carriers: less-than-truckload carriers and truckload ("TL") carriers.⁹ Each type is subject to different economic considerations that affect its growth and structure. This is very well illustrated by the reaction of trucking companies to the Motor Carrier Act of 1980,¹⁰ which deregulated

review of 2002 trucking events that "[t]eamsters call off three-year unfair labor practice strike at Overnite Transportation in big win for Richmond, Va.-based carrier." *2002 in Review: Trucking*, TRAFFIC WORLD, Dec. 23/30, 2002, at 25. This was reiterated in later articles in regard to the union strike loss and the decertification votes. *See also* John D. Schulz, *Teamsters Out at Memphis*, TRAFFIC WORLD, Aug. 4, 2003, at 26; John D. Schulz, *Initial Choices*, TRAFFIC WORLD, Oct. 20, 2003, at 26; John D. Schulz, *Labor's Uphill Fight*, TRAFFIC WORLD, Oct. 27, 2003, at 7.

4. Data from Overnite Transp. Co. & the Teamsters Union. *See also* Associated Press, *Teamsters Fold Trucking Company Strike* (Oct. 25, 2002), available at http://www.teamster.org/overnite/overnitenews_021025_2.htm.

5. Telephone Interview with the Office of Senior Vice-President and General Counsel, Overnite Transp. Corp. (Oct. 26, 2002).

6. *Id.*

7. *Teamster's Union Calls End to Strike*, *supra* note 1, at AA-1.

8. OVERNITE TRANSPORTATION, HISTORY 60+ YEARS OF SERVICE (2000). For an account of such mergers and acquisitions during this period, *see* Herbert R. Northrup, *The Failure of the Teamsters' Union to Win Railroad-Type Protection for Mergers or Deregulation*, 22 TRANSP. L.J. 365 (1995).

9. Northrup, *supra* note 8, at 383.

10. Pub. L. No. 96-296, 49 USC § 10101 (1980).

lated the industry.

A. THE LTL SEGMENT

The LTL trucking industry segment consolidates shipments from various sources into a truckload and carries them to the same or nearby destinations, or to several destinations where the shipments are unloaded and re-loaded at terminals for their respective destinations.¹¹ The LTL business requires substantial investment for terminals, local trucking facilities for delivery, computer facilities for scheduling, order taking, billing, telecommunications facilities, and other functions, as well as large trucking equipment.¹² As a result, entry into this branch of trucking operations is limited by the requirement of extensive financial investment.¹³

The number of LTL motor carriers has substantially declined since the passage of the Motor Carrier Act of 1980.¹⁴ A study by an industry magazine found that, between 1980 and 1991, 43 of the 100 largest motor carriers had closed or were otherwise no longer in business.¹⁵ Another fourteen had survived by merging, by being taken over, or by selling out to another carrier, and two remained in business but had ceased LTL operations.¹⁶ All but ten of the carriers that closed, merged, or discontinued were LTL carriers.¹⁷ A similar study issued in 1993 by Trucking Management, Inc., which then represented several of the largest LTL unionized carriers in collective bargaining, is partially summarized in Table 1. This study reported that:

In the 1970s, around 200 carriers a year closed their doors; from 1980-89, over 11,500 failed. There were 2,000 closings in 1991 alone. In 1979, 65 of the top 100 carriers were identified as primarily LTL. Of those 65, more than two-thirds had ceased operations by 1991. In fact . . . only eight LTL carriers of the top 50 trucking companies from 1965 [by then] . . . have survived deregulation . . . All the companies that failed were unionized carriers . . .¹⁸

The author's updates to Table 1 show that the decline of large carriers has continued to the present. Moreover, not only large LTL carriers disappeared after being unable to cope with a deregulated industry. In

11. Northrup, *supra* note 8, at 383.

12. *Id.*

13. *Id.* For a more detailed picture, see Michael H. Beltzer, *Trucking: Collective Bargaining Takes a Rocky Road*, in COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 311 (Paul F. Clark, John T. Delaney, & Ann C. Frost, eds., 2002).

14. Northrup, *supra* note 8, at 383.

15. *Id.*

16. *Id.*

17. *Id.*

18. These summary data were first reproduced in Northrup, *supra* note 8, at 384 (quoting TRUCKING MANAGEMENT, INC., THE STATE OF THE LTL TRUCKING SECTOR (Washington, D.C. 1993) (on file with author).

November 1991, the economics department of the Teamsters issued a list of 122 LTL carriers that failed between July 1, 1980 and October 31, 1991 and that were parties to the national agreement.¹⁹ This list included carriers with employee counts from 17,593 to 34.²⁰ In June 1999, the IBT issued a supplemental list of thirty-nine additional carriers that closed since the first list was published.²¹

These trends have continued up to the present time. In 2002, for example, a large regional carrier in the Northeast, A-P-A, failed and shut down, as did many other “decent-sized” carriers.²² This was followed by the collapse and closing of Consolidated Freightways, headquartered in Vancouver, Washington, one of the five largest LTL national carriers.²³ The A-P-A Transport closing threw 15,500 unionized Teamsters out of work.²⁴

B. THE TL SEGMENT

The TL segment of the motor carrier industry is quite different in terms of investment requirements.²⁵ For the small entrepreneur, there is no need for terminals, local delivery equipment, or elaborate computer and telecommunications facilities.²⁶ There are a few large operators in the TL business, such as Schneider National, Green Bay, Wisconsin, which is noted for its advanced use of information technology, and J.B. Hunt Transport Services, Lowell, Arkansas, which first grew as a carrier for Wal-Mart Stores,²⁷ but the great majority of TL operators are relatively small businesses. One can enter the TL business by leasing one or more rigs, taking business to deliver a truckload of goods from destina-

19. TEAMSTERS, THE TOP 100 CARRIERS IN 1980 AND NOW, Table V-I (1991) (on file with author).

20. Norman A. Weintraub, International Brotherhood of Teamsters, *I.C.C. Regulated Motor Carriers of General Freight Under NMFA That Terminated General Freight Operations from July 1, 1980 to October 31, 1991* (Nov. 1, 1991) (on file with author).

21. International Brotherhood of Teamsters, *Teamster Carriers That Have Closed Since [then IBT President] Ron Carey's List of 122 Teamster Carriers* (June 8, 1999) (on file with author).

22. John D. Schulz, *End of a Long Proud Run*, TRAFFIC WORLD, Sept. 9, 2002, at 26-27 (“In the past year [2002], the brutal trucking environment has claimed New Jersey-based A-P-A Transport, which closed in February. In addition, Iowa-based Crouse Cartage and hundreds of other decent-sized truckers have ceased operations. That doesn't count the thousands of smaller, less-than-20 truck operators that close with barely a notice except to themselves.”).

23. Pui-Wing Tam, *Consolidated Freightways Is To Fold*, WALL ST. J., Sept. 3, 2002, at A3; Schulz, *supra* note 22, at 26.

24. Schulz, *supra* note 22, at 26.

25. Northrup, *supra* note 8, at 384.

26. *Id.*

27. Schneider National is listed as the fourth largest of all motor carriers and Hunt, the fifth in Traffic World's list of the fifty largest motor carriers. See TRAFFIC WORLD, May 31, 2004.

TABLE 1
 MOTOR CARRIERS THAT REMAIN IN 2003 FROM
 THE TOP 50 IN 1965

Rank	1965	2003
1	United Parcel Service	United Parcel Service
2	Consolidated Freightways	
3	Roadway Express	Yellow/Roadway
4	Associated Transport	
5	Pacific Intermtn. Express	
6	McLean Trucking Co.	
7	Interstate Motor Freight	
8	Spector Freight System	
9	Denver Chicago Trucking Co.	
10	Pacific Motor Trucking	
11	Harris Freight Lines	
12	Transamerican Freight Lines	
13	Yellow Transit Freight	Took over Roadway Express in Merger
14	Gateway Transportation	
15	T.I.M.E. Freight	
16	Transcon Line	
17	Eastern Express	
18	Anchor Freight*	
19	Ryder Truck Lines	
20	Garrett Freightlines (ANR)	
21	Western Gillette, Inc.	
22	Associated Truck Lines	
23	IML	
24	Norwalk Truck Lines	
25	Red Ball Motor Freight	
26	Navajo Freight Lines	
27	Jones Motor Co.	
28	Wilson Freight Lines	
29	United Buckingham Freight	
30	Brach Motor Express	
31	Kramer-Consol. Frt	
32	Illinois Calif. Express	
33	Watson-Wilson Trans. Sys.	
34	Hemingway Transport	
35	Overnite Transportation	Overnite Corporation
36	Strickland Transportation	
37	Cooper-Jarrett	
38	Carolina Freight Carriers	Taken over by ABF Freight System
39	Gordon Transport	
40	Midwest Emery Freight Sys.	
41	Akers Motor Lines	
42	Terminal Transport	
43	All States Freight	
44	Johnson Motor Lines	
45	East Texas Motor Lines	
46	Mason and Dixon Lines	
47	Leeway Motor Freight	
48	Ringsby Truck Lines	
49	Arkansas Best Freight Sys.	ABF Freight System – Took over Carolina Freight Carriers
50	Pilot Freight Carriers	

Source: Traffic World

* Auto transport carrier, not an LTL carrier.

Reproduced from the *State of the LTL Trucking Sector* 11 (1993); also reproduced in Northrup, *supra* text note 8; updated by the author to reflect development through 2003.

tion A to destination B, and hoping to have a load for the return trip.²⁸ This easier entry led to a rapid expansion of the number of TL carriers as a result of deregulation and high turnover, with owner-operator companies becoming quite common and nonunion small companies a dominant factor in the TL industry segment.²⁹ As a result of this competition, rates have fallen and profit margins were likely to be small.³⁰

Meanwhile, during the 1990s, industry concentration increased in the TL sector. As the percentage of trucking companies with annual revenues fewer than one million dollars rose, net load factors and profit margins declined, and high rates of turnover for small companies and of bankruptcies occurred.³¹ Such developments made many smaller companies interested in being purchased by larger ones.

Because of the large number of small carriers and the lack of terminals as focal points of operation and unionization, the TL sector, unlike the LTL sector, is difficult for the IBT to unionize and is predominately nonunion.³² Deregulation's elimination of barriers to entry, among other changes, had a profound impact on unionization.³³ "[By] 1991, union employment in trucking was 40 percent below its 1978 level, while non-union employment grew over 80 percent."³⁴ In round numbers, this meant a loss to the Teamsters of as many as 225,000 dues-paying members.³⁵

Just as the number of TL operators greatly expanded during the prosperous 1990s, it fell rapidly when the economy turned downward thereafter. According to one analyst: "[t]he good news for trucking is at least 7,000 carriers and 60,000 owner-operators have left the industry. That lessened capacity is expected to mean better rates for the survivors. We have fewer chickens chasing that same kernel of business"³⁶

Of course, as margins grow and profits increase in the TL segment, this will undoubtedly attract new entrants and more competition, which in time will likely again lower margins and reduce profitability.

28. Northrup, *supra* note 8, at 384.

29. *Id.*

30. *Id.*

31. *Id.* See, e.g., NICHOLAS A. GLASKOWSKY, JR., EFFECTS OF DEREGULATION ON MOTOR CARRIERS (2nd ed. 1990), at Chapter 6. It should be noted that the largest and most successful TL carriers also invest heavily in the latest computer, software, and telecommunications equipment in order to provide rapid, reliable service. For an account of how a leading TL carrier handles just-in-time pick-up and delivery for large customers, see Myron Magnet, *Meet the New Revolutionaries*, FORTUNE, Feb. 24, 1992, at 12.

32. Northrup, *supra* note 8, at 384.

33. *Id.*

34. THE STATE OF THE LTL TRUCKING SECTOR, *supra* note 18, at 12. This study provides general union figures as well as those pertaining to LTL carriers.

35. Author's estimate from Teamster membership figures.

36. John D. Schulz, *Wild Card Year*, TRAFFIC WORLD, Dec. 23, 2002, at 23 (quoting traffic consultant, Martin Labbe).

C. DEREGULATION IMPACT ON OVERNITE

Overnite was founded by Harwood Cochrane and his brother, Calvin, in 1935 and became profitable two years later.³⁷ World War II and the post-war boom saw Overnite expand rapidly in the South, where non-union operations were relatively common.³⁸ Harwood Cochrane and his brother incorporated separate companies in Virginia, the brother left the business shortly, and Overnite made its first acquisitions, as it added terminals in Atlanta and other locations.³⁹ Under regulation, the right to operate had to be approved by the Interstate Commerce Commission ("ICC"), so that buying companies and their certificated rights to operate routes was the best way to acquire new operation authority.⁴⁰ Over the years Overnite acquired more than twenty companies to aid expansion and to acquire terminals and equipment.⁴¹

By 1963, Overnite had expanded to the more western states of the Old Confederacy, and had become one of only four trucking companies whose stock was traded on the New York Stock Exchange.⁴² By 1971, it had crossed the Mississippi River, and by 1980, the year that deregulation began, it had reached California and the markets of the Southwest.⁴³ Its growth was summarized by a company brochure in 1999 as follows:

From a single used truck in 1935, Overnite's fleet has grown to more than 4,000 tractors and 18,000 trailers and become one of the nation's largest less-than-truckload carriers. 13,000 employees in 166 Service centers serve 45,000 cities and towns in the continental U.S., Hawaii, Alaska, Canada, Mexico, Guam, the U.S. Virgin Islands and Puerto Rico.⁴⁴

Thus by 2003, Overnite's transformation from a local and regional TL carrier saw ninety-two percent of its business included in the LTL segment of the industry.⁴⁵

II. THE IMPACT OF THE UNION PACIFIC TAKEOVER

In 1986, Cochrane sold the company to the Union Pacific Corpora-

37. OVERNITE TRANSPORTATION, *supra* note 8.

38. *Id.*

39. *Id.*

40. ESTELLE SHARPE JACKSON, MR. COCHRANE'S OVERNITE 50 (1989). Although this little book is largely a *Festschrift* for Mr. Cochrane, it does contain much useful information concerning his beliefs, wishes, methods, and policies. In addition, the author talked to many Overnite Transp. Co. personnel about Cochrane's management and used the information given on a confidential basis.

41. *Id.* at 40.

42. OVERNITE TRANSPORTATION, *supra* note 8.

43. *Id.*

44. *Id.*

45. *Overnite Corp. Prospectus*, OVERNITE CORP., Oct. 30, 2003, at 32.

tion, which has become the nation's largest railroad.⁴⁶ All mergers and takeovers involve positive and negative outcomes both for the company being taken over and for the acquiring company. This one was no exception.

A. THE POSITIVE TAKEOVER IMPACT FOR OVERNITE

The purchase by Union Pacific had many benefits for Overnite, especially in operational systems and methods. As stated in its brochure:

The national presence and financial clout of that corporate parent quickly helped Overnite to achieve quantum leaps in the growth of both its physical network and the technology that supports it. Interlocked mainframe computers combined with the latest in desktop voice and data systems made possible a centralized Customer Service Center that is the envy of the industry. Electronically imaged customer bills and shipping documents move freely through a digital network. At the press of a key in Richmond, an exact image of such a document can be sent to a customer's fax in Monterey, Miami or Montreal.⁴⁷

There is no doubt that these technical advances materially aided Overnite's business and expansion, as did Union Pacific's contacts and relationships in new Overnite territory. Moreover, since Overnite had inaugurated an employee stock purchase plan and Union Pacific paid a hefty premium over the listed stock price for the acquisition, a sizable percentage of Overnite employees acquired considerable wealth.⁴⁸

B. PROBLEMS CREATED BY THE MERGER

Mergers and company takeovers also create problems. These occurred heavily, as is often the case, for Overnite in the human resources area. To understand the situation, the employee relations policies and methods of management by Harwood Cochrane are next reviewed.

1. *The Cochrane Labor Relations Policies*

Cochrane was a one-man manager.⁴⁹ He made all the important decisions, and made them very well.⁵⁰ He had a keen mind and an excellent memory, and he kept track almost on a daily basis of how each segment of the business was performing, including each terminal, each product carried, where to locate terminals, and how to allocate funds.⁵¹ He wanted no committee management, and he used the Board of Directors

46. *Id.*

47. *Id.*

48. *Overnite Corp. Prospectus*, *supra* note 45, at 84.

49. Author's analysis. *See also* JACKSON, *supra* note 40, at 76.

50. *Id.*

51. *Id.* at 26.

mainly to report what decisions were being made or planned.⁵² Since his judgment was very good and he did not encourage dissent, he ruled.

Cochrane clearly believed, undoubtedly correctly, that nonunion operating provided Overnite with a clear advantage over unionized competitors.⁵³ It appears to the author that Cochrane understood that unions are more than economic organizations striving to increase the wages and benefits of their memberships and political organizations in which individuals compete for union positions and leadership.⁵⁴ He discerned that unions are also management-regulating devices that demand either a strong voice in, or the right to question, management decision-making.⁵⁵ Unions cannot gain power unless they have a major voice in such things as worker employment or layoffs.⁵⁶ This would involve ceding power and authority over critical manpower decisions, which Cochrane's record demonstrates that he did not desire to do for anyone, especially an outside organization. He fought hard to maintain Overnite's nonunion status and was highly successful.

Cochrane was also a generous employer in his personnel relations. His door was always open, he talked freely to employees, and he had their respect because he was successful, he had packed trucks, driven them in bad weather at undesirable hours, and as will be recounted below, in the face of Teamster violence.⁵⁷ He was sympathetic to the problems of hourly employees and endeavored to provide financial plans and fair and safe conditions of work.⁵⁸ Drivers were especially treated well.⁵⁹ Their pay was kept just below the union rate, they received special bonuses for safe driving, and they were otherwise treated with respect and understanding.⁶⁰ Terminal workers' wages were not as close to union rates, but were comparable to similar rates in southern communities.⁶¹ They also were eligible for open driving jobs.⁶²

52. *Id.* at 76.

53. *Id.* at 44.

