Striking Bargains: The At-Will Employment of Permanent Strike Replacements

Michael D. Moberly
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I. INTRODUCTION

The National Labor Relations Act ("NLRA" or the "Act"),¹ also commonly known as the Wagner Act,² was arguably the first,³ and is

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³See Sheet Metal Workers Local Union No. 20 v. Baylor Heating & Air Conditioning, Inc., 877 F.2d 547, 548 n.1 (7th Cir. 1989) (observing that "[m]odern labor law started" with the NLRA's enactment); Palm Beach Co. v. Journeymen's & Prod. Allied Servs. Int'l Union Local 157, 519 F. Supp. 705, 708 n.6 (S.D.N.Y. 1981) (stating that the NLRA's enactment "marked the beginning of a significant federal labor policy in this country"). The Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88 (1994), which predated the NLRA, also reflected "a pioneering federal attempt to secure the peaceful settlement of employer-employee disputes, previously characterized by strikes, lockouts, and other disruptive forms of self-help." O'Donnell v. Wein Air Alaska, Inc.,
clearly the most significant, comprehensive labor-management legislation in this country. Enacted in 1935 "in response to one of the most monumental social crises of the century," the principal purpose of the Act was to establish the right of workers to organize and bargain collectively "for the purpose of negotiating the terms and conditions of their employment[,] or [for] other mutual aid or protection."

551 F.2d 1141, 1145 (9th Cir. 1977). However, the RLA’s coverage is far more limited than that of the NLRA. See Aircraft Mech. Fraternal Ass’n v. United Airlines, Inc., 406 F. Supp. 492, 508 (N.D. Cal. 1976).

4. See Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969) ("To the extent that there exists today any relevant corpus of ‘national labor policy,’ it is in the law developed during the ... years of administering our most comprehensive national labor scheme, the National Labor Relations Act."); Midwest Motor Express, Inc. v. Int'l Bhd. of Teamsters, Local 120, 512 N.W.2d 881, 884 (Minn. 1994) ("The principal expression of federal labor law has since 1935 been found in the ... NLRA."); Falls Stamping & Welding Co. v. Int'l Union, UAW, 485 F. Supp. 1097, 1135 n.13 (N.D. Ohio 1979) (describing the NLRA as "the primary federal statute regulating labor-management relations").

5. There have been two significant intervening amendments to the NLRA. See Driscoll v. Carpenters Dist. Counsel, 536 A.2d 412, 415 n.6 (Pa. Super. Ct. 1988). In 1947, the NLRA was amended by the Taft-Hartley Act "to prevent abuses by unions of the power that the 1935 act had given them[,]" Bald v. RCA Alascom, 569 P.2d 1328, 1335 (Alaska 1977), by "prohib[ing] unfair labor practices of unions." Wallace, 708 F. Supp. at 156 n.27 (citing 29 U.S.C. § 158(b)). The Landrum-Griffin amendments were passed in 1959 "to eliminate the intolerable and corrupt conditions which prevailed throughout segments of organized labor during the 1950’s." Hodgson v. Chain Serv. Rest. Employees Union, Local 11, 355 F. Supp. 180, 183 (S.D.N.Y. 1973). There also have been other more modest amendments to the Act. See Midwest Motor Express, Inc., 512 N.W.2d at 890 ("In addition to [the] major revisions ... in 1947 and 1959, Congress has frequently ... amend[ed] the statute to conform with its regulatory intention.").

6. Bald, 569 P.2d at 1335. The social crisis was, of course, the Great Depression. See Fafnir Bearing Co. v. NLRB, 362 F.2d 716, 717 (2d Cir. 1966) (observing that the NLRA was "conceived during the Great Depression and founded upon a frank recognition that our boom-and-bust economy was attributable in part to labor-management unrest"); Brandon C. Janes, The Illusion of Permanency for Mackay Doctrine Replacement Workers, 54 Tex. L. Rev. 126, 127 (1975) (stating that Congress enacted the NLRA "as a part of the great economic reconstruction during the depression of the 1930’s"); Bryan M. Churgin, Comment, The Managerial Exclusion Under the National Labor Relations Act: Are Worker Participation Programs Next?, 48 Cath. U. L. Rev. 557, 571 (1999) (noting that the NLRA was "enacted ... during the height of the Great Depression").

7. See NLRB v. U.S. Sonics Corp., 312 F.2d 610, 615 (1st Cir. 1963) ("[T]he basic philosophy of the Act ... is the encouragement of collective—as opposed to individual—bargaining."). In this context, collective bargaining refers to:

- the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . .

29 U.S.C. § 158(d) (1994); see also Thomas v. LTV Corp., 39 F.3d 611, 618 (5th Cir. 1994) ("Collective bargaining has been defined as bargaining by an organization or group of workmen on behalf of its members with the employer . . . .") (citation omitted).

In enacting the NLRA,\(^9\) Congress consciously elected to regulate some aspects of labor relations, while leaving others to the “free play of economic forces.”\(^10\) This dichotomy has created a limited sphere of labor combat\(^11\) in which employers and employees are free to use certain self-help weapons to advance their respective economic interests.\(^12\) The prohibition of some economic weapons while permitting others reflects Congress’s balancing of the competing interests of unions, employees and employers in the collective bargaining process.\(^13\)

An economic strike\(^14\) is one of the self-help weapons available to

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12. See Employers Ass’n v. United Steelworkers, 803 F. Supp. 1558, 1564 (D. Minn. 1992), aff’d, 32 F.3d 1297 (8th Cir. 1994); see also Midwest Motor Express, Inc. v. Int’l Bhd. of Teamsters, Local 120, 512 N.W.2d 881, 889 (Minn. 1994) (observing that “federal labor law intends to permit the use of economic weapons by both sides of a labor dispute”). See generally NLRB v. Ins. Agents Int’l Union, 361 U.S. 477, 489 (1960) (“The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.”).


14. A strike exists “when employees withhold their services in a manner that interferes with their employer’s production with the object of pressing the employer into granting a work-related
further the employees’ interest in collective bargaining." Indeed, the right of employees to engage in such a strike has been described as “a cornerstone of the Congressional scheme under the NLRA,” without which their ability to bargain effectively would be seriously (if not totally) undermined. As one commentator has stated:

The strike (and the credible threat of a strike) is an essential component of the collective bargaining system. There are, obviously, other costs of disagreement that disgruntled workers can impose upon an employer: they may quit, producing higher turnover and increased training costs; they may slow down; they may produce bad work; and, even without resort to sabotage, they may merely withhold important information, such as the need for maintenance, that results in excessive wear, increased repair costs, and lost production. But, in the context of the negotiation of a collective bargaining agreement, the strike has been thought of as virtually indispensable to the ‘agreement-making process.’
Employers, on the other hand, are free to use reasonable measures to discourage strikes by pressuring the economic interests of their employees. The principal weapon available to an employer faced with an economic strike is the right to hire replacements for its striking workers. These new employees may be temporary replacements employed only for "the duration of the strike," or permanent replacements who may have the right to retain their jobs when the strike ends and the striking workers seek to return to work.

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19. See NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 39 (1967) (Harlan, J., dissenting); see also H. & F. Binch Co. v. NLRB, 456 F.2d 357, 361-62 (2d Cir. 1972) ("When strikers have resorted to the economic weapon of endeavoring to impair production, the employer is entitled to respond with efforts to preserve it . . ."); cf. NLRB v. Gen. Elec. Co., 418 F.2d 736, 772-73 (2d Cir. 1969) (Friendly, J., concurring in part and dissenting in part) (indicating that the Act permits employers to "attempt[] to persuade employees that they should not strike . . . because a strike will cost too much in lost pay").

