

## **Employer Treatment of Permanently Replaced Strikers, 1935-1991: Public Policy Implications**

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Employer hiring of permanent replacements for economic strikers<sup>1</sup> has become one of the most controversial labor law issues since the early 1980s.<sup>2</sup> While such hirings have occurred for over a century in the United States<sup>3</sup> and were recognized as lawful in 1938 by the Supreme Court,<sup>4</sup> the extensive use and threat to use permanent replacements by major U.S. employers during the 1980s and early 1990s have intensified attention and debate surrounding the issue.<sup>5</sup>

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1. In general, an economic striker is an employee who withholds her labor with the objective of improving or preserving her compensation or conditions of employment. *See generally* 2 ABA SECTION OF LABOR AND EMPLOYMENT LAW, THE DEVELOPING LABOR LAW 1100 (Patrick Hardin ed., 3d ed. 1992).

2. Bruce E. Kaufman, *Research on Strike Models and Outcomes in the 1980s: Accomplishments and Shortcomings*, in RESEARCH FRONTIERS IN INDUSTRIAL RELATIONS AND HUMAN RESOURCES 77 (David Lewin et al. eds., 1992).

3. *See, e.g.*, State v. Stewart, 9 A. 559 (Vt. 1887); Crump v. Commonwealth, 6 S.E. 620 (Va. 1888); State v. Glidden, 8 A. 890 (Conn. 1888) (discussing early cases in which employers hired striker replacements).

4. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

5. Employers using permanent replacements include Continental Airlines, *see* In re Continental Airlines Corp., 901 F.2d 1259 (5th Cir. 1990); O'Neill v. Air Line Pilots Ass'n, 886 F.2d 1438 (5th Cir. 1989), United Airlines, *see* Rakestraw v. United Airlines Inc., 981 F.2d 1524 (7th Cir. 1992), Trans World Airlines, *see* TWA Inc. v. Independent Fed'n of Flight Attendants, 489 U.S. 426 (1989), Eastern Airlines, *see* Eastern Airlines Inc. v. Air Line Pilots Ass'n Int'l, 744 F. Supp. 1140 (S.D.Fl. 1990), Greyhound, *see Proposed Greyhound Settlement Includes \$22 Million in Back Pay*, DAILY LAB. REP. (BNA) No. 75, at C-1 (Apr. 21, 1993), Phelps Dodge, *see* United Steelworkers of America v. Phelps Dodge Corp., 833 F.2d 804 (9th Cir. 1987), *cert. denied*, 493 U.S. 809 (1989), A.T. Massey, *see* Tall Timber Mine and United Mine Workers of America, District 17, Local 1440, Mar. 24, 1992 (M. LeRoy, Arb.) (unpublished decision on file with author), the Pittston Group, *see Ratification of Pittston Contract Hailed by Union Leaders, Secretary Dole*, DAILY LAB. REP. (BNA) No. 35, at A-7, -10 (Feb. 21, 1990); Int'l Union, United Mine Workers of America v. Bagwell, 114 S.Ct. 2552 (1994), the Chicago Tribune, *see* Chicago Tribune Co. v. Graphic Communications Union, Local 7, 138 L.R.R.M. (BNA) 1041 (1991), the Pittsburgh Press, *see* Pittsburgh Press Co. v. Preate, 797 F. Supp. 436, 444 (W.D.Pa. 1992), *aff'd*, No. 92-3486, 1992 U.S. App. LEXIS 33096 (3d Cir. Nov. 3, 1992).

The hiring of permanent replacements was not seriously challenged until 1991, when the House of Representatives passed the Workplace Fairness Act prohibiting employers from hiring permanent striker replacements.<sup>6</sup> However, the bill failed to garner the two-thirds majority necessary to override a promised veto by President Bush.<sup>7</sup> It subsequently died in the Senate due, in large part, to strong opposition by Senate Minority Leader Bob Dole (R-KN).<sup>8</sup>

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Geo A. Hormel, *see* William Serrin, *Hormel Plant Shuts as Troops Arrive and Strikers Thin Ranks*, N.Y. TIMES, Jan. 22, 1986, at A12; Hardy Green, ON STRIKE AT HORMEL: THE STRUGGLE FOR A DEMOCRATIC LABOR MOVEMENT (1990); Dave Hage and Paul Klauda, NO RETREAT, NO SURRENDER: LABOR'S WAR AT HORMEL (1989), International Paper, *see* Adrienne M. Bierecree, *Capital Restructuring and Labor Relations: The International Paper Strike*, 1 INT'L CONTRIBUTIONS TO LABOUR STUDIES 59, 72-73 (1991), Colt Industries, *see* NLRB Administrative Law Judge Finds Colt Strike Caused Unfair Labor Practices, DAILY LAB. REP. (BNA) No. 177, at A-11 (Sept. 14, 1989); *Colt Told to Rehire 800 Strikers; Back Pay Is to Be in Millions*, N.Y. TIMES, Sept. 13, 1989, at B3, Caterpillar, *see* Robert L. Rose, *Thousands Respond to Caterpillar Ads to Replace Striking Workers in Illinois*, WALL ST. J., Apr. 8, 1992, at A3, Bridgestone/Firestone, *see* Raju Narisetti, *Bridgestone Says Not All Strikers Can Return to Work*, WALL ST. J., Jan. 16, 1995, at A4, major league umpires, *Umpires Call "Strike" - A Different Kind*, U.S. NEWS & WORLD REP., Apr. 16, 1979, at 8, and major league baseball players, *see* Peter T. Kilborn, *Bitter Sweet Success: The Failure of Replacement Baseball is a Labor Victory, and an Exception*, N.Y. TIMES, Apr. 4, 1995, at A16.

6. The Workplace Fairness Act passed on a recorded vote of 247-182 on July 17, 1991. The bill would have amended the NLRA and RLA by prohibiting two employer practices:

- (i) to offer, or to grant, the status of permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute; or (ii) to otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed, during a labor dispute over an individual who—(A) was an employee of the employer at the commencement of the dispute; (B) has exercised the right to join, to assist, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection through the labor organization involved in the dispute; and (C) is working for, or has unconditionally offered to return to work for, the employer.

H.R. 3936, 101st Cong., 2d Sess. (1990). There were several precursors to the Workplace Fairness Act. For example, Rep. William Clay (D-Mo.) introduced on February 1, 1990, the first proposal for an outright ban on employer hiring of permanent striker replacements. *See Strike Replacement Bill Introduced by Rep. Clay*, DAILY LAB. REP. (BNA) No. 24, at A-7 (February 5, 1990). But the bill died in subcommittee. On June 11, 1992, Senator Bob Packwood (R-OR) introduced an alternative to the Workplace Fairness Act in a compromise amendment that provided for a form of "advisory arbitration" during contract impasses. *See Text of Substitute Version of S. 55, Including the Packwood Amendment*, DAILY LAB. REP. (BNA) No. 115, at D-1, D-2 (June 15, 1992). However, on June 16 it failed along with the Workplace Fairness Act on a 57-42 cloture vote. *Senate Vote Kills Bill to Restrict Use of Permanent Striker Replacements*, DAILY LAB. REP. (BNA) No. 117, at A-9 (June 17, 1992).

7. *Striker Replacement Bill Faces Uncertain Future in Senate*, DAILY LAB. REP. (BNA) No. 143, at A-17 (July 25, 1991). President Bush had issued a statement that he planned to veto any striker replacement bill; he argued that such legislation "would destroy a prime component of the economic balance between labor and management in collective bargaining." *Administration Policy Statement on S. 55 Workplace Fairness Act*, DAILY LAB. REP. (BNA) No. 112, at F-1 (June 10, 1992).

8. *See Striker Replacement Bill Is Dead, Sen. Dole Tells National Grocers*, DAILY LAB. REP. (BNA) No. 122, at A-6 (June 25, 1991). *See also* 140 CONG.REC. S8537-01 (daily ed. July 12, 1994) (statement of Sen. Dole) ("Without the prospect of permanent striker replacement, unions will resort to the strike weapon more and more frequently. Consumer process will rise, jobs will be lost, communities will plunge into chaos."). President Clinton's election initially raised expectations of the enactment of a strikers' rights bill. *Labor's Agenda Seen Rising under Clinton*, DAILY LAB. REP. (BNA) No. 11, at A-6 (January 19, 1993). But Senate Democrats' failure to end a Republican filibuster followed by the Republicans' winning of majorities in both houses of Congress meant that no such legislation would pass in the foreseeable future. *Senate Vote to End Filibuster on Striker Replacement Fails 53-47*, DAILY LAB. REP. (BNA) No. 133, at AA-1 (July 13, 1994); *Defeat of Striker Replacement*

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Nonetheless, unions and employers continue to argue intensely over various proposals to limit the hiring of permanent replacements.

The stakes for labor and management are high. On one side, unions and their congressional supporters contend that the doctrine enunciated by the Supreme Court in *Mackay Radio* essentially permits employers to discharge strikers by allowing replacements to remain in their positions indefinitely.<sup>9</sup> This, they say, leads to an intolerable incongruity in the law because the National Labor Relations Act (NLRA)<sup>10</sup> and the Railway Labor Act (RLA)<sup>11</sup> expressly safeguard the right to strike.<sup>12</sup> Union representatives have testified before Congress that over 20,000 strikers who were simply exercising their right to strike have lost their jobs to replacements.<sup>13</sup>

On the other side, employers and their congressional supporters argue that what unions really want is the right to *win* every strike.<sup>14</sup> They attest to the damaging effects of strikes<sup>15</sup> and insist that employers would be forced to cease operating if prohibited from hiring permanent striker replacements.<sup>16</sup>

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*Bill A Victory for Business Coalition*, DAILY LAB. REP. (BNA) No. 134, at AA-1 (July 14, 1994).

9. See *Statements and Summaries of Amendment to S. 55 by Sen. Bob Packwood and AFL-CIO President Lane Kirkland*, DAILY LAB. REP. (BNA) No. 114, at E-1 (June 12, 1992) (quoting Lane Kirkland saying, "Current U.S. labor law says you cannot be fired for striking, but you *can* be 'permanently replaced.' That meaningless distinction has cost tens of thousands of workers their jobs and incomes, their pension and health care, their homes and dignity.").

10. 29 U.S.C. §§ 141-200 (1994).

11. 45 U.S.C. § 151 (1994).

12. See 29 U.S.C. §163 (1994) (stating that "nothing in this subchapter . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike"). The RLA limits the right to strike procedurally by providing mediation, fact-finding, and an emergency board to break contract impasses. See 45 U.S.C. §§ 152-160 (1993). Nevertheless, "[i]mplicit in the statutory scheme . . . is the ultimate right to self-help—the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration." *Florida East Coast Railway v. Bhd. of Railroad Trainmen*, 336 F.2d 172, 181 (5th Cir. 1964), cert. denied, 379 U.S. 990 (1965).

13. Stephen Franklin & Michael Arndt, *Time Grows Short in Battle Over Striker-Replacement Bill*, CHI. TRIB., June 14, 1994, at C1, C2 (noting that the AFL-CIO estimates that at least 20,000 strikers have lost their jobs). Some of these strikers have testified at congressional hearings about the devastating consequences of being permanently replaced. See *Prohibiting Discrimination Against Economic Strikers: Hearing on S. 55 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources*, 102nd Cong., 1st Sess. 64 (1991) (according to striker Karen Behnke, "[t]he strike has caused enormous hardships for the strikers and their families.").

14. See *Prohibiting Discrimination Against Economic Strikers: Hearing on S. 55 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources*, 102nd Cong., 1st Sess. 168 (1991) (statement of Sen. Hatch).

15. *Preventing Replacement of Economic Strikers: Hearing on S. 2112 Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources*, 101st Cong., 2d Sess. 138 (June 6, 1990) [hereinafter *Preventing Replacements*] (testimony of Richard S. Hoyt, U.S. Chamber of Commerce):

My business, like many others, is labor intensive and operates under severe time constraints.

If I cannot provide my customers with a product within budget and on time, they will find a contractor who can. Disruptions caused by labor disputes are costly and counterproductive in any industry, but especially in the construction industry, where work is performed sequentially. A work stoppage caused by a labor protest at a critical stage of a multiemployer construction project can bring the entire project to a standstill.

16. See *id.* at 126 (testimony of James P. Melican, Senior Vice President of International Paper) ("Why does an employer hire permanent replacements? Usually it is because the only alternative is to

Moreover, they believe that U.S. businesses forced to capitulate to striker demands would be less competitive in global markets.<sup>17</sup>

Employers also point to existing restrictions on their right to hire permanent replacements and continuing obligations to striking workers. Employers can hire only *temporary* replacements for unfair labor practice (ULP) strikers.<sup>18</sup> Presumably, this increases the bargaining power of ULP strikers because few potential employees would be willing to work in a temporary job. Even in an economic strike, an employer must reinstate strikers when they unconditionally offer to return to work, provided that their positions have not been filled or that a permanent employee vacates the position.<sup>19</sup> Also, an employer cannot entice replacements by offering certain employment preferences, such as enhanced seniority.<sup>20</sup>

Debate surrounding the Workplace Fairness Act has relied chiefly upon anecdotal evidence, each side rushing to Capitol Hill to recount their respective story. This Article endeavors to advance debate by contributing empirical analysis regarding employer compliance with existing law.<sup>21</sup> Part I traces the evolution of striker rights following the Supreme Court's *Mackay Radio* decision in 1938. There, I discuss how subsequent decisions by lower courts and the National Labor Relations Board (NLRB) have significantly limited an employer's right to hire permanent striker replacements. Part II describes the research methodology used in this study.

Part III documents the results of the study of 292 adjudicated decisions concerning permanent replacement strikes from 1935 to 1991. It reports six basic findings: (1) The percentage of decisions finding employer violation of strikers' right to be listed for eventual reinstatement has fallen in the past two decades; (2) the percentage of decisions finding employer violation of the duty to recall strikers has changed little but has remained moderately high; (3) few

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shut down the operation. Very few employers can keep an operation running for any sustained period of time utilizing supervisory personnel, and temporary replacements are frequently impossible to come by"). *But see* Robert L. Rose, *Temporary Heaven: A Job at Struck Caterpillar*, WALL ST. J., Nov. 29, 1994, at B1, B7 (reporting on Caterpillar's hiring of many temporary replacements for striking UAW workers); Robert L. Rose, *Caterpillar and Striking UAW to Meet U.S. Mediator; Firm Curbs Agenda*, WALL ST. J., Jan. 10, 1995, at A14 (reporting that the employer has the "upper hand" in responding to a large strike, in part because temporary workers have helped keep their plants open).

17. *See Prohibiting Permanent Replacement of Striking Workers: Hearing on H.R. 5 Before the Subcommittee on Aviation of the House Committee on Public Works and Transportation*, 102d Cong., 1st Sess. 209 (1991) (testimony of Alliance to Keep America Working) (explaining that "by forcing an employer to accept demands for higher wages . . . the bill would logically result in making American products too expensive to compete in Europe and Japan . . . or anywhere else in the world").

18. An unfair labor practice striker is someone who withholds her labor partly or wholly because of an unfair labor practice committed by an employer. *See* Hardin, *supra* note 1, at 1100-1104.

19. *See* Laidlaw Corp. and Local 681, Int'l Bhd. of Pulp, Sulphite, and Paper Mill Workers, 171 N.L.R.B. 1366 (1968), *enforced* 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

20. *See* NLRB v. Erie Resistor, 373 U.S. 221 (1963).

