Protecting the Expectations of Permanent Replacements: When May An Employer Limit the Seniority Rights of Striking Employees?

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NOTE

PROTECTING THE EXPECTATIONS OF PERMANENT REPLACEMENTS: WHEN MAY AN EMPLOYER LIMIT THE SENIORITY RIGHTS OF STRIKING EMPLOYEES?

An employer’s right to hire and retain permanent replacements during an economic strike\(^1\) is one of its most powerful weapons. This right was first recognized in \textit{NLRB v. Mackay Radio and Telegraph Co.}\(^2\) Since \textit{Mackay}, there has been a conflict between the employer’s right to hire and retain permanent replacements and a striker’s right to full reinstatement at the conclusion of a strike. This article examines that conflict and the attempt to reconcile the competing rights of employers and their employees.

The National Labor Relations Board (NLRB) and the United States Supreme Court have attempted to ensure that the \textit{Mackay} doctrine does not discourage union activity.\(^3\) Recent federal court decisions\(^4\) permitting employers to limit the seniority rights of economic strikers have increased the risks faced by striking employees.\(^5\)

1. An economic strike exists when employees engage in a work stoppage relating to wages, hours or terms and conditions of employment. Gillespie, \textit{The Mackay Doctrine and The Myth of Business Necessity}, 50 Tex. L. Rev. 782, 782 n.1 (1972). In comparison, an unfair labor practice strike is a work stoppage induced by an employer’s conduct which restrains, coerces or interferes with employee rights under section 7 of the NLRA. See Vulcan Hart Corp. v. NLRB, 718 F.2d 269 (8th Cir. 1983).
2. 304 U.S. 333 (1938).
3. \textit{See infra} notes 31-76 and accompanying text.
4. NLRB v. Harrison Ready Mix Concrete, Inc., 770 F.2d 78 (6th Cir. 1985); Giddings & Lewis, Inc. v. NLRB, 675 F.2d 926, 110 L.R.R.M. (BNA) 2121 (7th Cir. 1982).
5. Permanently replaced strikers may wait indefinitely before returning to their positions. Gillespie, \textit{supra} note 1, at 785-86.
I. CASE AND STATUTORY BACKGROUND

The right to strike is the major weapon available to private sector employees. Whether threatened or actually commenced, strikes encourage employers to bargain in good faith and often lead to employer concessions.

An employer can counteract an economic strike by hiring replacements and offering them permanent positions. If the employee concerted activity is an economic strike, the strikers are not entitled to immediate reinstatement at the strike’s conclusion. In effect, Mackay holds that an employer’s economic interest in maintaining its business during a strike outweighs “the impact of such action (hiring permanent replacements) on the employees’ exercise of the right to strike.” Thus, the power to hire permanent replacements discourages striking because striking employees may face prolonged unemployment.

Hiring permanent replacements may also lead to union concessions during collective bargaining. There are two premises behind the Mackay doctrine. The first

6. The right to strike is not expressly provided for in section 7 of the NLRA, (unless otherwise provided all statutory references refer to the NLRA) but is implied:

Employees 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 . . .


Additionally, the right to strike is referred to in section 13:

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.


7. The employer’s and union’s duty to bargain in good faith is set forth in section 8(d):

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.


9. See supra note 1.

10. 304 U.S. at 345-46. Unfair labor practice strikers are ordinarily entitled to reinstatement even if permanent replacements have been hired. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 n.5 (1967).


13. Id. at 875.
premise is the legal conclusion that the employer should be allowed to keep his business operating during a strike. Secondly, the federal courts and the NLRB assume that an employer cannot continue its business during a strike unless it offers replacements permanent employment.

Commentators have challenged the assumption that an employer must usually offer permanent employment to replacements to replenish its workforce. One commentator recommends that an employer should be allowed to hire permanent replacements only when an offer of temporary employment to replacements is inadequate to allow the employer to continue operations. In such an instance, the employer should bear the burden of proving that not enough replacements will accept available positions if they are only offered temporary employment. If the employer does not satisfy this burden, it should not be allowed to retain permanent replacements, and strikers should be entitled to immediate reinstatement.

