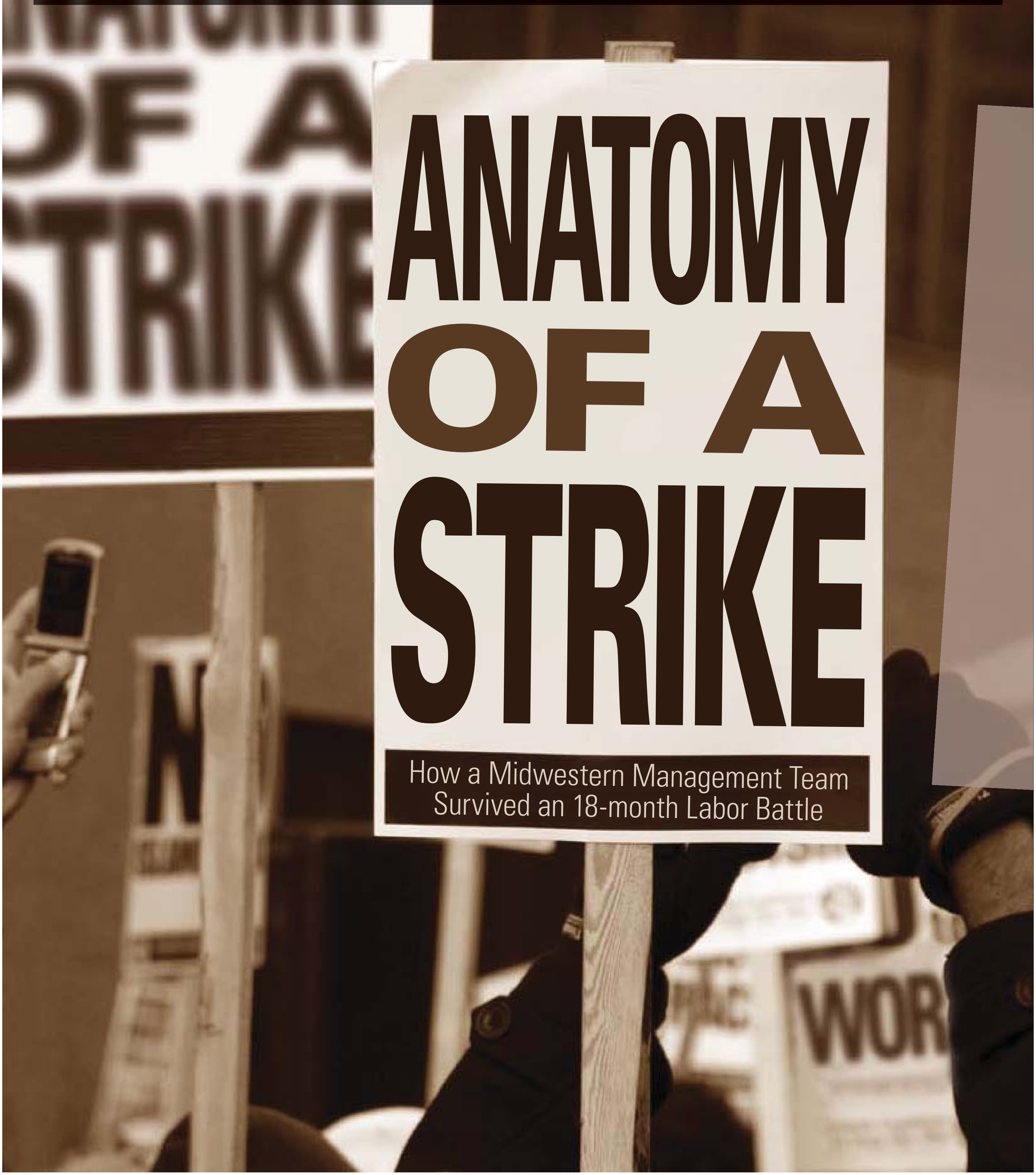
ANATOMY OF A STRIKE

How a Midwestern Management Team Survived an 18-month Labor Battle



BY RAUL ROSADO AND GREG UTKEN

Hard bargaining. A strike. Picket line misconduct. An injunction. Contempt of court. Permanent replacements. Mediation. Regressive bargaining. Charges of unfair labor practices. A corporate campaign. Demand for arbitration. A federal lawsuit. Decertification of the union. All of this and more happened during an 18-month strike at the Cincinnati-area operations of Cognis Corp., a global specialty chemical manufacturing company.