21. *See also* Michael H. LeRoy, *The Changing Character of Strikes Involving Permanent Striker Replacements, 1935-1990*, 16 J. LAB. RESEARCH (forthcoming summer, 1995) (finding high rates of NLRB rulings that employers committed unfair labor practices in the course of replacement strikes).

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decisions have resulted in a finding that employers unlawfully discriminated against strikers; (4) the percentage of decisions finding that employers had unlawfully discharged strikers has remained consistent and moderately high; (5) the percentage of decisions finding that employers granted nonstrikers preferential treatment has fallen, but remained significant; and (6) the percentage of decisions that have found that employers unlawfully failed to reinstate ULP strikers has been fairly small but persistent.

Based on these results, Part IV outlines policy prescriptions. It suggests that penalties for employer violation of striker rights should be increased and that more aggressive use of injunctions under the NLRA should be made to deter employer misconduct and to minimize injury to strikers from employer violations. The Article concludes with observations about the prospects and impetus for enactment of legislation to protect replaced strikers.

### I. THE EVOLUTION OF STRIKER REPLACEMENT DOCTRINE FOLLOWING *MACKAY RADIO*

#### A. *The Genesis of the Permanent Striker Replacement Doctrine: NLRB v. Mackay Radio*

An employer's right to hire permanent striker replacements has its dubious origin in *NLRB v. Mackay Radio*.<sup>22</sup> In that case, the NLRB ruled that an employer had unlawfully discriminated against five strike organizers by refusing to reinstate them after the union had unconditionally ended the strike.<sup>23</sup> The Supreme Court affirmed the NLRB ruling.<sup>24</sup> Had the Court written a parsimonious decision, the matter would have ended there. But in expansive dictum, the Court stated what has become popularized as the striker replacement doctrine:

[An employer] is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.<sup>25</sup>

Commentators have criticized this doctrine on various grounds. Some have questioned whether such a doctrine can be based on dictum.<sup>26</sup> Others have expressed concern that this doctrine is fundamentally at odds with the core

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22. 304 U.S. 333 (1938).

23. *Id.* at 339, 347.

24. *Id.* at 347.

25. *Id.* at 345-46.

26. See Matthew W. Finkin, *Labor Policy and the Evaporation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 548 (1990); Paul Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 388 (1984).

purpose of the NLRA: the protection of employee organization, collective bargaining, and concerted activity.<sup>27</sup> Indeed, it is difficult to reconcile § 163 of the NLRA, which expressly protects the right to strike,<sup>28</sup> with a doctrine that appears to subject lawful striking to the seemingly heavy penalty of permanent replacement.

Nevertheless, the striker replacement doctrine has endured. The Minnesota Supreme Court recently offered what is perhaps the most convincing explanation for *Mackay Radio's* durability: time. The striker replacement doctrine remains because Congress has implicitly agreed for over fifty years that it is consistent with the NLRA.<sup>29</sup> Another possible explanation is that *Mackay Radio's* dictum simply made explicit a well-settled common law principle that derived from English labor statutes.<sup>30</sup> As such, *Mackay Radio's* dictum has endured because the idea that employers be permitted to hire permanent striker replacements is so thoroughly embedded in American and English law.

#### B. *The ULP Striker Doctrine*

Striker replacement doctrine has undergone numerous refinements since the Supreme Court decided *Mackay Radio*. Over time, the NLRB has imposed

27. See 29 U.S.C. § 157 (1994) (providing that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .”). See, e.g., Note, *One Strike and You're Out? Creating an Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669, 674 (1993) (concluding that “[e]mployers currently abuse the right of hiring permanent replacements in order to rid themselves of unions, thus destroying the benefits that unions provide.”); Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 421 (1992), (observing that “it is clear that the *Mackay Radio* decision severely undermined the statutorily protected right of employees to strike.”); Daniel Pollitt, *Mackay Radio: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295, 308 (1991) (noting that “the *Mackay Radio* doctrine is an increasingly effective tool with which employers can undermine employees’ efforts to organize themselves and to meaningfully bargain with employers.”).

28. 29 U.S.C. § 163 (1992) (“Nothing in this subchapter . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike. . . .”).

29. See *Midwest Motor Express v. IBT, Local 120*, 512 N.W.2d 881, 890 (Minn. 1994) (Fifty-five years have gone by since the Supreme Court ruled in *Mackay* that an employer does not commit an unfair labor practice by hiring permanent replacements for striking employees. More than 30 years ago the Court characterized the use of economic pressure as part and parcel of the process of collective bargaining. In addition to major revisions of the basic federal labor statute in 1947 and 1959, Congress has frequently demonstrated its capacity to amend the statute to conform with its regulatory intention. But Congress has never seen fit to limit in any respect the employer’s right to hire permanent replacements for striking employees.)

(Citations omitted).

30. See Michael H. LeRoy, *Changing Paradigms in the Public Policy of Striker Replacements: Combination, Conspiracy, Concert and Cartelization*, 34 B.C. L. REV. 257, 283 n.157 (1993) (comparing an 1878 Connecticut statute prohibiting intimidation of a person seeking to engage in lawful activity, such as a striker replacement seeking to cross a union’s picket line, with the Conspiracy and Protection Act, 1875, 38 & 39 Vict., ch. 86, § 3 (1875) (Eng.), prohibiting intimidation to compel a person to abstain from engaging in lawful conduct).

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limitations on employers' use of permanent replacements. Most importantly, the Board has held that no employer has a right to replace permanently an unfair labor practice (ULP) striker.<sup>31</sup> ULP strikes are strikes undertaken in response to an employer's unlawful act, such as firing a striker,<sup>32</sup> withholding financial information during negotiations,<sup>33</sup> or refusal to recognize a certified bargaining agent.<sup>34</sup> In addition, a strike that started off as an economic strike may evolve into a ULP strike if the Board finds that the employer committed a ULP during the strike.<sup>35</sup> As a result, a poorly timed ULP obviates *Mackay Radio's* benefit to an employer.

Further, in *Mastro Plastics Corp. & Local 3127, United Bhd. of Carpenters and Joiners*,<sup>36</sup> the NLRB carved out an exception for ULP strikers to the harsh sanctions of the Taft-Hartley Act amendments to the NLRA.<sup>37</sup> The Act provided that a union must give sixty-day notice of intent to terminate or modify an existing labor agreement<sup>38</sup> and that if employees engaged in a strike within that sixty-day period, they would lose their status as employees.<sup>39</sup> However, the NLRB held that when a spontaneous strike occurred to protest the unlawful discharge of a union officer, strikers could not lose their status as employees, even if they failed to provide proper notice of their intent to strike.<sup>40</sup> The Supreme Court upheld the Board's decision, concluding that the Taft-Hartley Act did not result in the strikers' loss of employment because their "strike was not to terminate or modify the contract," but rather to contest an unfair labor practice.<sup>41</sup> As a result of *Mastro Plastics*, ULP strikers not only remain employees under the NLRA, but are entitled to immediate reinstatement once they end their strike.

### C. *Mitigation of the Mackay Radio Doctrine as Applied to Economic Strikers*

A second refinement of the striker replacement doctrine since *Mackay Radio* has been the NLRB's position that in an economic strike, an employer must offer reinstatement to strikers whose positions remain open. In *Laidlaw*

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31. See, e.g., *NLRB v. My Store, Inc.*, 345 F.2d 494, 498 (7th Cir. 1965) ("That there may also have been economic reasons for the strike did not deprive the strikers of their rights as unfair labor practice strikers . . .") (Citation omitted).

32. See *Champ Corp.*, 291 N.L.R.B. 803 (1988).

33. See *Blu-Fountain Manor*, 270 N.L.R.B. 199 (1984), *enforced*, 785 F.2d 195 (7th Cir. 1986).

34. See *Rose Printing Corp.*, 304 N.L.R.B. 1076 (1988).

35. See *Burkart Foam*, 283 N.L.R.B. 351 (1987), *enforced*, 848 F.2d 825 (7th Cir. 1988).

36. 103 N.L.R.B. 511, 515 (1953).

37. 29 U.S.C. § 141-87 (1994).

38. 29 U.S.C. § 158(d) (1994).

39. 29 U.S.C. § 158(d)(4) (1994).

40. *Mastro Plastics Corp.*, 103 N.L.R.B. 511, 515 (1953).

41. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 286 (1956).

*Corp. and Local 681, Int'l Bhd. of Pulp, Sulphite, and Paper Mill Workers*,<sup>42</sup> the NLRB provided that

economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime 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.<sup>43</sup>

Before this decision, an employer was only required to consider strikers for reinstatement at the moment they applied for vacant positions.<sup>44</sup> If the employer refused to reinstate the striking employee to a vacant position without a "legitimate and substantial business justification," the employer was guilty of an unfair labor practice.<sup>45</sup> Nevertheless, this principle made a striker's prospects entirely dependent on lucky timing. In *Laidlaw Corp.*, the Board eliminated this anomaly, stating that "an economic striker's right to full reinstatement . . . does not depend on [job] availability at the precise moment of application . . . ."<sup>46</sup> The Board further refined this regime in *Rose Printing*<sup>47</sup> by stating that an employer does not discharge its duty of reinstatement of economic strikers by assigning them to positions inferior to their pre-strike jobs.<sup>48</sup>

Even though the *Mastro Plastics* and *Laidlaw* doctrines have significantly curbed an employer's ability to use permanent replacements, employers may still deny reinstatement to strikers who engage in strike-related misconduct. The Supreme Court construed this doctrine one year after *Mackay Radio* in a case involving strikers who were discharged for taking possession of and blocking employer access to the plant during a sit-down strike.<sup>49</sup> Consistent with this doctrine, § 10(c) of the NLRA expressly forbids the Board from requiring "the reinstatement of any individual . . . if such individual was suspended or discharged for cause."<sup>50</sup>

In replacement strikes, where picket line hostilities are more likely to

42. 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

43. 171 N.L.R.B. 1366, 1369-70 (1968).

44. *See Bartlett-Collins Co.*, 110 N.L.R.B. 395 (1954), *aff'd*, 230 F.2d 212 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 988 (1956).

45. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967).

46. *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369 (1968), *enforced* 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

47. *Rose Printing Corp.*, 304 N.L.R.B. 1076 (1988).

48. *Id.* at 1078. *See also Laidlaw Waste Systems, Inc.*, 313 N.L.R.B. 680, 680-82 (1994) (holding that an employer unlawfully discriminated against a striker by failing to assign him to a substantially equivalent position that had become available, and instead assigning him to a more physically demanding position).

49. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

50. 29 U.S.C. § 160(c) (1992). *See also NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *NLRB v. IBEW Local 1229*, 346 U.S. 464 (1953).



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occur, the Board's definition of misconduct is particularly crucial. The Board consistently defines misconduct to include assaults on nonstrikers<sup>51</sup> and malicious destruction of property.<sup>52</sup> But the Board has wavered regarding its treatment of strikers who verbally abuse replacements, crossovers<sup>53</sup> and other people coming into contact with a picket line. The Board's current definition was set forth in *Clear Pine Mouldings*.<sup>54</sup> It broadened the misconduct standard to include a striker's threat to harm a nonstriker, even if unaccompanied by a physical act or gesture.<sup>55</sup> The Board and courts have also negated an employer's duty to reinstate ULP strikers when striker misconduct has been egregious.<sup>56</sup>

### D. Preferential Treatment of Nonstrikers

In *NLRB v. Erie Resistor*<sup>57</sup> the Supreme Court articulated a third refinement of the striker replacement doctrine: a limitation upon the degree to which an employer can give preferential treatment to nonstrikers in relation to strikers. In that case, to continue operating its plant during an economic strike, an employer offered any replacement or crossover twenty years of superseniority.<sup>58</sup> Since seniority is often used to determine promotions and layoffs, this practice would benefit replacements and crossovers at the expense of continuing strikers. The Supreme Court ruled that such a grant violates § 8(a)(3) by creating an intolerable breach in the bargaining unit: "This breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder

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51. See *NLRB v. Cambria Clay Products Co.*, 215 F.2d 48 (6th Cir. 1954).

52. See *United Auto., Aircraft & Agric. Implement Workers of Am., Local 833 v. NLRB*, 300 F.2d 699 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 911 (1962); *NLRB v. Ohio Calcium Co.*, 133 F.2d 721 (6th Cir. 1943); *Republic Steel Corp. v. NLRB*, 107 F.2d 472 (3d Cir. 1939).

53. Like a striker replacement, a crossover crosses a union's picket line to perform bargaining unit work during a strike. The key difference is that this person is not a new hire, but rather a person who was employed in the bargaining unit when the strike began. See, e.g., *Pattern Makers League v. NLRB*, 473 U.S. 95, 97-98 (1985).

54. 268 N.L.R.B. 1044 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985). The Board's revised policy is

that the existence of a "strike" in which some employees elect to voluntarily withhold their services does not in any way privilege those employees to engage in other than peaceful picketing and persuasion. They have no right, for example, to threaten those employees who, for whatever reason, have decided to work during the strike, to block access to the employer's premises, and certainly no right to carry or use weapons or other objects of intimidation.

*Id.* at 1047.

55. *Id.* at 1048. Before this decision, the Board protected such threats, viewing them as part of the heated milieu of a picket line. See *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 528 (1st Cir. 1977).

56. See *NLRB v. Thayer Co.*, 213 F.2d 748, 752-53 (1st Cir. 1954) ("[I]f the particular collective action is not a protected § 7 activity, the employer commits no unfair labor practice by thus terminating the employment relation."), *cert. denied*, 348 U.S. 883 (1954). The NLRB initially rejected this approach in *Thayer II*, 115 N.L.R.B. 1591 (1956), but adopted the reasoning in *Blades Mfg. Co.*, 144 N.L.R.B. 561 (1963), *enforcement denied*, 344 F.2d 998 (8th Cir. 1965).

57. 373 U.S. 221 (1963).

58. *Id.* at 230-31.

of the dangers connected with striking and with union activities in general.”<sup>59</sup> To this doctrine, the NLRB added several other forms of prohibited preferential treatment: granting retroactive pay raises to replacements that exceed the pay offered to strikers,<sup>60</sup> and exempting replacements from a required physical fitness exam applied to returning strikers.<sup>61</sup>

However, in *TWA, Inc. v. Independent Fed'n of Flight Attendants*,<sup>62</sup> the Supreme Court substantially narrowed *Erie Resistor*. During a strike by flight attendants, TWA had attempted to lure crossovers by announcing that they would obtain seniority advantage over strikers, thereby improving crossovers' job and domicile assignments.<sup>63</sup> However, in order to avoid the prohibitions of *Erie Resistor*, TWA structured the enticement to allow junior crossovers to bid and retain indefinitely a senior striker's domicile and scheduling preference.<sup>64</sup> In short, TWA gave crossovers *Erie Resistor* preferences without using twenty years' superseniority. The Court rejected the union's argument that TWA's plan violated *Erie Resistor*.<sup>65</sup> The Court observed, “While the employer and union in many circumstances may reach a back-to-work agreement that would displace crossovers and new hires . . . nothing in the NLRA or the federal common law we have developed under that statute requires such a result.”<sup>66</sup> Thus, while the NLRB and the courts have narrowed the *Mackay Radio* doctrine somewhat, employers retain a potent weapon in replacements.

## II. RESEARCH: METHODOLOGY AND LIMITATIONS

### A. Methodology

The analysis in this Article is based on 292 NLRB rulings in cases involving permanent striker replacements. Cases were identified through a Westlaw keyword search.<sup>67</sup> This list was supplemented by citations in cases

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59. *Id.* at 231.

60. *See Soule Glass & Glazing Co.*, 246 N.L.R.B. 792 (1979), *enforced in part*, 652 F.2d 1055 (1st Cir. 1981).