The above commentator's approach would result in excessive litigation. First, the employer would have to show that he offered replacements temporary employment. Secondly, the employer would have to show that it waited a reasonable amount of time to receive responses from prospective replacements. Since a "reasonable" time period would be decided on a case by case basis, the amount of litigation would increase and would provide no precedent for the future. Thirdly, the employer would have to demonstrate that the number of acceptances of temporary employment were insufficient to allow its operations to continue. The demarcation line between an insufficient and sufficient number of acceptances would also have to be determined on a case by case basis. The increase in litigation cannot be justified, even though the above approach focuses on the reality of strikes—whether the employer actually needs permanent replace-

15. Id. at 384.
16. See, e.g., Janes, supra note 8, at 150; Schatzki, supra note 14, at 385. Professor Schatzki questioned the assumption that an employer must usually offer replacements permanent employment in order to continue operations:
In the absence of any study that demonstrates employers are left helpless without the use of permanent—as opposed to temporary—replacements, there appears to be little justification for the rule that an employer subjected to an economic strike may employ permanent replacements and thereby rid himself of his striking employees and, of course, the union.
Schatzki, supra note 14, at 385.
17. Janes, supra note 8, at 150.
18. Id.
ments. The case at hand would be prolonged and the decision on employee reinstatement delayed. Decisions concerning other cases would be delayed due to the overload of cases faced by the NLRB and the courts. Therefore, the need for judicial expediency outweighs the need for determining whether permanent replacements are actually needed.

Furthermore, the courts and the NLRB are not likely to abandon the current approach because both temporary and permanent replacements serve useful functions. First, replacements reduce or avoid economic waste by allowing a business to continue operations. Secondly, replacements reduce the risk of bankruptcy to an employer coping with a strike. Given these benefits to society, it is unlikely that the premises behind Mackay will change.

An employer facing an economic strike may conclude that hiring temporary and permanent replacements is not a viable option. Replacements must often be trained and are less efficient than the striking employees that they have replaced. Additionally, the concept of permanency for replacements is often "illusory" for several reasons. First, the collective bargaining agreement between the employer and union may require that the replacements be discharged. Additionally, the collective bargaining agreement may offer the employer better economic terms than those demanded by the replacements. Furthermore, the employer may discharge replacements before a strike is settled to appease the union and create a good faith bargaining atmosphere that could lead to the conclusion of a strike.

In contrast to Mackay, many cases have held that economic strikers are entitled to full reinstatement once a strike ends. The U.S. Supreme Court and the NLRB have attempted to reconcile the conflict between the Mackay doctrine and the full reinstatement

19. See infra notes 28-52 and accompanying text.
20. See Schatzki, supra note 14, at 391.
21. Id.
23. Janes, supra note 8, at 126.
24. Id. at 133.
25. See, e.g., NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) (employer's grant of super-seniority to permanent replacements and abandoning strikers constituted an unfair labor practice); See also Vulcan Hart Corp. v. NLRB, 718 F.2d 269 (8th Cir. 1983) (employer's reinstatement policy allowing returning strikers to retain their accrued seniority for all purposes except layoff and recall was an unfair labor practice); Laidlaw Corp., 171 N.L.R.B. 1366, 68 L.R.R.M. (BNA) 1252 (1968), (employer who conditioned a striking employee's reinstatement upon the employee forfeiting seniority and vacation rights committed an unfair labor practice) enforced, 414 F.2d 99 (7th Cir. 1969).
right in two landmark cases: *NLRB v. Fleetwood Trailer Co.*\(^26\) and *Laidlaw Corp.*\(^27\)

In *NLRB v. Fleetwood Trailer Co.*,\(^28\) the Court ruled that an employer who refuses to reinstate strikers violates NLRA sections 8(a)(1) and (3)\(^29\) unless he “can show that his action [is] due to ‘legitimate and substantial business justifications . . . .’”\(^30\) The hiring of permanent replacements by an employer is a legitimate and substantial business justification for refusing to immediately reinstate an economic striker.\(^31\) Additionally, the *Fleetwood* Court ruled that “[i]t is the primary responsibility of the Board and not of the courts to strike the proper balance between the asserted business justification and the invasion of employee rights in light of the Act and its policy.”\(^32\)

Striking employees’ rights were refined further in *Laidlaw*. In *Laidlaw*, the NLRB concluded that economic strikers are entitled to full reinstatement once a vacancy occurs, unless legitimate and substantial business justifications excuse the failure to reinstate the economic striker.\(^33\) Thus, an employer who partially reinstates\(^34\) a

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29. Id.
30. Section 8(a)(3) provides:
   It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
32. Id. at 379: The Court put forward a second justification for refusing to reinstate a striker. A striking employee is not entitled to reinstatement when his position “has been eliminated for substantial and bona fide reasons other than considerations relating to labor relations . . . .” Id. in all likelihood, the Court is referring to situations in which a striker’s job has become obsolete or eliminated due to economic cutbacks. See, e.g., NLRB v. Southern Florida Hotel and Motel Ass’n, 751 F.2d 1571 (11th Cir. 1985).
33. 389 U.S. at 378.
34. 171 N.L.R.B. 1366, 68 L.R.R.M. (BNA) 1252 (1968), enforced, 414 F.2d 99 (7th Cir. 1969).
striker violates sections 8(a)(1) and (3) of the NLRA unless it can show sound business reasons for the incomplete reinstatement.