The global economy and foreign competition are making collective bargaining between companies and unions more challenging than ever. If a union exercises its economic weapon—the strike—failure of the parties to reach agreement can result in a lengthy labor dispute.

Such conflicts are rare. According to the News Media Guild, 98 percent of union contracts in the United States are settled each year without a strike. But when strikes do happen, the potential disruption and costs can be tremendous.

How do you successfully handle complicated labor negotiations when the pressure of a strike looms? How do you navigate your way through and survive the pitfalls of a strike? This real-life case study illustrates some of the moves a company might consider in this complicated mix of a chess game and boxing match.

Starting from a Difficult Position

Here's the case. Since the mid-1940s, the United Steelworkers of America represented production and maintenance employees at Cognis Corp.'s main North American manufacturing facility in Ohio. The company and the union had been parties to a series of collective bargaining agreements, typically three years in length. Prior to 2005, Cognis had experienced only one short strike at the facility, and that was about 20 years earlier.

The plant was facing serious business challenges. Foreign competition and excess industry capacity were adding pressure to an already costly operation. The costly labor contract covering production and maintenance employees was among the issues seriously challenging the plant's ability to compete. In fact, this particular plant had the highest labor costs of all Cognis' US facilities.

The problem wouldn't be an easy one to solve. The hundreds of employees in question and the union were reluctant to make changes.

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Playing it Straight

To address the challenge, the Cognis management team took a direct approach. The team was candid in sharing the state of the business with the union, outlining numerous steps the company had already taken to substantially reduce costs. Those costs included reductions in salaried staff, closing other facilities and significant reductions in administrative expenses. The management team reinforced the fact that costs at this particular facility were the highest of all of Cognis' facilities—and were seriously affecting the plant's ability to remain competitive.

Round One

The parties began negotiations for a new labor contract in December 2003 and continued through early February 2004. Cognis made proposals that would have resulted in significant cost savings and put the plant on a more level playing field with competitors. These proposals included eliminating special weekend premium pay and eliminating premium vacation pay.

Under the labor contract, employees were paid overtime for any work performed on Saturday and double-time for any work on Sunday, regardless of the number of hours they had worked during the pay period (Weekend Premium Pay). Additionally, the contract paid employees vacation based on a percentage of their W-2 earnings (Premium Vacation Pay). Because employees were paid significant amounts of overtime based on the Weekend Premium Pay language, Cognis also was paying significant amounts in vacation pay. (For example, W-2 earnings for full-time employees were in the $70,000 to $90,000 range, with some surpassing $100,000.) As a result, Cognis proposed replacing those provisions with more standard ones, calling for overtime after 40 hours and vacation pay based on 40 hours per week. The union continuously rejected the proposals without making counterproposals.

The parties bargained until a couple of hours before contract expiration. When it was clear that any final offer from Cognis would include those concessions and that the union was not going to accept them and would likely go on strike, the parties agreed at the 11th hour to extend the then-current contract, without change, for one year. During the next year, the Cognis team began studying organizational issues within the business, including a potential reorganization.

A Revised Gambit

When negotiations reopened the following year, Cognis took a different approach. The management team recognized that after the 2004 negotiation experience, it was highly unlikely that the union would agree to forgo the Premium Weekend Pay or Premium Vacation Pay. A strike seemed likely. In an effort to avoid that outcome, Cognis decided to take a two-tiered approach: Premium Weekend Pay and Premium Vacation Pay would be preserved for existing employees, but all future hires would be paid traditional weekend overtime and vacation pay based on 40 hours, a move that would be much less costly to the company.

The parties agreed to try to reach an early contract settlement and set a late-December deadline. (Prior to the start of these "early" negotiations, the company presented an updated financial picture reflecting the continued challenging state of the business, and it offered to open its books to the union.) The parties exchanged initial proposals, and early negotiations began. Cognis ultimately presented the union with its final offer, which included a three percent wage increase each year of the contract and the two-tier system for overtime and vacation pay. The union membership, however, voted the company's offer down by a 3-to-1 margin. Thus, early negotiations failed.

Thereafter, the union took Cognis up on its offer to open the books, and in January 2005, company representatives took financial records to United Steelworkers of

America headquarters in Pittsburgh, Pennsylvania, to meet with the international union's financial representative. But even after reviewing the company's financial situation, the union didn't change its bargaining position.

An Issue of Successorship

By January 2005, the Cognis management team had concluded its analysis of organizational issues and let the union know what it was considering. The company announced that later in the year it planned to reorganize and carve out part of its operations as a separate limited liability corporation (LLC) business.