20. See NLRB v. Potlatch Forests, Inc., 189 F.2d 82, 86 (9th Cir. 1951) ("[H]iring replacements . . . is regarded as a legitimate weapon of economic warfare."); Van-Go Transp. Co. v. New York City Bd. of Educ., 53 F. Supp. 2d 278, 289 (E.D.N.Y. 1999) (describing "the right to hire strike replacement workers" as "an important right guaranteed to an employer under federal labor law"); Illinois v. Fed. Tool & Plastics, 344 N.E.2d 1, 4 (Ill. 1975) ("An employer has a right to hire replacements for striking employees, and that right constitutes an important economic weapon left to the employer by Congress when it struck the balance of power between labor and management.") (authorities omitted). See generally Superior Nat'l Bank & Trust Co., 246 N.L.R.B. 721, 725 (1979) ("The Act protects the right to strike to press economic demands. Balancing this, however, must be the employer's right to continue in business. Thus economic strikers . . . may be replaced.").

21. See Hess Oil V.I. Corp., 205 N.L.R.B. 23, 23 (1973) (Fanning & Jenkins, dissenting) ("The use of temporary replacements during a strike is permitted under legal principles long since settled . . ."); Midwest Motor Express, Inc. v. Int'l Bhd. of Teamsters, Local 120, 494 N.W.2d 895, 899 (Minn. Ct. App. 1993) (observing that "employers are free to hire temporary replacements during a labor dispute"), rev'd, 512 N.W.2d 881 (Minn. 1994); LeRoy, supra note 15, at 844 (referring to the "employer practice of hiring temporary replacements to work only through a strike") (emphasis omitted).


23. See Belknap, Inc. v. Hale, 463 U.S. 491, 499 (1983) (referring to "the right to hire permanent replacements" as "one of the employer's primary weapons during an economic strike"); NLRB v. Herman Wilson Lumber Co., 355 F.2d 426, 430 (8th Cir. 1966) ("[T]he offer of permanence to replacements . . . can be used as an economic weapon to discourage or overcome a strike."). But see Midwest Motor Express, Inc. v. Int'l Bhd. of Teamsters, Local 120, 512 N.W.2d 881, 893 (Minn. 1994) (Wahl, J., dissenting) (asserting that "the practice of hiring permanent replacements cannot be considered a protected 'weapon' of the employer").
The rationale for permitting employers to hire permanent replacements for economic strikers has frequently been questioned. For example, the National Labor Relations Board ("NLRB" or the "Board") has occasionally indicated that the practice discourages union membership, and thus it is potentially violative of section 8(a)(3) of the Act. Precisely because the employer's ability to hire permanent replacements also may deter employees from participating in strikes,

return to work unconditionally") (internal punctuation and citation omitted); cf. LeRoy, supra note 15, at 844 ("An employer does not dismiss permanent striker replacements once a strike is ended."). See generally Burr E. Anderson, "Permanent" Replacements of Strikers After Belknap: The Employer's Quandary, 18 J. MARSHALL L. REV. 321, 325 (1985) ("T]he Board initially shaped an undifferentiated replacement doctrine, but subsequently adopted tests to determine whether the employer's purpose for replacement was lawful temporary replacement or permanent replacement.").

25. See, e.g., Employers Ass'n v. United Steelworkers, 803 F. Supp. 1558, 1565 n.9 (D. Minn. 1992) (referring to the "academic theory" that "the first case to permit the hiring of permanent replacement workers," NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), is "in error," and that "this error has compounded itself over 50 years of Supreme Court precedent"), aff'd, 32 F.3d 1297 (8th Cir. 1994); Indep. Fed'n of Flight Attendants v. Trans World Airlines, Inc., 643 F. Supp. 470, 474-75 (W.D. Mo. 1986) (implicitly questioning the soundness of Mackay Radio, and noting that "some academic critics advocate disabling employers from hiring permanent replacements for strikers"), aff'd in part and rev'd in part, 819 F.2d 839 (8th Cir. 1987), rev'd, 489 U.S. 426 (1989); see also Finkin, supra note 18, at 548 ("[I]n Mackay Radio, . . . the United States Supreme Court . . . defined the statutory right to engage in an economic strike as a privilege of the employee to be replaced permanently for having exercised it.").


29. See Chamber of Commerce v. Reich, 74 F.3d 1322, 1337 (D.C. Cir. 1996) (suggesting that "the prospect of permanent replacements deters strikes"); Am. Home Sys., 200 N.L.R.B. 1151, 1155 (1972) ("[E]mployees often cut a strike off for fear of losing their jobs to permanent replacements."); Midwest Motor Express, Inc. v. Int'l Bhd. of Teamsters, Local 120, 512 N.W.2d 881, 893-94 (Minn. 1994) (Wahl, J., dissenting) (finding it "impossible to believe that a worker's will to strike is not greatly diminished" by the "threat, or actual hiring, of replacement workers"). But see Erie Resistor Corp., 132 N.L.R.B. 621, 628 (1961) (asserting that "the threat of replacement
the practice conceivably could violate sections 8(a)(1) and 13 of the Act as well.\footnote{30}

In any event, many observers maintain that the use of permanent strike replacements undermines cooperative labor relations,\footnote{31} and the practice has become perhaps the "most contentious labor law issue since the 1980s."\footnote{33} As one court has noted: ""[T]here is substantial disagreement over these issues, ... the House and Senate have in the

by outsiders may solidify the strikers in their collective efforts""), enforcement denied, 303 F.2d 359 (3d Cir. 1962), rev'd, 373 U.S. 221 (1963), enforced on remand sub nom. Int'l Union of Elec. Workers, Local 613 v. NLRB, 328 F.2d 723 (3d Cir. 1964).

30. 29 U.S.C. § 158(a)(1) (1994). Section 8(a)(1) prohibits employers from interfering with employees in the exercise of the rights guaranteed to them by section 7 of the Act. Am. Motors Corp., 214 N.L.R.B. 455, 462 (1974); see also Eisenberg v. Lenape Prods., Inc., 781 F.2d 999, 1007 (3d Cir. 1986) (Becker, J., dissenting) ("Section 8(a)(1) prohibits an employer from interfering with the exercise of Section 7 rights, which include concerted activities for mutual aid and protection."). A strike constitutes concerted activity generally protected from employer interference under sections 7 and 8(a)(1). See NLRB v. Transp. Co. of Tex., 438 F.2d 258, 263 (5th Cir. 1971); see also Midwest Motor Express, Inc., 512 N.W.2d at 891 (Wahl, J., dissenting) ("The primary 'concerted' activity ... is the strike.").

31. Section 13 provides that the Act generally is not to be construed "so as either to interfere with or impede or diminish in any way the right to strike." 29 U.S.C. § 163 (1994). One jurist has asserted that the hiring of permanent replacements "contradicts ... the express language of the NLRA" because it impedes the statutory right to strike. Midwest Motor Express, Inc., 512 N.W.2d at 892-93 (Wahl, J., dissenting); see also LeRoy, supra note 15, at 845 (stating that the hiring of permanent replacements "seemingly contradict[s] an express statutory prohibition against diminishing or interfering with a worker's right to strike"). But see Midwest Solvents, Inc. v. NLRB, 696 F.2d 763, 765 (10th Cir. 1982) ("[T]he right to strike is not absolute. An employer can hire permanent replacements for employees engaged in an economic strike."); TNS, Inc., 1999-2000 NLRB Dec. (CCH) ¶ 15,322, at 28,541 (Sept. 30, 1999) (describing the right to hire permanent replacements as "an exception to the Act's general prohibition on interference with the right to strike").


33. Michael H. LeRoy, Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLA Strikes 1935-1991, 16 BERKELEY J. EMP. & LAB. L. 169, 169 (1995); see also Schaub, 984 F. Supp. at 1055 (characterizing the hiring of permanent replacements as "one of the most odious and inflammatory uses of an employer's economic weaponry"); Corbett, supra note 11, at 1511 (describing the employer's right to hire permanent replacements as "one of the most vehemently debated of all labor law principles"); Note, One Strike and You're Out?: Creating an Efficient Permanent Replacement Doctrine, 106 HARV. L. REV. 669, 669 (1993) ("A fiery debate currently rages in American labor law about whether employers should be able to replace striking workers permanently.").
past few years held hearings on different approaches to the problem although no legislation has in fact been enacted, and . . . the debate itself is rather emotional.”

