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Of Service Workers, Contracting Out, Joint Employment, Legal Consciousness, and the University of Miami

KENNETH M. CASEBEER†

On February 28, 2006, at the 10:00 p.m. shift change, the janitorial and groundskeeping staff at the University of Miami went on strike against their employer, UNICCO. UNICCO contracts with the University to provide these services. The strike was led by those workers assisted by the Service Employees International Union (SEIU) in an attempt to organize the workers. However, the strike itself occurred over unfair labor practices charged by the National Labor Relations Board (NLRB) during the organizational activities.

The strike and accompanying struggle were historic. And not just because it was rare that the workers won. Concepts of class appeared in a myriad of contexts. The victory represented the most basic way in which class enters discussion—the struggle of workers to organize and use their collective strength to obtain higher wages and better working conditions. However, class played a far deeper role. Before the strike was over, individual workers had been fired for union activities, students were undergoing disciplinary proceedings for protest activities, workers and students went on hunger strikes—some requiring hospitalization—and clergy were arrested. Thus, class consciousness became somewhat shared among workers, union activists, students, and faculty. Further, the

† Professor of Law, University of Miami. In addition to public documentation, the author was a direct observer of many of the events described within. The author thanks Andrew DeWeese, Ali DeMatteo, and Christine Blyth for their research assistance, and also thanks Professors Kevin Kordana and David Tabachnick and the participants of faculty workshops at the University of Virginia Law School and University of Miami Law School for their suggestions.

strike became both a community and civil rights struggle attracting national figures and celebrities. The striking workforce was almost entirely Latin American, Haitian, or Black. Thus, class solidarity emerged around a low wage community and its ethnic identity. More mundane, but perhaps most important for class analysis, the strike setting represented the quintessential new world economy: a large corporation contracting out work done on its premises to another large service provider utilizing largely poor minority workers, most of whom were immigrants. Thus, the labor market structured the experience of class. This form of employment differs from an older, well-known practice of worker contracting for short-term needs.¹ It is the service, rather than the worker, that the end user wants for an indefinite long-term use.²

Also, raising the stakes even further, the strike represented the coming together of the living wage movement and the union movement in the first major test of the Change to Win Coalition of unions that had recently broken away from the AFL-CIO.³ That schism basically turned on how to reinvigorate worker organization, especially in low wage occupations. Class is implicit both in terms of the conditions of organization and market wage segmentation. This is the present and future of mass service employment, and the University is the largest private employer in Miami-Dade County. Thus, the strike was about class and workers, class and consciousness, class and communities, class and labor markets, class and worker organization, and class as an entering wedge against the largest employer in area-wide struggles for advancement. All these issues are affected by the background of legal permissions, protections, and prohibitions, both inside and outside labor law proper.

1. According to Richard Belous, the contingent workforce increased approximately seventy-five percent faster than the overall workforce between 1980 and 1993. As of 1995, it was projected that the contingent workforce would grow to represent 50% of the U.S. labor force. Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 864-67 (1995).

2. See Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 BRIT. J. INDUS. REL. 727, 728 (Dec. 2004).

3. See generally *Change to Win, Who We Are*, <http://www.changetowin.org/fileadmin/pdf/CTW2Pager.pdf> (last visited Oct. 31, 2008).

In this Essay, Section I narrates the strike entirely from the point of view of strike supporters, recovering the potentially lost events and views of the workers.⁴ Section II analyzes the contemporary legal doctrine of contracting out services, focusing on the responsibilities of such contractors as joint employers under the National Labor Relations Act (NLRA).⁵ It also offers suggestions for labor law reform to maintain the vitality of the Act which fails to fit changing structures of economic organization. While the NLRA was meant to empower the working class by protecting collective organization, the new reality of third party employment hiring across an area's labor force fragments potential class interests and makes organization under traditional procedures very difficult at any location of work. The concluding section, Section III, describes how contemporary legal doctrine structured the parties' description and perception of the strike. Law appears in the narrative as both doctrine and legal consciousness.

I. THE STRIKE

In August 2001, *The Chronicle of Higher Education* reported that in a survey of 195 institutions, the University of Miami ranked second worst in terms of wages paid to janitors on campus, paying less than the federal poverty wage.⁶ The University appointed a committee to study the question, which in turn recommended pay raises. Nothing happened. In 2005, the SEIU began to help organize the employees of UNICCO, which had won a contract to provide housekeeping and groundskeeping work. In 2006, the workers were being paid starting at \$6.40 per hour with no health care benefits,⁷ more than \$4.00 per hour less than the Miami-Dade County living wage. The average wage was

4. By doing so, it will be situated in the historiographical movement of recovering lost and minority voices, applied to a contemporary setting.

5. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2000)).

6. Martin Van Der Werf, *How Much Should Colleges Pay Their Janitors?: Student Protests Force Administrators to Consider Issues of Social Justice and Practicality*, CHRON. HIGHER EDUC., Aug. 3, 2001, at A27.

7. Steven Greenhouse, *Walkout Ends at Univeristy of Miami as Janitors' Pact is Reached*, N.Y. TIMES, May 2, 2006, available at <http://www.nytimes.com/2006/05/02/us/02labor.html>.

\$7.53 per hour.⁸ With the announcement of a strike vote on February 26, 2006, University President Donna Shalala formed another review committee to study market wages. Her statement read in part:

It is in keeping with the mission and character of the University of Miami that we be responsive to questions raised by our constituents regarding the compensation and benefits of employees of outside contractors working on the University's campuses.

... Because changes in wages and benefits during an organizing campaign can be unlawful if motivated by union considerations, the University has, to date, remained silent on those issues.

The University has a responsibility and an obligation to be responsive to its community, however We have heard from virtually every constituent group in our University community, including students, faculty, staff, alumni, trustees, donors, civic leaders, the clergy, elected officials, and the SEIU, all of whom have called for—even demanded on occasion—an increase in resources from the University for employees of outside contractors.⁹

However, the strike called February 26, 2006, was neither over recognition of the union nor for higher wages. Rather, the strike was called over unfair labor practices by UNICCO during the organizing campaign. This status was important because, under the NLRA, unfair labor practice strikers cannot be permanently replaced by their employer as is the case with purely economic or organization strikes.¹⁰

In January, the NLRB issued charges against UNICCO that included interrogating workers about union activities, prohibiting workers from discussing the union at work, forcing them to sign a statement disavowing the union, accusing workers of disloyalty for off-hour activities, threatening reprisals against supporters, and illegally

8. Posting of Faculty for Workplace Justice to Picketline, *Bishop Estevez Offers to Mediate Between President Shalala and the Striking Janitors*, <http://picketline.blogspot.com/2006/03/bishop-estevez-offers-to-mediate.html> (Mar. 7, 2006, 21:50 EST).

9. Statement from University of Miami President Donna E. Shalala, *New Work Group Formed to Study Compensation and Benefits for Employees of Outside Contractors*, E-VERITAS, Feb. 23, 2006, <http://www6.miami.edu/news/everitas/2005-06/02-23-06Extra.htm>.

10. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) (finding that in reinstating employees after a strike, discriminating against striking employees for the sole reason that they had been active in the union was an unfair labor practice, and the permanent replacement of such workers was not permissible).

spying on union meetings.¹¹ Within a week before the beginning of the strike, UNICCO fired a union leader, Zoila Mursuli, for talking with a newspaper reporter.¹² If the company could be forced to stop engaging in such behavior, of course, union organization would be more likely, and that would increase pressure for both recognition and better pay and working conditions. Worker Maritza Paz commented, "I feel good about what President Shalala said. But it only happened because we were working to form a union. But we can not [sic] stop our campaign until UNICCO stops retaliating against us when we stand up for ourselves."¹³ Legal rights were a necessary predicate to economic rights.

"I was here the first time the University formed a committee to talk about our wages. I was making barely over minimum wage then, and I still am now," said Nelson Hernandez who has worked at the University for 25 years and earns only \$6.80 an hour. "I look forward to working with the committee and the union to make this real."¹⁴

Furthermore, economic advances were seen through a class-based frame:

Zoila Garcia has the toughest job at the University of Miami. From 10 p.m. to 6 a.m., five nights a week, she washes windows, cleans desks and picks up the potato chip bags and used condoms that students leave behind in the library.