54. This line of thinking was stressed by Professor Sumner H. Slichter, the late, great labor economist at Harvard under whom the author studied. See SUMNER H. SLICHTER, JAMES J. HEALY, & E. ROBERT LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* (1960). See also GORDON F. BLOOM & HERBERT R. NORTHRUP, *ECONOMICS OF LABOR RELATIONS* (9th ed. 1981), at Ch. 6.

55. Sumner, *supra* note 54, at 4.

56. *Id.*

57. JACKSON, *supra* note 40, at 24, 44, 70.

58. *Id.* at 74-76.

59. *Id.* at 19.

60. *Id.* at 46. This information is also based on discussions with Overnite Transp. Co. personnel who had worked with Mr. Cochrane.

61. *Id.* at 46.

62. *Id.* This information is likewise based on confidential interviews with Overnite Transp. Co. management personnel.

This combination of determined opposition to unionization, treatment of people with fairness and consideration, and credibility of a hardworking entrepreneur who had started at the bottom was obviously a difficult act to follow when the company was sold. An experienced and able successor as chief executive was clearly required to succeed Cochrane.

2. *Early Attempts at Unionization*

The IBT did not take Overnite's nonunion policies lightly. There were many attempts to organize the company while Cochrane still ran it. In 1942, Cochrane actually signed a union contract for one year rather than lose a large customer.⁶³ When the IBT blacklisted Overnite with the Atlantic & Pacific Tea Company ("A&P"), then the largest supermarket operator, and other companies, and attempted to shut down Overnite's newly acquired terminal in Atlanta, Cochrane refused to renew the agreement.⁶⁴ Cochrane personally drove a truck in a convoy to the Carolinas where they met a convey from Atlanta, changed drivers with the Atlanta drivers, and drove the Atlanta trucks back to Richmond while the Richmond ones were driven to Atlanta, despite violence by IBT-driven truck drivers in both directions.⁶⁵ After seven weeks, an agreement was reached whereby Overnite dropped charges against the IBT and agreed to pay the union \$5,000, and the IBT agreed not to picket for at least one year.⁶⁶

In 1959, James Hoffa, father of the current IBT president, targeted Overnite as the only major LTL carrier in the Carolinas not signatory to a union contract.⁶⁷ Hoffa did not petition the National Labor Relations Board ("NLRB") for a representation election; he just demanded that Overnite sign a union contract.⁶⁸ When Cochrane refused, a strike was called for which there was little employee response.⁶⁹ Hoffa then organized a boycott in which unionized carriers refused to handle interchanges with Overnite.⁷⁰ This was costly to the company, which countered with additional employees, new routes, and thousands of dollars spent for guard services, extra telephone and communication expenses, and the extra costs of operating twenty-three additional trailers and nine additional tractors.⁷¹ Profits were lower for Overnite and growth slower.⁷²

63. *Id.* at 44.

64. *Id.*

65. *Id.* at 45.

66. *Id.*

67. *Id.* at 32-33.

68. *Id.* at 33.

69. *Id.*

70. *Id.*

71. *Id.*

The union boycott lasted for about five months before it was called off.⁷³ Overnite then sued the union for \$1 million to recover actual and punitive damages caused by unfair labor practices in calling and maintaining a strike and secondary boycotts.⁷⁴ The North Carolina state courts denied the punitive damages but allowed the actual ones, which came to approximately \$600,000.⁷⁵ It took some time to force payment of these funds, but they were eventually collected.⁷⁶ Thereupon Cochrane ordered a special dividend and distributed the money to Overnite's shareholders.⁷⁷

Union attempts to organize Overnite continued throughout the 1970s and 1980s on a terminal by terminal basis under the leadership of R.V. Durham, then head of the Asheville, North Carolina, IBT local union and later an international union trustee and safety director.⁷⁸ This approach was approved by the national union leadership.⁷⁹ From 1971 to 1988, NLRB representation elections were held in twenty-two terminal locations.⁸⁰ The Teamsters won six elections, withdrew one petition for an election, and lost the remainder.⁸¹ In the late 1970s, the IBT attempted to organize the whole company; the union lost the NLRB election, protested to the NLRB that Overnite had committed unfair labor practices, was awarded a rerun, and lost the second election.⁸² There were no strikes during this period as negotiations failed to reach any agreements.⁸³ Then IBT President, Ron Carey, was criticized because he allegedly "never devoted the resources to make . . . [the organizing drive] work."⁸⁴

72. *Id.*

73. *Id.*

74. *Id.*

75. Information supplied by Overnite Transp. Co. (1983).

76. JACKSON, *supra* note 40, at 44. One union official received a jail sentence for criminal contempt.

77. In the early 1980s, this author was retained by the Richmond Waterfront Commission to make a study as to whether port business could be increased by having the city build a truck terminal that all truck companies could use. For this purpose, the author began by interviewing Cochrane as head of the largest trucking concern headquartered in Richmond. He was very cordial and forthcoming and advised that Overnite and other nonunion companies would not use such a terminal because they did not want their employees associating with employees of unionized companies. In talking, he told the author how he had used the \$600,000 received from the IBT. The author reported to the Waterfront Commission that there was no use proceeding with the study. Interview with Mr. Cochrane, Overnite Transp. Co., Richmond, Va., 1983.

78. Personal investigation by author. *See also*, JACKSON, *supra* note 40, at 45.

79. Personal investigation by author.

80. JACKSON, *supra* note 40, at 46.

81. *Id.* *Also*, information from NLRB.

82. *Id.*

83. Personal Investigation of Overnite strike record.

84. John D. Schulz, *Down for the Count*, TRAFFIC WORLD, Nov. 4, 2002, at 10.

3. *Problems During the First Several Years of Merger*

After the 1986 sale of Overnite to the Union Pacific Corporation, Cochrane remained as chief executive for five years before retiring.⁸⁵ He was replaced by Thomas Boswell, a financial executive at Union Pacific, who was a key person in Union Pacific's due diligence investigation and negotiations to acquire Overnite.⁸⁶ He had no experience in operations or in the trucking business, and he came from a company that notes that its employees are eighty-seven percent unionized.⁸⁷

Boswell's administration ran into difficulties when, in 1994, the IBT struck the other LTL unionized carriers over the failure to reach agreement for a new contract.⁸⁸ Many companies at this stage sought to transfer business to Overnite, which accepted more than it could handle.⁸⁹ This put considerable pressure on terminal personnel and resulted in delays for long-term customers who felt that Overnite was ignoring their interests in an attempt to gain new business.⁹⁰ Thus Overnite, in sharp contrast to the Cochrane approach, was alienating two of its most important relationships - employees and customers. Some of the former turned to unionization, and some of the latter took business elsewhere.⁹¹

Not surprisingly, newly elected President James Hoffa, son of the former president, endorsed the drive to unionize Overnite, which initially had some success. Again, it was on a terminal by terminal basis; the IBT won bargaining rights in two Overnite terminals in 1994, six in 1995, four in 1996, seven in 1997, two in 1998, and two in 1999.⁹² Moreover, the IBT wins included some of the largest terminal facilities: Kansas City, St. Louis, Memphis, and Atlanta.⁹³ Including the terminals won earlier, this meant that the IBT represented employees in thirty facilities. Four of these facilities were shut down, along with about nine nonunion ones,

85. Overnite Press Release, *Overnite Corporation Names New Board of Directors* (Nov. 19, 2003) (on file with author).

86. Confidential Interview with Overnite Transp. Co. Personnel (July 2002).

87. UNION PACIFIC CORP., ANNUAL REPORT (1999), at 29 (stating "Approximately 87% of the Railroad's 52,000 employees are represented by rail unions.") Similar statements are found regularly in annual reports for other years. *Also* interview with Overnite Transp. Co. executive who supplied Mr. Boswell's background.

88. Schulz, *supra* note 84, at 12.

89. *Id.*

90. *Id.* This is the author's analysis of what occurred and why after researching developments of the period. This research commenced in the period when Overnite began being targeted for NLRB elections as the author wondered what occurred, and whether Overnite would become a unionized operation. At that time, the author had not considered writing an article because it was not clear that anything significant would result from the early research.

91. *Id.*

92. *See infra* Table 3 for dates.

93. Teamster Press Release, *Overnite Misstates Teamster Representation* (June 29, 1998), available at <http://www.teamster.org/overnite/nwpr0629f.html>.

after a study by a large consulting firm, A.T. Kearney, recommended that consolidation into large facilities would be economically wise.⁹⁴ The company was also appealing union NLRB representation victories in four other locations on question of bargaining unit eligibility and size.⁹⁵ This left the IBT with twenty-two unionized terminals representing approximately fourteen percent of the work force in the company's 166 service centers.⁹⁶

C. THE STRIKE AND ITS FAILURE

By the fall of 1999, several years of unfavorable developments for the IBT had occurred that had fairly well dissipated the union organizing drive.

1. *New Overnite Suggs Administration and IBT Strike*

In April 1996, after a short tenure by James Douglas, who succeeded Boswell as Overnite president, Leo H. Suggs took over as chief executive.⁹⁷ Suggs was former president of a large regional motor carrier with long experience in the industry and a person with a good human resources approach.⁹⁸ He immediately set about to repair the damages to employee morale and customer relations and to build a management team with both objectives in the forefront.⁹⁹

Meanwhile, although negotiations continued, the IBT had been unable to win a contract, and negotiations had staggered.¹⁰⁰ Moreover, its organizing program was failing. Since 1997, the IBT had lost seven of nine NLRB elections and avoided losses by withdrawing from seven others.¹⁰¹ In addition, at several of the unionized terminals, employees were attempting to decertify the IBT, but votes were not held because unionists filed unfair labor practice charges, which permitted the NLRB general counsel to block a vote.¹⁰²

The IBT officials decided on a drastic step: they called a strike although, as already noted, the IBT was recognized by Overnite as representing only twenty-two terminals and fourteen percent of the total

94. Information from Overnite Transp. Co.

95. *Overnite Transp. Co. v. N.L.R.B.*, 294 F.3d 615, 617 (4th Cir. 2002).

96. Confidential Telephone Interview with Overnight Transp. Co. Personnel (Sept. 10, 2002). See also *infra* Table 3.

97. OVERNITE TRANSPORTATION, Overnite Fact Sheet, available at <http://www.overnite.com/-aboutus/general/factsheet.asp> (2004).

98. *Id.*

99. Confidential Interview with Company Executive, who is part of the Suggs Administration, Overnite Transp. Corp. (Oct. 31, 2002).

100. Personal investigation of situation by author.

101. Data from Overnite Transp. Co. and NLRB information services.

102. See *Overnite Transp. Co. v. N.L.R.B.*, 280 F.3d 417 (4th Cir. 2002).

company work force.¹⁰³ The strike began on October 24, 1999.¹⁰⁴ The company claimed that many picket lines were peopled by Teamsters from other companies.¹⁰⁵ Violence and mass picketing were common in many locations.¹⁰⁶ The IBT claimed that 2,000 employees answered the strike call; Overnite stated that only 900 quit work.¹⁰⁷ Even if the union data were accurate, which is doubtful, the number of employees answering the strike call seem far too little to effectuate a successful strike. Actually, it is believed that not one represented facility saw the entire work force strike, and few from nonrepresented facilities apparently joined the strike.¹⁰⁸ Overnite did not permanently replace anyone, and took back strikers who returned to work unless they had engaged in serious violence.¹⁰⁹ To completely man facilities at the strike's inception, Overnite used volunteers from non-struck facilities and "temporary workers placed on standby by contracted third party providers."¹¹⁰ The drift back of strikers seems to have begun early so that employment of strike replacements was not large nor lasted for long periods.

President Hoffa was reluctant, at first, to approve the strike.¹¹¹ He was persuaded to do so by John Murphy, whom he had appointed as director of organization, and Philip Young, IBT freight director.¹¹² Murphy assured Hoffa that the strike would last only three weeks, and that by then Overnite would be willing to sign any contract rather than go out of business.¹¹³

This was a fantastic miscalculation in every respect. Murphy apparently thought that the strike would shut down the company's key terminals and that employees from many nonunion terminals would join the strike. No such shutdown occurred. In addition, the strike was rejected by a significant minority of the employees who were already represented by the IBT.¹¹⁴ Equally important, the company fought back vigorously; it

103. Overnite Press Release, Hoffa Teamsters to Face Federal Racketeering Charges (Jan. 24, 2000) [hereinafter *Overnite Press Release Jan. 2000*].

104. Schulz, *supra* note 84, at 10.

105. *Overnite Press Release Jan. 2000, supra* note 103.

106. *Id.*

107. Teamster Press Release, *supra* note 93.

108. Confidential Telephone Interview with Overnight Transp. Co. Personnel (Oct. 26, 1999).

109. Telephone Interview with the Office of Senior Vice-President and General Counsel, Overnight Transp. Corp. (Oct. 26, 2002).

110. Overnite Press Release, Picketing Has Minimal Effect Says Overnite Transportation (Oct. 27, 1999), available at <http://www.overnite.com/news/News1999/on102799b.asp>.

111. Schulz, *supra* note 84, at 10.

112. *Id.*

113. *Id.* Hoffa had agreed to permit the taping and later to have these comments and meetings shown on television. This was done by HBO, and shown on the Public Television network. The tape itself is available.

114. Confidential Telephone Interview with Overnight Transp. Co. Personnel.

retained the Chicago firm of Matkov, Salzman, Madoff, & Gunn as coordinating labor counsel along with regional labor counsel at all affected locations, obtained injunctions against violence and mass picketing, and filed charges for illegal secondary boycott violations.¹¹⁵ Most important, it kept all facilities open. The strike utterly failed to prevent the company from operating, and the longer that it continued, the more employees returned to work. By May 24, 2000, Overnite reported:

The protest [strike] continues today but with more than 94 percent of Overnite employees coming to work and ignoring the [picket] lines the company continues to service all geographical areas. With day-to-day service virtually unaffected by the walkout, Overnite has raised its on-time percentage to an all-time high of 98 percent. Internally, the union continues to struggle with its own members. In 1999, Teamsters at 11, or half of those locations represented by the union, filed petitions with the federal government [the N.L.R.B.] seeking to decertify the Teamsters as their bargaining agent.¹¹⁶

D. WHY NO AGREEMENT WAS POSSIBLE

There have been many reasons advanced as to why no agreement was reached between the Teamsters and Overnite and why the Teamster strike failed so utterly in attempting to shut down the company.

1. *The "Easy Answer" at Traffic World on Terminology and Nature*

John D. Schulz, who covered the negotiations and the strike for *Traffic World*, and generally did it very well,¹¹⁷ had a facile answer as to the nature of the strike and the reason for Overnite's success. He wrote:

A key factor in Overnite's success in warding off the high-profile organizing effort largely was its ability to utilize the deep pockets of parent Union Pacific Corp. The strike cost Overnite millions of dollars, especially in the early days of the walkout in October 1999. But Overnite Chairman, President and CEO Leo H. Suggs got the go-ahead from UP to spend "whatever it takes" to keep Overnite union-free.¹¹⁸

Schulz later noted that, as a result of Union Pacific spinning off Overnite by an initial public offer ("IPO"), Overnite would pay Union Pacific \$170 million "in what is described as an intercorporate loan."¹¹⁹ Schulz then commented that this payment is "[m]ost likely repayment for UP support during a three-year unfair labor practice strike called by the

115. See *infra* section III-B: The IBT's Use of Illegal Secondary Boycotts.

116. OVERNITE TRANSPORTATION, *supra* note 8.

117. The author subscribes to TRAFFIC WORLD and found it indispensable in his research.

118. Schulz, *supra* note 84, at 10.

119. John D. Schulz, *Initial Choices*, TRAFFIC WORLD, Oct. 20, 2003, at 27.

Teamsters that ended with the company being virtually union free.”¹²⁰

2. *The True Nature of the Strike*

The strike was, first of all, an organizing one, not an unfair labor practice strike. It ended with Overnite being union free in its main operations and with the Teamsters being left as bargaining agent only at two terminals of Motor Cargo, a Utah-based regional LTL carrier acquired by Overnite in November 2001.¹²¹ The rationale for the IBT to term the strike as unfair labor practice seems clear.

Section 8(b)(7) of the Labor Management Relations Act of 1947 amendments to the National Labor Relations Act (“NLRA”) make it an unfair labor practice for a union

to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, . . . of such employees¹²²

Subsection (C) of Section 8(b)(7) defines the unfair labor practice of a recognition strike further: “where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. . . .”¹²³

This section of the Act then permits informational picketing “or other publicity” but also limits such picketing

for the purpose of truthfully advising the public, including consumers, [that] an employer [does not employ members of, or have a contract with a labor organization,] as long as such publicity does not have an effect of such picketing is to induce any individual employed by any person other than the primary employer in the course of his employment [not] to pick up, deliver, or transport any goods, or not to perform any services. . . .¹²⁴

By terming the strike an unfair labor practice, it seems likely that the IBT hoped to subvert its true nature as an organizing effort, as set forth by Director of Organization Murphy, from the strike’s inception. Moreover, throughout the entire controversy, the IBT’s posture was to demand a contract covering unorganized units as well as already unionized ones.

Additionally, the claim of Union Pacific’s purpose in “lending”

120. *Id.*

121. *Overnite Corp. Prospectus*, *supra* note 45, at 17.

122. Labor Management Relations Act of 1947, 29 U.S.C. § 158(b)(7) (1947).

123. 29 U.S.C. § 158(b)(7)(C) (1947).

124. 29 U.S.C. § 158(4)(D) (1947).