Nevertheless, the precedent for hiring permanent replacements is well-established, having been judicially created in NLRB v. Mackay Radio & Tel. Co. shortly after the NLRA was enacted. Some jurists and commentators have noted that, in contrast to the employees’ right to strike, there is no specific reference to the employer’s right to hire

34. Reich, 897 F. Supp. at 580; see also Bldg. Serv. & Maint. Union Local No. 47 v. St. Luke’s Hosp., 227 N.E.2d 265, 268 (Ohio C.P. Cuyahoga County 1967) (“Strikes and replacement of strikers have long been, and still are, sensitive and emotional areas for both employer and employee.”); Samuel Estreicher, Strikers and Replacements, 3 LAB. LAW. 897, 897 (1987) (asserting that the use of permanent replacements “has always been a troubled area of American labor law”).

35. See, e.g., Van-Go Transp. Co. v. New York City Bd. of Educ., 53 F. Supp. 2d 278, 284 (E.D.N.Y. 1999) (observing that the Supreme Court has “approved and reaffirmed” the employer’s right to permanently replace economic strikers “on numerous occasions”); Employers Ass’n v. United Steelworkers, 803 F. Supp. 1558, 1565 (D. Minn. 1992) (“It is well-established federal labor law that an employer may hire permanent replacement workers during an economic strike by employees.”), aff’d, 32 F.3d 1297 (8th Cir. 1994); Midwest Motor Express, Inc., 512 N.W.2d at 889 (discussing the “time-honored position that the employer’s right to hire permanent replacements whom it need not discharge in order to accommodate strikers seeking reinstatement is protected under federal labor law”).


38. See Midwest Motor Express, Inc., 512 N.W.2d at 884; see also TNS, Inc., 1999-2000 NLRB Dec. (CCH) ¶ 15,322, at 28,541 (Sept. 30, 1999) (indicating that the right to hire permanent strike replacements was recognized “only 3 years after Congress had passed the Act”); Jans, supra note 6, at 127 (describing Mackay Radio as “one of the earliest decisions under the Act”); cf. Chamber of Commerce v. Reich, 74 F.3d 1322, 1330 (D.C. Cir. 1996) (referring to “the long-recognized NLRA right to hire permanent replacements”); Employers Ass’n, 803 F. Supp. at 1566 (“[H]iring permanent replacements in an economic strike has been permitted for over 50 years.”).

permanent replacements in the NLRA itself.\(^{40}\) However, Congress has implicitly confirmed the latter right by addressing the voting rights of economic strikers who are “not entitled to reinstatement”\(^{41}\) (that is, those who have been permanently replaced),\(^{42}\) and also by electing not to exclude replacement workers from the statutory definition of “employee.”\(^{43}\)

One administrative law judge has observed that the legislative history of these NLRA provisions “unquestionably prove[s] that

\(^{40}\) See Midwest Motor Express, Inc., 512 N.W.2d at 892 (Wahl, J., dissenting) (“[N]othing in the NLRA expressly provides protection for an employer’s hiring of permanent replacement workers.”); William R. Corbett, A Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: “A Far, Far Better Thing” Than the Workplace Fairness Act, 72 N.C. L. REV. 813, 838 (1994) (“The NLRA does not include any reference to a right of an employer to replace striking employees permanently . . . .”); Stromire, supra note 36, at 1228 (“Congress . . . did not choose to grant employers the right to hire permanent replacement workers.”).


\(^{42}\) See C.H. Guenther & Son v. NLRB, 427 F.2d 983, 986 (5th Cir. 1970) (indicating that the quoted statutory provision refers to “permanently replaced economic strikers”); St. Joe Minerals Corp., 295 N.L.R.B. 517, 517 (1989) (“By its own terms, the provision preserves full voting rights to strikers who are not entitled to reinstatement . . . . [T]he Board has construed this section and its legislative history to mean . . . permanently replaced strikers . . . .”) (emphasis added); Gulf States Paper Corp., 219 N.L.R.B. 806, 806 (1975) (holding that the provision governs “[t]he eligibility of [permanently] replaced economic strikers to vote”); Note, supra note 33, at 673 n.31 (indicating that the statutory reference to “workers who are ‘not entitled to reinstatement[ ’] . . . implicitly recognize[s] that Congress might have sanctioned a class of permanently replaced workers.”) (citation omitted).

\(^{43}\) See 29 U.S.C. § 152(3) (1994); see also Greenspan Engraving Corp., 137 N.L.R.B. 1308, 1312-13 (1962) (Rodgers and Leedom, dissenting) (indicating that “the Board [has] held that striker replacements . . . are ‘employees’ within the meaning of Section 2(3) of the Act”) (citing Rudolph Wurlitzer Co., 32 N.L.R.B. 63 (1941)); Janet L. Braun, Comment, Belknap, Inc. v. NLRB—Problems with Preemption and the Rights of Economic Strikers, 46 OHIO ST. L.J. 381, 405 (1985) (noting that “replacements are employees as defined in section 2(3) of the NLRA”). See generally NLRB v. Monterey County Bldg. & Constr. Trades Council, 335 F.2d 927, 930 n.4 (9th Cir. 1964) (observing that the NLRA definition of employee “was designed to include all employees not specifically excepted”). One commentator has asserted that “Congress’ rejection of [statutory language] which would have excluded replacements from the definition of ‘employee[ ]’ . . . can only be read as an endorsement of permanent replacement of economic strikers.” Sales, supra note 37, at 881 n.158; see also Ronald Turner, Banning the Permanent Replacement of Strikers by Executive Order: The Conflict Between Executive Order 12954 and the NLRA, 12 J.L. & POL. 1, 23 (1996):

As initially proposed by Senator Robert Wagner, the NLRA would have excluded striker replacements from the statutory definition of employee. That exclusion was subsequently deleted; as explained in a Senate committee report, the bill’s definition of “employee” should not lead to the conclusion that an employer could not hire new workers, temporary or permanent, for strikers.

Id. (footnotes omitted).
Congress was keenly aware of the Mackay rule which permit[s] employers who [are] guilty of no unfair labor practice to hire permanent replacements" for their striking employees.\textsuperscript{44} Despite this awareness,\textsuperscript{45} Congress has repeatedly declined to enact legislation that would overturn Mackay Radio\textsuperscript{46} and make it unlawful for employers to hire permanent replacements.\textsuperscript{47}

In terms of policy, employers frequently argue that they would be unable to hire qualified replacement workers unless they could offer them some degree of permanency.\textsuperscript{48} Whatever the merits of this

\textsuperscript{44} TNS, Inc., 309 N.L.R.B. 1348, 1449 (1992), remanded, 46 F.3d 82 (D.C. Cir. 1995); see also Union Mfg. Co. v. NLRB, 221 F.2d 532, 535 (D.C. Cir. 1955) ("The Mackay case involved an affirmative act by the employer—replacement,—and its citation in the Senate Report is an indication that the Senate had that situation in mind.").

\textsuperscript{45} See TNS, Inc., 309 N.L.R.B. at 1450 (referring to "Congressional recognition of Mackay's consequences on strikers"); Greenspan Engraving Co., 137 N.L.R.B. at 1309 n.7 ("There are frequent references throughout the legislative history to the possibility of an employer's hiring replacements . . . .").


\textsuperscript{48} See, e.g., Butterworth-Manning-Ashmore Mortuary, 270 N.L.R.B. 1014, 1014 (1984) (affirming administrative law judge's finding that an individual who was hired as a permanent replacement "would not have accepted employment on a temporary basis"); Int'l Ass'n of Machinists, Dist. No. 8 v. J. L. Clark Co., 471 F.2d 694, 696 (7th Cir. 1972) (referring to the "necessity of offering the inducement of permanent employment to secure employees willing to violate a picket line"); NLRB v. Transp. Co. of Tex., 438 F.2d 258, 266 (5th Cir. 1971) (discussing
argument may be, the employer is increasingly hiring (or at least threatening to hire) permanent replacements when their employees strike, although the empirical evidence on this point is not extensive.