During January and into February 2005, the parties conducted regular negotiations for a new contract. The significant unsettled issues continued to be the company's two-tier proposal on Premium Vacation Pay and Premium Weekend Pay. For the first time, a big issue for the union became a "successorship" clause. This demand was spawned by Cognis' earlier announcement of the planned carve-out.

The successorship language demanded by the union provided that Cognis could not sell, or otherwise transfer the operations, or any part of them, to anyone else unless:

- The buyer had entered into an agreement recognizing the union.
- The buyer assumed the existing labor contract or entered into a new agreement with the union.

Cognis rejected the successorship clause because, if the company ever wanted to sell any portion of its business in the future, the clause had the effect of limiting the pool of potential buyers and providing the union with an opportunity to effectively veto a transaction by its non-agreement.

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Locking Horns

In early February 2005, after two months of bargaining, Cognis put its last, best and final offer (LBFO) for a new contract on the table. It included the two-tier premium weekend and Premium Vacation Pay proposals, a wage increase each year of the contract and a nonrestrictive successorship clause under which the company would use good faith efforts to encourage a buyer to accept the contract or bargain with the union. Union employees, however, voted the LBFO down by a 10-to-1 margin, and the very next day, they began a strike. The parties met several times in February and March, but neither side changed its position.

Even though a labor contract has expired, by law, an employer is required to continue to observe the expired contract's terms until the parties either reach a new agreement or hit a bargaining impasse. In the latter case, the employer has the option to unilaterally implement the last offer it had on the table. Cognis held fast on its LBFO but did not elect to unilaterally implement it.

Managing the Middle Game

As is often typical with strikes, picket-line misconduct, including strikers threatening physical violence, jumping on vehicles entering and leaving the plant, and throwing "jack spikes" on the driveway had an impact on Cognis' day-to-day operations. The company obtained an injunction prohibiting picket-line misconduct and limiting the number of picketers who could gather at any entrance to the facility.

Given the plant is across the street from the company's North American headquarters, strikers also picketed the headquarters building's only entrance. Jack spikes on the driveway at the headquarters building punctured the tires of several employees' cars.

Meanwhile, Cognis continued to operate and service customers for several weeks by using salaried employees and temporary contractors. When it looked as if the strike would drag on for a significant period of time, Cognis developed a strategy to begin seeking permanent replacements for strikers.

The Tables Turn

Over a period of two months, Cognis found that it was able to attract and hire permanent replacements. The company weathered the strike for several months and learned something important: It was able to hire qualified employees at rates lower than those contained in the company's LBFO. Another key discovery: The temporary maintenance contractor Cognis had hired was handling maintenance work more efficiently and with a smaller staff. All the while, the plant was meeting customer deliveries and operating with fewer employees. The company then offered temporary maintenance contractors positions as full-time maintenance employees to replace strikers. These replacement workers began expressing concern about whether they would have to join the union when the strike ended.

With this newfound bargaining leverage, Cognis withdrew its LBFO and presented a new contract offer with somewhat less attractive terms in certain limited areas. Those terms included a new maintenance structure; some wage rates lower than those in the LBFO, and a different proposal on union security. The labor contract historically had "closed-shop" provisions that required employees to join the union and pay dues as a condition of employment. The company's new offer contained an "open-shop" proposal. The parties met sporadically between May and October without progress. Flare-ups on the picket line occurred, and Cognis successfully moved to have the union held in contempt of court.

Stalemate?

As of January 2006, there had been no meetings since October 2005, and the state court judge who had issued the injunction tried unsuccessfully to mediate an end to the strike. Additionally, during the course of the strike, the union filed multiple unfair labor practice charges against Cognis with the National Labor Relations Board (NLRB). These charges alleged unlawful surface bargaining, unlawful surveillance of picketers, bad-faith bargaining, unlawful regressive bargaining, and unilateral change of procedures without bargaining. Because of careful planning earlier, the company was able to successfully defeat all of the union's charges.