"Ay mamita! And when they decide to draw on those tables, it's scrub scrub scrub," Garcia said.

When she returns to her mobile home off Southwest Eighth Street just after dawn, she takes the pills she gets through a Jackson clinic. Some are for high blood pressure. One is for the pain in her arms.

For now, there's nothing to be done about a blood clot that formed on her calf and blackened the leg from knee to ankle. She needs an operation. But when the doctor told her it would cost \$4,000, she laughed. "Where do you get that kind of money?"

Garcia, who makes \$6.70 an hour, has no health insurance.

....

11. *See Labor Board Will Hear Union's Case*, MIAMI HERALD, Feb. 2, 2006, at 3C.

12. Maya Bell, *Fired University of Miami Janitor Leads Strike Over Benefits*, ORLANDO SENTINEL, Mar. 1, 2006, at D1.

13. Posting of Faculty for Workplace Justice to Picketline, *A Brief Documentary History: The President's Statement of 2/23*, <http://picketline.blogspot.com/2006/03/brief-documentary-history-presidents.html> (Mar. 5, 2006, 09:34 EST).

14. *Id.*

"I have worked hard all my life, but the situation in this country has changed," Zoila said. "The cost of living is so high and no one can live with these salaries. These millionaires just don't understand the struggles of working people."¹⁵

Approximately fifty percent of the more than four hundred UNICCO workers went on strike. Many others were sympathetic but simply could not afford to go out.

The University administration immediately announced that since it was not the actual employer, it would remain neutral in the labor dispute. Despite this stance, the SEIU filed an unfair labor practice claim alleging that the University had been allowing the company to speak out against the union to its workers on campus (legal activity) while prohibiting the union from accessing campus (illegal discrimination). This prohibition extended to preventing the union from soliciting workers on campus for Hurricane Wilma relief and providing food to workers with storm damages.

The University also immediately established a special gate several blocks from other campus activity, through which all UNICCO workers had to report and be assigned work, in order to arguably restrict picketing to that one location. This was a controversial legal position because of the common *situs* doctrine.¹⁶ Workers in a labor dispute have the right to reach other workers of their employer in order to publicize their dispute and gain support. However, where, as here, the employer does all its work on the premises of another, the workers can only effectively protest at that worksite. If an outside contractor does work which is not part of the everyday operation of the workplace company, picketing can be restricted to a single gate in order to limit impact on the neutral employer.¹⁷ Janitorial and groundskeeping work do not fit this exception. Further, UNICCO workers had to use company trucks on public

15. Ana Menendez, *While Shalala Lives in Luxury, Janitors Struggle*, MIAMI HERALD, Mar. 1, 2006, at 1B.

16. *Sailors' Union of the Pac. (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950). "When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights." *Id.* at 549.

17. *See Local 761, Int'l. Union of Elec., Radio & Mach. Workers v. NLRB.*, 366 U.S. 667, 681-82 (1961).

roads to reach many parts of campus from their sign-in gate. It should therefore have been possible to picket at these other university entrances. Nonetheless, the SEIU respected this designation. Initially about one hundred workers picketed at the sign-in gate. Later on in the strike, when the union had evidence of non-striking UNICCO workers using other gates, picketing was briefly extended for two days to the main entrance of the University.

Finally, the University administration continuously and publicly called for a union election among UNICCO workers. In contrast, the union's position was that it wanted the faster card signing approach instead of the majority recognition method provided for under the NLRA.¹⁸ Unions can demonstrate they have majority support to force bargaining in a number of ways, including: holding elections supervised by the NLRB; collecting signed representation cards; wearing union T-shirts; or calling a strike. Once an employer knows a union has majority support, a company is under a duty to bargain in good faith. The catch is that unless the company agrees to recognize the majority by other means, the company can at that time call for an election. During an election period, the employer can run an anti-union campaign during work hours, make hints of the consequences of unionization, and even utilize illegal tactics of threats and discharge knowing how long it will take to pursue remedies. Because of this time and events the union will have lost momentum. This would be a particularly relevant risk where the company was already facing charges of unfair labor practices. In such a situation, an election might not even be scheduled until after the unfair labor practices were resolved because those practices may have already tainted a fair election.¹⁹ The estimated time to an election would be two to three years. President Shalala's continued calling for a secret election, therefore, had the rhetorical power of pro-democracy, but a hollow promise of actual current worker choice.²⁰

18. See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824 (2004-2005).

19. It was rumored that UNICCO offered to waive the usual election period if SEIU agreed to an election. The union refused, perhaps believing an election was already tainted, or perhaps just preferring the card check procedure.

20. Seventy percent of private-sector workers organized (150,000) in 2005

Despite having several weeks notice of the strike vote, the initial reaction of the campus seemed to be shock. Many professors spontaneously moved their classes off campus, refusing to cross a hypothetical picket line. A loose faculty organization formed by professors Traci Ardren, Michael Fischl, and Giovanna Pompele, Faculty for Workplace Justice, was joined by a student group, Students Toward a New Democracy (STAND).²¹ Web sites were established by the company, as well as faculty and student groups. Through faculty volunteers and the faculty web site, rooms for classes were located off campus in area churches and community rooms. Many classes were conducted outside on a green adjacent to the University and visible to drivers.²² After a few days, some classes met on the lawn in front of the Ashe Administration Building. In total, more than 200 classes moved off site.

On Friday, March 3, 2006, over three hundred and fifty faculty and students marched past the administration building and through the campus, to the corner of the campus, where they met more than one hundred strikers. More than five hundred marchers then crossed Miami's main thoroughfare, U.S. 1, chanting the strike's theme, "Si Se Puede!", "Yes, we can." This was the beginning of a publicity campaign that largely shunned traditional labor picketing in favor of community protests. The march was followed by a faculty letter to President Shalala, dated March 5, signed initially by 102 faculty.²³ On Monday, March 6, the Auxiliary Catholic Bishop of the Archdiocese of Miami offered to mediate the dispute between UNICCO and SEIU by including the University President.²⁴

were organized through card checks. Steven Greenhouse, *Employers Sharply Criticize Shift in Unionizing Method to Cards from Elections*, N.Y. TIMES, Mar. 11, 2006, at A9.

21. See generally Richard Michael Fischl, *The Other Side of the Picket Line: Contract, Democracy, and Power in a Law School Classroom*, 31 N.Y.U. REV. L. & SOC. CHANGE 517, 520 (2007); Posting of Faculty for Workplace Justice to Picketline, *FAQ One*, <http://picketline.blogspot.com/2006/03/faq-one.html> (Mar. 4, 2006, 4:03 EST).

22. See generally Nicholas Spangler, *U.M. Janitors' Strike Turns Park into Classroom*, MIAMI HERALD, Mar. 3, 2006, at 1B.

23. Faculty for Workplace Justice Posting, *A Brief Documentary History: the President's Statement of 2/23*, *supra* note 13.

24. Posting of Faculty for Workplace Justice to Picketline, *Bishop Estevez*

On Wednesday, March 8, the STAND organization held a meeting discussing peaceful civil disobedience. The SEIU announced plans to walk out at the medical campus and the airport, triggering a response of support from Miami Commissioner Joe Martinez. Striking workers issued a statement reflecting both class and ethnic/racial concern:

Announcement from striking UNICCO employees at UM: Every Miami Worker Deserves A Chance for a Better Life. You Can Help UM Janitors Get That Chance. IT'S NEARLY IMPOSSIBLE TO MAKE ENDS MEET in Miami on \$6.40 an hour. Yet that's all many contract cleaners at the University of Miami are paid. \$51 a day with no health benefits. Less than half the county median wage. On these tiny salaries, we're forced to make choices we never thought we'd be faced with in the United States: Do we pay rent or buy groceries? Buy shoes for our kids or fill a prescription? UM's mostly Cuban-American janitors have been joining together to build a better life for ourselves, one where we don't have to make these choices. But the company we work for—UNICCO, the cleaning contractor hired by the university—has been punishing those who speak out by threatening, intimidating, and even suspending union supporters. So we've decided we must strike to make our voices heard. You can help send a message to UNICCO: **"Give Miami janitors a chance to live the American dream!"**²⁵

At a student sponsored teach-in Wednesday night, the topic of worker health brought forth myriads of complaints from workers about the impossibility of obtaining health care, or debts incurred up to thousands of dollars. One woman had been turned away from a mammogram to check a lump in her breast.²⁶

On Friday, three hundred to four hundred people rallied at the County Government Center Building in downtown Miami, as part of widening the conflict to the community. Significantly, the SEIU strategy throughout the strike centered on public demonstrations and events to

Offers to Mediate Between President Shalala and the Striking Janitors, supra note 8.