Overnite \$170 million has no support elsewhere except in Schulz's guess. Union Pacific did indeed support the actions of Suggs and his management team, and presumably financial resources were available in case of need. Also, Overnite's profits were definitely hurt by the expenditure of large amounts for security, legal assistance, and a host of other costs related to the strike. As a result, Overnite's profit picture dimmed considerably in the strike's first year. As time went on, however, these costs declined considerably. In its 1999 annual report, Union Pacific reported:

Teamster activities have increased the [Overnite] company's costs due largely to increased security measures to ensure the safety of Overnite employees and to maintain customer service. As a result, while Overnite's net income declined 28% year-over-year to \$29 million, it generated strong cash flow of \$43 million to the [Union Pacific] Corporation.¹²⁵

Overnite sources questioned on a confidential basis a report that its cash flow to Union Pacific was positive throughout the strike.¹²⁶ Thus, although Union Pacific had deep pockets, there is no proof that it used the contents of these pockets to pay the strike costs. Moreover, the \$170 million "payment" was the total of Overnite dividends paid to Union Pacific that were kept in a separate account and added interest.¹²⁷ When the division of assets for the IPO occurred, Union Pacific decided to keep these funds, as it had the right to do.¹²⁸

Actually, the basic reasons why no agreement was ever reached between Overnite and the Teamsters before or during the strike were more fundamental and relate to the conflicting requirements for settlement on the part of Overnite *and the Teamsters*, which precluded any genuine compromise.

3. *Overnite's Three Intractable Issues*

In the negotiations, Overnite offered to the IBT local unions compulsory union membership in states where legal, the checkoff of dues, wage increases, holidays, and improved vacations, the same benefits that were given to its nonrepresented employees.¹²⁹ Overnite declined to agree to the Teamster demands on three significant issues: (a) that Overnite participate in the Central States Pension Fund, the multi-company pension plan that covered the unionized companies; (b) that Overnite agree to bargain on a multiplant bargaining basis, although it offered the same contract to all unionized units; and (c) that Overnite

125. UNION PACIFIC ANNUAL REPORT (1999), *supra* note 89, at 3.

126. Confidential Interviews with Overnite Transp. Co. Personnel (Jan. 2004).

127. *Id.*

128. *Id.*

129. *Negotiating Summary*, *infra* note 163, at No. 3.

agree to numerous contract and work rule provisions which limited management rights in the assignment and scheduling of work and the deployment of personnel.¹³⁰

a. Central States Pension Fund

Overnite's decision not to participate in the Central States Pension Fund is easily understandable. Whereas Overnite's plan was initially over-funded and remains in excellent shape,¹³¹ the Teamsters' Central States Pension Fund, the largest of its pension funds, has been seriously under-funded and is growing more so as investment income has declined, the number of retirees has increased, and the number of active Teamster employees has declined.¹³² Other IBT funds are in similar trouble as set forth in Table 2. Long-run trends project a continued downward spiral as the average age of Teamsters paying into the fund is increasing from fifty-five years old to fifty-seven years old, with many eligible for retirement soon.¹³³

Additionally, Table 2 shows that huge numbers were vested in 2002 under the Central States and other Teamster plans, but were neither working under the jurisdiction of any major Teamster plan, nor receiving benefits. These persons may currently have been working for companies like Overnite who were not covered by major Teamster plans. Such former employees could one day file for their pension payments, a serious problem for the plans in which they are vested. This problem has arisen because of the decline of unionized trucking in the industry since deregulation became effective.

By the fall of 2002, the last date for which Central States Fund data are available, the Central Fund had an unfunded pension benefit liability of \$4.9 billion.¹³⁴ Pension funds were then being paid into the Fund only for 187,229 working Teamster employees as compared with 197,011 retirees who were receiving benefits, and investments of the Fund lost 4.5 percent of its value over that year although the fund was profitable in 2003.¹³⁵ Herve H. Aitken, a trucking attorney who has specialized in pension analysis, has predicted a "tidal wave" of unfunded liability over the next two or three years.¹³⁶

As demographics change and declining union membership continue, Hoffa has recognized that something must be done. He has replaced

130. *Id.*

131. *Overnite Corp. Prospectus*, *supra* note 45, at 15, 40, 42, and 49.

132. John D. Schulz, *Big Black Cloud Looming*, *TRAFFIC WORLD*, Dec. 10, 2001, at 27.

133. *Id.*

134. Clayton Boyce, *Gathering Clouds*, *TRAFFIC WORLD*, Oct. 28, 2002, at 5.

135. *Id.*

136. *Id.*

TABLE 2
 PARTICIPANTS IN LARGE TEAMSTER PENSION PLANS (2002)

Plan Name	Active Participants (Current Employees)	Current Beneficiaries	Vested but Not Working or Receiving Benefits	Total of Current Beneficiaries and Vested but Not Working
Western Conference of Teamsters Pension Plan	234,845	90,437	155,333	245,770
Central States, Southeast, and Southwest Pension Plan	177,076	204,669	78,202	282,871
New York State Teamsters Conference Pension & Retirement Fund	16,531	14,891	4,246	19,137
Central Pennsylvania Teamster Defined Benefit Plan	9,975	16,033	6,720	22,753
Teamster Pension Trust Fund of Philadelphia & Vicinity	10,330	12,771	4,202	16,973
Western Pennsylvania Teamsters and Employees Pension Plan	7,324	12,365	5,095	17,460
Local 705 Int. Brotherhood of Teamsters Pension Trust Fund	6,843	7,904	2,367	10,271

Source: 2002 Form 5500 data provided by each of the Pension Plans. Reproduced from Alan Robinson, *Trucking Structure of the Less-Than-Truckload (LTL) Industry and Legislative Issues*, Congressional Research Service 10 (Mar. 5, 2004).

union board members on the fund, retained two outside audit firms to study and report on the situation, and sponsored an article in the union journal which explains why pension plans are often in difficulty currently.¹³⁷

Management and union representatives on the Central States, Southeast, and Southwest Pension Funds have not been able to agree on a solution for solving the condition of the Funds, with the union representatives proposing enhanced employer contributions, and the employers wanting a decrease in benefits.¹³⁸ Pursuant to a 1982 consent decree, the situation was referred to the U.S. District Court, Northern District of Illinois, for a binding decision. On November 17, 2003, the Court ruled that benefits could be reduced, but postponed any decision on increased employer contributions.¹³⁹ The Court, however, retained jurisdiction in the case,

137. John D. Schulz, *Shakeup at IBT Central States Fund*, TRAFFIC WORLD, Nov. 4, 2002, at 31; John D. Schulz, *Taking Action*, TRAFFIC WORLD, Dec. 16, 2002, at 26; *Pension Security in the Spotlight*, TEAMSTER, Mar./Apr. 2004, at 14.

138. *Chao v. Estate of Fitzsimmons*, No. 78 C 342, No. 78 C 4075, No. 82 C 7951, 2003 U.S. Dist. LEXIS 20800, *1, *5 (N.D. Ill. Nov. 17, 2003).

139. *Id.* at *8-*9.

and put heavy pressure on the employer group to meet its obligations to maintain viability in the Fund.¹⁴⁰

A reduction of benefits has occurred in the form of requiring employees to work several additional years to receive the same benefit.¹⁴¹ Thus, an employee who was formerly eligible for a benefit at age fifty-seven with thirty years work experience must now work several more years to receive the same benefit.¹⁴²

The IBT representatives on the Fund have joined company representatives in tightening up the restrictions against employees receiving pensions and working in jurisdictions covered by Fund pensions.¹⁴³ Some of these restrictions are being challenged in court with varying results. In one case, a participant had his pension payments suspended because, according to Fund representatives, he not only owned trucks, but was in the trucking business because he employed drivers for that purpose.¹⁴⁴ The Seventh Circuit Court of Appeals agreed that the suspension was proper because the claimant was in "prohibited reemployment" which is defined in Fund rules as "[e]mployment in any position . . . including self-employment . . . in which the Participant or Pensioner earned any Contributory Service Credit while covered by the Pension Fund."¹⁴⁵

On the other hand, there is apparently some unrest within the IBT concerning the reduction agreed to by Teamster officials. Represented by Public Citizen, a Nader advocacy group, and supported by an anti-Hoffa employee group, Teamsters for a Democratic Union, three union members filed a suit in the U.S. District Court, Northern District of Illinois demanding more public access to the rationale for the reductions agreed upon.¹⁴⁶ No additional contributions have been agreed to by employers. Led by United Parcel Service ("UPS"), the largest contributor to the Central States Fund, which pays almost forty percent of the total contri-

140. *Id.* at *3. See also *Proposal to Cut Central States Benefits OK'd, But Push to Increase Contributions Reserved*, 49 CONST. LABOR REP. (BNA) (Nov. 26, 2003).

141. *Chao*, 2003 U.S. Dist. LEXIS 20800, at *10.

142. Telephone Interview with Herve Aitken, Esq., Thiemann, Aitken, Vohra, & Rutledge, Alexandria, Va. (Mar. 2, 2004); see also John D. Schulz, *Teamsters Make the Cut*, TRAFFIC WORLD, Dec. 1, 2003, at 24. This article states, "[t]he realistic effect of the new rules is that they will severely penalize early retirees, who used to enjoy a '30-and-out' provision that provided a \$3,000 monthly pension, Teamsters familiar with the plan say."

143. John D. Schulz, *Pensions in Peril*, TRAFFIC WORLD, (Oct. 7, 2002), at 23. (see discussion about 'kick-outs').

144. *Militello v. Central States, S.E., and S.W. Areas Pension Fund*, 360 F.3d 681, 684 (7th Cir. 2004). See also *Participant's Benefits Properly Suspended Because of Self-Employment, Court Rules*, DAILY LAB. REP. (BNA) No. 43 (Mar. 5, 2004) at A-3.

145. *Participant's Benefits Properly Suspended Because of Self-Employment, Court Rules*, *supra* note 144, at A-3.

146. *IBT Members Seek Access to Special Counsel Reports About Central States Pension Funds*, DAILY LAB. REP. (BNA) No. 137 (July 19, 2004), at A-10.

butions, employers are attempting to gain federal legislation which would alter contributions to attach them to each contributing employer while allowing them to be invested jointly.¹⁴⁷ This aims to alter the Central States Fund so that the contributors can subsequently withdraw.¹⁴⁸ Action on such legislation is not likely in the immediate future, and the District Court has the authority to force employers to increase contributions if it desires to do so.¹⁴⁹ Certainly, the need for more action in bringing costs and benefits in line is clear. The costs, however, will be large if real reform is made.

On April 10, 2004, President Bush signed the Pension Funding Equity Act (H.R. 3108) which provided some temporary help to a few multiemployer pension funds including the Central States Fund.¹⁵⁰ Basically, it provided, among other provisions, that a multicompany-union fund which suffered a financial loss in 2002 and 2003 and thereby experienced a funding deficit could postpone taking eighty percent of that loss, and would not be required to register its loss when the loss actually occurred.¹⁵¹

Essentially what this law has done for the Teamster funds set forth in Table 2 is to postpone the need for immediate remedial action but to require it nonetheless. UPS supported the 2004 Act after some hesitation.¹⁵² The company, as noted above, remains committed to paying only for its own pensioners rather than supporting, as it does at the Central States Fund, a substantial part of the total funding of that Plan.¹⁵³ On the other hand, UPS does already have an advantage because its part-time employees, which have been estimated as high as 10,000, have pensions but are covered by a company plan not connected with the Teamster-affiliated fund.¹⁵⁴ In contrast, part-time employees of LTL carriers are included in the Teamster funds.¹⁵⁵ If UPS part-time employees were included in the Central States Fund, those employees for whom pension payments are made would narrow the differential between those receiving pensions and those paying into the fund.¹⁵⁶ Given the large payments

147. John D. Schulz, *Pension's 'Perfect Storm'*, TRAFFIC WORLD, Nov. 17, 2003, at 40.

148. *Id.*

149. *Id.*

150. Pension Funding Equity Act of 2004, Pub. L. No. 108-218, 118 Stat. 596.

151. *Id.* at §104(a)(1)(F)(i).

152. David Rogers, *Pension Bill to Clear Congress in Big Win for Business Lobby*, WALL ST. J., Apr. 8, 2004, at A2.

153. It is estimated that UPS accounts for about 40 percent of the contributions, according to Mr. Aitken (Telephone Interview, May 6, 2004).

154. Alan Robinson, *Trucking Structure of the Less-Than Truckload (LTL) Industry and Legislative Issues*, Congressional Research Service (Mar. 5, 2004), at 9.

155. *Id.*

156. Data are author's estimate.

UPS is already making to the Fund, it clearly has no interest in altering the situation in this manner.

UPS received a jolt in its pension cost when in August 2004, the Federal Court of Appeals, Second Circuit, affirmed a lower court decision that UPS was required to contribute to a pension fund for hours employees worked in excess of an eight-hour work day. This pension fund originally contained a provision governed by a cap on contributions after eight hours work per day, but the cap was omitted from contracts negotiated after 1990. UPS claimed that there was an unwritten understanding between UPS and the Teamsters to excuse payments for hours worked from contributions in excess of eight hours per day, but the court ruled that unwritten understandings could not be used to supersede the fund's rules regarding contributions, stating: "valid collection regulations promulgated by a multiemployer plan to effectuate contributions cannot be defeated by implied or unwritten agreements between employers and unions."¹⁵⁷

Overnite's posture in negotiation was that the substitution of this Fund for its own much superior funded one would endanger the pensions of its employees and that Overnite's contributions would be used to bolster the pensions of rival companies.¹⁵⁸ The *Prospectus* for the IPO, which is discussed below, states:

While we [Overnite] follow FAS 87 rules to record the expense and liability associated with our pension plans, actual cash funding is governed by employee benefit and tax laws and the JCWAA, which included temporary rules allowing companies to use discount rates for 2002 and 2003 equal to 120% of the weighted average 30-year U.S. Treasury bond yield. During 2002, we contributed \$126.5 million to our defined benefit pension plans, of which \$125.0 million was voluntary. With this contribution, our defined benefit pension plans were approximately 94% funded on an IRS funding basis as of December 31, 2002. Through September 30, 2003, we contributed \$45.7 million to our defined pension plans, of which \$45.0 million was voluntary.¹⁵⁹

Given this situation, Overnite declined to agree to any relationship with the Central States Fund.

b. Multiplant Bargaining

Overnite insisted on bargaining on an individual terminal basis

157. N.Y. State Teamsters Conference Pension & Ret. Fund v. United Parcel Service, Inc., 2004 WL 1921829 (2d Cir. 2004).

158. Letter from Kenneth T. Lopatka, Overnite counsel to Joseph H. Bornong, Field Attorney, NLRB Region 18 (Dec. 10, 2001)(on file with author) [hereinafter *Overnite Letter Dec. 10, 2001*].

159. *Overnite Corp. Prospectus*, *supra* note 45, at 49.

whereas the Teamster negotiators pushed for a multi-terminal approach.¹⁶⁰ Since the NLRB certifications were on a single facility basis, the company could successfully insist on its approach in each location. On the other hand, the same contract was offered to the IBT at each terminal, and the same negotiators were involved from each national organization along with local personnel from each facility. Actually, by offering the same contract, the company prevented one facility's proposal from being played off against another's, but it also sought to avoid having all facilities on strike at one time, which was obviously a union strike objective. If the contracts had common termination dates, then the union would presumably have been in position to effectuate multi-terminal strikes.

Moreover, even without common termination dates, the IBT could stretch out negotiations at several terminals so that it could strike these facilities at the same time.¹⁶¹ Thus, even though Overnite's proposals provided that a contract would be effective when accepted by the union, it does not appear that this posture was a strong one for the company, or that the IBT was in any position to take advantage of this possible opening.¹⁶²

It appears also from the record that the company never internally resolved the issues of contract termination or even the dates. It concentrated on what it regarded as key strategic values. First, with eleven of the twenty-two unionized terminals having already filed decertification petitions, it insisted on local bargaining to preserve in practice employees' rights to file for decertification and to avoid the difficulties that might result if employees were required to seek support for decertification on a multi-terminal basis.¹⁶³ And second, the company strongly desired contracts that terminated as far as possible from the termination date of the National Master Freight Agreement ("NMFA"), which it always believed was necessary if it would ever be able to gain an agreement that was not a virtual duplicate of the NMFA contract.¹⁶⁴

c. Restrictions on Management's Right to Manage

Critical in the negotiations was Overnite's insistence that it could not agree to provisions of the NMFA contract that affected operations and

160. Confidential Interview with Overnite Corp. Negotiating Person (Feb. 11, 2003).

161. This method of obtaining multi-facility bargaining is followed by unions seeking to enhance their bargaining power. It has been defined as "coalition bargaining" by scholars where several unions dealing with one employer jointly act in this manner. For the seminal study of coalition bargaining, *See generally* WILLIAM N. CHERNISH, *COALITION BARGAINING* (1969).

162. Interview with Overnite Corp. Negotiating Person (Feb. 11, 2003).

163. *Id.*

164. *Id.*

placed limits on Overnite's management rights to manage, nor would Overnite agree to a wage and benefit schedule literally taken from the current NMFA agreement.¹⁶⁵ Overnite has officially stated:

We believe that our predominately non-union workforce provides us with a significant advantage over union LTL carriers, including less restrictive work rules and lower labor costs, particularly with respect to employee benefit costs. The advantages of a less restrictive workforce include flexible work hours and the ability of our employee to perform multiple tasks, which we believe result in greater productivity, customer service and efficiency. This flexibility is typically not permitted or is significantly limited under the contracts that govern our union competitors.¹⁶⁶

It was thus clear that with the IBT bargaining objective quite clearly attempting to bring Overnite within the orbit of NMFA contract provisions, agreement could be difficult. IBT presented provisions copied from, or vary similar to, the NMFA agreement as part of the proposal. In most cases, Overnite offered counter-proposals which greatly watered down or effectively cancelled the union proposals. These were rejected by the IBT, and the negotiations failed on many of these issues to the bitter end although there was agreement on several issues. Since there were about fifty such items on the negotiating table, what are regarded as the foremost issues in dispute, or what was settled, are dealt with herein.