This article considers one important aspect of hiring permanent strike replacements—the employer’s ability to preserve its right to terminate them at will. The issue stems from the fact that the termination of employees who were offered permanent employment at the time of hire may result in the assertion of common law claims.

The Board has indicated that in order to be considered “permanent” strike replacements under the NLRA, individuals hired to work during a strike must be “regarded by themselves and the employer as having received their jobs on a permanent basis.” Ga. Highway Express, Inc., 165 N.L.R.B. 514, 516 (1967) (citing Hot Shoppes, Inc., 146 N.L.R.B. 802, 804 (1964)), aff’d sub nom.
under the implied contract exception\textsuperscript{54} to the employment-at-will doctrine.\textsuperscript{55}

The potential viability of such a claim presents a particular dilemma for an employer required to reinstate its striking employees when, for example, what was originally thought to be an economic strike instead is found to be an unfair labor practice strike.\textsuperscript{56} In that situation, or alternatively when a settlement with the union provides for the reinstatement of strikers,\textsuperscript{57} the employer could be contractually liable to any permanent replacements it is forced to terminate in order to make room for the returning strikers.\textsuperscript{58}

This dilemma is compounded by the fact that a strike’s character

\textsuperscript{54} See generally Hinson v. Cameron, 742 P.2d 549, 554 (Okla. 1987) (“Under the implied contract restrictions of the freedom to discharge an at-will employee, courts have found from particular facts that the parties had intended a contract of permanent employment or one of tenured job security.”). For a general discussion of the contractual implications of offering permanent employment, see Robert A. Brazener, Annotation, \textit{Validity and Duration of Contract Purporting to be for Permanent Employment}, 60 A.L.R. 3d 226 (1974).


\textsuperscript{56} See NLRB v. Charles D. Bonanno Linen Serv., Inc., 782 F.2d 7, 10-11 (1st Cir. 1986) (“It is well settled Board law that the conversion of a strike into an unfair labor practice strike... give[s] the strikers the right to force the dismissal of any replacement hired after conversion, upon an unconditional request for reinstatement.”); Janes, supra note 6, at 128 (“As a practical matter, ... a replacement hired on terms of permanent employment becomes a temporary employee if the strike ripens into an unfair labor practice strike, because the replaced strikers are entitled to reinstatement upon termination of any such dispute.”) (footnotes omitted).

\textsuperscript{57} Justice Scalia has opined that in any strike settlement negotiations, the union not only can be expected to, but “indeed, would have a legal obligation[ ] to seek displacement of the strikebreakers by the returning strikers.” NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 809 (1990) (Scalia, J., dissenting); see also Dold Foods, Inc., 289 N.L.R.B. 1323, 1323 (1988) (“[U]nions often demand, at least in the first instance, that the replacements be discharged and the strikebreakers hired.”).

\textsuperscript{58} See E. Air Lines, Inc. v. Air Line Pilots Ass’n Int’l, 744 F. Supp. 1140, 1144 (S.D. Fla. 1990) (observing that an employer “may be liable in contract to ousted replacement [workers], even though forced to reinstate strikers in an unfair labor practices dispute”); Indep. Fed’n of Flight Attendants v. Trans World Airlines, Inc., 132 L.R.R.M. (BNA) 2422, 2423 (W.D. Mo. 1989) (“A promise made in the context of a strike exposes the employer to a breach of contract suit if later repudiated to accommodate returning strikers...”); DeGraff Mem’l Hosp., Nos. 3-CA-14257 & 3-CB-5253, 1998 NLRB GCM LEXIS 41, at *3 n.4 (May 25, 1988) (“Of course, if the replacement employees were promised that they would not be ousted by the strikers at the end of the strike, they may have a private cause of action against the [e]mployer.”).
Striking Bargains generally cannot be determined while it is occurring. And even if the strike is ultimately found to be an economic one, the question of whether the replacements are temporary or permanent (and thus whether the employer was required to terminate them to accommodate returning strikers) is also typically determined in a Board proceeding following the conclusion of the strike and the employer’s receipt of the strikers’ request for reinstatement. The uncertainty inherent in this situation leaves an employer that has attempted to hire permanent replacements for what it perceives to be economic strikers with exposure for enormous potential back pay liability if its assessment of the strike’s character (or the replacements’ status) proves to be inaccurate.

This article explores this issue, and concludes that the dilemma can be avoided, at least in part, by permitting employers to hire replacements on an at-will basis without sacrificing their permanency for NLRA purposes. In that regard, the Supreme Court has indicated that “conditional” offers of permanence do not necessarily make replacements temporary employees, and there appears to be no

59. See Detroit Newspaper Agency, 161 L.R.R.M. (BNA) 1033, 1034 (1999); see also Belknap, Inc. v. Hale, 463 U.S. 491, 530 n.2 (1983) (Brennan, J., dissenting) (“Whether a particular strike is an economic strike or an unfair labor practice strike ... is often unclear until the strike has ended. Where the character of a strike is contested, as it frequently is, the issue must be resolved in an unfair labor practice proceeding before the Board.”) (quoting the Board’s amicus brief).


61. See Gehnrich & Gehnrich, Inc., 232 N.L.R.B. 1122, 1129 n.17 (1977). Because employers may be required to terminate temporary replacements to make room for returning economic strikers, “[i]t is often disputed whether an employer has, in fact, hired ‘permanent’ replacements.” Braun, supra note 43, at 402 n.153. In that situation, the burden is on the employer to prove that the replacements were hired “permanently.” See NLRB v. Murray Prods., 584 F.2d 934, 939 (9th Cir. 1978); Harvey Mfg., 309 N.L.R.B. at 467. Absent such proof, a refusal to reinstate striking employees at the conclusion of an economic strike constitutes an unfair labor practice. Murray Prods., 584 F.2d at 939.

62. See Gatliiff Bus. Prods., 276 N.L.R.B. 543, 563 (1985) (“The economic consequences to the parties because of a determination about the nature of a strike can be substantial.”); Corbett, supra note 11, at 1521 n.48:

Suppose an employer, concluding that it lawfully could hire permanent replacements and that it in fact has done so, denies reinstatement to striking employees who offer to return to work. If the employer’s conclusions are later determined to be incorrect by the NLRB (and perhaps a court of appeals), the employer will be held liable for potentially large back pay and other make-whole relief.

Id.

63. There appears to have been no prior academic consideration of this specific issue. Indeed, commentators have generally “ignored the rights of ... permanent replacements.” Janes, supra note 6, at 126.

64. Belknap, Inc., 463 U.S. at 503.
persuasive basis for refusing to extend this analysis to permit offers of permanent “at-will” employment to strike replacements.65

II. THE RESPECTIVE RIGHTS OF STRIKERS AND THEIR REPLACEMENTS

A. The Reinstatement Rights of Striking Workers

1. Rights of Economic Strikers

The reinstatement rights of striking workers generally depend on the nature of the strike in which they are engaged.66 An economic striker who was permanently replaced is entitled to reinstatement if there is a vacancy in the striker’s former position,67 or in another substantially equivalent position for which the striker is qualified.68 An employer also must recall all qualified strikers who have made unconditional requests

65. See Target Rock Corp., 324 N.L.R.B. 373, 376 (1997) (Higgins, concurring) (“[T]he intention of permanence need not be a binding unconditional promise. For example, an employer can couple its ‘intention’ language with a statement that... employment is ‘at will.’”) (citing Belknap, Inc., 463 U.S. at 503 n.8), enforced, 172 F.3d 921 (D.C. Cir. 1998).