An Aggressive Counterattack

Having failed at the bargaining table, on the picket line, and before the NLRB, the union moved to a public-pressure campaign. The union began to picket and handbill companies doing business with Cognis. The company filed unfair-labor-practice charges against the union, which successfully ended the secondary pressure on Cognis' customers. The union also aligned itself with environmental groups, religious organizations and others to publicly denounce the company. The union filed safety complaints and environmental complaints, sought a resolution from the city-county council and sent letters to

ACC Extras on…Labor Issues

ACC InfoPAKs

- *The New Face of Union-Organizing Success: Neutrality Agreements, Ballot-Free "Elections," and Corporate Campaigns* (2007). In recent years, organized labor has employed new organizing issues, aggressive campaign strategies, and innovative techniques designed to catch the unwary employer off guard. Minimizing vulnerability to corporate campaigns should become part of the organization's overall risk management strategy. These steps discussed in this InfoPAK will improve the ability to avoid or survive a corporate campaign, and will enhance an employer's overall human resource posture. *www.acc.com/resource/v8709*

ACC Practice Profiles

- *Collaboration between Corporate Legal and Human Resources Departments on Non-Litigation Matters* (2007). The relationship between legal and human resources departments as is crucial to the success of companies as they compete in the marketplace. Strong collaboration between these departments helps companies navigate the complex web of regulatory, personnel, and employer liability management, and benefits and compensation policies, while minimizing the likelihood of disputes that can detract from a corporation's mission and affect its bottom line. *www.acc.com/resource/v8720*

Online CLE

- *Managing Employees in an Organized Workforce* (2006). Looking for an update on managing an organized workforce or tips to prevent employment organization? If so, this session is for you. Our labor experts will first provide an introduction to the laws that govern collective bargaining and then present tactics and tools to prevent a workforce from organizing, as well as legal methods to prevent a union from driving a wedge between you and your organized employees. *www.acc.com/resource/v7834*

Webcast Transcripts

- *The In-house Counsel's Playbook: Assessing Corporate Vulnerability to New Union Organizing Tactics, Corporate Campaigns, and Two Labor Federations* (2006). The schism in 2005 between the AFL-CIO and the powerful unions that formed the Change to Win federation garnered more media attention for organized labor than had been seen since Jimmy Hoffa. Whether in the long term it was much ado about nothing remains to be seen, but the short-term effects are being felt today. Struggling for survival and relevancy, organized labor now has two camps and one target—your employees. Join in-house colleagues for a discussion with labor law specialists on assessing the threat to your organization, industry, geographic location, and workforce. *www.acc.com/resource/v7634*

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The Right Moves

Here's a short list of lessons learned from the challenge at Cognis:

- **Plan a detailed strategy.** A strike has many moving parts, and the speed at which they come into play can vary. If you anticipate difficult bargaining, be prepared for a work stoppage and plan well in advance of the labor contract expiration. At Cognis, this process began about nine months before the strike. The management team, the general counsel, human resources representatives, and other key company employees sat down with outside labor counsel to develop a plan that included establishing timelines, considering specific scenarios and potential responses, hiring a security company, finding alternative transportation and factoring in strike-related costs.
- **Hold regular management team meetings.** Leading up to and during the strike, the management team had weekly one- to two-hour meetings with a standard agenda that focused on the strike and related matters. This provided an opportunity to vet strategies, options and decisions. During a strike, every change in the plot needs to be considered with a fresh eye.
- **Involve experienced labor counsel from the beginning.** Federal labor law can be very nuanced and is sometimes counterintuitive. For example, hiring replacement workers during a strike, which Cognis did, is an option, but it's a big step. There are very specific rules. You need to make sure you dot the "i's," cross the "t's," and use the appropriate language. An experienced labor lawyer can guide you through that process and help you overcome potential challenges, such as picket-line misconduct or employees' reluctance to cross the picket line.
- **Know where you're going and have the commitment of top management.** Everyone on the management team needs to know exactly what it means to face a strike—how long the strike might last, how it could affect delivery to customers and how much it might cost. The management team also needs to establish clear objectives. Where do you have flexibility? Where are your bottom lines? Are you willing to live through a strike to achieve those bottom lines, even if the strike may be an extended one? Everyone on the leadership team needs to agree on the objectives you establish and go into the strike with eyes wide open. It's a case of knowledge first, commitment second.
- **Keep the management team strong.** Several months into the strike, someone on the management team asked, "What's this costing us a month?" Then someone else asked, "How long is this going to go on?" This is typical. As a strike evolves, and particularly if it lasts for an extended time, some members of the management team may begin to second-guess the strong commitment they felt at the start of the process. The costs of ongoing security, legal expenses and the stress of working through difficult situations make it easy to have second thoughts about holding out for the course of the strike. When that happens, it is important to point out that backing down will destroy the morale of your frontline management team and the replacement workers. It also makes the company vulnerable to future labor disputes, because the union will know management cannot withstand a strike.
- **Be candid.** Because collective bargaining can be like a chess match, it's only natural to resist sharing your strategy and management discussions with your opponent. But you have every reason to be straightforward with the union and its members about the company's financial situation and what needs to be accomplished if the company is to remain competitive. During the strike, Cognis was willing to open its books and share them at the union's national headquarters. That's how serious it was about establishing and maintaining credibility.
- **Take the high road.** Often, the union will use the media in an effort to put pressure on the company and garner community support. It may call the company or its officers names, exaggerate incidents and do other things that put the company in a bad light. Cognis endured attacks on the company's environmental record, picketing at the Malaysian embassy, even jack spikes in the parking lot. Some members of the management team wanted to strike back in the media. That rarely is productive. Keep your team calm, be thoughtful and remain professional. And be sure to include your external communications representative in all of your meetings related to the strike.
- **Don't gloat when you succeed.** It is often said that no one wins in a strike, and that is absolutely true. During the strike, though Cognis continued to operate effectively and serve customers, there really wasn't much to celebrate. The Company spent considerable amounts of money on security and legal fees. The management group and permanent replacements faced intense stress and scrutiny. Cognis ended up providing a significant number of permanent replacements with good, high-paying jobs, but the workers they replaced—many of whom had devoted many years of service to the company—were left without jobs. This may have been a direct consequence of the union's strategies and decisions, but it's still a sad fact.