61. *See Craw & Son*, 244 N.L.R.B. 241 (1979), *enforced*, 622 F.2d 579 (3d Cir. 1980).

62. 489 U.S. 426 (1989).

63. *Id.* at 430.

64. *Id.* at 430-34.

65. *Id.* at 438.

66. *Id.*

67. The keyword search was “MACKAY RADIO” & REPLACEMENT(!) OR “PERMANENT REPLACEMENT!” & STRIKE(!). The symbol (!) extends a root word search. For example, it generates a match for any case mentioning STRIKE, STRIKER, and STRIKES.

The objective of the keyword search was to identify as many cases involving strikes with permanent replacements. Used alone, *Mackay Radio* would have likely identified many cases not involving replacement strikes, since this was an early case construing the NLRA's very general prohibition against anti-union discrimination. *See* 29 U.S.C. § 158(a)(3) (1988). Accordingly, “replacement” and “permanent replacement” were added to *Mackay Radio* to narrow the search to pertinent cases. These

## Permanent Striker Replacements

that referred to other replacement strikes that were not identified by the keyword search. The resulting database consisted primarily of NLRB decisions from 1938 (when the Supreme Court decided *Mackay Radio*) through May 1994. The search produced 385 cases, 87 of which were deleted from further analysis because the strikes they reported did not involve actual employer hiring of permanent striker replacements. Thus the sample contained 298 decisions, of which 292 were from the NLRB<sup>68</sup> and 6 were from federal courts acting under jurisdiction created by the RLA or the federal bankruptcy code.<sup>69</sup> This study examines only the NLRB rulings under the NLRA, because the RLA does not define employer unfair labor practices *per se*.

This sample of NLRB decisions is likely to capture a significant share of the volume of replacement strikes that have occurred within the confines of the NLRA. Unlike the U.S. Supreme Court, which exercises discretionary jurisdiction, the NLRB generally rules on all administrative decisions for which it receives appeals.<sup>70</sup> In addition, all unfair labor practice cases are “prosecuted by an attorney for the regional office acting on behalf of the (NLRB’s) general counsel”<sup>71</sup> so prosecution of these cases is not biased to omit replacement strikes where unions lack litigation resources. Also, because strikes are generally the ultimate employee action to exert economic pressure on an employer, and the hiring of replacements is generally the ultimate employer response to strikes, unions and employers generally have an interest in appealing any adverse administrative decisions to the Board.

This study divided NLRB cases into two periods delineated by the year that a particular change in striker replacement law or doctrine occurred. Once cases were divided into two blocks of time, discriminant function analysis<sup>72</sup> was used to compare the percentage of cases finding that employers committed a particular unfair labor practice involving replaced strikers. This permitted a comparison of employer violation rates over periods and, also, an inference about whether or not observed differences in these rates were statistically

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two terms were added disjunctively to the search to avoid excluding cases in which the author only used one phrasing to express the idea of strikers who were permanently replaced.

68. See *infra* Appendix I.

69. These replacement strike cases include *Air Line Pilots Ass’n v. United Air Lines*, 802 F.2d 886 (7th Cir. 1986); *O’Neill v. Air Line Pilots Ass’n*, 886 F.2d 1438 (5th Cir. 1989); *TWA v. Independent Fed’n of Flight Attendants*, 489 U.S. 426 (1989); *In re Continental Airlines*, 901 F.2d 1259 (5th Cir. 1990); *Eastern Airlines v. Air Line Pilots Ass’n*, 744 F.Supp. 1140 (S.D. Fla. 1990); and *Rakestraw v. United Airlines*, 981 F.2d 1524 (7th Cir. 1992).

70. Only 6 of these 298 cases involved disputes arising under the RLA which were adjudicated in federal courts. The remaining 292 cases were strictly NLRB decisions. Although some of these cases were appealed to a federal court, those federal court decisions are not part of this database.

71. See *Hardin*, *supra* note 1, at 1797-1800 (describing Board review of administrative law judges’ decisions).

72. Discriminant function analysis is a statistical technique that compares measurable characteristics of cases belonging to one group to a second group of cases. See generally William R. Klecka, *Discriminant Analysis*, in *SPSS: STATISTICAL PACKAGE FOR THE SOCIAL SCIENCES* 434-35 (Norman Nie et al. eds., 1975).

significant.<sup>73</sup>

### B. *Potential Limitations of Empirical Data*

Although the methodology for identifying and classifying cases involving striker replacements was designed to minimize biases, some distortion is probably inevitable. A brief discussion of the limitations of the data follows. Other potential sources of error and bias are discussed in Appendix III, *infra*.

The strikes in this database almost certainly do not include the entire universe of all NLR and RLA decisions involving permanent replacement strikes, and the sample may not be entirely representative of this population of decisions. The cases in the sample primarily involved employers or unions who were charged with committing an unfair labor practice, or breaching some other legal duty, during such a strike. Undoubtedly, some replacement strikes never involved legal proceedings, or were settled at some point short of a published decision.<sup>74</sup> Therefore, this database may be biased to contain a disproportionate share of unlawful activity during strikes or to contain the most intractable and extreme cases decided by the Board and courts. It also means that employers' use of the *threat* of replacement to scuttle a strike or force an early settlement on the employers' terms will not be captured by the sample.

Notwithstanding these limitations, it is important to remember that this study fills a virtual void in empirical studies of replacement strikes.<sup>75</sup> Empirical information, limited as it may be, contributes significantly to the anecdotal evidence in this area. Thus, the best way to think about the findings here is that they are preliminary and have some undetermined error component, but nevertheless provide important new information.

## III. RESULTS

Data were classified and analyzed and aggregated over discrete time periods in order to measure employer compliance with existing laws governing employer conduct during replacement strikes. Specifically, six questions were considered: (1) How often employers failed to place economic strikers on

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73. See *infra* text accompanying notes 155-160.

74. See *Belknap v. Hale*, 463 U.S. 491, 493-496 (1983) (discussing an employer who hired permanent replacements for 400 striking employees, but later negotiated a strike-settlement agreement providing for the strikers' return). This case never progressed beyond the NLRB regional director's office. *Id.* at 495-96. It therefore did not result in a published Board decision. Moreover, if not for the fact that replacements who were dismissed to make room for returning strikers sued in state court for breach of contract to provide permanent employment, it is highly unlikely that this episode involving permanent replacements would ever be reported in a court decision. In short, strike settlements providing for reinstatement of strikers do occur, and probably diminish the likelihood of a published decision recording the strike.

75. This study does, however, complement a long list of empirical studies about strikes in general. See, e.g., Joseph S. Tracey, *An Investigation into the Determinants of U.S. Strike Activity*, 76 AM. ECO. REV. 423 (1986).

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reinstatement lists; (2) how often employers failed to recall the strikers who were on reinstatement lists; (3) how often employers discriminated against the strikers in recalling them; (4) how often employers unlawfully discharged strikers; (5) how often employers granted nonstrikers (replacements and crossovers) preferential treatment; and finally, (6) how often employers denied reinstatement to unfair labor practice strikers.

Each of these questions corresponds to a specific legal duty of an employer or right of an employee during a strike. Two research questions were derived from the Board's seminal *Laidlaw* decision. Although that decision does not *per se* require an employer to put replaced economic strikers on a reinstatement list, this duty is almost certainly implied. In this case strikers offered unconditionally to end their strike and return to work, but the employer effectively treated them as discharged employees and told them to apply for their jobs as if they were new applicants.<sup>76</sup> Strikers then completed employment applications but because no vacancies occurred precisely when they applied, their employer never recalled them. Meanwhile, the employer "continu[ed] to advertise for and hire new unskilled employees."<sup>77</sup> Departing from its doctrine requiring that employers only consider replaced strikers on a nondiscriminatory basis as new applicants,<sup>78</sup> the Board moved to require that employers *reinststate*—not *rehire*—replaced economic strikers as job vacancies arise in positions held by replacements.<sup>79</sup> *Laidlaw* refers to employees (strikers) with outstanding unconditional applications for reinstatement,<sup>80</sup> and it is this language that all but requires employers to maintain a "reinstatement list" for replaced economic strikers. Thus, this study examines how frequently employers failed to comply with this particular duty.<sup>81</sup>

The next research question was based on extensive litigation involving employers' failure to recall replaced strikers from a *Laidlaw* list. There are many issue-variations on this theme: employer claims that business is declining, so that there is no need to fill vacancies in jobs held by replacements;<sup>82</sup> that the skill requirements in jobs held by departing replacements have increased to the point where replaced strikers are no longer qualified;<sup>83</sup> that the duty to

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76. *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 102, 112 (7th Cir. 1969).

77. *Id.* at 106.

78. *Bartlett-Collins Co.*, 110 N.L.R.B. 395, 398, *aff'd sub nom.* *American Flint Glass Workers' Union*, 230 F.2d 212 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 988 (1956).

79. *Laidlaw Corp.*, 414 F.2d at 103.

80. *Id.* at 105.

81. It was difficult to decide whether to analyze cases beginning in 1968, the year *Laidlaw* was decided, or 1969, the first full year thereafter. Nineteen sixty-eight was used because the Board's revised reinstatement policy was all but determined by two U.S. Supreme Court decisions in 1967: *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), and *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

82. See *Kurz-Kasch, Inc.*, 286 N.L.R.B. 1343 (1987), *enforcement denied*, 865 F.2d 757 (6th Cir. 1989).

83. See *Lehigh Metal Fabricators*, 267 N.L.R.B. 568 (1983), *enforced*, 735 F.2d 1350 (3d Cir. 1984).

reinstate to the same type of job does not arise if a vacancy occurs in a different facility operated by the employer;<sup>84</sup> that the duty to reinstate does not arise when a replacement has not left a striker's job, but a new equivalent job becomes available;<sup>85</sup> that laying off replacements does not create a vacancy for reinstating strikers;<sup>86</sup> that in recalling laid-off employees, replacements with more seniority than strikers would be given priority;<sup>87</sup> and more generally, that striker misconduct terminates any *Laidlaw* rights.<sup>88</sup>

Research questions on employer discrimination against strikers and unlawful discharge of strikers were derived from *Mackay Radio*. That decision's dictum on permanent replacements receives much attention, but the decision also was important because it ruled that employers cannot discriminate against replaced strikers on the basis of "their union activities."<sup>89</sup> Although *Mackay Radio* involved selective reinstatement of replaced strikers and the constructive discharge of others who were union activists, the Board has found other forms of unlawful discrimination against replaced strikers.<sup>90</sup> Thus, the discrimination and discharge issues are related; the latter is almost always a special case of the former.

The following question, relating to employer preferential treatment of nonstrikers, is another way of asking whether an employer unlawfully discriminated against strikers. Ordinarily this type of violation would have been recorded along with those ruled as unlawful discrimination.<sup>91</sup> However, this was separately measured because the Workplace Fairness Act specifically included a proposal to grant an employment preference to nonstrikers over strikers,<sup>92</sup> and because some Board decisions use the "preferential treatment"

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84. See *Bryan Infants Wear Co.*, 235 N.L.R.B. 1305 (1978).

85. See *NLRB v. W.C. McQuaid, Inc.*, 617 F.2d 349 (3d Cir. 1980).

86. See *Aqua-Chem*, 288 N.L.R.B. 1108 (1988).

87. See *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982).

88. See *infra* text accompanying notes 49-56.

89. *NLRB v. Mackay Radio*, 304 U.S. 333, 346-47 (1938)

(The Board's findings as to discrimination are supported by evidence. . . . The Board found, and we cannot say that its finding is unsupported, that, in taking back six of the eleven [replaced strikers] and excluding five who were active union men, the [employer's] officials discriminated against the latter on account of their union activities and that the excuse given that they did not apply until after the quota was full was an afterthought and not the true reason for the discrimination against them.)

90. See, e.g., *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (finding that an employer's grant of superseniority to replacements and not to strikers was unlawful discrimination); *Soule Glass & Glazing Co. v. NLRB*, 246 N.L.R.B. 792 (1979) (finding that an employer's retroactive grant of a pay raise to replacements in excess of pay offered to strikers was unlawful discrimination); *NLRB v. Craw & Son*, 244 N.L.R.B. 241 (1979) (finding that an employer's requirement that replaced strikers take a physical exam, but not replacements, was unlawful discrimination).

91. The Board treats these as § 8(a)(3) violations under the NLRA.

92. See *supra* note 6, part (ii). Arguably, this proposal merely duplicates the anti-discrimination provision in § 8(a)(3).

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terminology.<sup>93</sup>

While *Laidlaw* provides a clear source for the reinstatement rights of economic strikers, there is no single Supreme Court decision establishing the doctrine providing added security against permanent replacement that ULP strikers enjoy. At least as early as 1942 the NLRA was interpreted to provide reinstatement for ULP strikers who offer to return to work, even if the employer had to dismiss permanent replacements.<sup>94</sup> Litigation in 1952 further refined the reinstatement doctrine, so that an employer's duty to reinstate did not arise until employees made an unconditional demand for reinstatement.<sup>95</sup> This study could have used the 1942 or 1952 decisions as starting points for analyzing ULP reinstatement cases, but did not because these were only circuit court decisions. Instead, 1957 was used because it was the first full year after the U.S. Supreme Court made an important statement and ruling expressly protecting ULP strikers. Affirming the Board's ruling requiring reinstatement of seventy-seven ULP strikers who were discharged, the Court rejected the employer's argument that this strike was not privileged because the union had signed a pledge in the labor agreement not to strike: "[The employer's] unfair labor practices provide adequate ground for the orderly strike that occurred here. *Under those circumstances, the striking employees do not lose their status and are entitled to reinstatement with back pay.*"<sup>96</sup> *Mastro Plastics* was used as the threshold ruling to study how often the Board did find that employers fail to comply with their legal duty to reinstate ULP strikers.

### A. Employer Compliance with *Laidlaw* Doctrine

#### 1. Placement of Employees on Reinstatement Lists

The first analysis examines employer compliance with the *Laidlaw* doctrine: the requirement that employers place economic strikers on a preferential reinstatement list. The analysis begins in 1968, the year in which the *Laidlaw* duty arose. The first comparison uses 1975 as a cutoff because a companion study showed that employer use of replacement strikers rose sharply in that year.<sup>97</sup>

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93. See e.g., *Alaska Pulp Corp.*, 296 N.L.R.B. 1260 (1989) (finding that the employer's apparent promises to replacements and to strikers who returned to work during the strike that, in effect, they would always enjoy superseniority or other *preferential treatment* over those employees who exercised their lawful right to remain on strike, are invalid insofar as the fulfilling of such promises interferes with the rights of strikers.)

(Emphasis added).

94. See *NLRB v. Remington Rand, Inc.*, 130 F.2d 919 (2d Cir. 1942).

95. See *NLRB v. Pecheur Lozenge Co.*, 209 F.2d 393 (2d Cir. 1953).

96. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956) (emphasis added).

97. See Michael H. LeRoy, *Regulating Employer Use of Permanent Striker Replacements*, 16 BERKELEY J. OF EMP. & LAB. LAW 169 (1995). This study has three basic conclusions: contrary to union assertions that replacement strikes rarely occurred before the 1981 PATCO strike, these strikes

The results, represented graphically in Figure A1,<sup>98</sup> show that employer violations of *Laidlaw* fell sharply in the most recent period, from 53.8% during the 1968-1974 period to 24.4% during the 1975-1991 period. The second comparison uses 1982 as a cut-off because a companion study again found a sharp increase in the use of replacements from 1982 to 1990.<sup>99</sup> The results for this comparison also show a marked decrease in *Laidlaw* violations, from 43.5% during the 1968-1981 period, to 12.5% during the 1982-1991 period.