Negotiations between Overnite and the IBT resulted in agreement on many issues. These included the checkoff and compulsory membership issues, and a clear statement that where a state had enacted "right-to-work" laws pursuant to Section 14(b) of the NLRA outlawing compulsory unionism there would be no attempt to circumvent them.¹⁶⁷ Since a majority of the twenty-one states which have enacted right-to-work laws are in Southeast and Southwest states in which a heavy concentration of Overnite's business is found,¹⁶⁸ the company's concession on the compul-

165. This section is based upon a summary of positions on each contractual issue by each of the parties and a copy of the agreement thereon where it was reached in 2000. These contractual issues are found in a large three ring binder which the author was able to acquire. Each issue contains the "Teamster Proposal," the "Overnite Proposal," "agreed" verbiage if any, and "Date," and "Comments," if any. There are more than 50 sections in the binder, some of which cover several issues. The author has determined what, in his view, are believed to be key issues and discusses them in this part of the article. Since each issue is separately numbered in the three ring binder, or designated as "Appendix" or "Economics," the citations thereto reference the numbers or the designation in the "Negotiating Summary." *Summary of Contractual Issues* (2000) (unpublished summary on file with author) [hereinafter *Negotiating Summary*].

166. *Overnite Corp. Prospectus*, *supra* note 45, at 3.

167. *Negotiating Summary*, *supra* note 165, at Nos. 2 & 3.

168. States which have enacted right-to-work laws are Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. See U.S. Dept. of Labor, Employment Standards Administration Wage & Hour Division,

sory union issue would not have insured an automatically large increase in IBT membership, but it certainly would have added some gains. It also gave the company an advantage to contradict any union claims that it was not bargaining in good faith.

Another issue that was largely solved was seniority.¹⁶⁹ Historically, Overnite has recognized length of service as a key criterion in layoffs and promotions, and operates separate seniority districts for terminal workers, local drivers, and over-the-road drivers. Company-wide seniority was also recognized where divisional seniority was not helpful. The record shows considerable give-and-take on seniority issues and a large portion of agreement.¹⁷⁰

The union presented Overnite with demands for NMFA-based wages and benefits on which there never was agreement.¹⁷¹ Pensions, as discussed above, were based on the Central States Fund in the Teamster demand, and were rejected out-of-hand by Overnite with no compromise in sight.¹⁷² Health insurance and benefits were in the same category.¹⁷³ Even less controversial items such as vacations, holidays, and jury duty remained without complete agreement.¹⁷⁴

Wages were also still on the table. The union wanted those agreed to in the NMFA negotiation; Overnite desired those given to its nonunion employees.¹⁷⁵ Although there was no movement on this issue, one wonders that if the benefits issues could have been solved - and that is a big "if" - whether wages could have been negotiated, but negotiations were not impelling either side at this juncture, late in the negotiation time cycle.

Penalty overtime regulations were a strong deterrent issue to agreement.¹⁷⁶ The Fair Labor Standards Act of 1938, as amended over the years, has always exempted the trucking industry from penalty overtime regulations.¹⁷⁷ Thus, paying time and one-half for work over 40 hours per week is not required by Federal law. Nothing in the law, however, precludes unions and companies from regulating overtime compensation. The Teamsters won penalty overtime after 40 hours work per week in its agreements, including NMFA. Overnite was paying overtime after 45

Table of State Right-to-work Laws as of January 1, 2004, available at <http://www.dol.gov/esa/programs/whd/state-/righttowork.htm>.

169. *Negotiating Summary*, *supra* note 165, at No. 5.

170. *Id.*

171. *Id.* at app. A-C & subheading marked "Economics".

172. *Overnite Letter Dec. 10, 2001*, *supra* note 158, at 1.

173. *Negotiating Summary*, *supra* note 165, at app. A-C & subheading marked "Economics".

174. *Id.*

175. *Id.*

176. *Id.*

177. 29 U.S.C. § 201 (1996).

hours, not after 40 hours as required by the NMFA agreement.¹⁷⁸ No compromise was achieved.¹⁷⁹

Allied with the wage issue were union demands to guarantee certain hours of work per day when a worker was called into work.¹⁸⁰ The result could be eight hours pay for considerably less work time through no fault of management. Overnight paid various amounts depending upon conditions, but rejected automatic grants of eight hours regardless of cause or actual length of work time.¹⁸¹

As significant as these wage and benefits issues were, except for pensions and health insurance, they might have had a better chance of being resolved if they alone stood in the way of general agreement than did the issues directly affecting management's right to direct its workforce. For example, when conditions warranted, Overnite contracted out work and used casual and temporary employees. The IBT wanted strict limitation on these policies which Overnite would have accepted only if well watered down.¹⁸²

Various proposals by the IBT concerning arbitration, power of arbitrators, and what could be arbitrated were rejected by Overnite.¹⁸³ The company did, however, agree to expedited arbitration for discharges and suspensions, and offered the right to strike when no arbitration was agreed to.¹⁸⁴ This provision was cited by the NLRB and its General Counsel in rejecting the IBT's final attempt to win a general unfair labor practice charge against the company, as discussed below.

Overnite also rejected IBT's attempts to exempt sympathy strikes and refusals to cross picket lines from a non-agreed no-strike clause or any other contractual intervention in its ability to provide uninterrupted service.¹⁸⁵ On the other hand, a clause holding an employee liable "for negligent, reckless, and/or intentional acts resulting in loss, damage, or theft of property when the company so concludes by a preponderance of the evidence" was agreed to.¹⁸⁶

Agreement was reached on equipment and related matters in the interest of safety in detail and covering many items.¹⁸⁷ There seemed little opposition on either side of these matters. Generally, the IBT made a proposal, and the company either accepted it or revised and expanded it.

178. Confidential Interview with Overnite Transp. Co. personnel.

179. *Negotiating Summary*, *supra* note 165, at app. A-C & subheading marked "Economics".

180. *Id.*

181. *Id.*

182. *Id.* at No. 3.

183. *Id.* at No. 7.

184. *Id.* at No. 8.

185. *Id.*

186. *Id.* at No. 9.

187. *Id.* at No. 15.

The union then accepted the revised version.¹⁸⁸

Management rights clauses were much discussed, but wording was apparently never agreed to. It has not been possible to determine from the material in the three-ring binder exactly what held up agreement, but it does not appear that the parties were far apart.¹⁸⁹

The parties also did not reach agreement on the union's desire to confine employees to their regular jobs. According to Overnite officials, about five times as much truck traffic is carted into Florida than comes out.¹⁹⁰ Rather than use over-the-road drivers to return empty trailers to a terminal where traffic could use them, Overnite used terminal employees who had the proper licenses or casual or contract truckers to do the job.¹⁹¹ Under union rules, this would be limited or the carrier would have to put the trailers on a train.¹⁹² No agreement was reached in this situation.¹⁹³

Essentially, Overnite has utilized workers where they are needed and are qualified.¹⁹⁴ Working out of classification is elastic under the Overnite practice, and management desired that it be continued this way which IBT rules would strongly resist.¹⁹⁵ Compromise on such matters can be costly for a company, and difficult for a long time nonunion operator like Overnite. At the same time, dropping its long held restrictions on management regulation is difficult for a union and can be politically dangerous for union incumbents.

It is no surprise that agreement on such issues did not occur in the Overnite-IBT negotiations. As already noted, freedom to shift workers around as they are needed gives nonunion operators a large advantage and in such matters each side declined any substantive move toward agreement. Studying the situation as has been done for this article has convinced the author that the matters of management freedom were among the most contentious in the negotiation, and ones upon which neither side was disposed for serious compromise.

4. *Why the IBT Believed It Could Only Accept the NMFA Agreement*

Overnite's strong position against what it regarded as significant restrictions on management's right to manage was mirrored by the IBT's strong position in favor of such restrictions. From the study of negotia-

188. *Id.*

189. *Id.* at No. 41.

190. Confidential Telephone Interview with Overnight Transp. Co. Personnel (May 2003).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

tions, it seems clear that the IBT leadership believed that it could not accept provisions which would provide Overnite with working conditions that were less restrictive than those provided in the NMFA agreement, and for a very obvious reason. It apparently seemed very clear to the IBT leadership that, if it yielded on these issues as Overnite proposed, the companies that were parties to the NMFA would be likely to demand the same or similar provisions. The NMFA was open for renewal negotiations with a March 2003 deadline during much of the Overnite strike period negotiations. If the IBT weakened its contracts at this juncture, the political ramifications for Hoffa and his administration could have been severe.

To preserve its posture, the IBT, therefore, continued to discuss these and other issues, but was never willing to reach agreement. It was careful not to allow a legal impasse to be reached because that would have permitted Overnite to implement its proposals unilaterally without legal penalty.¹⁹⁶ Of course, with decertification elections on the horizon, it is doubtful that Overnite would have taken such advantage of an impasse. Negotiations had actually broken down, but the pretense of ongoing negotiations was maintained by the union to the end. It is significant that Hoffa called off the Overnite strike after an expensive agreement was reached with the largest unionized LTL carriers. He could then quietly admit defeat at Overnite by ending the strike while concentrating communications on the NMFA settlement as a great success.

a. Analysis

In retrospect, one may wonder why the IBT leadership did not adopt a different policy. Perhaps it could have accepted the deal offered by Overnite and possibly maintained at least some of its position in Overnite. To its unionized companies, it could then explain that this was the first step, and that in all future negotiations with Overnite, it would strive to move Overnite closer to the NMFA model until it achieved this goal. This would not have been the first time that the IBT varied from the NMFA contract. Overnite's subsidiary, the regional carrier, Motor Cargo, has agreements with IBT that do not replicate the NMFA.¹⁹⁷ Overnite is,

196. For an analysis of NLRB policies in regard to impasse, see Ronald Turner, *Impasse in the 'Real World' of Labor Relations: Where Does the Board Stand?*, 10 EMP. REL. L.J. 468 (1984-85). See also 1 THE DEVELOPING LABOR LAW 918 (Patrick Hardin et al. eds. 4th ed., 2001); THE DEVELOPING LABOR LAW 242 (Howard Z. Rosen et al. eds. Cum. Supp. 2003).

197. *Overnite Corp. Prospectus*, supra note 45, at 66 where it is stated:

Employees at two Motor Cargo service centers located in North Salt Lake, Utah, and Reno, Nevada, representing approximately 11% at our Motor Cargo work force at 37 service centers, are covered by two separate collective bargaining agreements with unions affiliated with the Teamsters. Although these agreements cover most of the employees at these two service centers, less than half of these covered employees are actual union members. Those contracts are significantly less onerous than the Team-

of course, far larger, and this may have been a factor.

If the IBT had accepted a contract from Overnite that was, in its view, below the NMFA model, the burden would have been on Overnite to accept it or face NLRB charges of bargaining in bad faith. The IBT really missed its opportunity at this juncture. The IBT opted for an all or nothing goal, and depended on the NLRB to rescue it.¹⁹⁸ As set forth in Table 3 below, it ended up with nothing.

III. UNION VIOLENCE, SECONDARY BOYCOTTS, "GISSSEL" ATTEMPTS, AND FINAL NLRB CASE

To attempt to force Overnite to accept its posture without being able to organize more than fourteen percent of its employees, the IBT utilized three principal tactics: violence, secondary boycotts, and attempts to gain bargaining rights by persuading the NLRB to order Overnite to bargain with the IBT in locations where the IBT actually lost elections, but where a majority of the bargaining unit had signed union supporting authorization cards. Such bargaining orders are termed "*Gissel*" orders after the lead case in the matter.¹⁹⁹ Finally, the IBT sought a nationwide "bargaining in bad faith" order undoubtedly in part to restrain Overnite's employees from decertifying actions.²⁰⁰ These four tactics are examined in this section.

A. VIOLENCE AS A UNION TACTIC

Union tactical violence has five purposes. First, such violence is an obvious endeavor to frighten bargaining unit employees, salaried employees who might be substituting for strikers by working in the plant, and striker replacements from crossing the picket lines.²⁰¹ Second, violence is meant to scare officials of the struck company, who might be horrified and frightened by the violence levels or fear for their personal and col-

sters' National Motor Freight Agreement in terms of wages, benefits and restrictive work rules.

198. A reader asked whether there was a "most favored nations" clause or other clause obligating the Teamsters to give the company recipients the benefits of any future signed contract that had terms less than the NMFA agreement, or other arrangements between IBT and the major unionized carriers that prevented IBT from varying from the NMFA model. We have found none. Any provision in one contract or understanding that the Teamsters could not sign contracts or make arrangements that all future contracts follow the NMFA model could undoubtedly be a violation of antitrust laws. See generally *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

199. *Nat'l Labor Relations Bd. v. Gissel Packing Co. Inc.*, 395 U.S. 575 (1969).

200. See Letter from Kenneth T. Lopatka, Overnite counsel to Joseph H. Bornong, Field Attorney, NLRB Region 18 (October 24, 2001) (on file with author).

201. ARMAND J. THIEBLOT ET AL., *UNION VIOLENCE: THE RECORD AND THE RESPONSE BY COURTS, LEGISLATURES, AND THE N.L.R.B.* 32 (2nd ed. 1999).

leagues' safety, into agreeing to a settlement favorable to the union.²⁰² Third, violence requires a host of extra company costs, including extra guards, repair of damaged vehicles and other equipment, court litigation, and maintaining employees overnight who fear crossing violent picket lines.²⁰³ Fourth, violence is designed to scare away suppliers and customers, especially those who use their own equipment to supply materials for or buy products from the struck company, or who have a union themselves that might attempt to support the struck company by various actions.²⁰⁴ And fifth, violence is meant to provide a warning to other companies in the same industry or area that it is costly, unpleasant, and generally unwise to oppose the union demands.²⁰⁵

The IBT is clearly very cognizant of the impact of violence. Moreover, truck drivers, the key employees of Overnite, are very susceptible to violence because they work alone unlike factory workers who often work in groups. Hence, the IBT has not been reluctant to utilize violence.

The only nationwide study of union violence found that the Teamsters were recorded by newspapers and a few other organs of news, from 1975 through mid-1996, as involved in 1,543 violent actions in labor disputes.²⁰⁶ The second largest involvement was by the United Mine Workers of America ("UMWA") with 946 reports.²⁰⁷ On a per capita basis, the now shrunk UMW was by far the leader with incidents per 1,000 members at 12.61 while the IBT ranked only sixth, with incidents per thousand members at 1.20.²⁰⁸ The authors of the study report that "the total number of incidents of violence is understated by considerable margins, not from bias, but from input inadequacy."²⁰⁹

Violence is usually at its peak at the inception of a strike, especially if the union is relatively weakly supported by employees at the struck facility and the company attempts to continue to operate. This was, of course, the situation at Overnite. According to Overnite, the IBT used employees of other trucking companies and temporarily hired personnel to picket.²¹⁰ After one year of the strike, Overnite pointed out the following:

There have been 21 injunctions in 14 states [against IBT violent or illegal actions] and the courts have made findings of serious violence by Teamsters.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 24.

207. *Id.* at 27.

208. *Id.*

209. *Id.* at 17.

210. *Overnite Press Release Jan. 2000, supra* note 103.

The NLRB has issued nine complaints against Teamster violence and threats of violence. A Teamster agent in Philadelphia was found in contempt of court and fined \$1,000 personally, while the union was fined \$20,000. Teamster agents were found guilty of criminal activity in Minnesota at the local headed by IBT General Secretary - Treasurer, Tom Keegal. Before the picketing began there were no recorded violent incidents involving Overnite trucks. Since the strike began on October 24, 1999, there have been more than 54 shootings at occupied Overnite vehicles.²¹¹

Beside seeking injunctions from the courts, Overnite filed more than sixty charges with the NLRB, which with the courts, has adopted a definition of restraint and coercion that is certainly broad enough to encompass most ordinary kinds of violent criminal or tortious conduct. "In applying section 8(b)(1)(A) [of the NLRA, the Board and the courts] . . . have construed the phrase, 'in the exercise of rights guaranteed in section 7,' to include almost anything an employee might do in connection with his work or in his relationships with the union. [The Board and the courts] . . . have also taken a broad but realistic view of union responsibility for the violence that occurs incident to unionization activities."²¹²

There are, however, two basic shortcomings with NLRB handling of violence matters. First, the NLRB can only charge unions with orders to cease and desist improper activity, and then seek enforcement by the federal courts, which can be a long process while violence may continue.²¹³ Second, the record of the NLRB in violence matters frequently reveals a reluctance to deal vigorously with union violence.²¹⁴ This was quite noticeable in the Overnite case in which finally, in the fall of 2002, the sixty odd cases were consolidated and assigned to Region 9, Cincinnati, for action, and a complaint including all of them covering 67 pages issued on October 31, 2002.²¹⁵ Some of these charges date back to 1999, 2000, and 2001, as well as 2002.²¹⁶

A hearing date was set, but later postponed, as the parties negotiated a *Settlement Stipulation* which was approved by the Director of NLRB Region 9, Cincinnati.²¹⁷ The *Stipulation* was four single spaced pages long and was remarkably complete. It contained promises that the IBT would not engage in any of the violent activities which it utilized during the strike, and included in its requirements virtually every type and aspect of

211. Talking Points Questions and Answers from Overnite Transp. Co. 2 (May 2000). (on file with author).

212. THIEBLOT ET AL., *supra* note 201, at 440-41.

213. *Id.* at 281.

214. *Id.* at 443.

215. Int'l Bhd. of Teamsters & Overnite Transp. Co., 9-CB-10716-2, 9CB-10716-4 N.L.R.B., *Complaint* (Oct. 31, 2002). (on file with author).

216. *Id.*

217. Int'l Bhd. Of Teamsters, 9-CB-10716-66 N.L.R.B. (2003).

violence that the IBT brandished during the strike.²¹⁸ It also required that it be posted on the union's "Internet Home Page . . . and that a copy of this *Notice to Employees and Union Members* be posted in plants for a period of 60 consecutive days."²¹⁹ The *Stipulation* was given wide publicity by the *Wall Street Journal* which reprinted four paragraphs from it as part of an editorial questioning whether the IBT should be freed from federal control.²²⁰ This is discussed below.

To illustrate how violence was utilized by the Teamsters and vigorously fought by Overnite in the courts and at the NLRB, what occurred in Minneapolis, Georgia, and other regions is examined.