66. See NLRB v. Harding Glass Co., 80 F.3d 7, 10 n.3 (lst Cir. 1996) (“The nature of the strike determines the reinstatement rights of striking employees once the work stoppage ends.”); NLRB v. Colonial Haven Nursing Home, 542 F.2d 691, 703 (7th Cir. 1976) (“The characterization of the strike has a significant impact upon the claimed right of the strikers to reinstatement.”); Harowe Servo Controls, 250 N.L.R.B. 958, 962 (1980) (referring to the “distinction between reinstatement rights accorded employees, depending upon the nature of the strike”).

67. See Keller Mfg. Co., 272 N.L.R.B. 763, 786 (1984) (“Economic strikers are entitled to reinstatement upon application and if their prestrike positions are filled at the time of application, they retain the right to their former position when it becomes vacant.”) (emphasis omitted).

68. See Medite of N.M., Inc., 314 N.L.R.B. 1145, 1148 (1994) (indicating that economic strikers “are entitled to... a substantially equivalent position” that is “left vacant by the departure of permanent replacements”). The Board has held that employers are not obligated “to offer to reinstate replaced economic strikers to vacancies in jobs which they are qualified to perform but which are not substantially equivalent to their former jobs,” although economic strikers “are entitled to nondiscriminatory treatment in their applications for other jobs.” Rose Printing Co., 304 N.L.R.B. 1076, 1078 (1991). By the same token:

an economic striker has no obligation to accept an offer of reinstatement to a position which is not the same [as] or substantially equivalent to his prestrike position. A refusal to accept such an offer does not extinguish entitlement to full reinstatement to the former or substantially equivalent job. . . .

In addition,... a striker’s acceptance of a position which is not the same as or substantially equivalent to that striker’s prestrike position does not extinguish the statutory right to subsequent reinstatement to a vacant prestrike position or a substantially equivalent one.

Id.
for reinstatement before it can hire new employees for jobs created by post-strike expansion of the employer's business, or by a replacement worker's having left the job.\textsuperscript{69} This right to reinstatement continues until the strikers abandon their employment for substantial and equivalent employment elsewhere.\textsuperscript{70} However, the employer is not required to terminate permanent replacements to make room for economic strikers who request reinstatement.\textsuperscript{71}

2. Rights of Unfair Labor Practice Strikers

If an unfair labor practice is a contributing factor in causing or prolonging a strike,\textsuperscript{72} the strike is (or becomes) an unfair labor practice strike.\textsuperscript{73} This contributing factor test is quite broad.\textsuperscript{74} The unfair labor practice need not be the only or even the major cause of the strike.\textsuperscript{75} The test instead is met if an unfair labor practice had anything to do with

\textsuperscript{69} See Laidlaw Corp., 171 N.L.R.B. 1366, 1368-69 (1968), enforced, 414 F.2d 99 (7th Cir. 1969); NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381 (1967); Rose Printing Co., 289 N.L.R.B. 252, 275 (1988); see also Bio-Sci. Labs., 209 N.L.R.B. 796, 803 (1974) ("[A]lthough the initial replacement of the striking employees is proper, a subsequent refusal to reinstate them when vacancies arise may be unlawful.").

\textsuperscript{70} See Laidlaw Corp., 171 N.L.R.B. at 1369.

\textsuperscript{71} See Hormigonera Del Toa, Inc., 311 N.L.R.B. 956, 957 (1993) ("An employer need not discharge permanent replacements it has hired for economic strikers . . . ").

\textsuperscript{72} Subject to certain limitations, the NLRA makes it an unfair labor practice for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the Act];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ;

(3) 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 . . . ;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the Act];

(5) to refuse to bargain collectively with the representatives of his employees . . . .


\textsuperscript{73} See Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719, 723 (D.C. Cir. 1990); NLRB v. Moore Bus. Forms, Inc., 574 F.2d 835, 840 (5th Cir. 1978).

\textsuperscript{74} See Chicago Beef Co., 298 N.L.R.B. 1039, 1052 (1990) (referring to "the minimal causal criterion on which the Board will base a finding of conversion of an economic strike into an unfair labor practice strike"), enforced, 944 F.2d 905 (6th Cir. 1991); Corbett, supra note 40, at 867 (describing the contributing factor test as "nebulous and labor-friendly"); Corbett, supra note 11, at 1521 n.48 ("[T]he standards for determining the characterization of a strike favor unions and the striking employees.").

\textsuperscript{75} See Moore Bus. Forms, Inc., 574 F.2d at 840; see also NLRB v. Harding Glass Co., 80 F.3d 7, 10 (1st Cir. 1996) ("It need not be shown . . . that the employer's unfair labor practice was the sole or even the primary factor in aggravating the strike . . . ").
causing or prolonging the strike.\textsuperscript{76}

Nevertheless, there clearly must be a causal connection between an unfair labor practice and the strike,\textsuperscript{77} which is not established by the mere occurrence of an unfair labor practice.\textsuperscript{78} Thus, an employer's unfair labor practice may be too inconsequential to convert an economic strike into an unfair labor practice strike,\textsuperscript{79} or may be sufficiently remedied to convert the strike back to an economic one.\textsuperscript{80}

In \textit{NLRB v. Harding Glass Co.},\textsuperscript{81} for example, the First Circuit refused to sustain a finding of a strike conversion,\textsuperscript{82} noting that the type of unfair labor practice at issue is a relevant consideration in evaluating that issue.\textsuperscript{83} In particular, the court held that an economic strike was not

\begin{itemize}
\item \textsuperscript{76} See \textit{Gen. Drivers Union, Local 662 v. NLRB}, 302 F.2d 908, 911 (D.C. Cir.1962); Domsey Trading Corp., 310 N.L.R.B. 777, 791 (1993), \textit{enforced}, 16 F.3d 517 (2d Cir. 1994); see also \textit{Rose Printing Co.}, 289 N.L.R.B. 252, 275 (1988) ("It is horn book law that a strike caused in whole or in part by an employer's unfair labor practices constitutes an unfair labor practice strike."). (emphasis added).
\item \textsuperscript{77} See \textit{NLRB v. Proler Int'l Corp.}, 635 F.2d 351, 354 (5th Cir. 1981); see also \textit{Rose Printing Co.}, 289 N.L.R.B. at 275. See generally \textit{Harding Glass Co.}, 80 F.3d at 10:
\begin{quote}
Causation is crucial: It must be found not only that the employer committed an unfair labor practice after the commencement of the strike, but that as a result the strike was expanded to include a protest over the unfair labor practice, and that settlement of the strike was thereby delayed and the strike prolonged.
\end{quote}
\begin{quote}
\textit{Id.} (internal punctuation and citation omitted).
\end{quote}
\item \textsuperscript{78} See \textit{C-Line Express}, 292 N.L.R.B. 638, 638 (1989) ("The Board has long held that an employer's unfair labor practices during an economic strike do not ipso facto convert it into an unfair labor practice strike."); Tufts Bros., Inc., 235 N.L.R.B. 808, 810 (1978) ("The requirement of a causal connection between the unfair labor practice and the strike is not satisfied merely because the two coincide in time."); Typoservice Corp., 203 N.L.R.B. 1180, 1180 (1973) ("An unfair labor practice strike does not result merely because the strike follows the unfair labor practice.").
\item \textsuperscript{79} See \textit{Radiator Specialty Co. v. NLRB}, 336 F.2d 495, 500 (4th Cir. 1964); see also \textit{Moore Bus. Forms, Inc.}, 574 F.2d at 840 ("[A] violation of the Act alone does not convert an economic strike into an unfair labor practice strike."); TNS, Inc., 309 N.L.R.B. 1366, 1369 n.6 (1992) (Raudabaugh, concurring) (indicating that the strike must have been caused by "serious unfair labor practices") (emphasis added); J.W. Rex Co., 308 N.L.R.B. 473, 499 (1992) (discussing a "somewhat atypical" case in which "the employer did engage in unfair labor practices during the strike, although they [were] not alleged to have converted it into an unfair labor practice strike").
\item \textsuperscript{81} 80 F.3d 7 (1st Cir. 1996).
\item \textsuperscript{82} See \textit{id.} at 10.
\item \textsuperscript{83} See \textit{id} at 11; cf. \textit{Soule Glass & Glazing Co. v. NLRB}, 652 F.2d 1055, 1080 (1st Cir. 1981) (observing that "the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context"); \textit{Gibson


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converted into an unfair labor practice strike by the employer's implementation of its final offer prior to reaching a bargaining impasse, even though implementing the offer under those circumstances was itself unlawful. In reaching this result, the court concluded that the conduct at issue was not the "type[] of unfair labor practice[] that inevitably impact[s] the length of a strike."  