One possible explanation of this general trend of increasing compliance is that employers have grown more aware of their *Laidlaw* duties with the passage of time and with increased experience in collective bargaining and strikes. A key finding supporting this hypothesis is that only 32% of strikes from 1935 to 1981 involved a union and employer with a bargaining history (the other 68% involved strikes to compel employer recognition of a union, or strikes over failure to agree on a first contract), whereas 81% of strikes from 1982 to 1990 involved parties with a bargaining history.<sup>100</sup> One would expect employers with collective bargaining experience to be more familiar with *Laidlaw*'s requirements than employers with less experience. In the most recent period new unions, and hence new bargaining relationships, occurred much less frequently than in earlier periods,<sup>101</sup> and so it is reasonable to infer that a relatively high proportion of struck employers in the most recent period were aware of their *Laidlaw* obligations.

Another possible explanation for the increase in *Laidlaw* compliance is that employers are thinking more strategically about replacing economic strikers.<sup>102</sup> If, in fact, an employer sees strategic value in using permanent replacements, proper implementation of *Laidlaw* is essential. Administering a reinstatement list is not terribly burdensome; whereas failure to administer such a list could frustrate an employer's attempt to use replacement strikers because it could convert an economic strike into a ULP strike, thereby subjecting

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occurred continuously and sometimes at high levels, since 1935; contrary to employer assertions that there was nothing unusual about current and recent replacement strike activity, these strikes occurred at abnormally high levels from 1975 to 1991; and replacement strikes activity occurred in low activity and high activity cycles for 1935 to 1991.

98. All references to figures hereinafter to *infra* Appendix II.

99. LeRoy, *supra* note 21.

100. *Id.* at Figure 3.

101. See Michael A. Curme et al., *Union Membership and Contract Coverage in the United States, 1983-1988*, 44 INDUS. & LAB. REL. REV. 5, 7-10 (1990); Steven G. Allen, *Declining Unionization in Construction: The Facts and the Reasons*, 41 INDUS. & LAB. REL. REV. 343, 344-45 (1988).

102. United Auto Workers President Owen Bieber gave testimony on this point:

We believe the reason employers want to be able to use the threat of permanent replacements is to strengthen their position in collective bargaining, and too often break the union. If the employer can effectively threaten hiring permanent replacements, the workers will be less likely to strike. And if they do still go out on strike, the employer can try to break the union by permanently replacing the entire workforce and then encouraging the replacement workers to vote to decertify.

*Preventing Replacements*, *supra* note 15, at 61.



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replacements hired after the ULP violation to displacement by strikers.

Still another, but rather attenuated, explanation for increased employer compliance with *Laidlaw* is that in recent decades employers have recognized that slack labor markets have rendered reinstatement lists largely meaningless. Unemployment rates in the most recent period have been unusually high, especially in unionized industries such as steel and auto manufacturing.<sup>103</sup> Consequently, replacements, with few alternative job opportunities, are conceivably more likely to stay in their jobs indefinitely, thereby precluding the possibility that many employees on the reinstatement lists would ever be rehired. Thus, an employer could comply with *Laidlaw* while employing (or threatening to employ) what are effectively permanent replacements.<sup>104</sup>

### 2. Recall of Employees on Reinstatement Lists

While violations in Figure A1 involve an employer's duty to put replaced strikers on a list for eventual reinstatement, violations represented in Figure A2 involve situations in which the Board found that an employer had violated its duty to reinstate a striker when such duty arose.<sup>105</sup> Using the same cutoff years as Figure A1, Figure A2 illustrates no significant change between the 1968-74 period and the 1975-1991 period (steady at about 27%) and only a slight increase between the 1968-1981 period and the 1982-1991 period (from 24% to 31%).

Two obvious conclusions may be inferred from Figure A2. First, there was little change in employer violation rates over the periods analyzed. Second, employer violation of striker reinstatement rights occurred with moderate frequency—between 23% and 30%—from *Laidlaw* to now. It is important to understand that employer violations may occur for very different reasons. Hypothetically, one employer may wish to flout the law, and ignore sound

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103. See LeRoy, *supra* note 97, at 186-90 (showing that national unemployment exceeded seven percent every year since 1975, except 1978-1979, and 1987-1989). See also *id.* at n.115 (indicating a decline in employment in basic manufacturing).

104. The plausibility of this explanation is reinforced by one account of the 1991-92 United Auto Workers strike against Caterpillar Corporation. After several months, the employer threatened to hire permanent replacements for approximately 12,000 strikers in Illinois, Pennsylvania, and Colorado. Caterpillar installed toll-free telephones to take job applications from across the nation and received tens of thousands of phone calls within a few hours. Robert L. Rose & Gregory A. Patterson, *Caterpillar Inc. Threatens to Replace UAW Strikers*, WALL ST. J., Apr. 2, 1992, at A3. This occurred during a recession in which employers laid off many thousands of employees.

105. Fact scenarios encompassed by these statistics include employer attempts to reinstate strikers to inferior positions, see MCC Pacific Valves, 244 N.L.R.B. 931, 936 (1979), employer failure to recall strikers because their jobs were transferred to another facility, see *Laidlaw Waste Systems, Inc. and Int'l Bhd. of Teamsters*, 313 N.L.R.B. 680, 681 (1994), or employer failure to recall strikers because employers considered a striker's reinstatement right extinguished by interim employment, see *Oregon Steel Mills, Inc. and United Steelworkers of America*, 300 N.L.R.B. 817, 821 (1990) (involving a replaced striker who was denied reinstatement because the employer viewed the striker's periodic employment in construction jobs as sufficient alternative employment. In doing so, the employer overlooked evidence that the striker had been unemployed the last seven months).

legal counsel to reinstate economic strikers in accordance with *Laidlaw*. Another employer may have interpreted *Laidlaw* to mean that the duty to reinstate did not arise because that employer may have redefined jobs during a strike. Accordingly, that employer might have acted on a good-faith belief that *Laidlaw*'s requirement of striker reinstatement to the same or equivalent job did not apply. Some violations, therefore, might have occurred because of certain ambiguities in *Laidlaw*.

### B. *Mackay Radio Violations*

Figure B shows the percentage of employers committing *Mackay Radio* violations: discrimination against replaced strikers on the basis of union activity.<sup>106</sup> The statistics show that these violations have been relatively infrequent since 1935, and particularly rare since 1976. In the two earliest comparisons, 1935 to 1975 and 1935 to 1981,<sup>107</sup> employers unlawfully discriminated against strikers in 17.4% and 14.7% of cases, respectively. For the periods 1976-91 and 1982-91, discrimination on the basis of protected activity fell sharply, to 4.8% and 4.2% respectively.

One plausible view of these statistics is that *Mackay Radio* has almost completely succeeded in eradicating a crude employer response to strikes. In part, this result may be explained by the fact that employers are receiving legal advice discouraging this overt form of discrimination.

Yet the statistics may hide a more insidious labor practice: the replacement of *all* strikers, regardless of union activity. As the Supreme Court held in its 1989 *TWA* decision,<sup>108</sup> this practice would avoid a finding of discrimination. The Court held that an employer did not unlawfully discriminate against strikers by creating a system in which *all* full-term strikers would be disadvantaged in recall and job-bidding rights as compared to *all* strike crossovers and *all* striker replacements.<sup>109</sup>

### C. *Unlawful Discharge of Replaced Strikers*

Figure C shows cases involving unlawful discharge of replaced strikers. These cases include two different types of dismissals. One occurs when an employer, instead of replacing strikers and putting them on a reinstatement list,

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106. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347 (1938) (concluding that "[t]he Board found, and we cannot say that its finding is unsupported, that, in taking back six of the eleven men and excluding five who were active union men, the [company's] officials discriminated against the latter on account of their union activities. . . .").

107. Nineteen seventy-five and 1981 were used as cutoffs because of preliminary studies separately indicating that employers began to confront strikers more aggressively at these times. This evidence consists of a sharp increase in replacement strikes beginning in 1975, see LeRoy, *supra* note 97, and a sharp increase in strike duration in 1982, see LeRoy, *supra* note 21.

108. *TWA, Inc. v. Independent Fed'n. of Flight Attendants*, 489 U.S. 426 (1989).

109. *Id.* at 433.

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fires them.<sup>110</sup> The other occurs when an employer dismisses a striker for strike-related misconduct.<sup>111</sup> The analysis uses 1984 as a cutoff because *Clear Pine Mouldings*,<sup>112</sup> a leading case on striker misconduct, was decided that year. Some commentators have speculated that the Board's new striker-misconduct standard established in *Clear Pine Mouldings* would permit employers to discharge a greater number of replaced strikers.<sup>113</sup>

While Figure C shows no significant change in unlawful discharge since 1984, it is impossible to know from this data alone the impact of *Clear Pine Mouldings*. In 32.3% of cases decided from 1935-84, the Board found employers unlawfully discharged strikers; from 1985-91, the rate remained essentially unchanged at 35.4%. Yet, this data does not reveal whether, in fact, it became easier following *Clear Pine Mouldings* for employers to discharge replaced strikers. All that can be said is that unlawful employer dismissal of replaced strikers continues to comprise a significant percentage of replacement cases despite doctrinal changes.

### D. Preferential Treatment for Nonstrikers

Figure D illustrates cases involving allegations that employers granted nonstrikers preferential treatment. The year *Erie Resistor*<sup>114</sup> was decided, 1963, was used as a cutoff. The Board found that employers unlawfully granted employment preferences to non-strikers in 33.6% of cases from 1935 to 1963, and in 24.8% of cases from 1964 to 1991.

The relatively low level of *Laidlaw* violations compared to the relatively high levels of *Erie Resistor* violations may reflect cost-benefit tradeoffs that inhere in complying with particular aspects of striker replacement doctrine. Compiling a *Laidlaw* list is a relatively lost-cost, penalty-avoidance measure. In contrast, the economic temptation to grant nonstrikers preferential treatment may be too great for many employers to resist.<sup>115</sup>

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110. See *NLRB v. United States Cold Storage Corp.*, 203 F.2d 924 (5th Cir. 1953) (involving an employer who fired economic strikers before filling their jobs with replacements).

111. See *supra* text accompanying notes 49-56.

112. 268 N.L.R.B. 1044 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985).

113. See, e.g., Albin Renauer, *Reinstatement of Unfair Labor Practice Strikers Who Engage in Strike-Related Misconduct: Repudiation of the Thayer Doctrine by Clear Pine Mouldings*, 8 INDUS. REL. L.J. 226, 256 (1986) (noting that the new standard "fails to recognize that some misconduct is inevitable, especially during strikes protesting egregious unfair labor practices by the employer.").

114. 373 U.S. 221 (1963) (finding unlawful discrimination in employer's grant of superseniority to replacements but not to strikers).

115. Another interesting finding in this analysis is that in the six cases from 1989 to 1991 involving a charge that an employer unlawfully granted nonstrikers preferential treatment, not one judgement was decided against an employer. (These negative results are not reflected in the chart.) While this result may be a product of chance, an alternative explanation may be that it is due to the Supreme Court's decision in *TWA* that made proof of unlawful preferential treatment more difficult.

### E. *Failure to Reinstate ULP Strikers*

Figure E shows the percentage of cases involving employer failure to reinstate ULP strikers. Nineteen fifty-seven was used as one cut-off because beginning in that year, all employers were under a duty to reinstate ULP strikers who offered unconditionally to return to work, in accordance with the Supreme Court's decision in *Mastro Plastics*.<sup>116</sup> Nineteen eighty-one was used as another cutoff for the same reason as explained in regard to Figures A1 and A2. From 1957 to 1981, the Board found that employers failed to reinstate ULP strikers in 11.5% of cases. This statistic remained essentially unchanged from 1982 to 1991, reaching an upper limit of 13.9%.

The results in Figure E are interesting because they capture double violations committed by employers: first, the commission of an unfair labor practice causing or prolonging a strike, and second, the failure to reinstate a ULP striker. In short, Figure E focuses on a type of employer violation that usually (but not always) indicates serious or egregious employer misconduct during replacement strikes.<sup>117</sup> Results here suggest that the percentage of employers committing more serious NLRA violations during replacement strikes has remained relatively steady. This finding contradicts anecdotal evidence offered by unions suggesting that the proportion of employers who seriously violate the law during replacement strikes has grown since the early 1980s. Nevertheless, Figure E does suggest that in a relatively constant and untrivial percentage of striker replacement cases, employers have been found to have committed multiple violations.

## IV. PRESCRIPTIONS

The data suggest several possible considerations in legislating further protection for replaced strikers. First, the data presented here clearly show that employers have been hiring permanent striker replacements since the NLRA was enacted. The continuation of this practice may alone be a sufficient reason to reject union arguments for a *total* ban on employer hiring of these replacement workers. The practice is so embedded in the arsenal of economic

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116. In *Mackay Radio* the Court ruled that the employer unlawfully discriminated against five strikers, and therefore could not be permanently replaced. Therefore, this study might have considered 1939 as the first full year in which reinstatement of ULP strikers was recognized. However, this year was not chosen because in 1947 Taft-Hartley expressly denied protection to strikers who failed to provide 60-day notice of intent to modify or terminate their contract by excluding them as employees under the NLRA. Thus, this provision exposed some ULP strikers who failed to give proper notice any protection under the Act. *Mastro Plastics*, decided in 1956, extended this protection to ULP strikers. For the purpose of collecting data decided under consistent legal rules, this study used 1957 as the earliest cut-off year.

117. See discussion *infra* Appendix III, part III (explaining that a problem with data in this study is that they often fail to quantify the magnitude of employer misconduct in a particular strike).

## Permanent Striker Replacements

weapons that underpins collective bargaining<sup>118</sup> that its outright repeal might create an unprecedented shift in the balance of bargaining power under the NLRA. (Though some may argue that such a shift is not necessarily undesirable.)

But if there is no precedent for an outright ban on employer hiring of permanent replacements, evidence presented here strongly suggests that some employers have abused this privilege. *Mackay Radio* protects striking employees from discharge, and yet the NLRB ruled in 35.4% of replacement strike cases from 1985 to 1991 (Figure D) that employers unlawfully discharged strikers. This is remarkable in view of *Mackay Radio*'s provident grant to employers enabling them to hire permanent replacements for strikers, and raises this question: Why should so many employers exceed this grant, if not for the purpose of sending a chilling message to all other employees who engage in protected concerted activity? The contextual significance of this particular violation is reason enough for more extensive regulation of employer hiring of replacements. Moreover, the constancy of this violation rate from 1935 to 1991 (see Figure D) indicates that employer tendencies to overreach against replaced strikers are virtually reflexive and are thoroughly ingrained.

Figure E provides a separate compelling justification for more intensive regulation of struck employers. These statistics do not show employer violations occurring in isolation. Instead, they show compound violations: first, the occurrence of an unfair practice sufficient to cause or prolong a strike, and then, employer failure to comply with a duty to reinstate an already aggrieved striker. In short, Figure E is a proxy for how often employers engage in a *pattern* of misconduct against replaced strikers. Roughly one in seven cases (13.9%) from 1982 to 1991 resulted in this finding. The pattern suggests that the present method for protecting the already limited rights of replaced strikers is inadequate.

Lawmakers, therefore, should consider increasing penalties for employer violations of strikers' rights.<sup>119</sup> One specific idea is to allow the NLRB to

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118. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 495 (1960) (“[T]he use of economic pressure by the parties to a labor dispute is not a grudging exception . . . [to the] Act; it is part and parcel of the process of collective bargaining.”).