25. Statement, SEIU Local 11, Announcement from Striking UNICCO Employees at UM (Mar. 7, 2006) (on file with author).

26. Posting of Faculty for Workplace Justice to Picketline, *Teach-In Last Night*, <http://picketline.blogspot.com/2006/03/teach-in-last-night.html> (Mar. 10, 2006, 7:34 EST).

bring attention to the strike, rather than traditional picketing at the job site gates. Most of the UNICCO strikers normally worked at night, so perhaps non-traditional public events would reach the same number of workers and a wider audience.

Strike activity on campus paused during the next week of spring break, although significant decisions were announced. First, the University's Living Wage Committee issued their report. The report acknowledged that university contractors were paying below market rates and that there were problems with recruitment and retention. The President responded by announcing that contractors would raise pay for food service employees to \$8.00 per hour, janitors to \$8.55, and landscapers to \$9.30, with health insurance benefits to be provided within a month.²⁷ Although both UNICCO and the SEIU welcomed the announcement, it was not explained how the University, a supposed neutral, could have effectuated the increase during a current contract.²⁸ The University's announcement did include other labor contractors besides UNICCO, but maintaining job parity between union and non-union employees would still be considered an unfair labor practice if carried out by a direct employer during on-going strike negotiations. The union expected the strike to continue because the one-time pay increase still fell considerably short of the county living wage (one to over two dollars per hour), and because the workers continued to insist on unionization by means of a card signature demonstration of

27. Niala Boodhoo, *Striking Workers at UM to Get Raise*, MIAMI HERALD, Mar. 17, 2006, at A1.

28. According to the President's statement:

It is also important to point out that the University's position on the labor dispute has not changed. The University remains neutral and is not a party to those discussions. That is an issue to be decided between UNICCO, its employees, and the union. . . . I appreciate your input on this issue during the past few weeks. And I know that you support our decision to provide increased wages and health insurance for the hourly employees of our service contractors. I wish I could assure you that the next few months will be quiet, as the union, service contract workers, and their employer engage in a debate over representation. We need to respect the process. Democracy is messy.

Donna E. Shalala, *A Message from President Shalala*, NEWS IBIS (Univ. of Miami Student Newsletter, Miami, Fl.), Mar. 19, 2006, available at <http://www6.miami.edu/ibis-news/20060319se/>.

majority status, without which workers felt they would be fired. Worker Elsa Rodriguez said, “[w]e’re not going to stop just because we’re getting more dollars. That’s not the only thing that we want. We want to form a union to get respect and to not be humiliated.”²⁹ Unsurprisingly, the workers’ class consciousness included a demand for respect as well as wages. However, after approval from the union, the leaders of the Faculty for Workplace Justice called for those teaching off campus to return to their normal class rooms, and continue support by other means. This was a highly controversial call according to many faculty supporting the strike, but almost all faculty returned to the classroom.

On March 22, the Faculty Senate passed two resolutions unanimously.³⁰ First, they insisted that all contract companies pay at least the Miami-Dade living wage, including affordable, employer-subsidized health insurance and other benefits and working conditions.³¹ Second, they voted that if the UNICCO contract is not renewed, the successful bidder will be required to offer to any and all UNICCO employees currently assigned to the University of Miami positions comparable to or better than they now hold. In a third resolution, passed by a strong majority, the Senate urged that all parties involved in the union negotiations adhere to fair labor practices and labor law.³²

On Monday, March 27, the union announced it had received signed membership cards from fifty-seven percent of the workers.³³

The [service workers] signed the cards despite threats from UNICCO over the past week that janitors would be fired for striking. “They called me over the weekend and said that [i]f I didn’t go back to work that they would fire me,” said janitor Elmis Loreda.

29. Boodhoo, *supra* note 27, at 10A.

30. Posting of Faculty for Workplace Justice to Picketline, *Academic Senate: Three Cheers for Justice*, http://picketline.blogspot.com/2006/03/academic-senate-three-cheers-for_24.html (Mar. 24, 2006 19:27 EST).

31. *Id.*

32. *Id.*

33. Posting of Faculty for Workplace Justice to Picketline, *Today’s SEIU Press Release: A “Super” Majority*, <http://picketline.blogspot.com/2006/03/todays-seiu-press-release-super.html> (Mar. 27, 2006 21:54 EST).

"Their words were supposed to send a chill through the whole community. But we will not be intimidated any longer. We have won a great deal, not just for us, but for all the workers on campus. And now our success is spreading hope to other workers that they too can win better wages and affordable health insurance."³⁴

Another worker, Eloy Morales, received seventeen calls in one day telling him to return to work or be fired.³⁵

One of the pivotal events of the strike took place the day following the card check announcement. A rally was called for 11:00 a.m. at the Episcopal Chapel on campus (also serving as the workers' strike sanctuary). The rally was sponsored by faculty, students, and the Committee for Interfaith Worker Justice, a group of local clergy. Local clergy had opened their churches from the beginning for alternative class rooms and publicly supported the low wage workers. Now, they led a march from the chapel to the intersection of U.S. 1 and Stanford Drive at the main campus entrance and met a large group of strikers. As the light changed, protesters moved into the street from all corners. A group of seventeen clergy and workers sat down in the middle of the intersection. Thereupon, Coral Gables police, who had been previously notified, moved in and arrested the group.

At noon, while this protest was taking place, a group of nineteen students from STAND moved into the Ashe Administration Building, occupying the admissions office on the first floor. They were later joined by the Episcopal priest on campus, Father Frank Corbishly. University police immediately isolated the building. One hundred workers from the U.S. 1 protest surrounded entrances to the building, chanting support for the students. Throughout the day, university police stayed inside the building and manned stairs and entrances. Coral Gables police stood a short distance from the building serving as back-up. Only a few faculty members with offices on upper floors were let in. People observing the students inside were permitted to

34. Press Release, SEIU, Today's SEIU Press Release: A "Super" Majority (Mar. 27, 2006) (on file with author).

35. Posting of Faculty for Workplace Justice to Picketline, *Why a Hunger Strike: Statement from STAND*, <http://picketline.blogspot.com/2006/04/why-hunger-strike-statement-from-stand.html> (Apr. 10, 2006, 18:11 EST).

leave but not return. In addition to the occupying students and Father Corbishly, three law students served as inside observers. An ACLU attorney who was on campus to speak to a class volunteered to provide counsel for the students, helping to establish communications with the administration. The administration responded to the occupation by denying the students inside access to bathrooms, water, and food, and by shutting off the air conditioning. The students had brought cat litter with them and were forced to use trash cans for bodily needs. Students were threatened with arrest, forced removal, and possible expulsion.

In mid-afternoon, University President Shalala, the Provost, and the Dean of Students agreed to meet with the students. Fearing they would not be allowed back into the admissions area, the students delegated negotiations to a small group of students and faculty, keeping in touch by cell phones. The students asked to have their lawyers take part, but were refused despite the fact that the University's outside counsel was present. Students demanded a living wage, and the increasing focal point for the strike—union recognition by the workers preferred method of a card check. No agreement was reached. At 4:30 p.m., the administration cleared the building except for the occupying students. At 5:00 p.m. a vigil of students, workers, and faculty stayed at each entrance. Large numbers of police cars and a paddy wagon parked around them. President Shalala refused to meet with students with Father Corbishly present. He was only allowed to sit outside the door. Negotiations and the vigil continued until approximately 1:30 a.m., when the President agreed that the students would not be arrested and that a group made up of students, faculty, workers, UNICCO, and the University would meet within forty-eight hours to attempt to settle the strike. President Shalala issued a statement to university students stating the University administration's position:

Why, then, did 15 students end up in the foyer of the Admissions Office at 1:00 am talking to me about their frustration with the university[?] Basically, they want the university to tell one of our contractors, UNICCO, to accept cards that the union, SEIU, has had UNICCO employees sign requesting union recognition. The union argues that collecting signatures as an indication of what the employees want is better and fairer than a secret, federal government (National Labor Relations Board) supervised vote. The contractor, UNICCO, has called for the secret ballot procedure

supervised by the NLRB (it should be noted that recognizing a union on the basis of cards is optional under the law; recognizing a union under a secret ballot election is mandated by the law).