Unlike economic strikers, unfair labor practice strikers have a substantially unqualified right to reinstatement upon making an unconditional offer to return to work. In particular, unfair labor practice strikers must be reinstated even if the employer has hired permanent replacements who will be displaced by the returning strikers. Indeed,
the Board routinely directs that replacements be discharged if necessary to make room for returning unfair labor practice strikers. In *Covington Furniture Mfg. Corp.*, for example, the Board stated:

> The law is settled that a strike in response to an employer's violations of the Act is an unfair labor practice strike, and the striking employees are entitled to full reinstatement to their former or substantially equivalent jobs immediately upon their unconditional offer to return to work, even if permanent replacements for them have been made and discharge of such replacements is necessitated.

### B. The Rights of Permanent Replacement Workers

#### 1. Rights Under the NLRA

Because replacement workers are themselves exercising statutory rights, they should perhaps be given greater protection than they are currently afforded under the NLRA. Under this view, employers who

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89. See, e.g., *Schaub ex rel. NLRB v. Detroit Newspaper Agency*, 154 F.3d 276, 278 (6th Cir. 1998) (characterizing a Board order "directing the [employer] ... to reinstate all of the strikers and discharge the permanent replacements if necessary" as "relief [that] would be available, under the governing law, if the strike was an 'unfair labor practice strike'"); *Stephenson-Yost Steel*, 294 N.L.R.B. 395, 406 (1989) (ordering employer to "dismiss[ ] ... [replacement] employees hired on or after [the date on which] the unfair labor practice strike began"), enforced, 904 F.2d 1180 (7th Cir. 1990).


91. Id. at 219; see also *Belknap, Inc. v. Hale*, 463 U.S. 491, 493 (1983):

> Where employees have engaged in an economic strike, the employer may hire permanent replacements whom it need not discharge even if strikers offer to return to work unconditionally. If the work stoppage is an unfair labor practice strike, the employer must discharge any replacements in order to accommodate returning strikers.

*Id.; Houston County Elec. Coop.*, 285 N.L.R.B. 1213, 1300 (1987) (noting that "unfair labor practice strikers ... [are] entitled to reinstatement to their former positions even if permanent replacements had to be discharged to make room for them").

92. See *Legal Aid Soc'y v. Ass'n of Legal Aid Attorneys*, 554 F. Supp. 758, 762 (S.D.N.Y. 1982) ("Section 7 ... guarantees the right of employees ... not to strike."); *Int'l Paper Co.*, 309 N.L.R.B. 31, 36 (1992) (referring to the Section 7 rights of "striker replacements"); *Gloversville Embossing Corp.*, 297 N.L.R.B. 182, 194 (1989) (discussing "the right, guaranteed to [nonstrikers] by Section 7 of the Act, to refrain from strike activity"); *Drivers Local 695, 174 N.L.R.B. 753, 758 (1969)* (discussing "the rights guaranteed in Section 7, among which is the right not to join a strike in which other employees participate"); *Westfall*, supra note 46, at 150 ("T[he] Act protects replacements as well as strikers.").

93. See, e.g., *Belknap, Inc.*, 463 U.S. at 543 (Brennan, J., dissenting) ("It might be a better world if strike replacements were afforded greater protection."); *Janes*, supra note 6, at 146 (asserting that "federal rights ... do not adequately serve the needs of the employee who wishes to
discharge replacement workers to make room for returning strikers may be discriminating against the replacements on the basis of their statutorily protected decision to refrain from participating in a strike. This implies that, rather than ordering that replacements be discharged when strikers return, the Board should require the employer to continue to employ both groups. Fortunately for employers, this view has rarely been seriously entertained. Although the Board recognizes that the interests of strikers and their replacements are typically in conflict, both the Board and the

hold the employer to the promise of permanent employment”); Westfall, supra note 46, at 156 (observing that “job-seekers who refrain from engaging in a strike... should be given greater protection than the Board and the courts now afford”).

94. See Baldwin v. Pirelli Armstrong Tire Corp., 927 F. Supp. 1046, 1051 (M.D. Tenn. 1996) (discussing the contention that it is a “violation of federal labor law” for an employer to terminate permanent replacement workers in order to make room for striking union members who request reinstatement); Janes, supra note 6, at 133 (“The disgruntled ex-replacement may have a cause of action against the employer under section 8(a) (3) of the NLRA based on unlawful discrimination against him, alleging that the employer deprived him of his section 7 rights because of his nonunion... status.”) (footnote omitted); Westfall, supra note 46, at 150 (“[F]or employers to deny permanency to replacements would seem to constitute discrimination on the basis of their choice to refrain from participating in the strike.”).

95. See Harvey Mfg., Inc., 309 N.L.R.B. 465, 470 (1992) (“Routinely, the economic strikers' entitlement to immediate reinstatement comprehends the discharge of temporary replacements occupying the strikers' prestrike or substantially similar jobs.”); Westfall, supra note 46, at 156 (“The Board routinely orders replacements for unfair labor practice strikers to be discharged, if necessary, to make room when the strikers return...”).

96. See Macy’s Mo.-Kan. Div. v. NLRB, 389 F.2d 835, 846 (8th Cir. 1968) (concluding that “consideration should be given to the rights of permanent replacements for economic strikers, even when the economic strikers have been returned to their jobs”); Westfall, supra note 46, at 156 (suggesting that the Board should “place[e] the burden on the employer to continue to pay both groups”); see also Transp. Co. of Tex., 177 N.L.R.B. 180, 186 (1969) (suggesting that “[r]einstated strikers [should be] treated uniformly with non-strikers and replacements”), enforced, 438 F.2d 258 (5th Cir. 1971); cf. Beard Indus., Inc., No. 15-CA-11923, 1993 NLRB LEXIS 937, at *9 (Sept. 21, 1993) (discussing an employer that “did not release [its] temporary replacements, but simply absorbed the returning strikers into the workforce”).

97. In NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990), for example, Justice Scalia flatly dismissed the proposition that “the employer should double its work force, paying both the replacement workers and the returning strikers.” Id. at 809 (Scalia, J., dissenting); see also Estreicher, supra note 34, at 906 (observing that “dicta can be found in many Board decisions, recognizing, as the Supreme Court in Belknap v. Hale plainly assumed, the legitimacy of... 'bumping' arrangements”). But see E. Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 744 F. Supp. 1140, 1142 (S.D. Fla. 1990) (“[T]he rights of... replacement employees are enforceable even if antithetical to the rights of the returning strikers.”); Janes, supra note 6, at 146-47 (asserting that “the replacement arguably has some... recourse against the party that deprives him of his section 7 rights”).

98. See Serv. Elec. Co., 281 N.L.R.B. 633, 641 (1986) (observing that because “[t]he replacements' ability to continue employment...[is] subject to their displacement by the strikers,” the interests of these two groups of employees are “diametrically opposed”); Leveld Wholesale, Inc., 218 N.L.R.B. 1344, 1350 (1975) (observing that “the interests of the two groups are not the...
courts have tended to ignore the rights of replacements, and occasionally even fail to recognize that replacements are engaging in protected activity. As a result, the permanent replacement debate has focused primarily on the rights of returning strikers, rather than those of replacement workers.