119. See, e.g., Paul Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 *YALE L.J.* 1907, 1919 (1993)

([U]nder contemporary antidiscrimination legislation and wrongful dismissal litigation, there is broad consensus in favor of substantial monetary awards (including explicitly punitive damages) against firms that fire employees in contravention of public policy. It is high time, then, that we applied that same principle to the remedies available under the NLRA—the legal pioneer in prohibiting firings for “bad reasons.”).

See also Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 *MICH. L. REV.* 419, 514 (1992) (concluding that “[t]he current remedial penalties of the National Labor Relations Act do not adequately deter costly strategic behavior.”).

award double or treble backpay damages to economic strikers who are unlawfully discharged and to ULP strikers who are not properly reinstated.<sup>120</sup> This proposal recognizes the generous advantage over strikers that employers already enjoy under *Mackay Radio* and seeks to deter employers from unlawfully enlarging upon this advantage. It should be noted that this proposal would not alter the balance of power between strikers and employers because law-abiding employers would not be affected. Instead increased damages improve employer compliance with already existing striker rights and employer obligations by raising the costs for employers who ignore or flout the law.

The persistent occurrence of cases (roughly 25% from 1964 to 1991) involving employers who unlawfully grant nonstrikers preferential treatment (see Figure D) suggests a different approach. Breakout part (ii) of the Workplace Fairness Act is a provision carefully tailored to deter this kind of behavior.<sup>121</sup> The persistent violation rate over the most recent twenty-seven years certainly suggests that § 8(a)(3) has failed to deter this form of employer misconduct. This proposal would not end an employer's right to hire permanent replacements. It would, however, end a different employer practice: dividing and conquering a striking union by creating destructive cleavages *within* the bargaining unit.<sup>122</sup>

In addition, the data support recent NLRB efforts<sup>123</sup> to use its injunctive

In 1993, Sen. Paul Simon introduced S. 1553, the Labor Relations Remedies Act, providing treble backpay for to employees illegally discharged for union activities. It also proposed to grant these workers the right to sue for compensatory and punitive damages in their choice of state or federal courts. *Simon Introducing Bills to Reform NLRA by Increasing Penalties, Forcing Arbitration*, DAILY LAB. REP. (BNA) No. 202, at A-2, A-3 (Oct. 21, 1993).

120. Congress has already considered a similar bill. See S. 1553, 103d Cong., 1st Sess. (1993).

121. See *infra* note 6 for text of provision. This provision is intended to repeal *TWA* by making it an unfair labor practice for an employer to offer an employment preference to a striker replacement or crossover without offering the same terms and conditions to continuing strikers. Its intent is to limit discrimination on the basis of union activities against strikers.

122. This provision is clearly aimed at repealing *TWA v. Independent Fed'n. of Flight Attendants*, 489 U.S. 426 (1989). Justice Brennan described how employer grants of preferential treatment to bargaining unit members who abandon the strike and return to work are inherently destructive of employees' collective rights:

The employer's promise to members of the bargaining unit that they will not be displaced at the end of a strike if they cross the picket lines addresses a far different incentive to bargaining unit members than does the employer's promise of permanence to new hires. The employer's threat to hire permanent replacements from outside the existing workforce puts pressure on the strikers *as a group* to abandon the strike before their positions are filled by others. But the employer's promise to members of the striking bargaining unit that if they abandon the strike (or refuse to join it at the outset) they will retain their jobs at strike's end in preference to more senior workers who remain on strike produces an additional dynamic: now there is also an incentive for *individual* workers to seek to save (or improve) their own positions at the expense of other members of the striking bargaining unit. . . . Such a 'divide and conquer' tactic thus strike(s) a fundamental blow to union . . . activity and the collective bargaining process itself'.

*TWA v. Ind. Fed. of Flights Attendants*, 489 U.S. 426, 448-49 (1989) (Brennan J., dissenting) (quoting majority opinion at 442).

123. See *NLRB Counsel Feinstein Sees Growth in Injunctive Relief for ULP Cases*, DAILY LAB. REP. (BNA) No. 122, at A-4 (June 28, 1994).

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powers more aggressively to protect mistreated replaced strikers.<sup>124</sup> This approach seems particularly appropriate for two types of cases examined in this study: those involving employer failure to put economic strikers on a *Laidlaw* reinstatement list (Figure A1), and those involving strikers who have been discharged unlawfully (Figure C).

The first type of case implicates an employer who is failing to comply even with its minimal legal obligation to economic strikers. Such a failure may be due to ignorance of, or simple disregard for the law. In any case, failure to put economic strikers on a reinstatement list is tantamount to discharging them. Since loss of employment often brings immediate and irreparable harm to a discharged employee, it would seem appropriate to use the NLRB's injunctive power, early in the picture, to avert further such decisions.

The second type of case, unlawful discharge, includes cases where employers are effectively extending their advantage under *Mackay Radio* by discharging rather than replacing strikers. As with cases involving failure to put strikers on a reinstatement list, injunctions should be used to avert the immediate and often irreparable harm that discharged employees suffer.

Although evidence presented in this Article and its companion publications leave many important questions about replacement strikes unanswered, it is clear that in the past fifteen to twenty years, employers have attempted to expand their right to hire replacement workers. They have hired permanent replacements more often,<sup>125</sup> concentrated this strategy in settings where previously they had bargained successfully with unions,<sup>126</sup> and violated the very limited rights of replaced strikers in roughly one-third of all cases,<sup>127</sup> notwithstanding their considerable advantage under *Mackay Radio*.

In the final analysis, employers and unions must realize that *Mackay Radio* carefully balanced the competing interests involved in labor disputes. It recognized an employer's right to hire permanent replacements, but also recognized a striker's right to be treated without discrimination. If *Mackay Radio* is to enjoy continued vitality, the portion of it condemning discrimination against strikers needs to be strengthened. The policy prescriptions offered here add to a growing body of thought suggesting that additional, but nevertheless partial limits, should be placed on employer use of permanent striker replacements.<sup>128</sup>

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124. Hardin, *supra* note 1, at 1819 (explaining that Congress authorized the Board to seek §10(j) injunctions "because of the lengthy time period of administrative proceedings before the Board in unfair labor practices," and citing S. REP. NO. 105, 80th Cong., 1st Sess. 27 (1947) ("It has sometimes been possible for persons violating the Act to accomplish their illegal purpose before being placed under any legal restraint and thereby to make it impossible or not feasible to preserve or restore the status quo.")).

125. LeRoy, *supra* note 97, at 208 (Figure 1).

126. LeRoy, *supra* note 21, at Figure 3.

127. See *infra* Figure C.

128. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 38 (1993) (endorsing the use of advisory interest arbitration as a substantial limitation on an employer's right to hire permanent striker replacements); William R. Corbett, *A*

## V. CONCLUSION

Striker replacement legislation was labor's most important legislative priority before Republicans took control of the 104th Congress.<sup>129</sup> However, the outcome of the 1994 national elections means that in all likelihood such legislation will not be seriously considered in the 104th Congress.<sup>130</sup> Ironically, though, replaced strikers who have lost several legislative battles in Congress may soon receive the most significant improvement in their protection to date. President Clinton has proposed an Executive Order that would bar contractors who hire permanent striker replacements from receiving federal contracts.<sup>131</sup> At the same time, the Clinton administration has pledged to continue to try to find a legislative solution to the problems unions are experiencing under *Mackay Radio*.<sup>132</sup> Not only is this a vital union issue, but most of the general public does not approve of how employers use striker replacements.<sup>133</sup>

The Executive Order will further regulate employer use of permanent striker replacements, as I have suggested, but its ultimate impact on employers' decisions to hire permanent replacements will be limited. It is of course inapplicable to employers who do not rely on federal contracts; in addition,

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*Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: "A Far Better Thing" Than the Workplace Fairness Act*, 72 N.C.L. REV. 813, 886 (1994) (proposing a temporary ban on employer hiring of permanent striker replacements until the NLRB determines, under expedited proceedings, that the strike is economic in nature); Douglas E. Ray, *Some Overlooked Aspects of the Striker Replacement Issue*, 41 U. KAN. L. REV. 363, 400 (1992) (recommending legislative repeal, or Board or appellate court reversal, of recent NLRB decisions that limit the reinstatement rights of replaced strikers).

129. For example, prior to the 1992 vote on this bill, the AFL-CIO aired TV and radio ads in 20 key states with uncommitted legislators and provided more than 600 newspaper editors with fact sheets answering questions about the bill. Muriel H. Cooper, *Union Members Fired Up to Win Big on H.R. 5*, AFL-CIO NEWS, July 8, 1991, at 1. In appealing to senators to vote for this bill, AFL-CIO president Lane Kirkland said it was "the most important labor law initiative to come before the Congress in more than a decade." Muriel Cooper, *Labor Mobilizes for Final Push on S. 55*, AFL-CIO NEWS, Mar. 30, 1991, at 1.

130. See *Letter from Reps. Goodling and Fawell to President Clinton on Issue of Permanent Replacement of Striking Workers*, DAILY LAB. REP. (BNA) No. 34, at E-1 (Feb. 21, 1995) (arguing against any further regulation of an employer's right to hire permanent striker replacements).

131. Executive Order No. 12,954, 29 C.F.R. 270 (1995). See also *Labor Secretary Reich Discusses Details of Proposed Executive Order on Strikers*, DAILY LAB. REP. (BNA) No. 35, at AA-1 (Feb. 22, 1995) (reporting on President Clinton's plan to apply this bar to federal contracts over \$100,000).

132. *Gore Pledges Another Try at Striker Replacement*, DAILY LAB. REP. (BNA) No. 117, at D-4 (July 17, 1994) (reporting Vice President Gore's message to union members: "Make no mistake: this is just a temporary setback. We're going to find a way to solve this problem."). See also James B. Parks, *Majority Not Enough To Pass S. 55 in Senate*, AFL-CIO NEWS (July 25, 1994), at 1 (reporting that "[w]orkers who had been deeply involved in the battle to pass S. 55 expressed their determination to continue the fight.").

133. *Poll Shows Two-Thirds of Americans Oppose Replacing Workers Who Strike*, DAILY LAB. REP. (BNA) No. 113, at AA-1 (June 15, 1994) (reporting AFL-CIO announcement of a national opinion poll showing that 65% of respondents disapprove of employers being allowed to hire permanent striker replacements).



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some employers may decide that the cost of forgoing federal contracts is small compared to the economic utility in hiring permanent replacements. These limitations suggest why additional regulation is necessary. The proposals suggested herein would ensure that if employers do hire permanent replacements, the existing rights of replaced strikers are adequately enforced.

The proposed Executive Order on striker replacements and the Republican opposition it generated clearly demonstrate that the issue of regulating employer use of striker replacements is not likely to disappear. Employers, particularly large ones, continue to hire permanent replacements. Whether by coincidence or design, on the first day in forty years that the Republican party controlled Congress, Bridgestone/Firestone announced plans to hire 4000 permanent striker replacements.<sup>134</sup> In response, Democrats brought a motion to pass a resolution condemning Bridgestone/Firestone's action directly to the Senate floor.<sup>135</sup> Although the motion was tabled on a 56-23 roll call vote, it signified Democrats' continued commitment to the issue of striker replacement.

The issue is likely to remain visible because this employer practice often provokes violence and militancy.<sup>136</sup> Partly in response to the Hormel strike involving the hiring of 1025 permanent replacements, and the rioting this action precipitated,<sup>137</sup> Minnesota enacted the Picket Line Peace Act.<sup>138</sup> This law expressly prohibited private employers in the state from hiring permanent replacements. Although it was ruled to be preempted by the NLRA,<sup>139</sup> it nevertheless underscored public concern about the harmful externalities of replacement strikes.

While Minnesota implicitly blamed employers for the violence resulting from replacement strikes, Virginia implicitly placed the blame on strikers. When Pittston Coal Group hired 1700 permanent replacements,<sup>140</sup> and strikers responded by littering highways with dangerous jackrocks and throwing rocks at passing vehicles,<sup>141</sup> a state judge levied heavy coercive civil con-

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134. Raju Narisetti, *Bridgestone/Firestone Begins to Hire Permanent Replacements for Strikers*, WALL ST. J. Jan. 5, 1995, at A3.

135. Gary Minich, *Senate Takes Up Strike*, HERALD & REVIEW, Jan. 7, 1995, at 1.

136. Foreexample, when Bridgestone/Firestone contemplated making temporary striker replacements permanent in December 1994, picket line violence flared. One striker was charged with bombing the home of a replacement in Polk County, Iowa. Another striker allegedly impaled a striker with a tire iron, and a local union president was charged with using a baseball bat to smash a replacement worker's windshield. *Report from the Picket Lines: Rubber Strike Starting to Burn*, LAB. TRENDS, Dec. 3, 1994, at 1.

137. See William Serrin, *Hormel Opens Plant as Guardsmen Bar Strikers*, N.Y. TIMES, Jan. 23, 1986, at 12.

138. Act of June 1, 1991, ch. 239, sec. 1, § 179.12(9), 1991 Minn. Laws 728, 729.

139. *Midwest Motor Express v. Local 120*, 512 N.W.2d 881 (Minn. 1994); *Employer's Ass'n, Inc. v. United Steelworkers of America*, 19 F.3d 405 (8th Cir. 1994).

140. *Proposed Settlement of Charges in Pittston Strike Agreed to by NLRB*, DAILY LAB. REP. (BNA) No. 29, at A-5, A-6 (Feb. 12, 1990).

141. *Mine Workers Chief Says Pittston Strike Underscores Need for Overhaul of Labor Law*, DAILY LAB. REP. (BNA) No. 160, at A-9, A-11 (Aug. 19, 1989) (reporting a Pittston official's account that

tempt fines to end this threatening conduct.<sup>142</sup> The Supreme Court eventually ruled that these fines were unconstitutional.<sup>143</sup> Even in garden variety replacement strikes, some violence perpetrated by highly frustrated individuals is all but inevitable.<sup>144</sup> Together, the Virginia and Minnesota cases span the spectrum of state regulation of violence stemming from the hiring of permanent replacements.

The futility of these responses<sup>145</sup> demonstrates the need for some form of additional national regulation. Because state regulation of violence resulting from replacement strikes is inadequate, the need for more national regulation of these strikes will continue. For now, the nation appears to be at a watershed as the issue of striker replacement remains controversial and heavily debated. Hopefully, this Article will improve the quality of the ensuing public policy debate by providing the first statistical analysis of how employers treat replaced strikers.

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since the strike began, some employees had been beaten and shot at, had their vehicles bombed, and with the company, had 700 truck windows smashed and 3,000 tires punctured).

142. *Bagwell v. International Union, UMWA*, 423 S.E. 2d 349, 352-53 (1992).

143. *Int'l Union, United Mine Workers v. Bagwell*, 114 S.Ct. 2552 (1994).

144. As the 104th Congress was preparing to convene, a little publicized strike involving permanent striker replacements for hundreds of meatpackers in Grayson, Kentucky was occasioned by violence. Nothing about this violence was particularly unusual for a replacement strike. Gunshots were fired at four strikers who were in union headquarters. *Shots Fired at Cook's; No Injuries Reported*, GRAYSON-JOURNAL ENQUIRER (Grayson, KY), Dec. 22, 1993, at 1 (copy on file with author). In another incident, a striker attempting to drive replacements off the road was convicted for wanton endangerment. *Coal Striker Gives Alford Plea*, DAILY INDEPENDENT (Ashland, KY), Dec. 24, 1994, at 7 (copy on file with author). This kind of strike, while failing to attract national attention because large numbers of workers, big-name employers, and trendy issues have not been involved, nevertheless typifies the intense divisiveness that communities experience when permanent replacements cross hostile picket lines.