Economic strikers, however, must make an unconditional request for reinstatement before the employer is under a duty to reinstate them. The request must be unconditional because most economic strikers return to work after the employer and the union have negotiated a tentative collective bargaining agreement. Neither the union nor individual employees should be allowed to subvert collective bargaining negotiations by conditioning the strike's conclusion on further concessions. Once striking employees make an unconditional request for reinstatement, the employer is under a duty to contact strikers as positions become available. The reinstatement request is continuous. The employer's duty to reinstate ends once a striking employee finds substantial and equivalent employment elsewhere. A striker who finds substantial and equivalent employment elsewhere is no longer an "employee" under section 2(3) of the NLRA. Thus, the striking employee who finds substantial and equivalent work elsewhere loses his previous position and whatever seniority, pension and other rights he accrued at that position.

Although Fleetwood and Laidlaw reduced some of the risks of striking such as the risk that the employer would not contact employees after a vacancy had occurred, a striking employee may remain unemployed indefinitely. Thus, the conflict between the employer's right to hire and retain permanent employees and the striking employees' right to full reinstatement at a strike's conclusion still exists.

35. Id. at 1370, 68 L.R.R.M. (BNA) at 1258.
36. Laidlaw presents an excellent example of partial reinstatement. The employer hired permanent replacements in order to continue operations while an economic strike was in progress. When requesting reinstatement one of the strikers was told he would have to forfeit seniority and vacation rights in order to be reinstated. Thus, under the employer's terms the employee would have returned to work with a status inferior to his position before the strike. Id. at 1255, 68 L.L.R.M. (BNA) at 1255.
37. Id. at 1370, 68 L.R.R.M. (BNA) at 1258.
38. Id.
40. Id.; Laidlaw, 171 N.L.R.B. at 1370, 68 L.L.R.M. (BNA) at 1258.
41. See Fleetwood, 389 U.S. at 381; Laidlaw, 171 N.L.R.B. at 1370, 68 L.R.R.M. (BNA) at 1258. Section 2(3) provides:
The term "employee" shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .
42. See Gillespie, supra note 1, at 786. The above principles are well illustrated by
The question narrows to why the Court and the NLRB contribute to the conflict between the rights to hire permanent replacements and full reinstatement for economic strikers. First, replacements are often not a viable option for an employer. The cost of training new employees and the amount of lost profits due to decreased productivity can be staggering. In these situations, the conflict between Mackay and the full reinstatement right does not exist because the employer is unable to hire replacements. Secondly, permanent replacements have a legitimate expectation of permanent employment. Third, Congress passed the NLRA intending to minimize the amount of government intervention in the employment relationship. Fourth, the Supreme Court and the NLRB view the Mackay doctrine as being fair, even though it conflicts with the right to full reinstatement. If an employee is not satisfied with the wages and terms of employment an employer offers, why should that employee prevent someone else from accepting the offer? One can argue that the striking employee has relied on the employment relationship to his detriment. Permanent replacements experience the same detrimental reliance. Furthermore, if an employer is not allowed to replace strikers, a large group of unemployed persons would be prohibited from accepting available work.

II. PARTIAL REINSTatement AND DISCRIMINATION

Traditionally, for an employer’s conduct to violate section 8(a)(3), the union had to prove that the employer intended to en-

Fleetwood, 389 U.S. 375 (1967). In Fleetwood, six strikers applied for reinstatement after an economic strike ended. (The union was the San Bernardino-Riverside Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Id. at 376 n.1). The employer rejected their reinstatement applications because no positions were available due to cutbacks caused by the strike. Two months later, Fleetwood hired six new employees for positions which the striker-applicants were qualified to fill. Id. at 376-77. The Supreme Court held that the employer’s conduct violated Sections 8(a)(3) and (1). Id. at 378. The strikers were entitled to return to work as vacancies arose; remained employees under Section 2(3); and their applications for reinstatement were continuous. Id. at 381.

43. See Gillespie, supra note 1, at 785-86.
44. See Note, supra note 12, at 883 n.162.
45. Id.
47. See Note, The National Labor Relations Act at Fifty: Roots Revisited, Heart Rediscovered, 23 Duq. L. Rev. 1059, 1080 (1985). The author referring to the NLRA states: “Only the legitimacy of the union, a forum for conflict, collective bargaining, and a few ground rules were established by the legislation.” Id.
courteous or discourage union membership. In American Ship Building Co. v. NLRB, Justice Stewart wrote the following in delivering the opinion of the Court:

Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the statute there must be both discrimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation.