In United Steelworkers, Local 8560, for example, the Board's General Counsel issued an advice memorandum acknowledging that unions (like employers) cannot discriminate against employees who exercise their statutory right not to participate in a strike. Nevertheless, the General Counsel effectively concluded that the rights of replacement workers (see also Curtin Matheson Scientific, Inc., 494 U.S. at 792 (assuming that "the interests of strikers and replacements conflict"). See generally Mike Yurosek & Son, Inc., 295 N.L.R.B. 304, 306 (1989) (discussing "the balance between the . . . rights of permanent replacements and the . . . rights of strikers").

99. See, e.g., NLRB v. Charles D. Bonanno Linen Serv., Inc., 782 F.2d 7, 10 (1st Cir. 1986) ("[U]nfair labor practice strikers have rights to their positions greater than any replacements hired during their strike . . ."); Rivera-Vega v. Conagra, Inc., 876 F. Supp. 1350, 1370 n.24 (D.P.R. 1995) (observing that the rights of picketing employees "outweigh the job rights of . . . temporary replacements"). See generally Anderson, supra note 24, at 332 n.62 ("The section 7 rights secured to strike replacements have historically been ignored by the Board and the courts . . .").

100. See, e.g., Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1145 (5th Cir. 1977) (Wisdom, J., dissenting) (asserting that replacement workers are "not exercis[ing] . . . section 7 rights"); Int'l Paper Co., 309 N.L.R.B. 31, 36 (1992) (referring to strike replacements' "right to refrain from engaging in protected activity") (emphasis added); cf. Estreicher, supra note 34, at 900 (indicating that strike replacements are "refrain[ing] from section 7 activities").

101. See, e.g., Chesapeake Plywood, Inc., 294 N.L.R.B. 201, 202 n.5 (1989) ("In economic strikes, the rights of strikers can be affected by . . . the hiring of permanent replacements."). See generally Janes, supra note 6, at 126 (noting that "the Mackay doctrine's effect on striking employees has generated substantial debate") (emphasis added).

102. See E. Air Lines, Inc., 774 F. Supp. at 1142; see also Westfall, supra note 46, at 156 ("Most discussions of the replacement of strikers treat the matter as a contest between striker and employer interests and give scant heed to the interests of . . . newly hired replacements (and would-be replacements)"); cf. NLRB v. Pope Maint. Corp., 573 F.2d 898, 907 (5th Cir. 1978) (discussing "the conflicting rights of an employer to hire permanent replacements with the employees' right to strike"). But see Macy's Mo.-Kan. Div. v. NLRB, 389 F.2d 835, 846 (8th Cir. 1968) ("Both the economic strikers and the permanent replacements have a legitimate interest in their jobs . . .").


104. See id. at 1239; see also Int'l Bhd. of Elec. Workers, Local Union No. 11, 273 N.L.R.B. at 193 ("It is well established that a union may not discriminate against employees who exercise their Section 7 right not to join a strike."). See generally Allen Bradley Co. v. NLRB, 286 F.2d 442, 445 (7th Cir. 1961), overruled by U.O.P Norplex, Div. of Universal Oil Prods. Co. v. NLRB, 445 F.2d 155 (7th Cir. 1971):

Section 7 protects an employee in his right to refrain from concerted activities and this includes, of course, the right to refuse to participate in or recognize a strike. Coercion or interference with that right, whether by the employer or by the union, is made an unfair labor practice by the terms of the Act.

Id.
workers can be circumvented in this context by basing reinstatement on seniority (assuming there is a legitimate contractual basis for doing so), because employers can lawfully award jobs on this nondiscriminatory basis. As one administrative law judge colorfully stated: "In that event, one hired as a permanent replacement may not be a permanent replacement permanently."

Despite its questionable underpinnings, the analysis in United

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105. See United Steelworkers, Local 8560, 103 L.R.R.M. (BNA) at 1239; cf. Mike Yurosek & Son, Inc., 295 N.L.R.B. 304, 306 (1989) (discussing the contention that economic strikers should be treated more favorably than their replacements "because the permanent replacements' seniority was... less than the seniority of the unreinstated strikers"); Bio-Sci. Labs., 209 N.L.R.B. 796, 796 (1974) (discussing union's contention "that the replacements should be 'bumped' out of their jobs by the former strikers who... had greater seniority"). See generally Gehnrich & Gehnrich, Inc., 232 N.L.R.B. 1122, 1129 n.17 (1977) ("It is not unlawful for an employer to permit all employees, strikers as well as permanent replacements, to compete on a seniority basis for available jobs."); Corbett, supra note 40, at 848 n.181 (indicating that the "use of seniority to give preference for placement in jobs does not run afoul of the [NLRA]").

106. Economic strikers have "no statutory right to be recalled by seniority." Bingham Willamette, 282 N.L.R.B. 1192, 1194 n.5 (1987), enforced, 857 F.2d 661 (9th Cir. 1988). Instead, "an economic striker's right to recall by seniority must be established by a collective-bargaining agreement or a binding past practice of reinstatement by seniority." Mike Yurosek & Son, Inc., 295 N.L.R.B. at 304; see, e.g., Bubbel v. Wien Air Alaska, Inc., 682 P.2d 374, 376 (Alaska 1984) (referring to a collective bargaining agreement pursuant to which striking employees were reinstated while their replacements were laid off "based on seniority"). See generally "Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521, 526 (1949) (observing that "seniority rights derive their scope and significance from union contracts").

107. See United Steelworkers, Local 8560, 103 L.R.R.M. (BNA) at 1239; cf. Int'l Bhd. of Elec. Workers, Local Union No. 11, 273 N.L.R.B. at 193 (observing that "a union may lawfully seek the reinstatement of economic strikers and the layoff of strike replacements pursuant to a nondiscriminatory system of layoff and recall"). See generally Transp. Co. of Tex, 177 N.L.R.B. 180, 186 (1969) (stating that an employer is "not required to give preference to strikers or place non-strikers and replacements in a subordinate position when deciding who to retain, and in choosing among [these] 'equals' [it] can give controlling weight to... factors unrelated to concerted activity"); Janes, supra note 6, at 134-35 ("The employer may be able to remove... replacements[] by nondiscriminatory means...").

108. Gehnrich & Gehnrich, Inc., 232 N.L.R.B. at 1129 n.17; cf. Molded Fiber Glass Body Co., 182 N.L.R.B. 400, 403 (1970) (discussing cases in which "the 'permanent' replacement proved... permanent"); Janes, supra note 6, at 128 (indicating that "a replacement hired on terms of permanent employment [may] become[ ] a temporary employee").

109. Seniority in theory may provide a lawful basis for preferring the reinstatement rights of strikers over the rights of replacement workers. See, e.g., Giddings & Lewis, Inc. v. NLRB, 675 F.2d 926, 931 (7th Cir. 1982) (upholding a "seniority system [that did] not discriminate between strikers and non-strikers"). But see Int'l Ass'n of Machinists, Dist. No. 8 v. J. L. Clark Co., 471 F.2d 694, 700 (7th Cir. 1972) (Pell, J., dissenting) (asserting that "seniority should be no basis for displacing a person accepting employment during the course of an economic strike"). However, employers cannot advance pretextual justifications for favoring strikers over replacements if there actually are statutorily prohibited motives behind their preferences. See Braun, supra note 43, at 406; cf. Janes, supra note 6, at 142 (suggesting that the NLRA would be violated by "the discharge of nonunion replacements and reinstatement of union workers on the pretext of retaining jobs on a seniority basis").
Steelworkers was subsequently confirmed in DeGraff Mem'l Hosp. In that case, employees engaging in an economic strike were permanently replaced by the employer. The union and the employer subsequently entered into a strike settlement agreement that provided for the reinstatement of all striking employees, and the termination of as many of the permanent replacements as necessary to accommodate the returning strikers.

One of the replacement employees then filed an unfair labor practice charge with the Board under section 8(a) (1) of the Act. The employee contended that the employer had violated her rights under section 7 of the Act by agreeing to a strike settlement pursuant to which replacements would be discharged to accommodate returning economic strikers. The charge was submitted to the General Counsel for review.