145. See, e.g., *Midwest Motor Express v. IBT, Local 120*, 512 N.W.2d 881, 894 (Minn. 1994) ("[A]lthough not the foundation for this dissent, Minnesota does have the right to pass laws to protect the safety of its citizens. Section 179.12(9) does just that. The most important factor contributing to strike-related violence . . . is the perception by strikers that 'their job security is being threatened.'") (Wahl, J., dissenting).

The U.S. Supreme Court's *Bagwell* decision prohibits a court from responding to striker violence speedily and summarily by imposing very large fines. In light of this, it is useful to consider the state judge's rationale for imposing fines in the first place: "This injunction is designed to keep the peace here in Virginia and to be sure that the . . . the citizens of this state, in these communities, can live in peace, free from the acts of terror which have been committed upon this community." 423 S.E. 2d at 353.

## Permanent Striker Replacements

### APPENDIX I: TABLE OF CASES

(Arranged Alphabetically by Decision Year)

◆ Decision Year 1938

*C.G. Conn, Ltd.*, 10 N.L.R.B. 498 (1938).

◆ Decision Year 1939

*Adams Brother Manifold Printing Co.*, 17 N.L.R.B. 974 (1939).

*American Range Lines, Inc.*, 13 N.L.R.B. 139 (1939).

*Calmar Steamship Corp.*, 18 N.L.R.B. 1 (1939).

*Eagle-Picher Mining*, 16 N.L.R.B. 727 (1939).

*Gulf Public Service Co.*, 18 N.L.R.B. 562 (1939).

*Stewart Die Casting Corp.*, 14 N.L.R.B. 872 (1939).

*Williams Coal Co.*, 11 N.L.R.B. 579 (1939).

◆ Decision Year 1940

*Alladin Industries, Inc.*, 22 N.L.R.B. 1195 (1940).

*American Shoe Machinery & Tool Co.*, 23 N.L.R.B. 1315 (1940).

*Chicago Casket Co.*, 21 N.L.R.B. 235 (1940).

*Klauber Wangenheim Co.*, 25 N.L.R.B. 245 (1940).

*Kroger Grocer & Baking Co.*, 27 N.L.R.B. 250 (1940).

*Lansing Co.*, 20 N.L.R.B. 434 (1940).

*Lone Star Gas Co.*, 18 N.L.R.B. 420 (1940).

*Omaha & Council Bluffs St. Railway Co.*, 18 N.L.R.B. 82 (1940).

*Paper, Calmenson & Co.*, 26 N.L.R.B. 553 (1940).

*Phelps Dodge Corp.*, 19 N.L.R.B. 547 (1940).

*Washington Woolen Mills*, 23 N.L.R.B. 1 (1940).

◆ Decision Year 1941

*Manville Jenckes Corp.*, 30 N.L.R.B. 382 (1941).

*National Seal Corp.*, 30 N.L.R.B. 188 (1941).

*New York & Puerto Rico Steamship Co.*, 34 N.L.R.B. 1028 (1941).

*Ore Steamship Corp.*, 29 N.L.R.B. 954 (1941).

*Sam M. Jackson, et al.*, 34 N.L.R.B. 194 (1941).

*S.H. Kress & Co.*, 34 N.L.R.B. 1152 (1941).

*The Ohio Calcium Co.*, 34 N.L.R.B. 917 (1941).

*Wilson & Co., Inc.*, 30 N.L.R.B. 314 (1941).

◆ Decision Year 1942

*A. Sarterius & Co.*, 40 N.L.R.B. 107 (1942).

*Burke Machine Tool Co.*, 36 N.L.R.B. 1329 (1942).

*Cleveland Worsted Mills*, 43 N.L.R.B. 54 (1942).

*Mrs. Natt's Bakery*, 44 N.L.R.B. 1099 (1942).

*Poultrymen's Service Ass'n*, 41 N.L.R.B. 444 (1942).

*The Barrett Co.*, 41 N.L.R.B. 1327 (1942).

## ◆ Decision Year: 1943

*American Bread Co.*, 51 N.L.R.B. 1302 (1943).  
*Berkshire Knitting Mills*, 46 N.L.R.B. 956 (1943).  
*Field Packing Co.*, 48 N.L.R.B. 850 (1943).  
*Industrial Cotton Mills, Inc.*, 50 N.L.R.B. 855 (1943).  
*Solvay Press Co.*, 47 N.L.R.B. 1113 (1943).  
*Western Cartridge Co.*, 48 N.L.R.B. 444 (1943).

## ◆ Decision Year: 1944

No cases are in sample.

## ◆ Decision Year: 1945

*Fairmont Creamery Co.*, 64 N.L.R.B. 824 (1945).  
*Republic Steel Corp.*, 62 N.L.R.B. 1008 (1945).

## ◆ Decision Year: 1946

No cases are in sample.

## ◆ Decision Year: 1947

*Times Publishing*, 72 N.L.R.B. 676 (1947).

## ◆ Decision Year: 1948

*Autopart Mfg. Co.*, 78 N.L.R.B. 461 (1948).  
*Container Mfg. Co.*, 75 N.L.R.B. 1082 (1948).  
*Massey Gin & Machine Works*, 78 N.L.R.B. 189 (1948).  
*National Grinding Wheel Co.*, 75 N.L.R.B. 905 (1948).

## ◆ Decision Year: 1949

*Ann Arbor Press*, 85 N.L.R.B. 58 (1949).  
*Belmont Radion Corp.*, 83 N.L.R.B. 45 (1949).  
*Cathy Lumber Co.*, 86 N.L.R.B. 157 (1949).  
*Cincinnati Steel Castings Co.*, 86 N.L.R.B. 592 (1949).  
*Columbia Pictures Corp.*, 82 N.L.R.B. 586 (1949).  
*Kallaher & Mee, Inc.*, 87 N.L.R.B. 410 (1949).  
*Kansas Milling Co.*, 86 N.L.R.B. 925 (1949).  
*Olin Industries*, 86 N.L.R.B. 203 (1949).  
*Myer Product Corp.*, 84 N.L.R.B. 32 (1949).  
*Pacific Powder Co.*, 84 N.L.R.B. 280 (1949).

## ◆ Decision Year: 1950

*Luzerne Hide & Tallow Co.*, 89 N.L.R.B. 989 (1950).

## ◆ Decision Year: 1951

*Celanese Corp. of America*, 95 N.L.R.B. 664 (1951).  
*Mackay Radio & Telegraph Co., Inc.*, 96 N.L.R.B. 740 (1951).  
*Nashville Corp., & Avco Mfg. Co.*, 94 N.L.R.B. 1567 (1951).  
*Office Towel Supply Co., Inc.*, 97 N.L.R.B. 449 (1951).  
*Roure-DuPont Mfg., Inc.*, 93 N.L.R.B. 1240 (1951).  
*Stilley Plywood Co., Inc.*, 94 N.L.R.B. 932 (1951).  
*Texas Co.*, 93 N.L.R.B. 1358 (1951).

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*United States Cold Storage Co.*, 96 N.L.R.B. 1108 (1951).

*West Coast Casket Co.*, 97 N.L.R.B. 820 (1951).

◆ Decision Year: 1952

*Longview Furniture Co.*, 101 N.L.R.B. 301 (1952).

*National Carbon Div.*, 100 N.L.R.B. 689 (1952).

*National Gas Co.*, 99 N.L.R.B. 273 (1952).

*Rubin Bros. Footwear*, 99 N.L.R.B. 610 (1952).

*Texas Founders, Inc.*, 101 N.L.R.B. 1642 (1952).

◆ Decision Year: 1953

*Cowles Publishing Co.*, 106 N.L.R.B. 801 (1953).

*Crowley's Milk Co.*, 102 N.L.R.B. 996 (1953).

*Marden Mfg. Co.*, 106 N.L.R.B. 1335 (1953).

*Mac Smith Garment Co., Inc.*, 117 N.L.R.B. 84 (1953).

*Mastro Plastics Corp.*, 103 N.L.R.B. 511 (1953).

*Oklahoma Furniture Mfg. Co.*, 104 N.L.R.B. 771 (1953).

*Ohio Ferro Alloys Corp.*, 104 N.L.R.B., 542 (1953).

*Pyrne & Co., Inc.*, 105 N.L.R.B. 447 (1953).

*Wheatland Electric Corp., Inc.*, 102 N.L.R.B. 1119 (1953).

◆ Decision Year: 1954

*Anchor Rome Mills, Inc.*, 110 N.L.R.B. 956 (1954).

*Bartlett Collins Co.*, 110 N.L.R.B. 395 (1954).

*B.V.D. Co., Inc.*, 110 N.L.R.B. 1412 (1954).

*Kerrigan Iron Works, Inc.*, 108 N.L.R.B. 933 (1954).

◆ Decision Year: 1955

*Brookeville Glove Co.*, 114 N.L.R.B. 213 (1955).

*Broward Marine, Inc.*, 112 N.L.R.B. 1443 (1955).

*Robinson Freight Lines*, 114 N.L.R.B. 1093 (1955).

◆ Decision Year: 1956

*Belton Smelting & Refining Works, Inc.*, 115 N.L.R.B. 495 (1956).

*Cranston Print Works, Co.*, 115 N.L.R.B. 537 (1956).

*Ford Radio and Mica Corp.*, 115 N.L.R.B. 1046 (1956).

*Guistina Bros. Lumber Co.*, 116 N.L.R.B. 700 (1956).

◆ Decision Year: 1957

*Bob Saunders Co.*, 118 N.L.R.B. 415 (1957).

*California Date Growers Ass'n*, 118 N.L.R.B. 246 (1957).

◆ Decision Year: 1958

*Economy Stores, Inc.*, 120 N.L.R.B. 1 (1958).

◆ Decision Year: 1959

*Caldwell Packaging Co.*, 125 N.L.R.B. 495 (1959).

*Crookston Times Printing Co.*, 125 N.L.R.B. 304 (1959).

*Florida Citrus Cannery Corp.*, 124 N.L.R.B. 1182 (1959).

*W.W. Wallwork Fargo, Inc.*, 123 N.L.R.B. 91 (1959).

## ◆ Decision Year: 1960

*Barney's Supercenter, Inc.*, 128 N.L.R.B. 1325 (1960).

*Jackson Mfg. Co.*, 129 N.L.R.B. 460 (1960).

*Mission Mfg. Co.*, 128 N.L.R.B. 275 (1960).

*Orange Premium Stays, Inc.*, 127 N.L.R.B. (1960).

## ◆ Decision Year: 1961

*Erie Resistor Co.*, 132 N.L.R.B. 621 (1961).

*Marydale Products Corp., Inc.*, 133 N.L.R.B. 1232 (1961).

*New Orleans Roosevelt Corp.*, 132 N.L.R.B. 248 (1961).

*Shook & Fletcher Insulation Co.*, 130 N.L.R.B. 519 (1961).

*Valley Die Cast Corp.*, 130 N.L.R.B. 508 (1961).

## ◆ Decision Year: 1962

*Albritton Engineering Corp.*, 138 N.L.R.B. 1482 (1962).

*American Optical Co.*, 138 N.L.R.B. 940 (1962).

*Metropolitan Millworks, Inc.*, 138 N.L.R.B. 1482 (1962).

*Park Edge Sheridan Meats, Inc.*, 139 N.L.R.B. 748 (1962).

*Redwing Carriers, Inc.*, 137 N.L.R.B. 1545 (1962).

*Sunbeam Lighting Co.*, 136 N.L.R.B. 1248 (1962).

*Titan Metal Mfg., Co.*, 135 N.L.R.B. 196 (1962).

## ◆ Decision Year: 1963

*Philip Carey Mfg., Co.*, 140 N.L.R.B. 1103 (1963).

*Sunbeam Plastics Co.*, 144 N.L.R.B. 1010 (1963).

## ◆ Decision Year: 1964

*Hot Shoppes, Inc.*, 146 N.L.R.B. 802 (1964).

*Little Rock Downtowner (The), Inc.*, 145 N.L.R.B. 1286 (1964).

*Shell Oil Co.*, 149 N.L.R.B. 283 (1964).

*Tom Joyce Floors, Inc.*, 149 N.L.R.B. 896 (1964).

*Western Equipment Co.*, 149 N.L.R.B. 248 (1964).

## ◆ Decision Year: 1965

*Crown Coach Corp.*, 155 N.L.R.B. 625 (1965).

*Empire Terminal Warehouse Co.*, 151 N.L.R.B. 1359 (1965).

## ◆ Decision Year: 1966

*John Kinkel & Son*, 157 N.L.R.B. 744 (1966).

## ◆ Decision Year: 1967

*Davis Wholesale Co.*, 165 N.L.R.B. 297 (1967).

*Georgia Highway Express, Inc.*, 165 N.L.R.B. 514 (1967).

*Local Union 8280, United Mine Workers*, 166 N.L.R.B. 271 (1967).

## ◆ Decision Year: 1968

*Chatham Mfg. Co.*, 172 N.L.R.B. 1948 (1968).

*Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968).

## ◆ Decision Year: 1969

*Ace Drop Cloth Co.*, 178 N.L.R.B. 664 (1969).

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*Downtowner of Shreveport (The)*, 175 N.L.R.B. 1106 (1969).

*International Van Lines*, 177 N.L.R.B. 353 (1969).

◆ Decision Year: 1970

*American Photocopy Equipment*, 186 N.L.R.B. 172 (1970).

*Chef Nathan Sez Eat Here, Inc.*, 181 N.L.R.B. 159 (1970).

*Colonial Manor Convalescent Nursing Home*, 184 N.L.R.B. 693 (1970).

*Hartman Luggage Co.*, 183 N.L.R.B. 1246 (1970).

*Little Rock Airmotive, Inc.*, 182 N.L.R.B. 666 (1970).

*Shell Oil Co.*, 186 N.L.R.B. 941 (1970).

◆ Decision Year: 1971

*H & F Binch*, 188 N.L.R.B. 720 (1971).

*Laher Spring & Electric Car Corp.*, 192 N.L.R.B. 464 (1971).

*Restaurant Ass'n of the State of Washington*, 190 N.L.R.B. 133 (1971).

*United Aircraft Corp.*, 192 N.L.R.B. 382 (1971).

◆ Decision Year: 1972

*Service Protective Covers, Inc.*, 199 N.L.R.B. 977 (1972).

*Southwest Engraving Co.*, 198 N.L.R.B. 694 (1972).

◆ Decision Year: 1973

*CYR Bottling & Co.*, 204 N.L.R.B. 527 (1973).

*Food Service Co.*, 202 N.L.R.B. 790 (1973).

*Montgomery Ward & Co.*, 202 N.L.R.B. 593 (1973).

*Ramona's Mexican Food Products*, 203 N.L.R.B. 663 (1973).

◆ Decision Year: 1974

*Bio-Science Laboratories*, 209 N.L.R.B. 796 (1974).

*Leon Ferenbach, Inc.*, 212 N.L.R.B. 896 (1974) (two strikes).

*Westinghouse Learning Corp.*, 211 N.L.R.B. 19 (1974).

◆ Decision Year: 1975

*Eagle International, Inc.*, 223 N.L.R.B. 29 (1975).

◆ Decision Year: 1976

*Newberry Energy Corp.*, 227 N.L.R.B. 436 (1976).

◆ Decision Year: 1977

*Charles D. Bonnano Linen Service*, 229 N.L.R.B. 629 (1977).

*Crossroads Chevrolet, Inc.*, 233 N.L.R.B. 728 (1977).