In NLRB v. Great Dane Trailers, Inc., the Supreme Court formulated the "inherently destructive" test. The test applies when striking employees are treated differently than replacements, abandoning strikers, and nonstrikers. If the employer's conduct is inherently destructive of important employee rights, the employer bears the burden of proving that its actions were for legitimate and substantial business reasons. The employer will be held to intend the foreseeable consequences of its actions; therefore, the union does not have to show the employer had an anti-union purpose. If the employer fails to satisfy its burden of proof, a section 8(a)(3) viola-

50. 380 U.S. 300 (1965).
51. Id. at 311.
52. 388 U.S. 26 (1967).
53. In Great Dane Trailers, the collective bargaining agreement between the parties provided that the company would pay vacation benefits to employees who worked a minimum amount of hours. The union (Local 26, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO) went on strike not long after an impasse was reached even though the collective bargaining agreement had been extended. This extension ended once the strike began. Thereafter, a group of striking employees demanded their accrued vacation pay. The company rejected the demand, arguing that all obligations under the contract ceased when the strike commenced. Subsequently, the company announced it would grant vacation pay to all employees who had reported to work on July 1, 1963, i.e. permanent replacements, nonstrikers, and strikers who had abandoned the strike as of that date. Id. at 28-29. The union charged that the employer's policy violated Sections 8(a)(3) and (1) in that the employer's policy granted vacation pay to employees who did not engage in striking while withholding benefits from employees who did strike.

Although the Supreme Court agreed with the union, it never decided if the employer's conduct was inherently or slightly destructive on important employee rights. The question was never decided because the employer offered no legitimate and substantial business justifications for its conduct.
54. Id. at 33.
55. Id. See also NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963).
tion exists. Furthermore, even if the employer satisfies its burden of proof by showing legitimate and substantial business justifications for its conduct, an unfair labor practice still exists if the harm to the employees’ protected activity outweighs the employer’s business interests.

However, if the harm to employee rights is “comparatively slight,” the employer still bears the burden of proving legitimate and substantial business justifications. Once the employer meets this initial burden, the burden shifts to the union to prove anti-union animus on the employers’ part. Thus, the possibility of anti-union animus on the employer’s part does not have to be considered at all if the employer has not offered any legitimate and substantial business justifications for its discriminatory conduct.

Some commentators argue that the Mackay doctrine should be modified or abandoned because hiring permanent replacements threatens important employee rights. One commentator argues that the Mackay doctrine is inconsistent with the “inherently destructive” test if temporary replacements would allow an employer’s business to continue functioning. Under this approach, an employer has a legitimate and substantial business justification in hiring permanent replacements only when offers of temporary employment to replacements are inadequate to replenish the employer’s workforce. Conversely, an employer’s use of temporary replacements is acceptable because the harm to strikers is “comparatively slight” and the employer has a legitimate and substantial business interest in continuing operations.

The above approach, which applies the “inherently destructive” test to the hiring of permanent replacements, should not be adopted

56. 388 U.S. at 33.
58. 388 U.S. at 34.
59. Id. Justices Harlan and Stewart, joined in dissenting in part with the majority opinion, on the ground that when an employer’s conduct is inherently destructive of important employee rights, the union should bear the burden of proving anti-union motivation to constitute a Section 8(a)(3) violation, whether or not the employer has come forward with legitimate and substantial business justifications for its conduct. Id. at 39.
60. 388 U.S. at 34; see also, Fleetwood, 389 U.S. at 375.
61. See supra notes 1-25 and accompanying text.
62. See, e.g., Janes, supra note 8; Schatzki, supra note 14.
63. Janes, supra note 8, at 150. See also supra notes 14-22 and accompanying text.
64. Janes, supra note 8, at 150.
because it will increase litigation while providing little benefit, if any, to the resolution of disputes between labor and management. To demonstrate the need for permanent replacements, the employer would have to show that it offered replacements temporary work; that it waited a reasonable amount of time to receive responses from prospective replacements; and that the number of acceptances of temporary employment was insufficient to allow operations to continue.  

The courts and the NLRB are unlikely to apply the “inherently destructive” test to the permanent replacement doctrine in light of the U.S. Supreme Court's decision in Fleetwood. In Fleetwood, the Court found that hiring permanent replacements is a legitimate and substantial business justification for refusing to immediately reinstate an economic striker, without explaining why this is “necessarily” true.  

The “inherently destructive” test was reaffirmed in Fleetwood and Laidlaw. The test applies when an employer offers less than full reinstatement to a striker, such as a reduction in seniority rights. Employees would be discouraged from joining a union or participating in concerted activities if an employer could penalize them for striking. Discouraging union membership is inherently destructive of concerted activities because unions gather their strength from their rank and file. By protecting a union’s strength, the “inherently destructive” test promotes union bargaining power and industrial peace and stability.  