1. Violence in the Minneapolis Area²²¹

Teamster Local 120, St. Paul, Minneapolis' twin city, struck the Overnite facility, which is actually in the suburb of Blaine, as part of the national strike that began on October 24, 1999.²²² This local had been certified as bargaining agent in the mid-1990s, but employees had filed for a decertification vote two weeks before the strike, which the NLRB had dismissed.²²³ Given this background, it is not surprising that the IBT local leadership resorted to considerable violence to attempt to gain support for the strike, and that Overnite management strenuously moved to uphold the rights of free access for employees.

The union charged that Overnite had bargained in bad faith and that the strike was caused by the company's unfair labor tactics.²²⁴ As a part of this strike, Local 120 established a picket line at the entrance to the Overnite terminal.²²⁵

On November 12, 1999, Overnite filed a lawsuit alleging, among other things, that Local 120 was violating the Minnesota Labor Relations

218. *Id.* at 3-5.

219. *Notice to Employees and Members, posted pursuant to a Settlement Stipulation* (Sept. 9, 2003) (on file with author).

220. Editorial, *The Teamster Promise*, WALL ST. J., Sept. 9, 2003, at A20.

221. This section profited for a draft by Mark Chrismer, Esq., Seaton, Beck, Peters, Bowen & Feuss, Enid, MN. The descriptions of the violence were prepared and submitted to the local court proceedings in which the union was found in contempt, as described, *infra*. The text of the case described herein is developed from the court case and Mr. Chrismer's report. It is difficult to quote in a paragraph because the various paragraphs are derived from several written sources by the author, Chrismer's report is the most complete source used. Marc Chrismer, Summary of Testimony for Finding Union in Contempt of Temporary Restraining Order and Permanent Injunction (on file with author) [hereinafter *Chrismer Report*].

222. *Overnite Transp. Co. v. N.L.R.B.*, 333 N.L.R.B. No. 1392, 1392 (May 15, 2001) (affirmed dismissal of request for review).

223. *Id.* at 1397.

224. *Id.* at 1393.

225. *Chrismer Report*, *supra* note 221, at 1.

Act,²²⁶ also known as Minnesota's "Little Wagner Act," and applied to the Anoka County District Court for a Temporary Restraining Order ("TRO") restraining Local 120's conduct.²²⁷ The Minnesota Labor Relations Act makes it an unfair labor practice for picketers, among other things, to engage in violent conduct. The TRO was issued the same day,²²⁸ and a permanent injunction was issued on December 1, 1999.²²⁹

The TRO and the permanent injunction enjoined Local 120 from committing acts of violence, coercion, intimidation, verbal harassment, threats, or any other actions which would attempt to compel a person to join a labor organization or strike against his or her will or would affect access to, and operation of, Overnite's terminal or the free and uninterrupted use of public roads.²³⁰ There were numerous violations of this provision. For example, one nonstriking Overnite driver was subjected to a person from the picket line yelling loudly at her, "Bitch, I'm going to kick your ass."²³¹ Another nonstriking Overnite driver was threatened four or five times by two picketers.²³² A third nonstriking driver was told by a picket, as he crossed the picket line, "We'll beat the shit out of you, cock-sucker. We'll see you somewhere else."²³³ Finally, another nonstriking driver was called a "fucking bitch" while at the Minneapolis facility. All of these drivers apparently felt threatened by the actions of the picketers.²³⁴

The permanent injunction enjoined Local 120 from "standing or remaining within five (5) feet of a vehicle approaching, ingressing or egressing [Overnite's] terminal or attempting to do so."²³⁵ Local 120 picketers were found to have been in violation of the five-foot rule on numerous occasions. Local 120 engaged in a strategy of forcing the Overnite trucks to stop two or three times before entering or leaving the terminal.²³⁶ It was able to do this by having its pickets step in front of the trucks or walk to one end of the truck and turn back and walk to the other end of the

226. MINN. STAT. § 179.01 (2003).

227. *Overnite Transp. Co. v. Teamsters Local 120*, No. C1-99-9735 (Minn. Dist. Ct. 1999) (Temporary Restraining Order granted) (on file with author).

228. *Id.*

229. *Overnite Transp. Co. v. Teamsters Local 120*, No. C1-99-9735 (Minn. Dist. Ct. 1999) (Permanent Injunction Against Violence granted) (on file with author).

230. *Chrismer Report*, *supra* note 221, at 3. Herein begins a summary of the failure of the Temporary Injunction to restrain violence, and the Overnite's move to seek contempt proceedings.

231. *Chrismer Report*, *supra* note 221, at 4.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Chrismer Report*, *supra* note 221, at 5.

truck.²³⁷

The TRO and the permanent injunction enjoined the union from damaging or threatening to damage the vehicles or property of Overnite or its employees and other invitees.²³⁸ The union was found to have committed considerable property damage to Overnite property. Nonstriking truck drivers had raw eggs, coffee, and human waste thrown on their trucks.²³⁹ Other nonstriking drivers had their trucks spit on and hit with picket signs.²⁴⁰ The property damage was not limited to Overnite trucks. Nonstriking Overnite drivers also suffered damage to their personal vehicles.²⁴¹ For example, a number of drivers found screws and jackrocks in the tires of their personal vehicles after crossing the picket line.²⁴² One non-striking driver heard a thump as she crossed the picket line in her personal vehicle and, after pulling over, discovered a jackrock in her tire.²⁴³ Another driver, while crossing the picket line, ran over a jackrock that punctured the front right tire of his vehicle.²⁴⁴ The terminal manager found nails and screws on the picket line.²⁴⁵ Finally, the Overnite mechanic shop supervisor had to replace air lines on an Overnite truck that had been cut by a sharp blade and had to remove graffiti from two Overnite trailers that had the word "scab" painted on them.²⁴⁶

The permanent injunction enjoined the union from mass picketing, from placing more than four pickets at any entrance to the terminal, and from remaining within 200 feet of Overnite's entrance except that no more than twenty persons could remain at a location not less than fifty feet from the entrance.²⁴⁷

The union held a rally in support of its strike on December 2, 1999.²⁴⁸ Local 120 provided a sound system equipped flat bed trailer upon which the speakers at the rally were to stand. During the rally, local politicians, along with Local 120 officials and members, addressed a crowd of approximately 200 to 250 Local 120 supporters.²⁴⁹ At the end of the rally, the police had difficulty getting union supporters to leave the

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Chrismer Report, supra* note 221, at 5.

242. *Id.* A jackrock is a welded, four-pronged metal "jack", sharpened at each tip, and designed by strikers to inflict damage on automobile tires.

243. *Id.*

244. *Id.* at 5-6.

245. *Id.* at 6.

246. *Chrismer Report, supra* note 221, at 6.

247. *Id.*

248. *Id.*

249. *Id.*

area.²⁵⁰ At this same time, Overnite vehicles were returning to the terminal and the police witnessed individuals who had been at the rally stopping the trucks and challenging their entrance to the facility.²⁵¹ According to the police, the union supporters and pickets continued in this activity for about twenty minutes before the police were able to get them to disperse. The union admitted that they had violated the order.²⁵²

On January 3, 2000, a Local 120 picket line captain jumped on the side of an Overnite truck. The picket line captain admitted jumping on the truck and stated that he became angry as the driver involved had several times charged up to the picket line, stopped quickly and accelerated again quickly, making what he called a "jackrabbit stop." The picket line captain also admitted that his behavior during this incident was a major infraction of the TRO and the permanent injunction.²⁵³ Interestingly, this picket line member later became a business agent for Local 120.²⁵⁴

Not only did Local 120 members jump on trucks, they also tried to pull Overnite drivers out of their trucks. On January 10, 2000, an Overnite driver was returning to the Overnite terminal.²⁵⁵ The driver had to stop before he reached the picket line area because a picket carrying a picket sign was in front of his truck.²⁵⁶ The picket then walked around to the side of the vehicle, opened the truck door, and tried to pull the driver out of the truck.²⁵⁷ The picket also used threatening language towards the driver and made hand gestures indicating that he was going to topple the driver from the truck.²⁵⁸ The driver was forced to propel the truck so that the picket would fall off.²⁵⁹ The picket admitted afterwards that he had attempted to pull the driver from the truck.²⁶⁰ Thus, Local 120 not only committed violence against Overnite property, but they used violence against Overnite employees who were attempting to do their job. Furthermore, the violence was not limited to the Overnite facility only, but was attempted against employees elsewhere.²⁶¹

The TRO and the permanent injunction prohibited the IBT local union from driving alongside Overnite vehicles, other than momentarily,

250. *Id.*

251. *Chrismer Report, supra* note 221, at 6-7.

252. *Id.* at 7.

253. *Id.*

254. *Id.*

255. *Chrismer Report, supra* note 221, at 7.

256. *Id.*

257. *Id.* at 7-8.

258. *Id.*

259. *Id.* at 8.

260. *Chrismer Report, supra* note 221, at 8.

261. *Id.*

from following Overnite employees, other than to conduct lawful ambulatory picketing, and from swerving or stopping in front of Overnite vehicles.²⁶² The union violated all of these provisions.

For example, one Overnite driver experienced a station wagon with a union decal and a blue truck pull in front of her truck and slow down, making it necessary for her to slow down and pull over abruptly, risking a collision.²⁶³ Another Overnite driver was followed as he left the Overnite facility. After exiting and reentering the roadway to confirm that he was being followed, the driver let the other car pass him.²⁶⁴ After doing so, the other driver pulled in front of his vehicle and slammed on the brakes.²⁶⁵ The Overnite driver then pulled his truck over to confront the other driver.²⁶⁶ The other driver verbally threatened the Overnite driver by saying, "You are hurting your people in line by working; I might have to hit you" and "I don't care if I hurt your vehicle or anybody else's vehicle or my own."²⁶⁷ The driver also said, "If I have to, I will kill you."²⁶⁸ The Overnite driver was later able to identify this driver as a union picketer.²⁶⁹

Yet another Overnite driver was driving his truck when a station wagon pulled in front of him and braked, slowing from 50-55 m.p.h. down to about 20 m.p.h. When the Overnite driver changed lanes, the station wagon also changed lanes, pulling in front of him and slamming on the brakes again.²⁷⁰ When the Overnite driver changed lanes yet again, the station wagon quickly changed lanes and nearly hit a third party's car.²⁷¹ A few minutes later, a projectile hit the Overnite driver's truck.²⁷² The Overnite driver was able to get the license number of the station wagon involved in this incident.²⁷³ Records from the Department of Motor Vehicles indicated that the car was owned by an individual who was a member of the union.²⁷⁴

The TRO and permanent injunction prohibited the union from damaging Overnite property or Overnite vehicles or vehicles of Overnite employees. Again, the union was guilty of all of the above. When one

262. *Id.*

263. *Id.*

264. *Chrismer Report, supra* note 221, at 8-9.

265. *Id.* at 9.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Chrismer Report, supra* note 221, at 9.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Chrismer Report, supra* note 221, at 9.

274. *Id.*

Overnite driver arrived at a customer's location to make a delivery, a man wearing a union hat was sitting in a nearby car.²⁷⁵ When she came out of the customer's location, the man was gone and three screws were in her tire.²⁷⁶ Other Overnite drivers found screws in their personal vehicles.²⁷⁷ On another occasion, an Overnite driver who had stopped for a soda came back to her truck and found that both of her passenger side tires had puncture holes and her driver's side window was shattered.²⁷⁸ Another Overnite driver stopped to see if she was okay and while he was seated in her passenger seat, the passenger side window was shattered.²⁷⁹

The violence was not limited to stationary Overnite vehicles. One Overnite driver's windshield was shot out with ball bearings and marbles fired by slingshots.²⁸⁰ On one occasion, an Overnite mechanic was called to repair an Overnite trailer that had eight flat tires.²⁸¹

Prior to November 12, 1999, the Overnite mechanics fixed approximately one windshield a month.²⁸² For a two-month period following November 12, 1999, Overnite mechanics replaced eight windshields.²⁸³ Also, for an eleven-year period prior to November 12, 1999, Overnite had to replace only one side window in its trucks.²⁸⁴ During the two-month period following November 12, 1999, Overnite had to replace twelve side windows.²⁸⁵

Another Overnite driver returned to his truck and found that his trailer was disconnected from the fifth wheel.²⁸⁶ The fifth wheel had been attached prior to making the deliver because otherwise the trailer would not have stayed connected to the truck. Further, it is not possible for the fifth wheel to come unattached on its own because the handle has special indentations that have to be lifted up and unlatched by hand. If one drives with the fifth wheel disconnected, there is a good chance that the trailer will turn over and cause both the trailer and the items inside the truck to be damaged. On another occasion this same Overnite driver returned to his truck after making a delivery and witnessed a man shooting a hole in his tire.²⁸⁷ The Overnite driver later picked the man out of a

275. *Id.* at 10.

276. *Id.*

277. *Id.*

278. *Chrismer Report, supra* note 221, at 10.

279. *Id.*

280. *Id.* at 12.

281. *Id.*

282. *Chrismer Report, supra* note 221, at 12.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Chrismer Report, supra* note 221, at 11.

287. *Id.*

photo lineup.²⁸⁸ He was a member of Local 120.²⁸⁹

Overnite drivers were subjected to other violent incidents including the following: cable locks being placed on a trailer that had to be cut off in order to complete a delivery, pins missing from the locks for a set of dual trailer wheels, and windows being shattered.²⁹⁰

When the strike began on October 24, 1999, Overnite contracted with a private security company to establish security at its Minneapolis terminal and at other Overnite terminals across the nation.²⁹¹ Security began at the Minneapolis terminal on October 26, 1999.²⁹² Pursuant to Overnite's nationwide corporate plan, it was supposed to reduce security at all facilities by fifty percent on December 20, 1999.²⁹³ On the latter date, Overnite instituted this plan nationwide, but was unable to implement the plan at its Minneapolis terminal because of the violence.²⁹⁴ Security in Minneapolis was not reduced to the fifty percent level until January 24, 2000.²⁹⁵ Prior to January 24, 2000, Overnite spent approximately \$15,500 in weekly security expenses.²⁹⁶ After January 24, 2000, Overnite spent approximately \$7,800 in weekly security costs.²⁹⁷ From December 20, 1999 through January 24, 2000, Overnite incurred total security costs of \$72,183.12.²⁹⁸ The Anoka County District Court granted Overnite's motion for an Order finding the union in contempt of the Court's TRO and permanent injunction.²⁹⁹

In order to indemnify Overnite for the actual losses, injuries, and other costs incurred because of the violations of the court orders by the union, the union was ordered to pay Overnite \$5,812 for property damage and \$24,061.04 for additional security costs incurred by Overnite after the Company sued and was granted an order finding the union in contempt.³⁰⁰ The trial court decision was affirmed by the court of appeals of Minnesota³⁰¹ and the Minnesota supreme court denied further review.³⁰²

The Teamsters Local 120 strike against Overnite's Minneapolis Ter-

288. *Id.*

289. *Chrimer Report, supra* note 221, at 11.

290. *Id.* at 11-12.

291. *Id.* at 12.

292. *Id.*

293. *Chrimer Report, supra* note 221, at 12.

294. *Id.* at 12-13.

295. *Id.* at 13.

296. *Id.*

297. *Chrimer Report, supra* note 221, at 13.

298. *Id.*

299. *Overnite Transp. Co. v. Teamster Local 120*, No. C1-99-9735, at 48 (Minn. Dist. Ct. June 20, 2000) (on file with author).

300. *Id.*

301. *Overnite Transp. Co. v. Teamsters Local 120*, No. C3-01-153, 2001 Minn. App. LEXIS 928, *1-*2 (Minn. Ct. App. Oct. 16, 2001).

minal and its aftermath was a microcosm of the Teamsters strike against Overnite generally. The union's seeming belief that it held a strong position at the outset of the strike, based on its certification as representative of the Minneapolis bargaining unit, the assumed strength of the national Teamsters union behind the local, and the apparent momentum of the union's national strike, ultimately foundered on the fundamental, albeit less apparent, weaknesses in the union's position as described above. The reliance on violence undoubtedly increased employees' distaste for union representation. In a secret ballot election held on October 19, 2002, the employees at the Minneapolis facility voted to decertify IBT Local 120 as their bargaining agent by a vote of thirty-six to three.³⁰³ No objections were filed and the NLRB certified the decertification results on November 5, 2002.³⁰⁴ Table 3 shows a similar result at the various struck locations.

2. *Violence in the Georgia Locations and Elsewhere*

As noted above, Overnite has a major terminal in Atlanta, there are smaller facilities in Lawrenceville (North Atlanta) and Kennesaw in the Atlanta area, and one in Macon.³⁰⁵ These facilities were beset with the same types of violence at facility gates and especially on the road as described in the Minneapolis area. Overnite both filed charges with the NLRB and filed for and won TROs and permanent injunctions in state courts prohibiting such violence.³⁰⁶ The incidents were especially concentrated on the Overnite trucks and drivers and apparently on women drivers who seemed to have been more heavily utilized in these facilities than in the trucking industry generally.³⁰⁷ Overnite, of course, was especially concerned about driver safety, not only because drivers are key employees, but also because its business depends upon being able to deliver freight on time and to avoid incidents at customer locations.

The TRO issued by Fulton County Superior Court on March 8, 2000, was broad.³⁰⁸ It applied to the IBT, its Local 728, officers, members,

302. *Overnite Transp. Co. v. Teamsters Local 120*, No. C3-01-153, 2001 Minn. LEXIS 670 (Minn. Oct. 16, 2001).

303. *See infra* Table 3 for Minneapolis results as well as similar results at all Teamster NLRB certified locations.

304. *Id.*

305. *See infra* Table 3 for a list of Overnite facilities.

306. *See Overnite Transp. Co. v. Teamsters Local Union No. 528*, No. 99-CV-7509 (Ga. Super. Ct. Nov. 15, 1999) (unpublished) (on file with author); *Overnite Transp. Co. v. Teamsters Local Union No. 728*, No. 1999-CV-15685 (Ga. Super. Ct. Mar. 8, 2000) (unpublished) (on file with author); *Overnite Transp. Co. v. Teamsters Local Union No. 480*, No. M2002-02116-COA-R3-CV, 2004 Tenn. App. LEXIS 139 (Tenn. Ct. App. 2004).