*Methodist Hospital of Kentucky*, 227 N.L.R.B. 1392 (1977).

*Robins Co.*, 233 N.L.R.B. 549 (1977).

*South Central Timber Development*, 230 N.L.R.B. 468 (1977).

*Windham Community Hospital*, 230 N.L.R.B. 1070 (1977).

*Wisconsin Packing Co.*, 231 N.L.R.B. 546 (1977).

*Woodland Hospital*, 233 N.L.R.B. 782 (1977).

◆ Decision Year: 1978

*Camay Drilling Co.*, 239 N.L.R.B. 997 (1978).

*Carpenter Sprinkler Corp.*, 238 N.L.R.B. 794 (1978).

*Pittsburgh & New England Trucking Co.*, 238 N.L.R.B. 1706 (1978).

*Standard Metal, Inc.*, 237 N.L.R.B. 1136 (1978).

*W.C. McQuaid, Inc.*, 237 N.L.R.B. 177 (1978).

*W-I Canteen Services, Inc.*, 238 N.L.R.B. 609 (1978).

◆ Decision Year: 1979

*Atlantic Creosoting Co., Inc.*, 242 N.L.R.B. 192 (1979).

*Burlington Homes, Inc.*, 246 N.L.R.B. 1029 (1979).

*Drug Package Co., Inc.*, 241 N.L.R.B. 330 (1979).

*Heritage House, Inc.*, 245 N.L.R.B. 242 (1979).

*M.C.C. Pacific Valve*, 244 N.L.R.B. 931 (1979).

*Markle Mfg. Co.*, 239 N.L.R.B. 1142 (1979).

*Rainbow Coaches*, 241 N.L.R.B. 589 (1979).

*Superior National Bank*, 246 N.L.R.B. 721 (1979).

◆ Decision Year: 1980

*Associated Grocers*, 253 N.L.R.B. 31 (1980).

*Atlas Metal Parts, Co.*, 252 N.L.R.B. 205 (1980).

*Harowe Servo Controls*, 250 N.L.R.B. 958 (1980).

*Interstate Paper Supply Co., Inc.*, 251 N.L.R.B. 1423 (1980).

◆ Decision Year: 1981

*Consolidated Dress Carriers, Inc.*, 259 N.L.R.B. 627 (1981).

*Home Insulation Services*, 255 N.L.R.B. 311 (1981).

*Mark Twain Marine Industries*, 254 N.L.R.B. 1095 (1981).

*Randall Burkhardt*, 257 N.L.R.B. 1 (1981).

*Research Products/Blakenship Co.*, 258 N.L.R.B. 19 (1981).

*True Drilling Co.*, 257 N.L.R.B. 426 (1981).

*Walker Die Casting*, 255 N.L.R.B. 212 (1981).

◆ Decision Year: 1982

*Brinkerhoff Signal Corp.*, 264 N.L.R.B. 348 (1982).

*Carruthers Ready Mix, Inc.*, 262 N.L.R.B. 739 (1982).

*Chevron Chemical Co.*, 261 N.L.R.B. 44 (1982).

*Conair Corp.*, 261 N.L.R.B. 1189 (1982).

*Forest Beverage Corp.*, 265 N.L.R.B. 285 (1982).

*Heads & Threads Co.*, 261 N.L.R.B. 800 (1982).

*Overhead Door Corp.*, 261 N.L.R.B. 657 (1982).

*Struthers Well Corp.*, 262 N.L.R.B. 1080 (1982).

◆ Decision Year: 1983

*Lehigh Metal Fabricators*, 267 N.L.R.B. 568 (1983).

*Whisper Soft Mills*, 267 N.L.R.B. 813 (1983).

◆ Decision Year: 1984

*Barry-Wehmiller Co.*, 271 N.L.R.B. 471 (1984).

*Coca Cola of Memphis*, 269 N.L.R.B. 1101 (1984).

*Clear Pine Mouldings*, 268 N.L.R.B. 173 (1984).



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- Denver Hilton Hotel*, 272 N.L.R.B. 488 (1984).  
*Gem City Ready Mix Co.*, 270 N.L.R.B. 1260 (1984).  
*Harrison Ready Mix Concrete*, 272 N.L.R.B. 331 (1984).  
*Harvey Engineering*, 270 N.L.R.B. 1290 (1984).  
◆ Decision Year: 1985  
*Brady-Stannard Motor Co.*, 273 N.L.R.B. 1434 (1985).  
*Garrett Railroad Car*, 275 N.L.R.B. 1032 (1985).  
*Medallion Kitchens*, 275 N.L.R.B. 58 (1985).  
*Storall Mfg. Co.*, 275 N.L.R.B. 220 (1985).  
*Wilder Construction*, 276 N.L.R.B. 977 (1985).  
◆ Decision Year: 1986  
*Lone Star Industries*, 279 N.L.R.B. 550 (1986).  
*Pacific Mutual Door Co.*, 278 N.L.R.B. 854 (1986).  
*Rapid Armored Truck Corp.*, 281 N.L.R.B. 371 (1986).  
*Service Electric Co.*, 281 N.L.R.B. 633 (1986).  
*Wright Tool Co.*, 282 N.L.R.B. 1398 (1986).  
*Zartic, Inc.*, 277 N.L.R.B. 1478 (1986).  
◆ Decision Year: 1987  
*Chromalloy American Corp.*, 286 N.L.R.B. 868 (1987).  
*Kurz-Kasch, Inc.*, 286 N.L.R.B. 876 (1987).  
*Land Air Delivery*, 287 N.L.R.B. 1131 (1987).  
*P & C Food Markets*, 282 N.L.R.B. 894 (1987).  
*Sunbelt Enterprises*, 285 N.L.R.B. 1155 (1987).  
*Tile, Terrazzo & Marble Contractors Ass'n*, 287 N.L.R.B. 769 (1987).  
◆ Decision Year: 1988  
*Aqua-Chem, Inc.*, 288 N.L.R.B. 1108 (1988).  
*Armored Transfer Service*, 287 N.L.R.B. 1244 (1988).  
*Champ Corp.*, 291 N.L.R.B. 803 (1988).  
*Christopher Construction*, 288 N.L.R.B. 1272 (1988).  
*Delta Macon Brick & Tile Co., Inc.*, 830 (1988).  
*Facet Enterprises*, 290 N.L.R.B. 152 (1988).  
*Gilmore Steel Corp.*, 291 N.L.R.B. 185 (1988).  
*Johns-Manville Sales Corp.*, 289 N.L.R.B. 358 (1988).  
*Oregon Steel Mills*, 291 N.L.R.B. 195 (1988).  
*Reichold Chemicals*, 288 N.L.R.B. 69 (1988).  
*Trumbull Memorial Hospital*, 288 N.L.R.B. 1429 (1988).  
◆ Decision Year: 1989  
*Accurate Die Casting*, 292 N.L.R.B. 284 (1989).  
*Alaska Pulp Corp.*, 296 N.L.R.B. 1260 (1989).  
*Chesapeake Plywood*, 294 N.L.R.B. 210 (1989).  
*Crown Beer Div.*, 296 N.L.R.B. 541 (1989).  
*Elastic Nut Shop Div. of Harvard Industries*, 294 N.L.R.B. 1102 (1989).

- Ford Bros.*, 294 N.L.R.B. 107 (1989).  
*Gloversville Embossing Corp.*, 297 N.L.R.B. 182 (1989).  
*Grocers Supply Co. (The)*, 294 N.L.R.B. 438 (1989).  
*Hydrologics, Inc.*, 293 N.L.R.B. 1060 (1989).  
*Liston Brick of Corona, Inc.*, 296 N.L.R.B. 1181 (1989).  
*Massachusetts Coastal Foods, Inc.*, 293 N.L.R.B. 496 (1989).  
*Mike Yurosek & Son, Inc.*, 295 N.L.R.B. 304 (1989).  
*Polynesian Hospital Tours*, 297 N.L.R.B. 228 (1989).  
*Southwest Merchandising Corp.*, 296 N.L.R.B. 1001 (1989).  
*Virginia Holding Corp.*, 293 N.L.R.B. 182 (1989).
- ◆ Decision Year: 1990
- Augusta Bakery Corp.*, 298 N.L.R.B. 58 (1990).  
*Gaywood Mfg. Co.*, 299 N.L.R.B. 697 (1990).  
*J.M. Sahlein Music Co.*, 299 N.L.R.B. 842 (1990).  
*Mohawk Liquer Co.*, 300 N.L.R.B. 1075 (1990).  
*Waterbury Hospital (The)*, 300 N.L.R.B. 992 (1990).
- ◆ Decision Year: 1991
- A.P.A. Warehouse*, 302 N.L.R.B. 110 (1991).  
*Chicago Tribune*, 304 N.L.R.B. 259 (1991).  
*Columbia Portland Cement*, 303 N.L.R.B. 880 (1991).  
*Concrete Pipe & Products Corp.*, 305 N.L.R.B. 152 (1991).  
*Conway Central Express*, 305 N.L.R.B. 837 (1991).  
*Daniel Finley Allen & Co.*, 303 N.L.R.B. 846 (1991).  
*New Life Bakery*, 301 N.L.R.B. 421 (1991).  
*Rose Printing*, 304 N.L.R.B. 1066 (1991).  
*Solar Turbines, Inc.*, 302 N.L.R.B. 14 (1991).  
*Textron, Inc.*, 302 N.L.R.B. 660 (1991).  
*Transport Services Co.*, 302 N.L.R.B. 22 (1991).
- ◆ Decision Year: 1992
- Harvey Mfg. Co.*, 309 N.L.R.B. 465 (1992).  
*International Paper Corp.*, 309 N.L.R.B. 31 (1992).  
*Noblit Bros.*, 309 N.L.R.B. 329 (1992).  
*Outboard Marine Corp.*, 307 N.L.R.B. 1333 (1992).  
*R & H Coal Co.*, 309 N.L.R.B. 28 (1992) (also contains information on United Mine Workers/Pittston strike).  
*Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992).  
*TNS, Inc.*, 309 N.L.R.B. 1348 (1992).
- ◆ Decision Year: 1993
- Auto Workers, Local Union 695*, 311 N.L.R.B. 1328 (1993).  
*Domsey Trading Corp.*, 310 N.L.R.B. 777 (1993).  
*Gibson Greeting, Inc.*, 310 N.L.R.B. 1286 (1993).  
*Hormigonera Del Toa, Inc.*, 311 N.L.R.B. 956 (1993).

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*Industrial Electric Reels*, 310 N.L.R.B. 1069 (1993).

*J.M.A. Holdings, Inc.*, 310 N.L.R.B. 1349 (1993).

*Page Litho, Inc.*, 311 N.L.R.B. 881 (1993).

*Park Manor Nursing Home*, 312 N.L.R.B. 122 (1993).

*R.E. Dietz Co.*, 311 N.L.R.B. 1259 (1993).

*S & F Enterprises, Inc.*, 312 N.L.R.B. No. 123 (1993).

*Sunol Valley Golf Club & Recreation Co.*, 310 N.L.R.B. 357 (1993).

◆ Decision Year: 1994

*Laidlaw Waste Systems, Inc.*, 313 N.L.R.B. No. 116 (1994).

*M.M.I.C., Inc.*, 313 N.L.R.B. No. 179 (1994).

APPENDIX II: FIGURES

FIGURE A2  
STRIKERS NOT RECALLED FOR REINSTATEMENT<sup>1</sup>

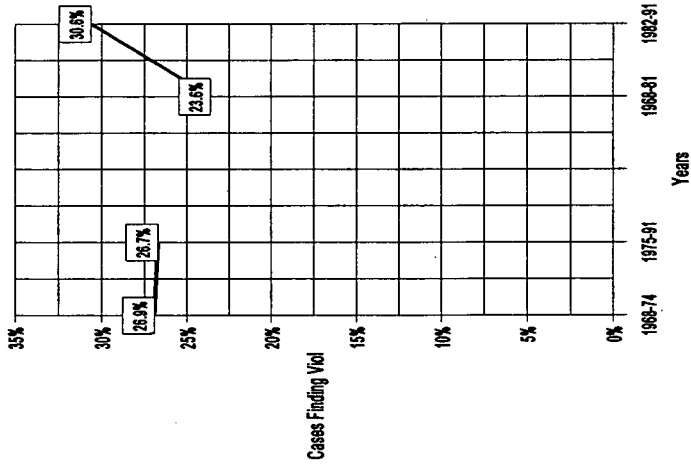
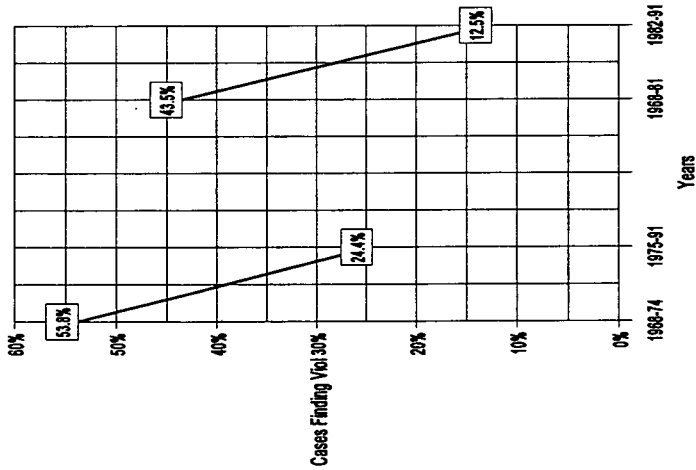


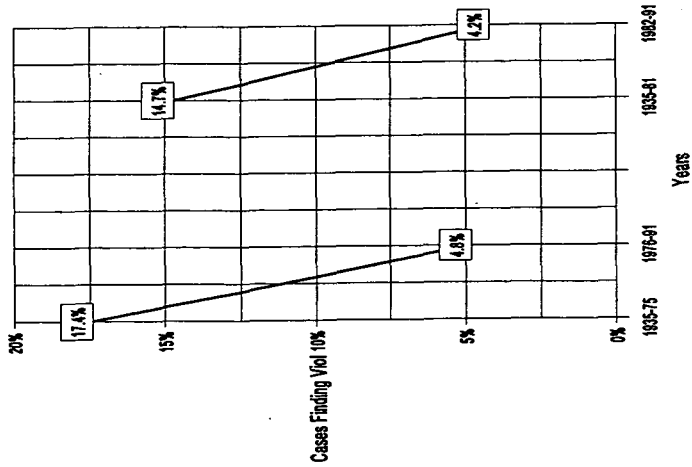
FIGURE A1  
STRIKERS NOT LISTED FOR REINSTATEMENT<sup>1</sup>



<sup>1</sup> The NLRB ruled that an employer committed a ULP by failing to list a striker for reinstatement in 14 of 26 cases from 1968-74; in 32 of 131 cases from 1975-91; in 20 of 85 cases from 1968-81; and in 22 of 72 cases from 1982-91. The NLRB ruled that an employer committed a ULP by failing to recall a striker for reinstatement in 7 of 26 cases from 1968-74; in 35 of 131 cases from 1975-91; in 20 of 85 cases from 1968-81; and in 22 of 72 cases from 1982-91.