Great Dane Trailer, Fleetwood and Laidlaw limit the harshness of the Mackay doctrine by protecting strikers from employer discrimination, treating them as employees while on strike, and making the reinstatement application continuous. All of these cases promote union bargaining power, and thus, industrial peace and stability.  

However, recent federal court decisions suggest that striking employees' reinstatement rights are being reduced while the expectations of permanent replacements are being expanded.
III. RETRENCHMENT & ENHANCEMENT

Recent United States Court of Appeals decisions have expanded the expectations of permanent replacements and increased the risks of striking employees. These decisions suggest that an employer can limit the seniority rights of striking employees if its goal is to protect the permanent employment status of replacements. These decisions are consistent with the United States Supreme Court’s decision in *Belknap, Inc. v. Hale.*

In *NLRB v. Harrison Ready Mix Concrete, Inc.*, the Sixth Circuit held that an employer had legitimate and substantial business justifications for denying full reinstatement to economic strikers. Harrison’s business was seasonal and cyclical. The amount of work for its 24 drivers depended on the amount of delivery orders on any given day. Drivers were assigned delivery runs on the basis of seniority. Drivers at the top of the seniority list worked as much as they desired; drivers in the middle were employed part-time; and drivers at the bottom of the list were “assigned a limited number of driving assignments.” Harrison’s employees were covered by a collective bargaining agreement which expired on February 28, 1983. The union began a strike the next day. Harrison responded by hiring permanent replacements. Subsequently, two employees were reinstated after unconditionally offering to return to work. Although these employees were given “full seniority for all other purposes, on the driver seniority list they were placed below replacement drivers with prior experience and above replacement drivers with no prior experience.” Thus, both employees were demoted from the middle third to the bottom third of the driver seniority list. If these employees had been given their full seniority, they would have been in the top third of the list.

The employees filed an unfair labor practice charge against Harrison, contending that Harrison violated sections 8(a)(1) and (3)

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73. *NLRB v. Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985); *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982).
74. *Id.*
76. 770 F.2d 78 (6th Cir. 1985).
77. *Id.* at 81. Harrison was a producer and seller of ready mixed concrete. *Id.* at 79.
78. *Id.* at 79.
79. The union was Truck Drivers, Chauffeurs and Helpers Local Union No. 100, which is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America. *Id.*
80. *Id.*
81. *Id.*
of the NLRA. Harrison contended that legitimate and substantial business considerations justified the partial reinstatement. Specifically, the permanent replacements would have been demoted to the bottom of the driver seniority list as strikers returned to work. In effect, this demotion would have left the permanent replacements unemployed due to the employer's seasonal and cyclical business. Thus, Harrison argued that the Mackay doctrine protected its conduct.82

In deciding the case for the employer, the Harrison court reasoned that there was no evidence that the employer's conduct had a "destructive impact" on employee rights.83 As the employer put forward a legitimate business justification, the employees could prevail only if they proved that Harrison acted with a discriminatory intent.84 Since no such evidence was presented, the Court ruled in Harrison's favor.

The ramifications of the Sixth Circuit's decision are significant. An employer who operates a seasonal and cyclical business may deny full seniority benefits to returning strikers if the employer's aim is to protect permanent replacements. Thus, employees of seasonal and cyclical business face greater risks in striking.

The Sixth Circuit's decision in Harrison contradicts Great Dane Trailers,85 Fleetwood,86 NLRB v. Erie Resistor Corp.,87 and Laidlaw.88

First, the Harrison court's ruling that a denial of seniority is not inherently destructive of employee rights blatantly contradicts Laidlaw,89 a decision which relied on Fleetwood Trailer and Great Dane Trailers.90 Even though a denial of seniority is inherently de-

82. Id. at 80-81.
83. Id. The Court's opinion used the term "destructive impact" as a synonym for "inherently destructive." Id.; see also NLRB v. Great Dane Trailers, 388 U.S. 26 (1967).
84. 770 F.2d at 81. See supra notes 53-64 and accompanying text.
86. 389 U.S. 375 (1967).
89. The NLRB reasoned as follows in Laidlaw:
[The employer's] offer of employment as a new employee or as an employee with less than rights accorded by full reinstatement (such as denial of seniority), was wholly unrelated to any of its economic needs, could only penalize [the employee] for engaging in concerted activity, was inherently destructive of employee interests, and thus, was unresponsive to the requirements of the statute.
171 N.L.R.B. at 1368, 68 L.R.R.M. (BNA) at 1256 (emphasis added).
90. Id. at 1369, 68 L.R.R.M. (BNA) at 1257; see supra notes 89-92 and accompanying text.
structive of important employee rights, the Sixth Circuit could have decided *Harrison* the same way if the employer’s legitimate business justifications outweighed the harm to important employee rights.\(^9\)