307. *See Overnite Transp. Co. v. Teamsters Local Union No. 728*, No. 1999-CV-15685 (Ga. Super. Ct. Mar. 8, 2000) (unpublished) (on file with author).

308. *Id.*

TABLE 3
OVERNITE TRANSPORTATION COMPANY TEAMSTER UNION
CERTIFICATION/DECERTIFICATION HISTORY

Location	Local Union	Certified Date	Decertified Date & Vote
Atlanta, GA	728	2/7/97	12/18/02 (92-53)
Bedford Park (Chicago), IL*	705	1982	3/21/03 (40-11)
Bowling Green, KY	89	8/2/99	9/18/03 (13-3)
Buffalo (Tonawanda), NY	375	7/30/99	IBT disclaimed interest
Cincinnati, OH	100	7/18/97	11/4/02 (67-2)
Decatur, IL	402	1/27/97	11/5/02 (24-1)
Detroit (Romulus), MI	290	8/19/99	9/25/03 (68-33)
Farmington (Bay Shore), NY	707	5/17/96	2/10/03 (19-11)
Grand Rapids, MI	406	6/7/95	10/31/02 (29-0)
Indianapolis, IN	133	12/28/94	2/28/03 (85-41)
Kansas City, KS	41	12/16/94	12/5/02 (137-38)
Laredo, TX	657	9/10/99	12/2/02 (9-3)
Little Rock, AR	878	12/2/96	11/4/02 (13-4)
Lexington, KY	651	8/11/99	8/28/03 (146-50)
Macon, GA	528	8/7/97	11/5/02 (17-0)
Marietta, GA	728	9/30/96	11/5/02 (34-1)
Memphis, TN	667	10/9/97	7/18/03 (180-151)
Milwaukee, WI	200	8/14/95	12/24/02 (37-12)
Minneapolis, MN	120	2/7/96	11/5/02 (36-3)
Miami, FL	390	8/15/95	2/25/03 (32-18)
New Orleans, LA	270	2/3/97	3/3/03 (11-7)
Sacramento, CA	150	2/3/95	3/27/03 (45-11)
Saginaw, MI	486	5/13/97	IBT disclaimed interest 2/18/03
St. Louis, MO	600	6/16/95	11/4/02 (98-2)
Toledo, OH	20	6/3/96	2/4/03 (31-8)
Tupelo, MS	667	5/29/98	2/10/03 (16-4)

Source: NLRB Records

*This was the last holdover from the IBT organizing drive of this early period; other facilities unionized then have been closed as a result of the A.T. Kearney study. Cumulative vote as of September 30, 2003: For decertification: 1,095 plus disclaimers by the IBT in two locations, Against decertification: 474, Challenged ballots: 38 (Not counted because would not have affected results.)

agents, and employees as well as “defendants presently unknown,” and then cited prohibitions against a long list of violent actions supported by a host of affidavits presented by Overnite.³⁰⁹ Among the prohibitions were any acts preventing, or attempting, to prevent Overnite and others from

309. *Id.*

working, continuing in their employment, engaging in a lawful vocation, engaging in and lawful business activity, or using property in the conduct of its or their business; any acts of violence, intimidation, or any other actions that had the effect of compelling a person to join the IBT or strike against his or her will;³¹⁰ using abusive language to persons entering or leaving Overnite terminals and property or making delivery to Overnite customers; swerving into or in front of, stopping in front of, throwing objects at, blocking access of, damaging, or vandalizing Overnite or personal vehicles of Overnite employees; and following Overnite's agents, employees or their families, or anyone having a business relationship with Overnite, or knowingly driving alongside them.³¹¹

A very similar TRO was issued by the Bibb County Superior Court covering the Macon area.³¹² The affidavits submitted in support of the charges indicated the same type of violent actions as were charged in the affidavits in Atlanta. In both locations, charges were also filed with the NLRB and these were included in the master charge noted above which was settled in confidential discussions.

In addition to Minneapolis, Atlanta, and Macon, Overnite also secured injunctions against Teamsters union violence during October and November 1999, the first six weeks of the strike in six other locations - Bridgeton, Missouri; Grand Rapids, Michigan; Farmingdale, New York; Fort Wayne, Indiana; Memphis, Tennessee; and Miami, Florida.³¹³ The violence there followed the same pattern as occurred in Minneapolis, Atlanta, and Macon.³¹⁴ The object was the same - to intimidate employees who were not striking and to intimidate the company and those who were working in order to make up for the fact that the strike had relatively little support from the employees. Overnite's strong legal reaction to this illegal union conduct clearly did much to thwart the union's violent tactics, and judging from the results of the decertification elections which followed, as set forth in Table 3, indicate that the violence undoubtedly alienated the employees, as will be discussed below.

In LaVergne, Tennessee, near Nashville and known as the "Nashville facility," Overnite operates a service facility.³¹⁵ Violence of much the same nature as described above occurred between October 1999 and January 2000. The company sought relief in state court. According to the

310. *Id.* at 2.

311. *Id.* at 2-4.

312. *Overnite Transp. Co. v. Teamsters Local Union No. 528*, No. 99-CV-7509 (Ga. Super. Ct. Nov. 15, 1999) (on file with author).

313. Information from the Overnite Transp. Co.

314. *Id.*

315. *Overnite Transp. Co. v. Teamsters Local Union No. 480*, No. M2002-02116-COA-R3-CV, 2004 Tenn. App. LEXIS 139, at *1 (Tenn. Ct. App. 2004).

Tennessee Court of Appeals at Nashville:³¹⁶

Between October 1999 and January 2000, the trial court entered five injunctions against the union, each more restrictive than the one before, enjoining the union from engaging in the alleged unlawful violence and intimidation. In August 2000, the trial court issued a show cause order, citing 128 alleged violations of the injunctions, requiring the union to show cause why it should not be held in civil contempt. In March 2002, the trial court determined that the company's petition for civil contempt was moot because, by that time, the contemptuous conduct had ceased. . . .³¹⁷

The Tennessee Appellate Court reversed the trial court on this issue, noting that when an injunction is issued, it must be obeyed.³¹⁸ It reversed and remanded the case to the trial court for further proceedings "not inconsistent with [the appellate court's] Opinion."³¹⁹ Judging from past practice, the parties may negotiate a settlement with Overnite receiving remuneration for damages from the violence and intimidation.

B. THE IBT'S USE OF ILLEGAL SECONDARY BOYCOTTS

The IBT's growth in the 1930s and early 1940s was heavily featured by the use of secondary boycotts whereby customers were picketed to prevent nonunion truckers from serving them and to induce the customers to change to unionized carriers.³²⁰ Pressure of this sort, directed against a third party which had no dispute with the union, was not illegal then and served the union's purpose, which was of course, the unionization of the nonunion truckers. It resulted in a general unionization of the LTL over-the-road trucking industry, of which Overnite has been the largest exception for many years. As recounted above, the father of the current IBT president led a strike in an attempt to unionize Overnite but failed to succeed by using the traditional secondary tactics largely as a result of amendments to the NLRA in 1947 and 1959, which are known as the Labor Management Relations Act ("LMRA").³²¹

The LMRA amendments severely limited secondary boycott usage by unions. Thus, Section 158(b)(4)(B) of the NLRA, as amended by the LMRA, makes it an unfair labor practice for a union

to engage in, . . . or encourage any individual employer by any person engaged in commerce or in an industry affecting commerce to engage in, a

316. *Id.*

317. *Id.* at *2.

318. *Id.* at *37.

319. *Id.* at *46.

320. See generally FARRELL DOBBS, *TEAMSTER POWER* (1973) for an exposition of this approach. He developed and instituted this approach, which was adopted and perfected by James Hoffa, father of the present Teamster president.

321. 29 U.S.C. § 141 (2004); 29 U.S.C. § 153 (2004).

strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

...
forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . .³²²

The LMRA Amendments to the NLRA also provided in § 187(a) that it was “unlawful for . . . this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4). . . .”³²³ Section 187(b) then provides:

Whoever shall be injured in his business or property by reason or [sic] any violation of subsection (a) . . . may sue therefor in any district court of the United States . . . without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.³²⁴

Because the IBT made no secret of its use of secondary boycotts, Overnite early sought relief and damages in the courts pursuant to § 187 of the LMRA.³²⁵ A major case was filed in U.S. District Court for the Northern Division of Georgia, Atlanta Division, because of the concentration of cases in that district and their impact on Overnite’s business. As examples of these cases, the cases described in the *Second Amended Complaint* therein are summarized below.³²⁶

On August 2, 1999, Phil Young, IBT vice-president and national freight director, sent Overnite customers a letter that advised them that there would be a nationwide strike, and that “ambulatory picketers will be used to picket all customers.”³²⁷ This was done as promised, but the poor response by Overnite employees to the strike call led the IBT in the second strike year to alter its boycott plans and to concentrate on areas, such as Atlanta, where it could be certain of obtaining adequate pickets and could recruit such pickets to rove in order to picket in other areas. “Instead of scattered picketing in many cities, the IBT planned to ‘saturate one city at a time with as many members as possible.’”³²⁸ Atlanta

322. 29 U.S.C. § 158(b)(4)(i)(B) (2000).

323. 29 U.S.C. § 187(a) (2000).

324. 29 U.S.C. § 187 (2000).

325. *Overnite Transp. Co. v. Int’l Bhd. of Teamsters*, No. 01-CV-1022-CC (N.D. Ga. 2001).

326. *Overnite Transp. Co. v. Int’l Bhd. of Teamsters*, No. 01-CV-1022-CC, *Second Am. Compl.* (N.D. Ga. 2001) (unpublished) (on file with author).

327. *Id.* at 4.

328. *Id.* at 5.

was also chosen as an initial target for such "saturation."³²⁹

On October 23, 26, and 27, 2000, IBT and Local 728 officers, employees, agents, and supporters picketed a Mack Truck facility in the small town of Morrow, south of Atlanta, at a time when no Overnite employee was present.³³⁰ As a result, Mack ceased doing business with Overnite.³³¹ The union actions as described were clearly in violation of § 158(b)(4)(i) and § 158(ii)(B) of the NLRA.³³²

Similar activities with the same conditions and results - ceasing to do business with Overnite - that took place at Huffman Tires in Atlanta and Tara Materials in Lawrenceville (North Atlanta) by the Teamsters were also described as clearly in violation of NLRA § 158(b)(4)(i) and § 158(ii)(B) of the NLRA.³³³

Memphis, Tennessee, like Atlanta, was a stronghold of the Teamster organization within Overnite and secondary picketing was conducted there. A target was United Warehouse, which provided warehousing and logistics services to Eveready Battery/Energizer, an Overnite customer.³³⁴ Picketing occurred there in violation of the NLRA, and Eveready ceased doing business with Overnite.³³⁵

Secondary picketing also occurred at the Swanson Intimate Commissary Services in Toledo, Ohio, on or about February 1, 2001, again resulting in a company ceasing doing business with Overnite.³³⁶

Overnite's major case for recovery of financial damages for illegal secondary picketing demanded a very substantial, but unknown dollar amount. It was settled as part of the confidential negotiations of the past several years and the case dismissed.³³⁷ It is likely that Overnite received a substantial sum for the settlement, but the amount is unknown.

Also in the courts was a major defamation case in which Overnite, former president James Douglas, and officials Robert Edwards and Gary McGuire sued the IBT and Local 728 in Atlanta, former IBT president Ronald Carey, and three other union officers for claiming that Douglas, Edwards, and McGuire had been "formally indicted by the US Government of massive violation of Federal Labor Laws," and of circulating this and other defamatory materials widely.³³⁸ The complaint demanded

329. *Id.* at 6.

330. *Id.* at 7.

331. *Id.* at 8.

332. *Id.*

333. *Id.* at 9-11.

334. *Id.* at 11.

335. *Id.* at 12.

336. *Id.* at 13.

337. *Overnite Transp. Co. v. Int'l Bhd. of Teamsters*, No. 1:01-CV-1022-CC (N.D. Ga. Nov. 21, 2003).

338. *Douglas v. Maddox*, 505 S.E. 2d, 43, 43 (Ga. Ct. App. 1998).

\$500,000 in compensatory and punitive damages and the same amount for the company and for each of the allegedly defamed executives who were claimants.³³⁹ The case likewise was allegedly settled on a confidential basis.

In Kansas City, the parties sued each other.³⁴⁰ This litigation involved the discharge of four individuals for strike violence, Overnite-obtained injunctions against such violence. Also the company brought lawsuits against employees from other companies for strike misconduct at or against Overnite facilities. The IBT brought charges with the NLRB in regard to Overnite's disciplining.³⁴¹ The costs of pursuing this case and the time and expense required to do so induced Overnite and the union to move to negotiation. Overnite ended up paying the employees discharged, but securing an agreement that they not be reinstated and never apply for work at the company in the future.³⁴² The NLRB cases were withdrawn by the union which agreed to a one year continuation of the injunction against strike violence.³⁴³ Overnite also paid certain moneys, but concluded this was cheaper than litigating especially since it received what it most desired, no reinstatement for the charged employees and a one year injunction against future strike violence.³⁴⁴

The IBT gained because it could have pointed to the settlement as "proof" that Overnite had engaged in unfair labor practices although the company denied this charge. The IBT did not, however, use this information in any substantive manner in so far as could be determined.

C. THE IBT'S SEARCH, INITIAL GAIN, AND THEN LOSS IN GISSEL CASES

The IBT adopted a number of strategies aimed at convincing the NLRB and the courts that Overnite was a viciously antiworker and antiunion employer as a means of gaining public, NLRB, and judicial support for its bargaining objectives. Thus, union supporters filed more than 1,000 unfair labor practice charges with the NLRB.³⁴⁵ The great majority of these cases were either dismissed or withdrawn and most of the others were settled, or otherwise disposed of after the parties met to attempt to reduce litigation.³⁴⁶ There was, however, no general agreement for the

339. *Douglas v. Maddox*, No. E37838, 7-9 (Ga. Super. Ct. 1996).

340. Information from Overnite Transp. Co. attorneys.

341. *Id.*

342. *Id.*

343. *Id.*

344. Talking Points for Kansas City Settlement from Overnite Transp. Co. 2 (2001). (on file with author).

345. *Id.*

346. Overnite Transp. Co., 329 N.L.R.B. 990, 991 (1990).

eleven locations³⁴⁷ where the union lost elections and then requested *Gissel* bargaining orders rather than a new election, but the parties understood that a consolidated case involving four cases, Louisville, Kentucky; Norfolk, Virginia; Bridgeton, Missouri; and Lawrenceville (North Atlanta), Georgia, could well be a decisive one.

The IBT initially assumed that it had finally won its goal in the major four location case, as did everyone else. The administrative law judge ("ALJ") found that the local unions had lost NLRB elections because of extensive Overnite unfair labor practices, and that there was no hope of fair elections.³⁴⁸ Therefore, both the ALJ and the NLRB Board ruled that a *Gissel* bargaining order should be ordered.³⁴⁹ The Board also issued a broad cease-and-desist order that directed the company to rescind the overtime and nonwage portions of a productivity package which it had effectuated at the four facilities, and to pay damages to workers at fourteen other unionized facilities where employees did not receive wage and mileage increases in 1995.³⁵⁰ Overnite appealed the decision to the Court of Appeals, Fourth Circuit, but a three judge panel voted 2-1 to sustain the NLRB decision.³⁵¹ Overnite then sought a ruling *en banc* from the Fourth Circuit, but in April 2002, it was announced that Overnite's request had been denied.³⁵² The IBT headlined in its journal, "Overnite Must Pay Workers \$3 Million," and declared that the court decision "will lead to negotiations with all thirty-seven terminals on behalf of 3,500 Teamsters."³⁵³

Overnite likewise assumed that the Teamsters had won the case. Following the Court's orders enforcing those of the NLRB, Overnite posted notices directed by the Board in all facilities where it was required to do so.³⁵⁴ It also began negotiating with the NLRB as to which employees

347. *Id.* at 993. There was one additional location, Chattanooga, Tennessee, on the list, but the IBT failed to obtain the number of eligible employees in the election there, which it lost. As a result it could not claim that it had a majority of signed cards to support its claim that it had a majority membership which Overnite dissipated by unfair labor practices, and that these unfair labor practices caused its representation vote defeat. Such a showing was essential for the Board to order a *Gissel* order. Hence, Chattanooga was dropped from the union claims for such an order. Personal investigation with Overnite Transp. Co. by author.

348. Overnite Transp. Co., 329 N.L.R.B. 990, 991 (1990).

349. *Id.* at 996.

350. *Id.* at 996-97.

351. Elizabeth Walpole-Hofmeister, *Fourth Circuit Denies Overnite's Request for Rehearing: Carrier to Bargain with IBT*, DAILY LAB. REP. (BNA) No. 132 (Apr. 20, 2002), at A-8.

352. *Id.*

353. *Overnite Must Pay Workers \$3 Million*, TEAMSTER, June-July 2001, at 7. The 37 terminals in the IBT list included the 22 where it held bargaining rights and 15 where it lost elections.