Both sides have accused the other of intimidating the UNICCO employees to support or not support the union and to sign or not sign the cards. The students . . . believe the NLRB process takes too long and is flawed. . . . I pointed out that the university simply could never take a position against a secret ballot procedure supervised by a federal government agency. Secret ballots are at the heart of our democratic system. In fact, many of the UNICCO employees in our community came to this country precisely because of our free (and secret ballot) elections.

....

In addition, I want to repeat the university's policy on demonstrations, protests and free speech – all are welcome and are part of the fabric of American higher education. However, no one has the right to coerce or intimidate another member of our community. Nor do they have the right to interfere with anyone's right to study, teach, do research, provide for our patients or do the university's other business.³⁶

The group announced by President Shalala met twice. On Friday, March 31, the meeting was moderated and run by a University Vice-President. One worker present reported that at the beginning of the meeting the University brought up the issue of an NLRB election to decide on representation. It was not spoken about by either the company or the union before that time. Another worker present reportedly banged a hand on the table stating, "I already voted. My signature is my word." The second meeting was run by an outside labor law mediator and was more productive, producing the outlines of the eventual agreement. Predictably, neither party moved their positions at either of the two meetings held. By now the strikers were convinced that they would be picked off over time and fired without union representation, and further convinced that card check recognition was the best strategy.

36. Press Release, Donna E. Shalala, President Shalala's Message to Students (Mar. 27, 2006) (on file with author), available at <http://picketline.blogspot.com/2006/03/president-shalalas-message-to-students.html>.

At this point, the strike gathered more national attention. It had become a University community affair, then a South Florida test of the living wage movement and a test for raising wages and unionization in the non-union era of service employment. A striker, Clara Vargas, said, "[t]he Mayor has been here along with commissioners, Congress members. . . . They have all promised to try to solve this problem. I do hope they will be able to do something."³⁷ Author and activist Barbara Ehrenreich headed a letter sent to President Shalala. Nova University UNICCO employees voted to authorize a strike over similar unfair labor practices there. Meetings were reported at the University of Virginia and the University at Buffalo.

Complicating the local strike support was the ethnicity of the strikers. Three faculty members, Elizabeth Aranda (Sociology), Elena Sabogal (Latin American Studies), and Sallie Hughes (Communication), explained what their research on labor and immigration revealed regarding the workers' strike support:

We have been researching the immigrant/Latino communities here for a couple of years now. In the course of our research, we have spoken to UNICCO workers on campus. One of the things we have learned is that many are part of a vulnerable population—more than earning poverty wages, these workers share an immigrant background that places them at an additional level of disadvantage. We speculate that some of them cannot afford to engage in civil disobedience because they know this could jeopardize their immigrant status. It's not just about losing their jobs or missed wages—they could put in danger the right to be in this country. One thing we have consistently heard in our interviews is that life as an immigrant has become harder to endure since 9/11 due to increasing fears of deportation in spite of being in the country legally. So, they lay low—something that is incompatible with a public demonstration. We feel this makes their fight even more courageous. In speaking to some of the workers in the past week, they have expressed to us how much they appreciate that students and faculty are fighting their fight. Even though some who we have spoken to do not plan to picket, rather than interpret this as a sign of ambivalence or non-support, in our view, it is part of their strategies for survival that involve remaining "invisible." The legal

37. Abby Goodnough & Steven Greenhouse, *Anger Rises on Both Sides of Strike at U. of Miami*, N.Y. TIMES, Apr. 18, 2006, at A18.

community could probably speak more on this issue that [sic] we can, but many immigrants feel that even if they are here legally, they are subject to deportation if they are arrested. This underscores their vulnerabilities as a population marginalized by multiple structures of inequality, something we should keep in mind as the strike unfolds.³⁸

On April 5, against the muted advice of the SEIU, workers began a hunger strike. Clara Vargas, Maria Ramirez, Isabel Montalvo, Victoria Carbajal, Maritza Gonzalez, Pablo Rodriguez, Odalys Rodriguez, Feliciano Hernandez, Elsa Rodriguez, and Reinaldo "el loco" Hernandez comprised the original group of ten. They built a tent enclave where the hunger strikers lived called "Justice City" or "Freedom City," across from the University and adjacent to the mass transit elevated tracks along U.S. 1. The tent city became a gathering place for media and strike supporters daily, creating closer ties between workers and supporters.

On April 9, Isabel Montalvo, one of the hunger strikers, was taken to the hospital, suffering from heat exhaustion and elevated blood pressure. Feliciano Hernandez, who was also suffering from elevated blood pressure, adamantly said, "[t]here are two ways in which I'll leave this place . . . either [President] Shalala recognizes our right to be treated like human beings, or they can bring me away dead."³⁹ The hunger strikers wrote to President Shalala:

Today, April 7, 2006, is the fourth day that UNICCO janitors have been on a hunger strike, after a month and a half of being on strike asking that they be treated like people, humanely. All they ask is that the university respect their human rights like citizens of this country and most of all they ask this under the representation of a union to defend the workers interests.

Today, after the fourth day of the hunger strike for the workers, they had to call the ambulance because one of the workers (Isabel Montalvo) had problems with blood pressure. The ambulance arrived silently, so as not to show the world what is happening at the University of Miami.

38. Posting of Faculty for Workplace Justice to Picketline, *Why Are All the Workers Not on Strike?*, <http://picketline.blogspot.com/2006/04/why-are-all-workers-not-on-strike.html> (Apr. 7, 2006, 16:40 EST).

39. Posting of Faculty for Workplace Justice to Picketline, *Yesterday at Justice City: One Striker is Evacuated*, <http://picketline.blogspot.com/2006/04/yesterday-at-justice-city-one-striker.html> (Apr. 10, 2006, 15:20 EST).

Another worker was also having problems with high blood pressure, but this worker, Odalys Rodriguez, decided to stay while she has the strength to show everyone that "yes, it is possible" (*si se puede!*) and we have to win, because we are only asking for liberty and respect, which is what we all hoped to find when we get to this country.

Because of this, we cannot conceive of this attitude that the hunger strike hasn't been given the appropriate press by the TV channels, now that each of these workers is risking their life to achieve what every person who lives and works in this country should have anyway.

This is why we are writing this short and thoughtful letter, so that everyone will know what is going on at the University of Miami and so that Donna Shalala, the president, will know she is responsible for whatever happens, seeing as though she is the one putting the brakes on the solution to these problems.

-Clara Vargas, elected representative of UNICCO workers and hunger striker

(Odalys was taken to the hospital since this letter was written).

This letter is signed by the remaining hunger strikers:

Feliciano Hernandez, 60
Reinaldo Hernandez, 52
Victoria Corbiajal, 50
Maria Leonor Ramirez, 25
Pablo Rodriguez, 34
Martiza Gomez, 44
Clara Vargas, 32⁴⁰

On April 12, one week after the hunger strike began, seven students joined the hunger strike. After a rally, twelve students again tried to enter the admissions office but were dragged outside by University police. The students then linked arms with others to block the entrance. The building was locked down by the administration, with no one allowed in or out. The administration employed professional photographers to take pictures of the protesters. President Shalala claimed in a letter to the University that outside protesters were entering campus and interfering with the dispute. In her strongest support for UNICCO's position, President Shalala said that pressure was being brought to "bully" the University to force UNICCO to accept unionization without a single vote by a worker. She implied union opposition by stating that

40. Posting of Faculty for Workplace Justice to Picketline, *Message from the Hunger Strikers*, <http://picketline.blogspot.com/2006/04/message-from-hunger-strikers.html> (Apr. 10, 2006 17:59 EST).

seventy-five percent of the workers were at work.⁴¹ This opposition to card checks came despite the fact that, according to the SEIU, ninety percent of UNICCO's 8000 unionized workers organized through card checks.⁴²

Another hunger striker, Feliciano Hernandez, who spent nine years in a Cuban prison for dissent, was rushed to the hospital with an advanced heart rate.