The *Harrison* court should have determined that the harm to employee rights outweighed the employer’s interest in continuing business operations. Demotion to the bottom third of the list, left striking employees effectively unemployed.\(^9\) The striking employees had at least regular part-time employment before the strike. Harrison’s reinstatement policy placed these employees in a worse position upon reinstatement because they worked less than they did before the strike.\(^9\) Additionally, if Harrison had followed *Fleetwood*\(^4\) and *Laidlaw*,\(^6\) the returning strikers would have been fully employed by being placed in the top third of the seniority list.\(^6\)

When applied to other seasonal businesses, Harrison’s seniority policy would deter employee concerted activities. The bargaining power of seasonal employees is severely undermined if they must approach the bargaining table knowing that a strike can jeopardize seniority status upon their return to work. Thus, the employer’s policy would restrain employees in the exercise of their section 7 rights and discourage membership in a union through discrimination because permanent replacements and returning strikers are treated differently.

While Harrison’s denial of full reinstatement greatly harms employee interests, any harm to Harrison by requiring it to grant full seniority to returning strikers would be minimal. The only danger which Harrison would face by granting full reinstatement to returning strikers is a breach of contract suit by permanent replacements.\(^8\) Harrison could protect itself from this threat by conditioning the duration of the permanent replacements’ employment on the striking employees return to work.\(^10\)

The *Harrison* court should have deferred to the NLRB. It is the primary responsibility of the NLRB and not the courts, to weigh the

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91. See supra notes 56-63 and accompanying text.
92. When the Sixth Circuit decided *Harrison*, the reinstated strikers had moved up the seniority list due to resignations and terminations. 770 F.2d at 79.
93. *Id.*
96. 770 F.2d at 79.
99. See infra notes 128-135 and accompanying text.
100. *Id.*
asserted business justifications against the harm to employee rights. Looking at the respective interests of the employer and its employees, there is no basis for finding the NLRB's application of the balancing test erroneous.

Furthermore, the Harrison court incorrectly applied the mandated balancing test. The closest the court came to performing the balancing test is revealed by the court's language that "there were no findings that Harrison intended or caused any discrimination between strikers and nonstrikers or any destructive impact upon the strike or union activity ...." As Harrison's conduct was inherently destructive of important employee rights, the union had no burden of proving anti-union animus on the employer's part. Assuming that the employer's attempt to protect permanent replacements is a legitimate and substantial business justification, the court should have performed the required balancing test, weighing the harm to employee interests against the employer's interest in keeping replacements. The Harrison court failed to perform the test.

Furthermore, Harrison's reinstatement policy may constitute a grant of super-seniority to permanent replacements. An employer may not offer super-seniority to permanent replacements, abandoning strikers, or nonstrikers. However, there is no litmus test to

102. See supra notes 56-64 and accompanying text.
103. NLRB v. Harrison Ready Mix Concrete, Inc., 770 F.2d 78, 80 (6th Cir. 1985).
104. Id. at 81.
107. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963). The facts in Erie are as follows: Erie Resistor Corporation and the International Union of Electrical, Radio and Machine Workers (Local 613) failed to renew a collective bargaining agreement. The union went on strike. Erie then extended a 20 year seniority credit applied to future layoffs. Shortly thereafter, the union capitulated and a new bargaining agreement was reached. Subsequently, Erie suffered a severe cutback. Many of the employees laid off during the cutback were reinstated strikers whose seniority was insufficient to retain their jobs under the company's super-seniority policy. Id. at 222-24. See also Great Lakes Carbon Corp. v. NLRB, 360 F.2d 19 (4th Cir. 1966) (Super-seniority plan held unlawful on its face when the plan discriminated against employees with respect to layoffs; vacation time; preferred shifts; and open jobs, solely on the basis of the employees' participation in concerted activities protected by section 7.) 360 F.2d at 22.
distinguish between super-seniority and extra-seniority. There have been no decisions declaring extra-seniority for permanent replacements valid or invalid.

Harrison's reinstatement policy should be viewed as a grant of super-seniority. The permanent replacements had regular work while the returning strikers were "assigned only a limited number of driving assignments." Although the employees in Erie were completely laid off, the Harrison court stated that "the nice distinction between 'discharge' and unavailability of work offers is without substance." Furthermore:

> It is one thing to say that a striker is subject to loss of his job at the strike's end but quite another to hold that in addition to the threat of replacement, all strikers will at best return to their jobs with seniority inferior to that of their replacements.

Additionally, the Supreme Court noted in Erie that super-seniority is not a legitimate corollary of Mackay. This finding implies that an employer may not grant super-seniority to permanent replacements with the aim of protecting their positions.