customers and area residents challenging the company's environmental and safety record using "scab" labor. When it became known that the carve-out LLC would have a Malaysian joint venture partner, union members picketed at the Malaysian Embassy in Washington, DC.

During the course of the strike, Cognis included the replacement workers under its hourly pension plan for purposes of beginning to accrue credit. The union filed a grievance alleging that including the replacement workers violated the collective bargaining agreement and the pension agreement. The company denied the grievance, and the union demanded that Cognis arbitrate its claim. Cognis refused on the basis that under federal labor law, once a labor contract has expired, the duty to arbitrate a grievance also expires. The union then filed suit in federal court asking the court to compel Cognis to arbitrate the pension issue, and the parties began litigating that issue.

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Endgame

By the summer of 2006, some employees had abandoned the strike, resigned from the union, crossed the picket line and returned to work. Additionally, Cognis had filled all remaining positions with permanent replacements. Then, employees working in the plant filed a petition with the NLRB requesting that a decertification election be held. In response, the union contended the replacement workers were not permanent and thus not entitled to vote, and that the strikers were the only eligible voters. After a hearing, the NLRB concluded that the replacements were permanent and eligible to vote. It also concluded that, because the replaced employees had been on strike for more than 12 months, they were *not* eligible to vote. The NLRB set the date for the decertification election.

Cognis ran a limited and low-key campaign. The decertification election was held in August 2006, and employees voted the union out by a 3-to-1 margin. The union filed objections to Cognis' pre-election conduct but later withdrew them. The NLRB certified the election results and, for the first time in more than 60 years, Cognis' Midwestern operations were union-free.

But the battle wasn't over yet. Even though the union was decertified, it and its members vowed to fight on. The strike and picketing activities continued. Cognis filed unfair-labor-practice charges against the union's continued activities, and the NLRB demanded that the union cease the ongoing strike and picketing.

Approximately 30 percent of the strikers made an offer to return to work, and in accordance with federal labor law, Cognis placed them on a preferential recall list should vacancies open up in the future. When the strike was over and the decertification resolved, the company reviewed incident reports and videotape of picketers' misconduct during the strike. Cognis identified strikers whose level of conduct was such that it served as a basis to terminate their employment.

Aftermath

The bottom line? Cognis did not want a strike. It tried to avoid one. Yet, confronted with an ever-changing set of facts and challenges, the company never wavered and strategically worked through each move. The result? Cognis successfully weathered a potentially crippling strike, continued to meet customer needs and achieved its economic objectives.

Perhaps the ultimate irony is that the union went on strike in an effort to force Cognis to include a successorship clause in the labor contract, which the union apparently told its members was necessary to assure them future job security. But the members' own actions in pursuing that objective led to them losing their jobs to permanent replacements.

In a final unique twist, approximately 125 of the strikers banded together and, in April 2007, sued the union in federal court, alleging that it had intentionally misled them with knowingly false information, withheld information from them, failed to inform them of key facts, failed to warn them that they could be replaced, and in fact assured them that they could not. That suit is pending.

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