The seven student hunger strikers who were denied a meeting with the President set up a second "Freedom Village" in tents outside the Ashe Building entrance. The University administration responded by turning on the water sprinklers in that area of the campus, leaving them on overnight and for the next several days. The water was briefly stopped when actor and activist Ed Asner visited "Freedom City" and tried to speak with President Shalala.

On Friday, April 14, Mayor Alvarez of Miami and former Congressman David Bonier visited "Freedom City." On Saturday, a fourth worker, Maritza Gomez, was hospitalized with tachycardia and a weak pulse. By Tuesday, a fifth worker, Pablo Rodriguez, was hospitalized shaking and with a weak pulse, and the first student, Tanya Aquino, went to the hospital. On the fourteenth day of the hunger strike five strikers remained at "Freedom City." The hunger strike finally changed on Friday, April 21, after seventeen days, when numerous faculty and community leaders substituted for the hunger strikers for up to seventy-two hour stints of fasting. SEIU President Andrew Stern and Vice-President Eliseo Medina, who had been a veteran organizer earlier with Caesar Chavez, began fasts after meeting with strikers.

On Monday, April 24, UNICCO announced health insurance employee premiums: only \$13.00 per month for the worker alone, but \$241 for the worker and one child, and \$493 for a family of four (thirty-six percent of pre-tax pay).⁴³ The next day a rally at "Freedom City" brought Rev.

41. Donna Shalala, Letter to the University of Miami Community, Apr. 12, 2006

42. Posting of Faculty for Workplace Justice to Picketline, *What About Card Check Versus NLRB Elections?*, <http://picketline.blogspot.com/2006/04/what-about-card-check-versus-nlrb.html> (Apr. 7, 2006 16:48 EST).

43. Posting of Faculty for Workplace Justice to Picketline, *And What About*

Charles Steele, President of the Southern Christian Leadership Conference, John Edwards, Democratic Vice-Presidential candidate in 2004, James Hoffa III, President of the Teamsters, and others to town. Meanwhile, the students camping at the Ashe building feared arrest by university police. Rev. Steele announced that if any student went to jail, he would be arrested too. Senator John Edwards said:

None of you, no American, should be working full time and be living in poverty. That's what this struggle is about. . . . Your struggle is my struggle . . . If a Republican can join the Republican Party by signing their name to a card, then any worker in America should be able to join a union by signing their name to a card.⁴⁴

Each day from April 25 to April 28, the University took out full page advertisements in the Miami Herald, presumably to counter the outside publicity. On April 25, the advertisement proclaimed: "We Provided Higher Wages. We Provided Health Insurance. We Have Done Our Part."⁴⁵ The wage/benefit increases indeed were applauded but, as noted, did not measure up to the county living wage, and did not address the main point of contention—a card check election.

On April 26, the advertisement stated: "Outside Protesters Trespass On Our Campus. Our Students, Faculty, Staff Are Harassed. The Union Has Gone Too Far."⁴⁶ No incidents of harassment were ever publicly reported. The only incidents were of university police confronting students. The University administration repeatedly locked down the Ashe Building when luminaries like Ed Asner, Charles Steele, David Bonier, or John Edwards spoke on or near the campus or tried to see President Shalala. A few "outsiders" from the community, including the organization ACORN, were briefly on campus, although not directly

Health Insurance, <http://picketline.blogspot.com/2006/04/and-what-about-health-insurance.html> (Apr. 7, 2006, 16:47 EST).

44. Posting of Faculty for Workplace Justice to Picketline, *Help Is on the Way*, <http://picketline.blogspot.com/2006/04/help-is-on-way.html> (Apr. 25, 2006 11:57 EST) (quoting Senator John Edwards, Address at the Freedom Village Rally (Apr. 25, 2006)).

45. Advertisement, "We Provided Higher Wages. We Provided Health Insurance. We Have Done Our Part," MIAMI HERALD, Apr. 25, 2006, at 13A.

46. Advertisement, "Outside Protestors Trespass On Our Campus. Our Students, Faculty, and Staff Are Harassed. The Union Has Gone Too Far," MIAMI HERALD, Apr. 26, 2006, at 6A.

connected to the strike. However, once the strike became a community matter the distinction between those who were and were not of the strike blurred. The University administration seemed to play both sides of the community issue, first saying they had done their part to bring wages to community or market standards, and then insisting the community had nothing to do with the strike.

On April 27, an advertisement stated: "They Stage Daily Publicity Stunts. They Disrupt Our Academic Mission. The Union Needs To Stop Its Tactics."⁴⁷ On the issue of publicity, many national leaders visited the hunger strike and spoke to workers and students. This was a matter of free speech. Again, there was no evidence that anyone other than the administration, which at times prevented students from reaching teachers' offices, caused academic disruption.

Finally, on April 28, the advertisement took sides and stated: "They Don't Want Workers To Vote. They Argue Against Freedom And Democracy. Does The Union Think Workers Are Second-Class Citizens?"⁴⁸ This ignored the fact that the majority of workers had signed cards. Tellingly, the advertisement put the University publicly on the side of management in the dispute. Real questions exist about the unfairness of NLRB elections, which the University never addressed, hiding behind the rhetoric of elections. The advertisements indicated to the workers and the community that the University was aligned with UNICCO, if not bargaining for it.

Almost paradoxically, on May 1, 2006, the union and UNICCO announced a settlement agreement to allow a card check process to determine a bargaining representative. The basics of the agreement formed a clear victory for the union and set forth the following provisions: (1) a code of conduct for both the union and management during the campaign; (2) verification of the result by the independent American Arbitration Association; (3)

47. Advertisement, "They Stage Daily Publicity Stunts. They Disrupt Our Academic Mission. The Union Needs To Stop Its Tactics," *MIAMI HERALD*, Apr. 27, 2006, at 20A.

48. Advertisement, "They Don't Want Workers To Vote. They Argue Against Freedom And Democracy. Does The Union Think Workers Are Second-Class Citizens?," *MIAMI HERALD*, Apr. 28, 2006, at 5A.

agreement by UNICCO to recognize the union the same day that a supermajority of sixty percent of the workers signed cards; (4) the union would have until August 1, 2006, to succeed; (5) the workers would return to work May 3; and (6) the union leader who was fired, Zoila Mursuli, would be rehired with back pay.⁴⁹ On May 2, the workers took down their “tent city.”

The strike was over, but the University administration was not over it. In the first week of May, twenty student activists were given administrative subpoenas, many handed out during classes. They were charged with “major” violations of University rules subjecting them to potential expulsion or suspension including: disorderly conduct; failing to follow University directives; and, “distributing literature.” The ACLU immediately found lawyers for all twenty students. In their administrative hearings, those lawyers counseled silence when administrators asked charged students to identify other students from pictures.

By May 30, the charges had been reduced to “minor” violations of the same charges. This had two effects: the students were no longer able to have lawyers or other representatives at their hearings, and since the hearings could be scheduled during the summer, no students or faculty needed to be part of the summary process used by the University. The procedure would be before a single Dean. One student’s attorney, Lida Rodriguez said:

This is about punishing these students for having the nerve to stand up for what they believe in and sending a message to other students not to do the same. Even for a private institution, this is the height of unfairness. I’m sure there are parents of UM students that do not know who [sic] their hard-earned dollars are going to a system that’s unfair.⁵⁰

Just before the mid-May graduation, the University obtained an injunction in state court preventing the union or its members from entering the campus, ostensibly to prevent any demonstrations at graduation ceremonies.

49. Posting of Faculty for Workplace Justice to Picketline, *In Case You Haven’t Heard . . . We’ve Won !!!!!*, <http://picketline.blogspot.com/search?q=we%27ve+won> (May 1, 2006, 19:32 EST).

50. Jessica M. Walker, *UM Dean to Run Hearing, Decide Student’s Fate*, PALM BEACH DAILY BUS. REV., June 9, 2006, at 253.

On Thursday, June 15, the results of the card check were announced: the union had collected more than seventy percent of the workers' signatures. Also in mid-June most of the charged students, faced with a fait-accompli, pleaded no contest to the charges. They were sentenced to two semesters probation, a five hundred word essay, and ironically, community service. They also lost housing privileges in newly constructed University student apartments. A faculty protest signed by a hundred and ten professors, despite dispersal for the summer, claimed:

1) Students who pleaded not guilty were denied postponement of their hearings to the Fall, at which time they would appear before a University Disciplinary Hearing Panel including their peers. Instead, Associate Dean Singleton, who is a witness in some of the cases, now serves simultaneously as investigator, prosecutor, judge and jury. . . .