The Harrison court committed a significant error in applying Erie. The court in Harrison attempted to distinguish Erie by finding that there was "a detailed assessment of the discriminatory effects" in the former case but not in the latter. Apparently, the Harrison court ignored the fact that Erie was decided before Great Dane Trailers and Fleetwood. Detailed assessments of the effects of an employer's conduct are not necessary when that conduct is inherently destructive of important employee rights.

There are several arguments available to employers, such as Harrison, that wish to protect the employment of permanent replace-
ments. First, an employer can argue that a denial of seniority rights to returning strikers is necessary to avoid a breach of contract suit by permanent replacements. If the returning strikers had been fully reinstated, the replacements would be shifted to the bottom of the seniority list. The replacements would then have no regular work and could sue for breach of contract. Therefore, seasonal employers can argue that enforcing the contract between the employer and the permanent replacements is a legitimate and substantial business justification for denying the reinstated employees their full seniority rights.

Belknap, Inc. v. Hale severely undercuts the above contract argument. In Belknap, the employer and union reached a settlement agreement which required the permanent replacements to be discharged to accommodate returning strikers. The replacements sued the employer for, inter alia, breach of contract in state court. The Supreme Court held that federal labor law did not preempt the state lawsuit.

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order from the NLRB to reinstate striking employees. A breach of contract suit is unlikely if the employer can easily limit its liability to permanent replacements. Therefore, seasonal and cyclical employers cannot claim that denying full seniority to returning strikers is necessary to avoid a contract suit by replacements. On the contrary, the employer can protect itself by giving notice to the replacements that they might be discharged pursuant to a settlement with the union or a reinstatement order from the Board.

Another factor weighing against Harrison's protection of permanent replacements is that the replacements knew the risks of being at the bottom of that list. Since the permanent replacements accepted employment knowing of Harrison's seasonal business and that strikers might be reinstated, the replacements had notice of the effects of reinstatement. The only reasonable expectation was that Harrison would grant full seniority to returning strikers, placing the replacements at the bottom of the drivers' seniority list.

Given the above analysis, one must query why the Harrison court viewed the employer's treatment of returning strikers as being generous, not discriminatory. The court stated that "if Harrison really wanted to discriminate against [the returning strikers] it did not have to take them back at all." The Harrison court erred in concluding that the employer did not have to take back the strikers who returned. First, the court's opinion acknowledged that job vacancies arose due to resignations and terminations, after the striking employees had made unconditional offers to return to work. According to established case law, the employer is under a duty to contact strikers who have made an unconditional offer to return to work once vacancies occur. Therefore, one cannot conclude, as the Harrison court did, that the employer was not under an obligation to take back the striking employees who made unconditional offers to return.

Another case that enhanced the expectations of permanent replacements and increased the risks to strikers is Giddings & Lewis, Inc. v. NLRB. In Giddings, the Seventh Circuit held that permanent replacements can be placed higher than reinstated strikers on a

123. 463 U.S. at 502; Comment, supra note 120, at 324-25.
124. See supra notes 80-85 and accompanying text.
125. 770 F.2d at 81.
126. Id.
127. Id. at 79.
128. See supra notes 43-44 and accompanying text.
129. 675 F.2d 926 (7th Cir. 1982).
seniority list that relates to a recall after a layoff, until those unrein-
stated strikers rejoin the employer's workforce. Recognizing that
economic strikers who have been permanently replaced are entitled
to reinstatement only as vacancies occur, the court held that a
permanent replacement's layoff does not create a vacancy that enti-
tled a striker to reinstatement once a recall begins. Thus, a perma-
nent replacement can be recalled before an unreinstated striker with
more seniority.

The facts in Giddings can be summarized as follows: After the
collective bargaining agreement between the employer and the
union had expired, the union conducted an economic strike. The
strike lasted for more than one year. Before all of the strikers had
been offered reinstatement, the employer distributed new hand-
books. The handbooks provided that in the event of layoff, unrein-
stated strikers who had more seniority would be laid off before per-
manent replacements and reinstated strikers. The union filed
charges with the NLRB, alleging that the promulgated seniority
rules violated sections 8(a)(1) and (3) of the NLRA. The NLRB
agreed with the union, on the grounds that unreinstated strikers re-
main employees under section 2(3) of the Act.

In overturning the Board's decision, the Seventh Circuit relied
on Mackay. In situations involving a layoff and recall, if unrein-
stated strikers with more experience were given seniority over per-
manent replacements with less experience, then “[e]mployers at-
temting to hire permanent workers could guarantee them
employment only until a layoff occurred. Such replacement workers
could hardly be called 'permanent.'” Therefore, a replacement's
expectation of permanent employment should not be jeopardized by
a layoff followed by a recall of employees.

