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PERMANENT REPLACEMENT OF STRIKING WORKERS UNDER FEDERAL LAW

by DAVID P. TWOMEY*

I. INTRODUCTION

The strike is the most potent weapon possessed by labor unions to force employers to meet their demands concerning improved wages, hours, and working conditions. In the past employers commonly responded to a strike by curtailing operations or by continuing operations utilizing managerial personnel and temporary replacement workers. Because of economic pressure to reduce labor costs due to deregulation, foreign competition, and because of the political climate initiated by the President of the United States in 1981 when he ordered eleven thousand air traffic controllers terminated from their federal employment after they failed to comply with his order to return to work,1 many employers have recently opted to replace their striking workers with permanent replacements. Companies such as International Paper Company, Greyhound, Eastern Airlines and the New York Daily News are a few examples of companies who recently replaced strikers with permanent replacements. No longer is a worker

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1 The Professional Air Traffic Controllers Organization (PATCO) called a nationwide air traffic controllers strike on August 3, 1981. Section 7166(b)(7) of the Federal Service Labor-Management Relations Statute makes calling or participating in a strike an unfair labor practice. President Reagan give the controllers forty-eight hours to return to work or forfeit their jobs. More than eleven thousand workers were terminated after failing to comply with his order. In PATCO v. F.L.R.A., 110 L.R.R.M. 2676 (D.C. Cir. 1981), the United States Court of Appeals upheld the revocation of PATCO's certification for repeatedly violating the law against federal employees striking.
who goes out on strike for economic reasons simply subject to losing pay for the period of time out on strike. That worker may also lose his or her job to a permanent replacement worker, and the labor organization directing the strike may find that it has lost its majority status through the substitution of replacement workers for union adherents. Because of all this, many union officials believe that the effectiveness of the strike weapon has been greatly diminished.

The courts have been called upon to settle disputes regarding replacement worker issues. This paper will set forth the legal status of the parties relative to the major issues involving strikers and replacement workers.

II. **THE MACKAY RADIO RULE: THE BASIC RIGHT TO HIRE PERMANENT REPLACEMENTS**

Since the 1938 Supreme Court decision in *NLRB v. Mackay Radio & Telegraph Co.* an employer has been allowed to hire permanent replacements for economic strikers. In dicta in Justice Roberts' majority opinion in *Mackay* he stated that it was not "an unfair labor practice to replace the striking employees with others in an effort to carry on the business." Additionally he stated that it was not an unfair labor practice "to reinstate only so many of the strikers as there were vacant places to be filled." Under *Mackay* then an employer can refuse to reinstate strikers at the conclusion of an economic strike if it has replaced them with permanent employees.

III. LIMITATIONS ON THE EMPLOYER

A. **Reinstatement Rights for Economic Strikers**

Section 2(3) of the National Labor Relations Act (NLRA) provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially similar employment. If at the conclusion of a strike, an employer refuses to reinstate striking employees to vacant positions, the effect is to discourage employees from exercising their rights to organize and strike guaranteed by Sections 7 and 13 of the

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2 304 U.S. 333 (1938).
3 *Id.* at 345.
4 *Id.* at 346.
5 The NLRA states in relevant part: "The term 'employee' shall include any employee ... whose work has ceased as a consequence of or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment...." 29 U.S.C. § 152(3) (1990).
NLRA. In *N.L.R.B. v. Fleetwood Trailer Company, Inc.* the Supreme Court dealt with the question of an employer's obligation to rehire economic strikers who unconditionally applied for reinstatement at the end of a strike, but no work existed for them at that time. The employer contended in *Fleetwood* that the right of strikers to jobs must be judged as of the date they apply for reinstatement, which was August 20; and, the employer argued, since no jobs were available on that date, their requests were properly rejected. On October 8 and 16 the employer hired six new employees for jobs which six strikers were qualified to fill. The six strikers were ultimately reinstated by December 14. The Supreme Court ruled that the six strikers should have been rehired as soon as jobs became available and therefore the employer had violated Sections 8(a)(1) and (3) of the NLRA by hiring six new employees rather than reinstating the strikers in October. Based on the Supreme Court's decision in *Fleetwood Trailer* the National Labor Relations Board (NLRB) set forth a comprehensive rule on the reinstatement rights of economic strikers in its *Laidlaw Corporation* decision. The *Laidlaw* rule states:

\[\ldots\] economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon departure of replacements unless they have in the mean time acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.\ldots\]

### B. Special Rule for Unfair Labor Practice Strikers

"Unfair labor practice strikers" are individuals who go out on strike to protest an unfair labor practice of an employer as opposed to going out on strike for better wages, hours and working conditions and being classified as "economic strikers." If an employer fires a union leader for the leader's union activity—a Section 8(a)(1) and (3) unfair labor practice—and the discharge precipitated a strike, the employer may hire replacement workers, but only for the period until the strikers return to work. When the strikers protesting the unfair labor practice make an unconditional request to return to

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6 389 U.S. 375 (1967).
7 Id. at 377.
8 Id.
9 Id. at 380.
10 171 N.L.R.B. 175 (1968).
11 Id. at 1369-70.
work, the employer may not continue to employ the replacement workers in preference to the strikers. And, should the employer do so, it would be liable to pay the unfair labor practice strikers back-wages for the period of time after its failure to reinstate them.  