2) Some students have now seen added to their previous charges the further charge of unauthorized distribution of printed material. . . . The policy refers specifically to advertising . . .⁵¹

The University administration responded with an unsigned letter to the *Daily Business Review*, claiming that the 2000 plus members of the faculty who had not signed the letter all supported the administration on the proceedings, despite the fact the letter only reached five hundred and fifty professors, many of whom no doubt never saw the overnight petition.⁵²

One of the students who pleaded no contest is suing the University for breach of contract for failing to follow student handbook procedures.

On August 23, the new SEIU local ratified a new contract, the main highlights of which include:

Wages: \$0.25 per hour raise on Sep 1, 2006, \$0.40 Sep 1, 2007, \$0.50 Sep 1, 2008, \$0.50 Sep 1, 2009.

Health Insurance: any increases in the premium up to 10% to be absorbed by UNICCO. Increases beyond that will trigger a committee to investigate further ways of reducing costs.

Personal Days: Increase from 2 to 3 paid personal days

51. Letter from University of Miami Faculty to Patricia A. Whitely, Vice President for Student Affairs, University of Miami, and William W. Sandler, Jr., Dean of Students, University of Miami (June 27, 2006) (on file with author).

52. See Posting of Faculty for Workplace Justice to Picketline, *Dear Colleagues*, <http://picketline.blogspot.com/2006/07/dear-colleagues.html> (July 14, 2006 09:16 EST).

Vacations: 1 year - 1 week, 5 years - 2 weeks, 10 years - 3 weeks.

Holidays: Three extra paid holidays: Christmas Eve, New Year's Eve and the day after Thanksgiving

Funeral Leave: 3 paid days

Seniority: Workers with more years get more benefits

Safety: A committee of workers and management will meet every month to address any safety issues

Union Rights: The union will have the right to post materials, to speak to new hires and to investigate abuses on job time

Immigration: Workers will be allowed time off to deal with immigration issues

Job Security: Basic structures will be put in place to deal with harassment, favoritism and improper dismissal.⁵³

The workers had won recognition, health benefits, and a living wage scheduled over the next three years.⁵⁴ Shortly after the University of Miami workers ratified their new contract, Nova University workers won their own union recognition from UNICCO. Nova University responded by not renewing UNICCO's contract.⁵⁵ The workers lost their contract and their jobs, and only some of them were rehired by the replacement contractors. Only a few new contractors hired sufficient numbers of former employees necessary to require successorship negotiations with the union.⁵⁶ Furthermore, the number of smaller contractors replacing UNICCO's services will make organizing the same number of workers improbable because each employer would have to be separately organized. The contrast between the University of Miami and the Nova University outcomes underlines the challenge by the tri-partite employment form of employee, labor contractor, and end user to collective bargaining as a statutory policy.

II. JOINT EMPLOYMENT

Although many legal issues have been raised by the Miami strike, one issue permeates the actions and structural

53. Posting of Faculty for Workplace Justice to Picketline, *The Contract We Fought For Has Been Ratified!*, <http://picketline.blogspot.com/2006/08/contract-we-fought-for-has-been.html> (Aug. 23, 2006 at 18:22 EST).

54. Niala Boodhoo, *Pay Day*, MIAMI HERALD, Aug. 24, 2006, at 1C.

55. See Ana Menendez, *Better Wages, Health Care Not Enough*, MIAMI HERALD, Feb. 18, 2007, at 1B.

56. See generally *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42-43 (1987).

relationships among affected parties: who is the real employer of the janitors and landscapers at the University? Is the University a joint employer with UNICCO? There are potentially two legal issues here. First, should the University be jointly liable for the alleged unfair labor practices committed by UNICCO? Second, should the University be considered the real employer required to negotiate wages and conditions of employment? The latter situation would represent a difficult labor-management negotiating arrangement since the end user would be part of determining the direct employer's labor costs.⁵⁷ Perhaps ironically, the University held more control over the latter issue than the labor practices of UNICCO.

Several interests are at stake in answering these questions. First, although there is very little settled law under the NLRA, the issue of joint responsibility is a profoundly important legal question as worker-management relations in a new global economy depend increasingly on the three-way relationship created by the work's end user. This is important both for organization initially and for determining whether the purpose of promoting collective bargaining under the NLRA can be feasibly pursued. Even a remedy of an unfair labor practice against the direct contractor may depend on the actions and interests of the end user. As attorney Jonathon Axelrod has stated:

As . . . [leased] employees turn toward unions, they will realize that a union's effectiveness is limited by the very predicament that caused them to seek a union.

Unions representing leased employees are ineffectual unless the recipient of the leased employees is a joint employer. . . . Absent joint employer status, the recipient is not a party to negotiations and is immune to a union's economic strength.⁵⁸

Second, the third-party contract relationship also explains the shape of bargaining and public relations among those interested. In this case the main public protagonists were the University (the end user) and the workers. Less publicly visible was the direct employer, UNICCO.

57. Although a simultaneous negotiation between the labor contractor and the end user, or a contract which automatically included the labor costs of the contract between the labor contractor and the workers, would be possible.

58. Jonathan G. Axelrod, *Who's the Boss? Employee Leasing and the Joint Employer Relationship*, 3 LAB. LAW 853, 871-72 (1987).

Third, the three-party relationship also invites turning the labor organization question into a community struggle, which the end user usually will not admit exists. This is not only significant in terms of the dynamics of the dispute, but again in terms of how the basic policies of our labor statute are characterized and fulfilled.

The definition of an “employer” under the NLRA is very broad; “[t]he term ‘employer’ includes any person acting as *an agent* of an employer, directly or indirectly”⁵⁹ Also, the question of whether one is an employer is to be interpreted broadly as the act is a remedial statute. The formal contract arrangements and the characterizations of the parties are not significant in finding a joint employment relationship.⁶⁰ Under many federal labor statutes, the issue in the joint employment doctrine is whether, as a matter of economic reality considering the totality of circumstances, the worker is economically dependent on the entity. This is initially a question of whether the putative employer has a right of control over the work or worker in question.

Arguably the test should be interpreted more liberally for statutes like Title VII,⁶¹ and even the Fair Labor Standards Act (FLSA)⁶², because the wrongs being remedied are more individualized than an NLRA issue affecting a collective bargaining practice. In the individual wrong context the economic dependence of the employee on

59. 29 U.S.C. § 152(2) (2000) (emphasis added).

60. The joint employer doctrine must be distinguished from two distinct doctrines: Single Employer, where two entities are in fact one business for the purpose of bargaining unit determination and negotiation; and Alter Ego, where an employer formalistically alters corporate form to attempt to avoid collective bargaining. See Walter V. Siebert & N. Dawn Webber, *Joint Employer, Single Employer, and Alter Ego*, 3 LAB. LAW. 873 (1987). The Sixth, Eighth, and Seventh Circuits have collapsed single employer and joint employer tests together, discussing the four factors of single employment: (1) some functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control. *Id.* at 875. This test, by examining ownership and management, makes a finding of joint employment more difficult than the majority rule. The two doctrines of single and joint employer are distinguished and the majority rule is established in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1124 (3d Cir. 1982).

61. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000), prohibits discrimination in the hiring or advancement of any person on the basis of race, sex, national origin, or religion.

62. 29 U.S.C. §201 (2000).

the end user may suggest more fault on the part of the end user than that for an unfair labor practice carried out entirely by the direct employer. Clearly this applies even more to the question of whether to extend collective bargaining responsibility to the end user. On the other hand, at least as to unfair labor practices, many but not all are also directed toward individuals, and FLSA actions are often directed against systematic practices of the employer(s). In fact in all the federal labor statutes, governmental involvement is predicated on a policy of deterring unwanted employer practices generally. It is reforming the underlying economic organization of the prohibited practices that creates the need for extension of these statutes to a second joint employer. Thus, the need to make collective bargaining feasible should govern the joint employment test's articulation and application.