354. Telephone Interview retained attorney who was handling this matter for Overnite (Sept. 2001).

should receive back pay and how much they should receive.³⁵⁵ In mid-May, however, the Fourth Circuit directed the NLRB to respond to the company's petition requesting it to set aside the panel's decision affirming the Board's decision, to hold an *en banc* hearing, and to issue a new decision *en banc*.³⁵⁶ On July 16, 2001, the Fourth Circuit issued a one sentence order granting Overnite's request vacating the February 16 decision of the panel enforcing the NLRB order and setting the hearing, after which an *en banc* ruling would be issued.³⁵⁷ The *en banc* ruling was issued on February 11, 2002.³⁵⁸ It supported most of the unfair labor practices findings of the NLRB, but concluded

that the Board's decision to issue *Gissel* orders was not supported by evidence sufficient to justify that extraordinary relief. By declining to follow our long-standing precedents for the application of *Gissell* [sic], the Board improperly bypassed the employees' will on the question of representation, frustrating the fundamental policy of employee democracy established by Congress in the labor laws.³⁵⁹

The Fourth Circuit had developed very strict rules for the implementation of *Gissel* orders. Neither the ALJ nor the NLRB provided any supporting information to sustain their rulings that the Overnite unfair labor practices were so serious that fair elections could not be held.³⁶⁰ Accordingly, that court found that, although it agreed that Overnite had committed unfair labor practices, the solution was to order new representation elections, not to impose a bargaining order.³⁶¹ The Teamsters never applied for such elections so that the results of the earlier elections in which the union lost became permanent.

Although the *en banc* decision sustained many of the unfair labor practice decisions that supported the NLRB and the court panel decisions, it rejected the claim related to the productivity increase stating that this would require conduct of nonunion companies superior to that required of unionized ones.³⁶² This had the effect of nullifying the back pay award that had been ordered not only to employees at the four locations, but also to many at other terminals as well. If the decision vacating the panel ruling had come just a short time later, the checks might well have been sent to employees and been difficult to recover.

355. *Id.*

356. *Fourth Circuit Grants Overnite Rehearing*, DAILY LAB. REP. NO. 132 (July 11, 2001), at A-9.

357. *Id.*; information also supplied by Daniel B. Pasternak, Esq., who was working on the back pay computations when the Fourth Circuit ordered the setting aside of the panel decision.

358. *Overnite Transp. Co. v. N.L.R.B.*, 280 F.3d 417, 417 (4th Cir. 2002).

359. *Id.* at 422.

360. *Id.* at 436.

361. *Id.* at 438.

362. *Id.* at 432.

The Fourth Circuit's *en banc* decision had both an immediate and long term impact on the IBT-Overnite relationship. Even before the decision was issued, the NLRB had decided a subsequent case in which the same ALJ has issued virtually the same ruling as he did in the four location case. This case involved seven locations: Dayton and Richfield, Ohio; Parkersburg and Nitro (Charleston), West Virginia; Nashville, Tennessee; Rockford, Illinois; and Bensalem (Philadelphia), Pennsylvania.³⁶³ The NLRB affirmed this decision after the Fourth Circuit took control of the four location case, but before the *en banc* decision was reached.³⁶⁴ Chairman Hurtgen, who voted with the majority in the prior case, dissented from this Board decision stating, "there is at least some doubt as to whether the Board's findings and conclusions in [the prior case] are correct."³⁶⁵ The NLRB did, however, order a hearing to determine whether Overnite's demand that union "misconduct" [violence] at four of the plants - Dayton, Nashville, Rockford, and Bensalem - merited revocation of bargaining orders at these locations as Overnite pleaded.³⁶⁶

Hurtgen's position proved accurate. The seven-facility decision was issued in August 2001, and immediately appealed by Overnite to the Fourth Circuit which had already vacated the court's panel decision.³⁶⁷ On October 2, 2001, the Fourth Circuit placed Overnite's appeal

in abeyance pending the Court's *en banc* decision in . . . [the four location case]. On February 11, 2002, the Court issued an *en banc* decision in that case which explicitly rejected the rationale that the Board also relied on in this case. Accordingly, it is hereby

ORDERED AND ADJUDGED that consistent with the Court's *en banc* decision in *Overnite Transportation Co. v. NLRB* . . . 280 F.3d 417 (February 11, 2002), the petition for review in this case is granted, and enforcement of the Board's order is denied.³⁶⁸

As in the earlier case, the IBT did not request any election. Thereafter, the Board joined with Overnite for a *Joint Motion* to remand the case to the Regional Director, NLRB Region 9, "for further appropriate action," apparently to cancel the Board's order that union violence at several facilities included in the dismissed *Gissel* bargaining order be

363. *Overnite Transp. Co.*, 334 N.L.R.B. 1074, 1075 (2001).

364. *Id.* at 1074.

365. *Id.* at 1081; Susan J. McGolrick, *Unfair Labor Practices: NLRB Orders Overnite to Bargain With IBT at Seven Additional Facilities*, DAILY LAB. REP. (BNA), No. 162 (Aug. 22, 2001), at AA-1.

366. McGolrick, *supra* note 365, at AA-1.

367. *Id.*

368. *Overnite Transp. Co. v. N.L.R.B.*, No.01-2031 (4th Cir. 2002) (unpublished) (on file with author).

investigated for violence.³⁶⁹ This was done and the case dismissed ending the NLRB order.³⁷⁰ Thus the IBT attempts to win bargaining rights in situations in which the union lost NLRB elections was terminated. Table 4 lists the locations where the NLRB granted *Gissel* bargaining orders, but which the Court of Appeals, Fourth Circuit, overturned.

One other case that is significant in discussing *Gissel* situations concerns four locations: Lexington and Bowling Green, Kentucky; Detroit (Romulus), Michigan; and Buffalo (Tonawanda), New York. In fact, there is no *Gissel* aspect to these cases because the union won the NLRB representation election vote in each, but Overnite refused to bargain on grounds that the NLRB bargaining units and employee eligibility determinations were flawed.³⁷¹ After the Board ordered Overnite to bargain, the company appealed to the Fourth Circuit, claiming that the Board misconstrued unit determinations and worker eligibility in the various cases.³⁷² The Court rejected Overnite's reasoning and ordered the company to bargain.³⁷³

The net effect was that decertification elections could not be held at these facilities for one year. Bargaining took place, but no agreements were reached for the same reasons as discussed above. The decertification ban ended on July 28, 2003, and employees at Lexington, Bowling Green, and Detroit soon thereafter decertified the IBT.³⁷⁴ At Buffalo, the IBT withdrew representation rights.³⁷⁵ These results mean, as shown in Table 3, that Overnite is now completely union free except at its newly acquired Motor Cargo subsidiary where the employees at Motor Cargo's Reno, Nevada, terminal voted to retain the Teamsters as bargaining agent in a decertification election.³⁷⁶ In all other Overnite facilities, the end of Teamster bargaining rights is truly an amazing result of the Teamster effort to win bargaining rights by striking, and a union defeat as great as ever occurred.

D. THE IBT'S FINAL ATTEMPT TO GAIN A NATIONWIDE NLRB UNFAIR LABOR PRACTICE BARGAINING ORDER

The IBT made one last attempt to gain NLRB assistance in staving off defeat. It filed a nationwide unfair labor practice charge against

369. Overnite Transp. Co., 18-CA-13394 (formerly 9-CA-33793) N.L.R.B., *Suppl. Order*, (July 18, 2003) (unpublished) (on file with author).

370. *Id.*

371. Overnite Transp. Co. v. N.L.R.B., 294 F.3d 615, 617 (4th Cir. 2002).

372. *Id.* at 617-18.

373. *Id.* at 626.

374. See *supra* Table 3.

375. *Id.*

376. Overnite Corp. *Prospectus*, *supra* note 45, at 17.

TABLE 4
 OVERNITE TRANSPORTATION COMPANY
 FACILITIES WHERE NLRB DIRECTED *GISSEL* BARGAINING ORDERS
 BUT NLRB ORDER OVERTURNED BY U.S. COURT OF APPEALS,
 FOURTH CIRCUIT

Location	Local Union
Bensalem (Philadelphia), PA	107
Bridgeton, MO	600
Chattanooga, TN*	515
Dayton, OH	957
Louisville, KY	89
Nashville (Laverne), TN	480
Nitro (Charleston), W VA	175
Norfolk, VA	822
North Atlanta (Lawrenceville), GA	IBT International
Parkersburg, W VA	175
Richfield, OH	24
Rockford, IL	325

Source: NLRB and Judicial Litigation

*For the special case of Chattanooga and why it was dropped, see *supra* text note 347.

Overnite maintaining that the company had violated NLRA § 8(a)(5) by failing to bargain in good faith.³⁷⁷ The matter was referred to NLRB Region 18, Minneapolis.³⁷⁸ Joseph Bornong, a staff attorney, was assigned the case. He wrote Overnite's chief negotiator on September 5, 2001, that the charges "point to a violation of the Act," and listed the charges, all but one of which were taken from prior cases.³⁷⁹ According to Bornong:

The Union makes reference to only one alleged statement not already passed upon in a prior case to support its charge, that being a March 28, 2001, statement attributed to you [Raudabaugh] to the effect that Overnite's bargaining goal was to maintain uniformity in wages, benefits and conditions for both its union and non-union employees.³⁸⁰

Overnite's replies were very thorough. On December 10, 2001, Overnite's counsel explained several Overnite actions, such as its refusal to accept the grossly underfunded Central States Pension Fund, the meaning of various trucking terms which Bornong did not understand,

377. Overnite Transp. Co., No. 18-CA-1618 (2001).

378. *Id.*

379. Letter from Joseph H. Bornong, Field Attorney, NLRB Region 18, to John N. Raudabaugh, Overnite Chief Negotiator (Sept. 5, 2001) (on file with author).

380. *Id.* at 2.

and included documentary evidence.³⁸¹ Prior thereto, Overnite's counsel sent a detailed, nineteen page, single space letter on October 24, 2001, dealing with each aspect of the charge including its rationale:

Preliminarily, it is worthwhile to put the Union's bad-faith bargaining in perspective. The charge was filed on the heels of the [NLRB] Office of Appeals' July 26, 2001, affirmance of Region 9's dismissal of the Union's widely publicized Holly charge (Case No. 9-CA-37915). That charge accused Overnite of unlawful, indeed criminal, conduct, ranging from suborning perjury to bribing employees to vandalize Company property while blaming the Teamsters for the damage. After a lengthy and thorough investigation, Region 9 found the charge to be specious in its entirety. From the Union's vantage point, however, the charge served a significant purpose - it blocked decertification petitions. When the charge no longer could be milked for that purpose, the union filed this charge.³⁸²

Overnite's counsel also pointed out that if the charges were confirmed, it would give IBT President Hoffa an excuse to explain why no agreement had been reached as he was campaigning for reelection as president.³⁸³ Counsel then described how the IBT had avoided bargaining by refusing to meet often, taking long lunch periods and excessive caucuses, having key members of the negotiating committee not show up for meetings "because it wanted to wait for the enforcement of bargaining orders [in vain] in other, separate units," and in the meantime engaging in violence against employees and company equipment, as well as unlawful secondary boycotts.³⁸⁴

The balance of Overnite's letter replied in depth to each of the union charges, noting why they were out of order, time-barred, or just plain erroneous.³⁸⁵ The union replied but was unable to explain away the facts of the case, including that, throughout, it had stuck to the NMFA model despite Overnite's rejection and the fact that the NMFA agreement provided for multi-location bargaining and they were bargaining on a facility-by-facility single terminal basis.³⁸⁶

On April 23, 2002, Ronald M. Sharp, Regional Director, Region 18, sent a letter to the IBT announcing that he would not issue a complaint and would dismiss the union charge. He explained:

Overall bad faith or surface bargaining. The Employer has met at reasonable times and places, over 200 meetings in six years. The Employer has offered a

381. *Overnite Letter Dec. 10, 2001, supra* note 158, at 1.

382. Letter from Kenneth T. Lopatka, Overnite counsel to Joseph H. Bornong, Field Attorney, NLRB Region 18 (October 24, 2001) (on file with author).

383. *Id.* at 1.

384. *Id.* at 2-3.

385. *See generally* Letter from Kenneth T. Lopatka, *supra* note 382.

386. *Id.*

contract that included a cause restriction on discharges, a guaranteed annual wage increase, and a grievance procedure permitting arbitration in case of discharges, suspensions and seniority disputes and an exception to the contract's no strike clause for other disputes. The Employer has not committed any recent unfair labor practices that sufficiently establish a motive to avoid an agreement, and it has undergone sufficient management changes since its unlawful 1994-1995 antiunion campaign. Based on the totality of the circumstances, it does not appear that I could sustain the burden of proof necessary to establish surface bargaining.³⁸⁷

On October 11, 2002, following a meeting requested by the union and a subsequent meeting with Overnite's counsel to defend the charge dismissal, Arthur F. Rosenfeld, NLRB General Counsel, denied the IBT's appeal from the Regional Director's letter decision of April 23, 2002, stating that "[c]ontrary to your contentions on appeal, the Employer's proposals did not eliminate the possibility of the Union playing a significant role in representing employees with respect to important terms and conditions of employment. Accordingly, further proceedings herein were deemed unwarranted."³⁸⁸ The cancellation of the strike became certain as a flood of affirmative decertification votes, mostly by overwhelming numbers, as set forth in Table 3, began at a rapid rate.

IV. CONCLUSION

The Teamsters attempt to organize Overnite, the largest open shop LTL trucking company, was grounded upon inaccurate assumptions and the use of illegal tactics.

A. THE TEAMSTERS' FAILURE

Teamster basic assumptions were that a union which had organized only twenty-two of the company's 166 terminals could attract large employee support and that its illegal tactics would insure the company's complete defeat in about three weeks. Complete defeat of the company would mean that Overnite would be compelled by a massive shutdown either to go out of business or to sign an agreement that varied very little from the NMFA agreement. In fact, the strike lasted three years, by which time the IBT was ready for complete surrender and Overnite was operating full-time with few, if any, disruptions.

All the IBT's assumptions about employee behavior were quite quickly shown to be inaccurate. There was little support for the strike from unorganized facilities, and in most of the unionized ones, a majority

387. Letter from Ronald M. Sharp, Regional Director, NLRB Region 18, to James A. McCall, Special Counsel, IBT (Apr. 23, 2002) (on file with author).

388. Letter from Arthur F. Rosenfeld, General Counsel, NLRB by Yvonne T. Dixon, Director, Office of Appeals, to James A. McCall, IBT, AFL-CIO (Oct. 12, 2002) (on file with author).

of employees crossed union picket lines either immediately or soon thereafter, so that Overnite was operating at a high level within a relatively short time. Union violence and illegal secondary boycott activity were met by aggressive use of legal tactics by Overnite so that the damage to its people, property, and customers declined as the strike continued and the number of strike supporters continued to drop. At the end of six months, it was obvious that, absent massive governmental support of the union's position, the strike was lost. This failure was, in no small part, also because the IBT top officials felt that anything less than the NMFA agreement was politically impossible for them to accept and Overnite had fundamental reasons for not signing such a document.

The NLRB provided strong union support, but the courts, particularly the Court of Appeals for the Fourth Circuit, refused to accept the NLRB's unsupported fundamental conclusion that Overnite should be ordered to recognize and to bargain at eleven terminals where the IBT had lost elections. Instead of these *Gissel* orders, the Court decreed that there should be new representation elections. The IBT was too weak at these locations even to request elections. Instead, the IBT filed a company-wide unfair labor practice charge which the NLRB general counsel took about one year to decide before ruling that it had no basis in fact and dismissing it. That was the end of the line. President Hoffa called off the strike at a politically opportune time for him after reaching agreement with the largest unionized contractors on a new NMFA deal.

By late September 2003, all twenty-six unionized bargaining units had voted, most by large margins, to decertify the IBT, and therefore, Overnite was union free, except for the situation in the Motor Cargo subsidiary. This was a union defeat of immense proportions, as set forth in Table 3.

Meanwhile, during the strike, the company had continued to grow and expand despite the enduring union attempted disruptive tactics. Overnite increased the number of its terminal service centers to 208 from the pre-strike number of 166, and its employee count from 13,000 to 14,400, while increasing its number of tractors to more than 6,000 and its trailers to 21,000.³⁸⁹ This permitted Overnite to provide full coverage in all fifty states with direct access to over 45,000 cities in the United States, Canada, Puerto Rico, Guam, the U.S. Virgin Islands, and Mexico.³⁹⁰ As a result, Overnite is moving toward being more of a national carrier rather than a regional one as it seeks more business.

Many questions remain about the future. A reader has raised two

389. Overnite Press Release, *Overnite Announces Divestiture Decision by Union Pacific* (Aug. 4, 2003) (on file with author) [hereinafter *Overnite Press Release, Aug. 2003*].

390. *Id.*

interesting ones: why did the Teamster strike not garner more employee support; and was there a racial factor in the situation.

B. THE LACK OF EMPLOYEE SUPPORT

There is no question that the Teamster strike failed in large part because it had little employee support. Even the IBT's probably exaggerated initial claim, stating that 2,000 employees went on strike out of a total of 14,000, was hardly a number for the union to win and one that closed no Overnite facilities. Employee relations literature includes many publications as to why employees do not support unions, many of which are not much help in analyzing particular situations that have several idiosyncratic features like this one.³⁹¹ The Overnite environment had a combination of general and particular environmental factors that are not easy to replicate.

Overnite is a company that was founded in the South where it remains very strong.

The southern states and municipalities generally do not welcome unions, have enacted right-to-work laws that forbid compulsory union membership, and result in unionized facilities having a varying percentage of employees who decline to join and to support union bargaining agents financially and emotionally.³⁹² Thus, even unionized locations are often not enthusiastic supporters of union action and can regard strikes as unnecessary or even foolish financial misadventures for which community, state, and local government support is weak at best. Overnite, a Richmond, Virginia company, and Harwood Cochrane, its founder, had earned strong respect in the community, and the Teamsters' union certainly lacked any such emotional support and certainly did not gain it with its use of violence.

The tremendous impact of deregulation that resulted in the disappearance of hundreds of unionized companies could not have been missed by Overnite employees who had seen their company grow while unionized ones disappeared. Attempts of the union to promise better jobs if Overnite were unionized must have fallen on deaf ears because of what was happening all around them. Like employees in steel, automobiles,

391. See generally Steven H. Kropp, *Reflections on Law, Economics, and Policy in Public Sector Labor Relations in Canada, the United States, and the United Kingdom*, 27 *LAW & POL'Y INT'L BUS.* 825 (1996).