The Giddings decision is consistent with Laidlaw and

130. 675 F.2d at 930.
131. See supra notes 43-44 and accompanying text.
132. See 675 F.2d at 931, 110 L.R.R.M. (BNA) at 2123.
133. Giddings was a manufacturer of machine tools. 675 F.2d at 927.
134. The union was Local 1402 of the International Association of Machinists and
Aerospace Workers. Id.
135. Id.
136. By June, 1979, all strikers were either reinstated or offered reinstatement. Id. at
n.2.
137. 675 F.2d at 928.
138. 675 F.2d at 929.
139. Id.
140. See supra notes 43-44 and accompanying text.
141. 171 N.L.R.B. 1366, 68 L.R.R.M. 1252 (1968), enforced, 414 F.2d 99 (7th Cir.
*Fleetwood.*142 *Laidlaw* and *Fleetwood* held that once striking employees make an unconditional request for reinstatement, the employer is under a duty to contact strikers as positions become available.143 Layoffs eliminate positions; they do not make positions available. Thus, an employer is under no duty to contact unreinstated strikers in the event of a layoff and eventual recall.144

Therefore, the *Giddings* decision compels the following conclusion: in situations involving a layoff and recall, an employer can unilaterally limit the seniority rights of striking employees in order to protect the expectations of those employees who were in the employer's workforce when the layoff occurred.

*Vulcan Hart Corp. v. NLRB*145 relied partly on *Giddings.*146 In *Vulcan Hart*, the union147 struck after the collective bargaining agreement between itself and the employer had expired. In response, the employer hired permanent replacements. Some strikers returned to work even though the strike had not been settled.148 Under the employer's reinstatement policy, returning strikers retained their accrued seniority status for all purposes except layoff and recall.149

The Eighth Circuit held that the employer's reinstatement policy had violated section 8(a)(1) of the NLRA.150 *Vulcan-Hart* attempted to justify the denial of full reinstatement on the grounds that the denial enhanced the job security of permanent replacements.151 *Vulcan-Hart* also argued that its reinstatement policy was permissible under *Giddings.*152 The Court rejected the employer's arguments because *Giddings* was distinguishable in that *Giddings* applied only to unreinstated strikers not to reinstated strikers.153

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143. *See supra* notes 43-44 and accompanying text.
144. *See* 675 F.2d at 930.
145. 718 F.2d 269 (8th Cir. 1983).
146. *See supra* notes 141-159 and accompanying text.
147. The union was Local 110 of the Stove, Furnace, and Allied Appliance Workers International Union. 718 F.2d at 272 n.1.
148. The strike was still in progress when this decision was handed down. 718 F.2d at 273.
149. *Id.*
150. *Id.* at 275. The Court did not discuss the reinstatement policy vis-à-vis section 8(a)(3).
151. *Id.*
152. *Id.* at n.5.
153. *Id.*; see also *Laclede Metal Products Co.*, 144 N.L.R.B. 15, 53 L.R.R.M. (BNA) 1514 (1963). In *Laclede*, after the collective bargaining agreement expired, Local 2187 of the International Association of Machinists instituted a strike against Laclede. Subsequently, the union and the employer executed a strike settlement agreement. At Laclede's insistence, the
IV. CONCLUSION

The conflict between an employer's right under Mackay to hire and retain permanent replacements and a striker's right to full reinstatement upon a strike's termination still exists. The Supreme Court and the NLRB have limited the harshness of the Mackay doctrine by protecting strikers from discrimination; treating strikers as employees while on strike; and making reinstatement requests continuous. Recent United States Court of Appeals decisions, such as Harrison Ready Mix and Giddings, have allowed employers to limit the seniority rights of striking employees in order to protect the employment of permanent replacements in two particular circumstances: 1) when the employer's business is seasonal and cyclical; and 2) when the employer recalls employees after a layoff. Thus, the risks faced by striking employees have increased while the expectations of permanent replacements have been enhanced.

Sean J. O'Sullivan

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agreement contained a clause providing that employees who abandoned the strike would be the last to be laid off during the forthcoming 18 months if layoffs occurred. Thereafter, Laclede laid off 25 employees. None of the abandoning strikers were laid off even though most had little seniority. The Board found that nine of the laid off employees would not have been let go if the super-seniority proposal had not been executed. 144 N.L.R.B. at 16, 53 L.R.R.M. (BNA) at 1515.

The Board held that the employer committed an unfair labor practice by granting superseniority to abandoning strikers.

154. 770 F.2d 78 (6th Cir. 1985)
155. 675 F.2d 926 (7th Cir. 1982).