Under the NLRA, early influential cases refer to whether the contracting employer "share[s] or codetermine[s]" labor relations or employment decisions.⁶³ In *Boire v. Greyhound Corp.*, the Supreme Court found sufficient control in the following situation:

The Board [NLRB] found that while Floors hired, paid, disciplined, transferred, promoted and discharged the employees, Greyhound took part in setting up work schedules, in determining the number of employees required to meet those schedules, and in directing the work of the employees in question. The Board also found that Floors' supervisors visited the terminals only irregularly - on occasion not appearing for as much as two days at a time - and that in at least one instance Greyhound had prompted the discharge of an employee whom it regarded as unsatisfactory.⁶⁴

The Third Circuit found joint employment in *NLRB v. Browning-Ferris Industries*.⁶⁵ In that case *Browning-Ferris Industries* (BFI), the end user waste processing plant, used brokers who hired truck drivers daily to haul waste to landfills.⁶⁶ BFI paid the brokers biweekly, had the work at its location, provided uniforms, approved hired drivers, assigned deliveries, and, on occasion discharged an employee, while the brokers hired the truckers, directed

63. See *Browning-Ferris Indus.*, 691 F.2d at 1117; *Clinton's Ditch Coop. Co.*, 274 N.L.R.B. 728 (1985), *cert. denied*, 479 U.S. 814 (1986).

64. *Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (1964).

65. 691 F.2d at 1117.

66. See *id.* at 1119.

the routes, scheduled and supervised the truckers daily, paid their wages on a per load basis, and provided their own insurance.⁶⁷

Under the common law of agency, right of control includes but is not limited to the location of work, provision of tools and processes, direct supervision of tasks, skill level, control over wages and hours, distinct occupation or business, length of employment, and intent of the parties.⁶⁸ These factors often point in differing directions or are blurred.

In the Miami situation, the location of work is on the premises of the University, and the work done is necessary to the regular course of University business. Tools are supplied by UNICCO, but other supplies are not always provided. The University makes decisions of what trees to plant and where, but direct daily supervision is by UNICCO. Skill levels are low and the workers do not own or manage their business. Employment is open-ended. The intent of the University is, however, to create a contractual relationship only with UNICCO. If these factors are considered alone it is arguable that the University would not be a joint employer.

Where joint employment was found in a recent Court of Appeals case, *Dunkin' Donuts v. Mid-Atlantic Distribution Center, Inc.*, the end user, Dunkin' Donuts, was involved in employment tenure, assignment of work and equipment, recognition and awards, and day-to-day direction of its leased drivers, who also did some warehouse work.⁶⁹ While in Miami's case, location, supplies, task-planning, the use of low-skill labor, and the management of the regular course of business all indicate the University's joint employment status, there seems much less direct supervision than in *Dunkin' Donuts*.⁷⁰

In addition to the right to control, perhaps more significantly in the Miami situation, is the potential importance of economic dependence between the employees and the end user. The UNICCO contract was low bid partly because the University assumed low-wage costs. The

67. See *id.* at 1119-20.

68. RESTATEMENT (SECOND) OF AGENCY, § 220 (2000).

69. 363 F.3d 437, 440 (D.C. Cir. 2004).

70. *Id.*

University knew, or should have known, that they were not paying enough for UNICCO to pay living wages. Although joint employer doctrine is formally the same under the NLRA, it seems to be found more easily in cases brought under the FLSA.⁷¹ For example, in *Bureerog v. Uvawas*, marketers of clothing apparel were potentially liable under the FLSA for past minimum wages where they paid clothing manufacturers at a product price they should have known was too low to allow payment of minimum wages to the manufacturers' workers.⁷² Plaintiffs were accorded leave to amend to state a claim based on the FLSA.⁷³

Further, if the entity controls another company's labor-management negotiations, they are *per se* joint employers.⁷⁴ In *Rivera-Vega v. ConAgra, Inc.*, a holding company controlled negotiations of a local plant with its union.⁷⁵ The holding company sent a representative to negotiations between the union and the subsidiary. The representative set the parameters of what was acceptable to the holding company and served as a conduit for approval or disapproval of offers made by the union.⁷⁶ In Miami, the University did conduct at least two negotiation sessions including UNICCO and the strikers and the union. The settlement adopted was first proposed during one of these sessions, but the University was never asked by UNICCO to approve those conditions or work on the substance of a collective bargain.

In *Greenhoot, Inc.*, not only did the property management company and the building owners share decisions about hiring and firing, but owner consent was required for wage budgets and wage increases.⁷⁷ In *Shultz v. Falk*, building owners and rental agents were joint employers given owner approval of long-term budgets and setting of wages for building workers.⁷⁸ But, in

71. See, e.g., *Bureerong v. Uvawas*, 959 F. Supp. 1231 (C.D. Cal. 1997).

72. See *id.*

73. See *id.* at 1238.

74. *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 163 (1st Cir. 1995).

75. See *id.*

76. See *id.*

77. *Greenhoot, Inc.*, 205 N.L.R.B. 250, 251 (1973).

78. *Shultz v. Falk*, 439 F.2d 340, 345 (4th Cir. 1971).

International Longshoreman's Ass'n v. Norfolk Southern Corp., the fact that the railroad paid all operating costs of the subsidiary was insufficient.⁷⁹ In *Clinton's Ditch Coop. Inc. v. NLRB* no joint employment was found despite the fact that Fairfield Transportation Corporation required consultation by its only customer, Clinton's Ditch, during the negotiation of employment contracts.⁸⁰ In Miami, the University unilaterally *raised* the wage rates of the contracted employees showing economic dependence of the employer on the University. Furthermore, if the University had promised these wage increases to their own employees during a strike, it would have been an unfair labor practice (like a bribe to avoid unionization).

Should the University-UNICCO combination be allowed to potentially circumvent the intent and provisions of the NLRA? Considering the totality of the circumstances, including: some control of employees, the conduct of negotiating sessions, making proposals, and running ads to side with the direct employer, whether the University would be held liable is uncertain. However, the point is that the University could be held liable without changing existing law. This would be the easiest, if not a final solution, for new labor markets. The doctrine of joint employment and its variables is capable of broader application than the lower federal courts and NLRB have held thus far. Also, most of the case law in all circuit courts of appeal was decided before 1987. Since then, the practices of leasing employees and contracting out services have exploded.⁸¹

From both a plain language view of an employer being an agent of another employer, and a purposive view of the need to fully carry out the intent of the statute, a broader reading of joint employment is more contemporary with the changing market and supportive of collective bargaining. Even more appropriate to economic reality as a test of joint

79. *Int'l Longshoremen's Ass'n v. Norfolk S. Corp.*, 927 F.2d 900, 903 (6th Cir. 1991).

80. *Clinton's Ditch Coop. Co.*, 274 N.L.R.B. 728 (1985), *cert. denied*, 479 U.S. 814 (1986).

81. See Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Workforce*, 52 WASH. & LEE L. REV. 879, 880 (1995).

employment would be an analysis of the power relationship of the end user, the direct employer, and the workers. A new test should find joint employment: (A) if the end user wants to substitute an "outside" workforce for; (B) a function the business would otherwise have to employ itself; in (C) a situation where the employees are economically or in their work conditions partially dependent on the financial influence of the end user; or (D) the worker is under the end user's ultimate supervision or control of employment status or relations, or a combination of some of these variables. Joint employment should be found for both bargaining and resolution of unfair labor practices. Perhaps a more attenuated additional variable of indirect approval or facilitation should be added for unfair labor practices liability.

Such a power-centered decisional test has a common sense connection to the right to "share or codetermine" employment relations.⁸² Such a test is certainly not new or foreign to interpretations of the NLRA in its applicability to changing markets.⁸³ If either doctrinal approach were adopted, the NLRB would be the primary applier of the test, presumably with deferential *Chevron* review of the factual basis of the determination.⁸⁴

In order to promote effective collective bargaining for such employees, ultimately a change in the NLRA is necessary. The labor contractor aims to organize a large group of workers who they will lease in subgroups to many end users. The more workers the contractor enrolls, the greater the bargaining leverage or attractiveness the contractor presents to potential end users, large and small. Our present units of bargaining are only required on a plant-by-plant, or shop-by-shop basis. Furthermore, the end user is not a party to the bargaining.