392. The Federal Government annually surveys the extent of union membership by various categories. The 2003 report found that "all states in the East South Central and West South Central divisions continued to have [union membership rates below the national average]." North Carolina and South Carolina, as in the past, "report[ed] the lowest union membership rates, 3.1 and 4.2 percent, respectively." See U.S. Dept. of Labor, *News*, USDA 04-53 (Jan. 21, 2004), at 2, available at <http://www.bls.gov/news.release/-pdf/union2.pdf>.

and other industries, they surely found union promises of security highly questionable at best.

The Teamsters had been unable to win a contract in recent years at Overnite. Employees had begun to react with their unhappiness about Teamster representation by filing decertification positions at about one-half of the Teamster organized locations, and by rejecting representation in nonunion locations. The fact that the IBT fought to avoid decertification elections and was filing for few representation ones indicates the employees had turned against the union prior to the strike call.

Union tactics were designed to force unionization regardless of employee desires. The most crude and self-defeating was the widespread use of violence against those who worked instead of obeying the strike call. There seems to be no question that violence exacerbated employee anti-unionism. Moreover, the fact that the company kept facilities running, clearly tried to protect employees and their property, and fought these union tactics to a standstill undoubtedly increased employee determination to support the company and to eliminate unionism in their daily lives. The idea that employees would rush to join unions given the opportunity, which propelled what now seems as a ridiculous statement by IBT director of organization, Murphy, prior to the strike, was based upon the assumption that employees stayed nonunion because of fear for their jobs. Just the opposite appeared true: there appeared to be much more fear that they would lose their jobs if the union won. Union tactics were certainly a major cause of the union's so thorough defeat, together with employee appreciation of what the company was doing to protect their life and property.³⁹³

C. WAS A RACIAL FACTOR INVOLVED?

Race has not been absent from the trucking industry as an employment factor. It was not absent from the situation at Overnite, but did not appear to have been a decisive factor. Although this author has researched and published extensively on the issue,³⁹⁴ race was not made a special part of the research for this article. Yet race did play a part, but a small indecisive one.

393. These statements are based upon what occurred during the strike which was carefully examined well before the strike occurred as well as during the strike itself.

394. See generally Hebert R. Northrup, *ORGANIZED LABOR AND THE NEGRO* (1944). Later the author directed, and was the leading author, for the Ford Foundation sponsored study of industry racial policies that covered thirty-one industries in the *RACIAL POLICIES OF AMERICAN INDUSTRY* (1968) and *STUDIES OF NEGRO EMPLOYMENT* series (1970-79). A study of the trucking industry's racial policies is found in both these series, and is cited below. The author's bibliography of "Equal Employment Opportunity and Civil Rights" includes forty-four articles and books and is available upon request.

Overnite may have had a better record in African-American employment than many other companies. Both the IBT and companies discriminated against African-Americans over-the-road work before the courts began to intervene in the early 1970s.³⁹⁵ Some groups even “explained” their discrimination by claiming that African-Americans lacked the capacity to handle large motor rigs while large numbers of this minority did so working for the U.S. Post Office.³⁹⁶

Knowing about this discrimination, the author was surprised to witness twice African-American drivers handling large Overnite rigs in the Richmond area during the early 1970s.³⁹⁷ The current management employees whom the author contacted on this issue knew nothing of past action in this regard.

African-Americans were, however, strongly represented in the various terminal facility jobs. Memphis and Atlanta probably have the largest percentage of African-American employment among the larger terminal facilities. In both, the vote was close in favor of decertification, as shown in Table 3. Memphis voted 180 to decertify and 151 to retain the Teamsters as bargaining agent.³⁹⁸ Thus a change of fifteen voters would have altered the result. The Atlanta score was also narrow, recording ninety-two votes to decertify and fifty-three votes to retain the Teamsters as bargaining agent, requiring twenty shifts of votes to retain the bargaining agent.³⁹⁹

This would seem to reflect the national figures as set forth in the above quoted U.S. Department of Labor study of union membership in 2003. It found that “Blacks were more likely to be union members (16.5 percent) than were whites (12.5 percent), Asians (11.4 percent), or Hispanics (10.7 percent)”.⁴⁰⁰

D. UNCERTAINTIES AHEAD

Despite Overnite’s amazing victory in repelling the IBT strike, there remain uncertainties in the future as companies, including Overnite, alter their structure and as public policy changes.

395. See generally Richard D. Leone, *The Negro in the Trucking Industry*, in NEGRO EMPLOYMENT IN LAND AND AIR TRANSPORT, Studies of Negro Employment, Vol. V (Herbert R. Northrup et al ed., 1971). See also Steven H. Kropp, *Deconstructing Racism in American Society - The Role Labor Law Might Have Played (But Did Not) In Ending Race Discrimination: A Partial Explanation and Historical Commentary*, 23 BERKELEY J. EMP. & LAB. L. 369 (2002).

396. Leone, *supra* note 395, at 43.

397. The author was doing regular consulting in the Richmond area during this period, but none with Overnite.

398. See *supra* Table 3.

399. *Id.*

400. U.S. Dept. of Labor, *supra* note 392, at 2.

1. *The Yellow-Road Merger*

One such change has been the takeover of the largest LTL unionized carrier, Roadway, by the second largest, Yellow Corporation.⁴⁰¹ The resultant merger controls about sixty percent of the LTL national business.⁴⁰² Although both buyer and seller agree that Roadway will continue to operate separately, few take that claim seriously because there will be many opportunities for consolidations and savings of terminals, back office operations, and even drivers.⁴⁰³ If this occurs, there will be unemployed drivers and terminal employees who might seek jobs at Overnite, and who are used to working under union conditions since it would violate the NLRA to refuse them jobs because of their union affiliation if jobs are available and the applicants are qualified; this could create a problem for Overnite.

Another factor to consider is that some customers either of Yellow or Roadway may decide that they desire a second carrier so that one carrier will not control all their business. It would be likely that some of these would approach Overnite about such an arrangement. Here Overnite has had ample experience, not only during the Teamster strike of 1994, when it took on more work than could be handled expeditiously, alienating customers and employees, and causing the successful union drives to unionize terminals which followed,⁴⁰⁴ but also when Consolidated Freightways ("CF") collapsed and shut down.⁴⁰⁵ According to Gordon S. Mackenzie, senior vice-president and chief operating officer of Overnite, the company was "very judicious in the deals" which it cut in the latter case.⁴⁰⁶ Overnite had clearly learned from the 1994 experience, and is likely to act accordingly as similar opportunities arise.

2. *Freeing the Teamsters from Government Control?*

The Teamsters have been pushing hard toward an agreement that would free the union from fourteen years of government oversight which was instituted to fight and eliminate criminal elements within the union. If this occurs, it would give the union more autonomy and free it from the costs of the oversight which have been running about \$6 million per year. As the *Wall Street Journal* has pointed out, "it would give the union more autonomy and credibility, though it won't solve more fundamental issues

401. John D. Schulz, *Billion Dollar Bombshell*, TRAFFIC WORLD, July 14, 2003, at 48; Claudia H. Deutsch, *No. 2 in Trucking, Yellow, will buy No. 1, Roadway*, N.Y. TIMES, July 9, 2003, at C1.

402. Schulz, *supra* note 401, at 48.

403. John D. Schulz, *The Morning After*, TRAFFIC WORLD, July 21, 2003, at 9.

404. Schulz, *supra* note 84, at 12.

405. Pui-Wing Tam, *supra* note 23, at A-3.

406. John D. Schulz, *Wild Card Year*, TRAFFIC WORLD, Dec. 23/30, 2002, at 24.

such as declining membership.”⁴⁰⁷ Since the early 1980s, IBT membership has declined from about 1.9 million to 1.4 million.⁴⁰⁸ Even if all the funds gained from the lifting of federal government oversight, the union, to judge by the decertification votes listed in Table 3, is so thoroughly discredited with Overnite employees, that opportunities to regain a position there seems very slight. Additionally, the IBT has given its political capital to the Democratic Party by endorsing John Kerry for President thus desensitizing the current administration in any support for abolition of Federal supervision.

Meanwhile, the *Wall Street Journal* has been cognizant of the negotiations to free the IBT from government supervision. Quoting from paragraphs of the consent settlement on the NLRB’s violence charge which read “WE WILL Not use or threaten to use a weapon of any kind . . . WE WILL Not endanger or impede the progress of or harass any non-striking employee . . . WE WILL NOT batter, assault . . . or attempt to assault any non-striking employee of Overnite or any member of his or her family . . . WE WILL NOT threaten to kill or inflict bodily harm . . . or otherwise threaten unspecified reprisals. . . .” the *Wall Street Journal* wonders why the Federal Government should consider even removing such an organization from government supervision.⁴⁰⁹

Whatever prospect the IBT had to be eliminated from the strict control of the Federal Government probably ended when the former FBI monitor and his staff that Hoffa had appointed to demonstrate his support of “clean” unionism resigned declaring that Hoffa had not supported, but indeed sabotaged attempts to clean up situations in Houston, Chicago, and New York.⁴¹⁰ This event and the release of reports by the internal counsel received wide press coverage.⁴¹¹ It certainly would seem that it would be a political mistake for the Bush Administration to support any change in government supervision at this stage.

3. *Independent Overnite Corporation*

A major change is that Union Pacific has sold 100 percent of the stock of Overnite in an IPO because Overnite was no longer considered “a core asset.”⁴¹² The IPO is considered a success. It was priced at \$17 per

407. Carlos Tejada & Majorie Valbrun, *Teamsters Say Federal Oversight May Be Ending*, WALL ST. J., Aug. 20, 2003, at B2.

408. Schulz, *supra* note 3, at 7.

409. Editorial, *supra* note 220, at A20.

410. *Head of IBT Anti-Corruption Effort Resigns, Says Hoffa Has Obstructed His Investigation*, DAILY LAB. REP. (BNA) No. 84 (May 3, 2004), at AA-1.

411. *Id.*

412. *Union Pacific Plans Sale of Shares of Trucking Unit*, N.Y. TIMES, Aug. 18, 2003, at C4; *Overnite Press Release*, Aug. 2003, *supra* note 389; John Gallagher, *Overnite Independence*, TRAFFIC WORLD, Aug. 11, 2003, at 9.

share, went up to \$19 during the sale, and was trading on the Nasdaq around \$30 per share in the autumn of 2004.⁴¹³ The same management remains in charge, and the same policies are being followed. For example, shares of the new corporation's stock were distributed to employees. The stock seems to have been purchased by a diversified number of investors including many employees who purchased it in addition to the distribution and who will not be anxious to upset Overnite's successful operations and policies. John W. Fain, Overnite's senior vice-president of sales and marketing stated in a letter to customers:

[T]he reasons you have chosen to make Overnite your transportation carrier - service, quality, and value - are unaffected by this week's announcement. The same drivers, service center managers, and sales representatives you have come to rely on to handle your transportation needs in the past will be there for you today and tomorrow.⁴¹⁴

Most important for Overnite's future is that management seems determined to continue its policies of being fair and thoughtful managers and supervisors, treat people fairly, and do not gloat over the union defeat. Anything else could cause a reaction that would undo what management has gained. Meanwhile, the IBT's tactics and major failure could make unionization at Overnite difficult to achieve, especially if attempted by the IBT. This case involves a classic study of what unions should not do if they have neither the support nor the strength to command employee support in a collective bargaining struggle.

4. *The IBT's Future in Trucking*

As a matter of fact, the future of the IBT in motor transport seems to have been made more bleak by its major failure in the Overnite strike. According to the associate editor of *Traffic World*,

Trucking employers, emboldened by the defeat of organizing attempts at Overnite Transportation, say they no longer fear the 1.4-million-member [IBT]. In fact, the Teamsters largely have become an afterthought to trucking executives. . . .

Despite having a popular leader in President James P. Hoffa, the union has not been able to win over workers at thousands of nonunion trucking companies. The Teamsters have not organized a large trucking company since the Motor Carrier Act of 1980 deregulated the trucking industry.⁴¹⁵

Unless the IBT learns how to court employees and gives up its utilization of violence and illegal coercion against the very people it attempts

413. Nasdaq quotations as published by the WALL ST. J.

414. Gallagher, *supra* note 412, at 9 (quoting John W. Fain).

415. John D. Schulz, *supra* note 3, at 7.

to unionize, this is not likely to change unless trucking companies fail utterly to treat employees with decency and fairness. There is some evidence that this may have allegedly have taken place. IBT has targeted a subsidiary of USF a very large, Chicago-based holding company that owns and operates five regional LTL concerns among other trucking facilities. According to John D. Schulz in *Traffic World*:

USF operates five regional LTL concerns. Two are completely unionized, two have "white paper" labor agreements covering a handful of workers at a couple of locations and USF Dugan is completely nonunion. Approximately 48 percent of USF's total work force of 21,000 is covered by Teamster agreements. More than 90 percent of the unionized workers are at USF Holland in the Midwest and USF Red Star in the Northeast. . . .⁴¹⁶

USF Dugan workers were allegedly upset about the failure of the company to provide healthcare benefits to the NMFA agreement that USF's unionized employees were receiving. The Teamsters' union organizers were contacted and rapidly signed up employees. The company refused to recognize anything but an NLRB representation election. The IBT requested NLRB representation elections at Cincinnati, Memphis, and Mobile, where it won, at Nashville where it was rejected, and at Little Rock where it withdrew its petition after the strike had shut down of Red Star, one of USF's unionized-owned firms.⁴¹⁷ This strike, as a move, may have tarnished the IBT's initial success.

On May 23, 2004, USF Red Star shut down, laying off about 2,000 employees after the Teamsters suddenly struck the entire company.⁴¹⁸ USF blamed the sudden layoff on the strike which followed an attempt by the Teamsters to secure representation for fifteen clerical workers at Red Star's headquarters in Newark, New Jersey. The company chief executive stated:

The unexpected and unilateral job action initiated [May 21] by the International Brotherhood of Teamsters had triggered a loss of customers and revenue to the point where Red Star would never be able to recover from the business losses caused by the Teamster job action.⁴¹⁹

Four days later, Hoffa declared that the company statement was a "smokescreen to shift the blame for [its] poor performance and management onto the workers."⁴²⁰ The union had demanded immediate recognition; management requested an NLRB election to ascertain employee

416. John D. Schulz, *Teamsters' New Target*, TRAFFIC WORLD, Mar. 22, 2004, at 13.

417. Date received by telephone from IBT organizing Department (May 21, 2004).

418. *2,000 Red Star Employees Laid Off Following Organizing Effort, Company Closure*, DAILY LAB. REP. (BNA) No. 102 (May 27, 2004), at A-4.

419. *Id.*

420. *Id.*

choice. The strike followed. According to the above cited *Traffic World* article, "Red Star has consistently lost money for the last ten quarters."⁴²¹

Both sides apparently suffered problems after the shut down at Red Star. USF found it difficult to schedule regional operators to take over the work formerly done by Red Star and blamed the shutdown for a second quarter loss of \$2 million.⁴²² Moreover, existing regional carriers developed "pricing powers" because of the carrier shortage and began to utilize it.⁴²³ Hoffa was apparently being criticized by internal opponents for the job loss.

These needs apparently brought the parties to a compromise solution. USF brought its profitable unionized carrier, USF Holland, to the Northeast and agreed to open 500 unionized jobs at eight of the former Red Star twenty-seven terminals – Albany and Syracuse, New York, Allentown, Harrisburg, and Wilkes-Barre, Pennsylvania, Richmond, Virginia, Baltimore and Philadelphia.⁴²⁴ Former Red Star employees were given job preference for these and other opened USF positions but were placed in introductory position with bonuses which would after two years add up to about \$20.30 per hour and were reinstated in their pensions and welfare benefits.⁴²⁵ The possibility of expanding USF Holland by opening more terminals was promised, and a deal was made for a quick check if office employees were claimed by the IBT via a count by a neutral person instead of the NLRB.⁴²⁶ A suit filed by some union personnel still laid off claimed that the union and the company were responsible does not seem likely to effectuate any change nor does an unfair labor charge made by such employees to the NLRB.⁴²⁷

The Teamsters are also attempting to unionize drivers in the "fragmented, highly competitive drayage market" of the various large harbors where containers are taking off ocean freighter and transferred to trucks.⁴²⁸ It is a difficult union drive and thus far has not reaped any direct success after several years of effort.⁴²⁹ To spur its organizing, the IBT is attempting to enhance its organizing capabilities by training and development. This endeavor does not concentrate on trucking but rather

421. Schulz, *supra* note 416, at 13.

422. *USF Posts 2Q Loss*, *TRAFFIC WORLD*, Aug. 2, 2004, at 23.

423. *Northeast's Pricing Power*, *TRAFFIC WORLD*, June 7, 2004, at 19.

424. *IBT Reaches Agreement With USF Holland Guaranteeing 500 Union Jobs in Northeast*, *DAILY LAB. REP. (BNA)* No. 122 (JUNE 25, 2004), at A-1.

425. *Id.* at A-2.

426. *Id.*

427. See John D. Schulz, *Red Star Closing Spurs Suit*, *TRAFFIC WORLD*, Aug. 30, 2004, at 26; *Shades of Red Star as USF Expands*, *TRAFFIC WORLD*, Sept. 20, 2004, at 24.

428. Bill Mongelluzzo, *Teamster Target*, *TRAFFIC WORLD*, Mar. 15, 2004, at 32.

429. Schulz, *supra* note 416, at 12.

is intended to enroll members wherever the opportunity lies.⁴³⁰ Whether the Teamsters will follow the USF experience with other organizing drives remains to be seen. Clearly, however, if company management does provide what appear to be inequities, Teamster organization has at least the opportunity for success. Assuming that, because of the Overnite experience, IBT organizing is dead can be a mistake especially if the target company's house is not in order in the opinion of the employees involved. On the other hand, there remains no strong promise that Teamster organizing in the trucking industry will achieve a serious expansion.

430. *Union Building Organizing Capabilities Using Resources From 2002 Dues Hike*, DAILY LAB. REP. (BNA) No. 102 (May 27, 2004), at C-1.