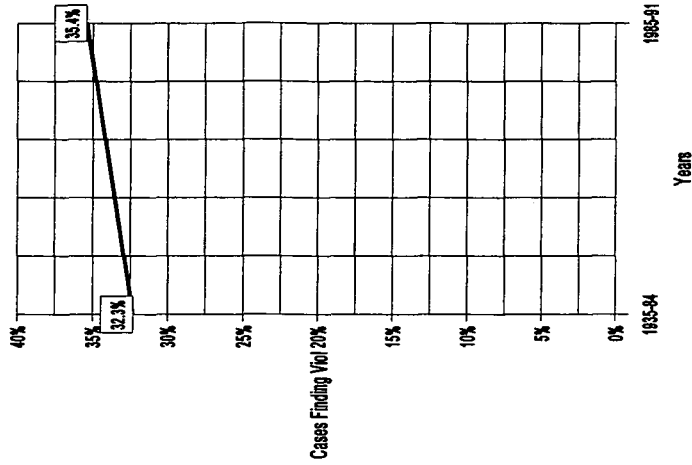
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**FIGURE B**  
**DISCRIMINATION AGAINST STRIKERS<sup>1</sup>**



<sup>1</sup> The NLRB ruled that an employer committed a ULP by discriminating in recalling strikers in 30 of 172 cases from 1935-75; in 6 of 124 cases from 1976-91; in 33 of 124 cases from 1982-91; and in 3 of 72 cases from 1982-91.

**FIGURE C**  
**STRIKERS UNLAWFULLY DISCHARGED<sup>1</sup>**



<sup>1</sup> The NLRB ruled that an employer unlawfully discharged a striker in 80 of 248 cases from 1948-84, and in 17 of 48 cases from 1985-91.

FIGURE E  
ULP STRIKERS NOT REINSTATED<sup>1</sup>

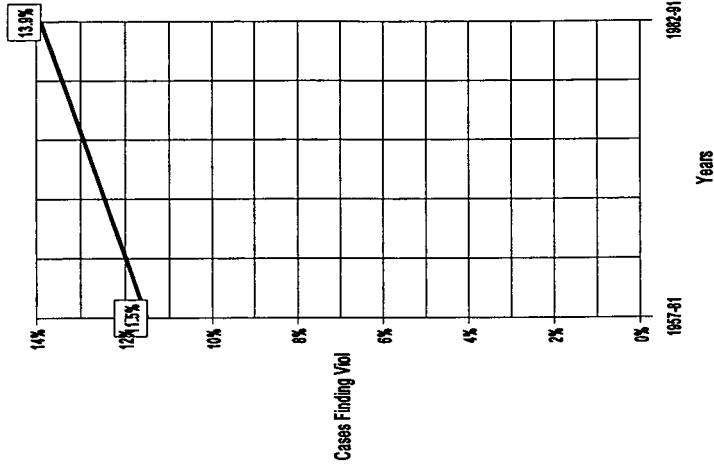
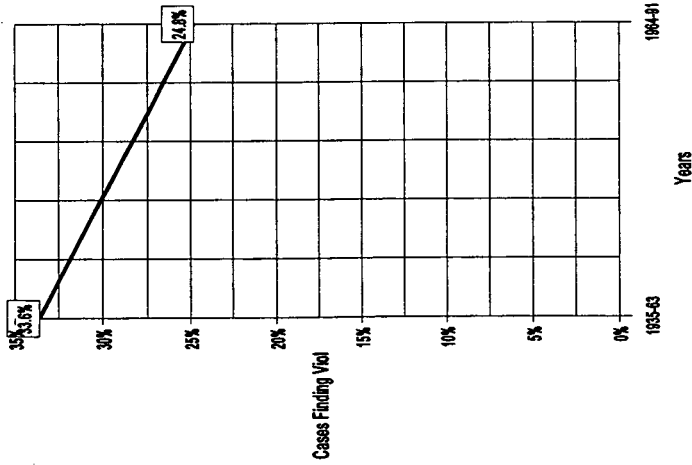


FIGURE D  
PREFERENTIAL TREATMENT FOR NON-STRIKERS<sup>1</sup>



<sup>1</sup> The NLRB ruled that an employer committed a ULP by not reinstating an unfair labor practice striker in 14 of 122 cases from 1957-81, and in 10 of 72 cases from 1982-91.

<sup>1</sup> The NLRB ruled that an employer committed a ULP by granting preferential treatment to non-strikers in 44 of 131 cases from 1935-63, and in 41 of 165 cases from 1964-91.

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### APPENDIX III: POTENTIAL SOURCES OF ERROR

#### I. SAMPLE OF CASES

##### A. *Keyword Search*

The keyword search utilized to identify striker replacement cases<sup>146</sup> probably introduced some error into the database, particularly for cases in which “replacement” was used exclusively. The problem with this term is that it can also mean temporary replacement, but an adjudicatory decision would not make this clear. For example, in the 1987 strike involving professional football players, the athletes were replaced but the Board ruled in 1994 that this was not a strike involving permanent replacements.<sup>147</sup>

Unfortunately, many decisions were not as explicit as this one in indicating that replacements were only temporary. Thus, all cases on the initial list were examined in order to determine whether the strike involved the hiring of *permanent* replacements. When cases were unclear on this critical point, reasonable judgment was used to make an inference based on the full record. To illustrate, consider a case that did not specifically indicate that permanent replacements were hired. If the decision involved a Board order requiring an employer to reinstate strikers with back pay while dismissing replacements, it was included as a permanent replacement case. This inference is reasonable because the back pay and dismissal of replacements indicate that replacements were hired on a permanent basis, and had worked a significant period of time.<sup>148</sup>

##### B. *Other Excluded Cases*

The database excluded strikes occurring outside the NLRA or RLA.<sup>149</sup> Although the NLRA and RLA cover most private-sector employees, they do not cover strikes involving federal,<sup>150</sup> state and municipal employees,<sup>151</sup>

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146. *See supra* note 67.

147. *See* National Football League, 309 N.L.R.B. 78, 81 & n.13 (1992).

148. *See, e.g.,* NLRB v. My Store, Inc., 345 F.2d 494, 498 (7th Cir. 1965).

149. *See, e.g.,* United States v. PATCO, 525 F. Supp. 820, 822 (E.D. Mich. 1981) (reporting the firing of striking air traffic controllers). The exclusion of this and similar cases from the database is significant not only because of the large number of strikers and replacements involved, but also because commentators maintain that this case influenced private sector employers. *See* H.R. CONF. REP. NO. 102-57, 102d Cong., 1st Sess. Part 3 (1991) (observing that President Reagan's firing and permanent replacement of 12,000 striking air traffic controllers in 1981 “was regarded by many observers as a signal to the employer community that it was acceptable to dismiss striking workers.”).

150. The NLRA's definition of employer expressly excludes “the United States or any wholly owned Government corporation.” 29 U.S.C. § 152(2) (1993). Consequently, any strike involving federal employees would not appear in this database. In any event, federal employees are prohibited from

agricultural employees,<sup>152</sup> and certain health care employees because of the exclusion of such employees from the Acts between 1947 and 1974.<sup>153</sup>

## II. DATA CODING

Data coding presents another potential source of error. This study examines NLRB rulings about particular aspects of employer treatment of replaced strikers. Yet the methodology for collecting data on NLRB rulings was more complicated and subjective than one might imagine. The variable NLRBRULE was coded 0 if an employer was found to have committed no ULP, and 1 if found to have committed one or more ULPs in the context of a replacement strike. Even this information can be misleading. Hypothetically, if an employer hired 1,000 permanent replacements, and the Board ruled that every hire was lawful except one, which involved an illegal discharge of a striker, NLRBRULE would be coded 1. Nominally, this would mean that the Board found for the union and against the employer, and would appear as such in the results reported here. In reality, the decision would amount to an employer victory, because 999 of its replacement decisions would have been upheld. In short, data on NLRB decisions do not capture the magnitude of violations that occurred.

But trying to refine further the system used here is futile. Imagine a single unlawful discharge occurring just as an economic strike was beginning (perhaps an employer told a union officer that she was being fired for striking), and a Board ruling that this isolated unlawful discharge converted the strike to an ULP strike *before* any permanent replacements were hired. If this single discharge was shown to prolong the strike by 999 co-workers, all of them would be entitled to immediate reinstatement.<sup>154</sup> But if the discharge occurred *after* the strike began and *after* permanent replacements were hired (perhaps the

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striking. *See* Civil Service Reform Act, 5 U.S.C. §§ 7116(B)(7), 73 (1993).

151. The NLRA excludes from its definition of employer "any State or political subdivision thereof. . . ." 29 U.S.C. § 152(2) (1993).

152. The NLRA expressly excludes from its definition of employee "any individual employed as an agricultural laborer." 29 U.S.C. § 152(3) (1993).

153. Before the Taft-Hartley Act amended the NLRA, health care employees were covered. *See, e.g.,* In re Central Dispensary and Emergency Hosp., 44 N.L.R.B. 533, 540-41 (1942). The 1947 Taft-Hartley Act amended the NLRA definition of employer to exclude "any corporation or association operating a hospital, if no part of the net retained earnings inure to the benefit of any private shareholder or individual." Labor-Management Relations Act, ch. 120, § 101, 2(2), 61 Stat. 136, 137 (1947). But in 1974, Congress amended section 2(2), making the Act applicable to "health care institution[s]." Pub. L. No. 93-360 §§ 1(a), 2(2), 88 Stat. 395 (codified as amended at 29 U.S.C. § 152(2) (1994)).

This database contains several cases reporting replacement strikes affecting the health care industry. *E.g.,* Park Manor Nursing Home, 312 N.L.R.B. No. 122 (1993); The Waterbury Hosp., 300 N.L.R.B. 992 (1990); Trumbull Memorial Hospital, 288 N.L.R.B. 1429 (1988); Woodland Hospital, 233 N.L.R.B. 782 (1977); Windham Community Hospital, 230 N.L.R.B. 1070 (1977); Methodist Hospital of Kentucky, 227 N.L.R.B. 1392 (1977); Colonial Manor Convalescent Nursing Home, 184 N.L.R.B. 693 (1970).

154. *Cf.* Burkart Foam, 283 N.L.R.B. 351 (1987), *enforced*, 848 F.2d 825 (7th Cir. 1988).



## Permanent Striker Replacements

employer erroneously discharged the striker for picket line misconduct), this same violation would have no beneficial effect for the 999 co-workers. Thus, even if data had been collected to try to capture the magnitude of employer violations—perhaps by counting number of violations, or number of people affected—these counting methods would have led to some misleading inferences. The timing of employer violations and nature of NLRB rulings may have fact-specific impacts that defied consistent quantification.

### III. ACCOUNTING AND PLOTTING

With regard to the accounting and plotting of the incidence of employer violations, several caveats apply. First, it is possible for the Board to find in any single case that an employer has committed multiple unfair labor practices. For example, it might find in one case that an employer unlawfully discharged a replaced striker and separately granted an unlawful employment preference to replacements. Thus, one case could result in two separate employer violations. Over all the cases it is possible that in 80% of them employers unlawfully discharged strikers, and in 40% of them they unlawfully granted an employment preference to replacements. This means that percentage rates for employer violations in all the charts should not be expected to sum to 100%.

Second, the results do not measure the gravity or pervasiveness of a given unlawful labor practice within one strike; they only measure the number of cases that involve that unlawful practice. For example, Figure A2 shows that from 1982 to 1991, economic strikers were not properly recalled for reinstatement in 30.6% of all cases, but a finding of one violation would be indistinguishable from a finding of hundreds of violations occurring during one strike. It is possible, therefore, that employer violation rates could be high but reflect nothing more than the frequent occurrence of isolated or minor infractions. Or it is possible that employers violated a specific duty—for example, by discharging strikers—in a small percentage of cases, but did so in an egregious manner. The egregious misconduct might be discharging all strikers without cause (perhaps hundreds of employees) in a given case. This misconduct would be recorded, however, as one type of violation occurring in a single case, and thus would not represent the gravity of the misconduct. In sum, this study counts rulings that involve alleged employer violations of strikers' rights, but this counting does not suggest the magnitude, severity, or quality of employer violations.

A third limitation is that many of the analyses reported in the charts are based on small subsamples. To illustrate, the employer's duty to put replaced strikers on a preferential reinstatement list did not arise until *Laidlaw* was decided in 1967. Thus, 1968 was the first full year after that decision in which employers should have been expected to comply with this legal duty. Accordingly, only cases from 1968 to 1991 were analyzed, and cases from

1935 to 1967 were deleted. As the footnote for Figure A1 reports, only 157 cases were used for this analysis.<sup>155</sup> The point here is that some analyses involve relatively few cases, and hence, certain “small number” problems arise.

One is that aberrations in employer conduct toward replaced strikers may give a distorted statistical impression of underlying phenomena that are not being captured by this methodology. For example, there was a concentration of replacement strikes in the mining industry in the 1980s,<sup>156</sup> and so there is a possibility that analyses focusing on that period<sup>157</sup> would amplify industry-specific characteristics that would not generalize to other employers and unions.

A second problem is that observed differences in employer violation rates from one period to another would be less likely to be statistically significant. The benefit of significance testing is that it minimizes the probability of falsely concluding that a change in behavior has occurred when only random variation produced some difference in employer-violation rates. At the same time, a small sample might lead to a false conclusion that employer violation rates did not significantly change, when in fact they did.<sup>158</sup> This study used a conventional significance level (.05)<sup>159</sup> for rejecting the null hypothesis that no change in employer violation rate occurred over the periods analyzed. The practical import of using this standard relates to the fact that only one of the analyses here showed a statistically significant difference in employer violation rates.<sup>160</sup> Practically speaking, there is only a small chance that this study falsely concludes employer violations for failing to list strikers for reinstatement fell over the periods analyzed.

Significance testing relates to whether change in employer violation rates occurred. However, apart from whether change occurred from period A to period B, the findings here give some baseline estimates of Board rulings that employers violated the rights of replaced strikers. In most of the charts the data do not permit a statistical inference that change occurred, but the charts nevertheless show that employer violations occur at certain levels. This

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155. This number is easily arrived at by adding the 26 cases for 1968-74 and 131 cases for 1975-91, or the 85 cases from 1968-81 and 72 cases from 1982-91.

156. These included Phelps Dodge, Pittston Coal Group and A.T. Massey. *See supra* note 5.

157. *See, e.g.*, cases from 1982 to 1991 in Figure E.

158. *See Description of Subpopulations and Mean Difference Testing: Subprograms Breakdown and T-Test, in SPSS, supra* note 72, at 267, (observing that the “goal of the statistical analysis is to establish whether or not a difference between two samples is significant. ‘Significant’ here does not mean ‘important’ or ‘consequence’; it is used here to mean ‘indicative of’ or ‘signifying’ a true difference between the two populations.”). *See also* discussion of Type I and Type II errors in statistical inferences. *Id.* at 268.

159. *Id.* at 268.

160. Figure A1, involving employer failure to put strikers on a reinstatement list, was significant at the .05 level.

## Permanent Striker Replacements

“baseline” information is just as important for making informed judgments about the effectiveness of existing striker replacement policy as information that measures change.

### IV. SUBJECTIVITY OF APPLICATION OF NLRA

One other data limitation should be noted. This Article reports NLRB rulings on allegations that employers violated the rights of replaced strikers. Since the NLRB is empowered to make these rulings,<sup>161</sup> it follows that Board findings of violations equate to occurrence of unlawful employer conduct. But before accepting this conclusion, one should consider that occasionally Board rulings are reversed on appeal.<sup>162</sup> This suggests two important caveats: Sometimes the Board errs in applying the law, and at all times, application of the NLRA involves a certain amount of subjectivity.

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161. 29 U.S.C. § 160(a) (1992) (“[The] Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce.”).

162. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (reversing the NLRB’s doctrine permitting nonemployee union organizers access to an employer’s private property, stating: “We cannot accept the Board’s conclusion because it rests on erroneous legal foundations.”) (citations omitted).