Although admittedly politically very unlikely, a more market realistic unit for representing such workers would

82. For a partial critique of a case-by-case approach, see Davidov, *supra* note 2, at 743.

83. See, e.g., *First Nat'l Maintenance Inc. v. NLRB*, 452 U.S. 666 (1981) (examining whether the power to decide issues of entrepreneurial control is subject to mandatory bargaining); *Fibreboard Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

84. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

allow either party to choose mandatory, regionally sectoral bargaining, including joint bargaining with end users and contractors. A union might choose to bargain only with the labor contractor in order to create pattern settlements as is the present setting, but if either party insisted, end user or multi-site bargaining could take place. Such sectoral bargaining voluntarily occurs in retailing between employer councils and unions.⁸⁵ Adding end users would be more complicated but also has taken place voluntarily in other settings.⁸⁶

Multi-employer, multi-*situs* bargaining should be allowed as long as the employee union represents a homogeneity of worker interests within the unit, such as janitorial staffs.⁸⁷ The strategically difficult decision for the union is whether it wishes to bring sympathy actions against the labor contractor's other units and, legally, whether such an action would violate any ban on secondary activity by pressuring end users. There seems no answer to the latter, but common *situs* cases would seem to create a similar problem.

In terms of the public interest in promoting collective bargaining, regional bargaining units would have several advantages. First, the employee voice could be coordinated and made effective. A community-wide wage standard would seem more likely if the fragmented workforce could be collectively organized institutionally. Second, the result at Nova University, when the end user repudiated continuation of the contract, would be unavailable. Races to the bottom of wage costs would thus be discouraged. Third, as was acknowledged to be a problem in the University of Miami's report on wages, stability and longevity of employment would be promoted, a gain for both employees and employers.

85. See, e.g., *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975).

86. See, e.g., *Greenhoot, Inc.*, 205 N.L.R.B. 250, 250 (1973); *Schultz v. Falk*, 439 F.2d 340, 345 (4th Cir. 1971).

87. See National Labor Relations (Wagner) Act, *supra* note 5, at ch. 372, § 9(a).

III. THE PARTIES' POSITIONS AND ECONOMIC REALITY

By legal consciousness this Essay means simply the way the parties publicly portrayed legal power during the dispute.⁸⁸ The University administration maintained throughout that they were a "neutral" third party to the dispute between UNICCO and its workers. This public stance served two instrumental purposes. It allowed the administration not only to avoid liability for the unfair labor practices of UNICCO, but also to manage the visibility of the strike to others in the University by confining picketing to a remote special contractor's gate. Many actions beyond the gate decision—siding with management on the election position, unilaterally raising wages, disparaging strike supporters without evidence, etc.—raised substantial doubts about neutrality. However, relying on contractual formality allowed the administration to suggest that strike supporters were unwanted outsiders and downplayed the claim that the events were of significance to the University community and to the Miami low-wage working community. This strategy played upon class divisions and attempted to alienate potential solidarity with the workers. Strikingly, aside from a polemical web site, UNICCO itself was almost publicly invisible, as the workers and the University administration fought out the issues in the media.

The workers and the union sought from the beginning to characterize the strike as a civil rights and even a community event and they used the unfair labor practices characteristic of the strike to their direct legal advantage. This was partly meant to mobilize the workers who were almost entirely immigrants, mostly Latinos and Haitians, as part of a class-wide response to exploitation of such workers by many employers. Partly, the stance reflected the organizing strategy of the SEIU, working with groups of workers who are low wage and often employed by many small employers. The corporate organization of the service worker market through third-party contractors all but required the union to target many end users

88. Compare the more rigorous description of legal culture in essays such as, James L. Gibson & Gregory A. Caldeira, *The Legal Cultures of Europe*, 30 L. & Soc'y REV. 55 (1996).

simultaneously to make the organizing economically effective and feasible. The aim was to organize the labor market in parallel to the contractor-employers.

This strike was part of the initial organizing done under the banner of "Change to Win," and was part of a growing living wage movement nationwide. It also reflected the problems of working poverty levels in Miami and the increasingly detrimental impact of a labor market more dependent on third-parties to manage contracted service work for multiple end users. Such end-users are seeking to avoid publicity and save costs through low wage rates.

In terms of community orientation, the strikers from the beginning welcomed and were emotionally moved by student and faculty support on the campus. They saw the strike as against the University and the place that they worked, and they felt, by virtue of the University administration's public statements, that the University had the final say on an agreement. Furthermore, the largest meetings and demonstrations started on campus and moved to public settings where large numbers of pedestrians or vehicle traffic were visible. The parading through South Miami, the sitting-in at the intersection on U.S. 1, and the pamphleteering at the airport were all aimed at instigating a reaction from the South Florida community. Few demonstrations in recent Miami history have so clearly identified participants by class. Miami city commissioners, clergy, and media figures responded by calling on the University to end the strike. The action expanded to both public and private area universities, with workers supporting the other actions. Even workers at universities in other cities started organizing drives based on the living wage movement.

From the beginning, strikers spoke of the importance of the strike in terms of obtaining a voice in the workplace and securing fairness for individual worker treatment. A union was, for them, a mechanism of government for the workplace. It was a substantial miscalculation that the University administration thought a unilateral wage increase during the third week of the strike would lead workers to cross the picket line or end the strike. In fact, at that point the strike intensified.

Strikers began speaking more about the connection between low wage work and recent immigration of families

to the U.S. Nationally known speakers addressed workers about low wage work, putting class issues before the public's notice. Most significantly, the strikers went on a hunger strike and built Freedom City adjacent to the University. By doing so, the workers bypassed traditional picketing of employer gates and created a visible presence in the community itself. Workers compared the power held by the University over their lives in response to the strike as a result of low wages as akin to imprisonment in Fidel Castro's jails for pro-democracy protests. They insisted that they came to the U.S. to avoid both economic and political oppression. Pressure was on the University to do something. The national publicity was not bothering UNICCO.

The hunger strike was definitely aimed at community support. Recognizing community backlash, the University felt it necessary to take out four full-page newspaper advertisements. This was the same week UNICCO and SEIU were agreeing to a settlement first proposed by the union at the sessions overseen by the University following the Administration building occupation.

Consciousness of the strike on the part of the University was driven by the doctrine of labor law. This could be seen in its claims of neutrality, support for elections, and restriction of picketing to a single gate. On the part of the strikers, it was driven by a larger vision of the connection of law or rule of law and political and economic power. The workers perceived their class position as created by power relations that were subject to the spirit of democracy in the economy, not just black letter doctrine. State and society were linked rather than separated. These conflicting visions doubtlessly protracted the strike. Direct negotiation between the union and UNICCO was overshadowed by the public antagonism of the workers and the University. The University was believed to be the real power behind the throne.

More importantly for class analysis, the workers' consciousness mapped well on the economic structure of the work—low wage immigrants doing service work which could be organized by labor contractors on behalf of and indirectly through contracts with end users. Consciousness mapped structure. The structure of the labor market also undoubtedly led to ethnic solidarity among immigrant

groups that transferred to workforce mobilization.⁸⁹ Structure mapped consciousness.

The strike was about class and workers, class and consciousness, class and communities, class and labor markets, class and worker organization, and class as an entering wedge against the largest employer in a regional struggle for advancement. The context of the strike illustrates the growing direct connection between low wage service workers and a livable wage with the organization of a more highly volatile and casual labor market whose end use employment of work by third parties avoids regulation under outmoded laws.

The premise of the NLRA and its development was based on a very different model of industrial, long-term employment. The working class is no longer organized around such market assumptions. Nonetheless, the NLRA has been applied to contractually separate entities in order to prevent circumvention of statutory policies. Expanding the application of the joint employer doctrine to cover end user employers is necessary to fulfill the goals of the NLRA and to promote industrial peace through encouraging union organization.

What is ultimately necessary to meet the terms of the new, more volatile, labor market is substantial statutory change. New workers must have the ability to self-organize and have collective bargaining leverage against groups of employers. Nonetheless, until law matches market structure, the existing law is capable of preventing unfair labor practices conducted under joint incentives, whether or not there is any direct conspiracy. Class organization, while hampered, can accommodate new hiring situations. Indeed, if the University had been considered a joint employer from the beginning, it would have forfeited more prestige than it did and there would have been less reason for UNICCO to oppose card check recognition similar to its agreements with 8000 of its other workers. Perhaps the strike, its accompanying misery, and destruction of free speech would have been avoided.

89. See E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT*, 258-69 (1975) (explaining that law, and therefore consciousness of which law is a part, both reflects and shapes social conditions).