C. Rejection of Preference for Trainees Over Returning Strikers  

In Eastern Air Lines Inc. v. Airline Pilots Association International the U.S. Court of Appeals for the Eleventh Circuit dealt with the question of whether Eastern was obligated to reinstate striking pilots prior to awarding pilot positions to new hire pilots who had not completed all requirements to fly revenue flights. The striking pilots had made unconditional offers to return to work by the end of the strike on November 22, 1989. As of that date at least 227 new hire replacement pilots remained in training not having obtained certificates from the FAA permitting them to fly regular revenue flights. Eastern contended that the new hire pilots, who were still in training, were permanent employees and as such should not be displaced by returning strikers. The Court of Appeals ruled that the trainees were not permanent replacements. The Court was reluctant to support Eastern's position because giving preference to trainees over returning strikers discouraged employees from exercising their rights to organize and to strike, and undermined the preservation of the employer—employee relationship both during and after the strike. Accordingly, the Court rejected Eastern's preference for trainees over returning strikers and remanded the case to the district court for further proceedings.  

D. Other Decisions Restricting Certain Employer Tactics  

The Supreme Court dealt with creative incentives extended by employers to induce striking employees to return to work in two other major cases. In NLRB v. Erie Resistor Corp. the Supreme Court upheld the Board's decision prohibiting employers from granting super-seniority to strike replacements and strike crossovers (striking employees who later crossed over the picket line to return to work before the termination of the strike) because of the damage

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13 920 F.2d 722 (11th Cir. 1990).  
14 Id. at 723.  
15 Id.  
16 Id. at 724.  
17 Id. 730.  
18 Id. 731.  
super-seniority would do to the right to strike and the future bargaining relationship of the parties.

In NLRB v. Great Dane Trailers, Inc., the Supreme Court upheld the Board’s decision that an employer’s payment of vacation benefits to replacements, crossovers, and nonstrikers but not to strikers violated the Act because of its destructive effect on the right to strike. The Court stated that paying accrued benefits to one group while announcing the extinction of the same benefits to another group surely would have the effect of discouraging present or future concerted activities.

IV. RESTATEMENT RIGHTS OF FULL-TERM STRIKERS VERSUS JUNIOR NONSTRIKERS

In TWA v. Independent Federation of Flight Attendants the Supreme Court dealt with the issue of whether senior flight attendants who unconditionally offered to return to work at the end of a strike may displace junior flight attendants who crossed picket lines to work during the strike. TWA argued that it would be anomalous to require crossovers to be displaced, when newly-hired, permanent employees cannot be displaced under the Mackay decision. The Court accepted this view of the Mackay decision, holding that crossovers need not be displaced in order to reinstate more senior full-term strikers. The TWA decision adds a new device for employers to use to break a strike. By upholding the legal right of employers to promise employees who refrain from participating in a strike or who return to work during a strike that they will not be displaced from desirable jobs at the end of the strike by more senior striking workers, employers have a potent new weapon which can be threatened at the bargaining table or utilized in economic conflict should a strike ensue. With the risk of losing their positions to permanent replacements or to junior crossover employees, senior employees may be very reluctant to support a strike.

V. LOSS OF RECOGNITION AS A RESULT OF HIRING PERMANENT REPLACEMENTS

In NLRB v. Curtin Matheson Scientific, Inc. the Supreme Court recently dealt with the question of whether the NLRB, in evaluating

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22 Id. at 1230. Please note that the national labor law governing the airline industry is the Railway Labor Act not the National Labor Relations Act. However, the Supreme Court has utilized the carefully drawn analogies from the federal common law developed under the National Labor Relations Act to help the Court decide cases under the Railway Labor Act. See TWA, 109 S. Ct., at 1230.
23 Id. at 1235.
an employer's claim that the employer had a reasonable basis for doubting a union's majority support, must presume that the permanent employees hired to replace the strikers oppose the union. On May 25 when the bargaining-unit consisted of 27 employees the Union began an economic strike. Five employees immediately crossed the picket line. On June 25, the employer hired 29 replacement workers for the 22 strikers. The Union ended its strike on July 20. On that date the employer notified the Union that it doubted that the Union was supported by a majority of the employees in the unit, and it withdrew recognition from the Union. As of July 20, the bargaining unit consisted of 19 strikers (not currently working), 25 replacement workers, and 5 crossover employees. The Board reversed the Administrative Law Judge's determination that the employer had a reasonably-based good faith doubt of the Union's majority status, holding that it would not use any presumptions with respect to replacement workers' union sentiments, but would instead take a case-by-case approach and require additional evidence of lack of union support. The Supreme Court upheld the Board's approach because the employer's anti-union presumption could allow an employer to eliminate a union in its entirety merely by hiring a sufficient number of replacements and thereby avoid good faith bargaining over a strike settlement.

While the Curtin Matheson decision went against the employer's mandatory, anti-union presumption, nevertheless an employer can rebut the presumption of majority support of a union after the certification year, either by showing that the union in fact lacks majority support, or by demonstrating a sufficient objective basis for doubting the union's majority status. The hiring of a significant number of permanent replacements under the Mackay rule may still very well undermine a union's majority status.

VI. CONCLUSION

Employers have the right to hire permanent replacement workers to fill positions vacated by economic strikes. Moreover, it is lawful

\[25\] Id. at 1544.
\[26\] Id.
\[27\] Id.
\[28\] Id.
\[29\] Id.
\[30\] Id.
\[31\] Id. at 1548.
\[32\] Id. at 1553.
\[33\] Id. at 1549-1650.
for employers to promise crossover employees that they will not be displaced from desirable jobs at the end of a strike by more senior striking employees. And, the hiring of significant numbers of permanent replacement workers may ultimately undermine a union's majority status. Union officials believe that the strike weapon has been diminished in its effectiveness by the hiring of permanent replacement workers in recent years. They believe that the balance of power in collective bargaining has shifted in favor of employers and they believe that legislation is necessary to overturn the *Mackay Radio* decision. Union leaders are currently supporting the Striker Replacement Bill now before Congress, which would allow companies to keep their operations running during a strike with temporary replacements, but prohibit the hiring of permanent replacements.