The General Counsel concluded that the charge should be dismissed. It reasoned that because a union can seek the reinstatement

110. Nos. 3-CA-14257 & 3-CB-5253, 1988 NLRB GCM LEXIS 41 (May 25, 1988); cf. Corbett, supra note 40, at 847-48 ("Although there is little law on this issue, apparently unions [accused of violating the NLRA by seeking the discharge of replacements to make room for returning strikers] would be able to defend successfully ... on the ground that they sought to have employees placed in the jobs on the basis of seniority rather than union affiliation.").
111. See DeGraff Mem'l Hosp., 1988 NLRB GCM LEXIS 41, at *1.
112. See id. See generally Curtin Matheson Scientific, Inc. v. NLRB, 859 F.2d 362, 369 (5th Cir. 1988) (Williams, J., dissenting) ("The settlement of an active economic strike almost always requires reinstatement of the strikers with full seniority rights."); rev'd, 494 U.S. 775 (1990); Sales, supra note 37, at 881 n.157 ("Commonly, when an employer and a union settle a dispute in which replacements have been utilized, the terms of the settlement require dismissal of the replacements and immediate reinstatement of all strikers.").
114. One of the "basic elements" of a section 8(a) (1) violation is "employer action that effectively interferes with, restrains, or coerces employees in the exercise of their section 7 rights." Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1144 (5th Cir. 1977) (Wisdom, J., dissenting).
115. See DeGraff Mem'l Hosp., 1988 NLRB GCM LEXIS 41, at *1; cf. Estreicher, supra note 34, at 906 (stating that "the legality of 'bumping' [replacement workers when a strike is settled] cannot be ... lightly assumed"); Janes, supra note 6, at 141-42 ("The permanent replacement who loses his job because of union pressure at the conclusion of an economic strike may have a federal claim ... against the union and the employer ...").
116. See DeGraff Mem'l Hosp., 1988 NLRB GCM LEXIS 41, at *1. Under section 3(d) of the NLRA, the Board's General Counsel is authorized to investigate unfair labor practice charges and issue complaints based on such charges, and also has the authority to prosecute those complaints before the Board. 29 U.S.C. § 153(d) (1994).
117. See DeGraff Mem'l Hosp., 1988 NLRB GCM LEXIS 41, at *2. Such a decision is not appealable. See Truck Drivers & Helpers Union, Local No. 170 v. NLRB, 993 F.2d 990, 997 n.4 (1st Cir. 1993) (observing that "the General Counsel's decision to dismiss is final"); Baker v. Int'l Alliance of Theatrical Stage Employees, 691 F.2d 1291, 1293 (9th Cir. 1982) ("The General Counsel's decision not to issue an unfair labor practice complaint is generally not reviewable.").
of economic strikers even if reinstatement would result in the displacement of permanent replacements, unions and employers may lawfully enter into agreements to that effect as long as their motive is simply to obtain the reinstatement of the strikers, rather than to retaliate against the replacements for exercising their statutory right to work during the strike. Because there was no evidence of unlawful motive, the General Counsel concluded that the employer had not violated the Act.

118. See DeGraff Mem'l Hosp., 1988 NLRB GCM LEXIS 41, at *2 & n.2 (citing Portland Stereotypers Union No. 48, 137 N.L.R.B. 782, 786, n.6 (1962) and Skydyne Div. of Brooks & Perkins, Inc., 282 N.L.R.B. 976 (1987)); see also Belknap, Inc. v. Hale, 463 U.S. 491, 532 n.5 (1983) (Brennan, J., dissenting) ("[I]t is a legitimate bargaining demand for a union to seek reinstatement of strikers in preference to replacements."); Hansen Bros. Enters., 279 N.L.R.B. 741, 741 (1986) ("[W]here the striker replacements are only temporary, an offer to return to work which demands ... the discharge of those replacements is perfectly appropriate.").

119. See DeGraff Mem'l Hosp., 1988 NLRB GCM LEXIS 41, at *2-*3; cf. S. Fla. Hotel & Motel Ass'n, 245 N.L.R.B. 561, 579 (1979) (describing union's contention that, as a condition to settling a strike, "all replacements must be dismissed and all strikers returned"); Local 457, United Rubber Workers, 147 N.L.R.B. 980, 985 (1964) (discussing union's efforts during negotiations "to obtain the Employer's agreement to discharge the replacements upon settlement of the strike"). See generally Corbett, supra note 40, at 847 ("The Board, although never deciding the issue, has made statements in its decisions indicating its recognition that unions routinely seek the discharge of replacements and its belief that the practice is a necessary incident of a union's duty to represent the strikers.").

120. See DeGraff Mem'l Hosp., 1988 NLRB GCM LEXIS 41, at *2-*3; but cf. Estreicher, supra note 34, at 906 (characterizing the similar analysis in United Steelworkers, Local 8560, 103 L.R.R.M. (BNA) 1238 (1979), as "formally correct but unsatisfying," because "in virtually all cases the union is not seeking to accommodate the rights of conflicting groups of workers but is acting out of an understandable, but unremitting hostility to the replacements."). See generally Gem City Ready Mix Co., 270 N.L.R.B. 1260, 1264 (1984) (indicating that strike settlement agreements may not be used "as schemes to deny employees statutory rights").

121. The discharge of permanent replacements does not, in and of itself, violate the NLRA. See Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 458 n.2 (1989) (Blackmun, J., dissenting) ("The employer, of course, may agree to discharge permanent replacements, subject to any claims the replacements may have under state law."); emphasis added); Copaz Packing Corp., No. 9-CA-19929-1, 1983 NLRB GCM LEXIS 35, at *2 (Sept. 28, 1983) ("Of course, the Employer does not violate the Act if it terminates permanent replacements at the end of the strike."); cf. Belknap, Inc., 463 U.S. at 519 (Blackmun, J., concurring) (observing that "federal law apparently does not obligate the employer to fulfill its promises to the replacements"). However, an employer would violate the Act by terminating permanent replacements "based on the fact that [they] were not union members." Baldwin, 927 F. Supp. at 1051 (internal quotation marks omitted).

122. See DeGraff Mem'l Hosp., 1988 NLRB GCM LEXIS 41, at *3; cf. Belknap, Inc., 463 U.S. at 507 (discussing the contention that "as a matter of federal law the employer cannot be foreclosed from discharging . . . replacements pursuant to a contract with a bargaining agent").
Although debatable, this result is a reflection of the NLRA policy encouraging collective bargaining, including the negotiation of strike settlement agreements, as a means of resolving labor disputes. In Gem City Ready Mix Co., for example, the Board relied on this policy to uphold a strike settlement agreement that favored the interests of strike replacements over those of returning strikers. The Board held that the union had properly waived the strikers' statutory rights in exchange for the opportunity to end the strike. Similar protection presumably extends to the employer as well.

generally Corbett, supra note 40, at 848 n.181 (asserting that "a successful action by replacements" is unlikely "if the union [and employer] can articulate some basis other than union affiliation for the allocation of positions").

123. See Corbett, supra note 40, at 847 (questioning "whether permanent replacements who are discharged at a union's insistence could prevail if they filed [unfair labor practice] charges against the union"). The General Counsel's inquiry into the employer's motive in DeGraff was in contrast to the typical analysis in the converse situation. In Gem City Ready Mix Co., for example, the administrative law judge concluded that a strike settlement agreement that "discriminates in favor of striker replacements and against returning strikers" is "inherently destructive of important employee interests," and thus "no specific evidence of unlawful motive is needed to make out a violation" in that situation. Gem City Ready Mix Co., 270 N.L.R.B. at 1264-65; see also O'Neill v. Air Line Pilots Ass'n, Int'l, 886 F.2d 1438, 1447 (5th Cir. 1989) (holding that a "negotiated division of [employees] into strikers and nonstrikers" that results in "unfavorable discriminatory treatment of returning strikers" is "inherently destructive of employee rights") (citation and internal quotation marks omitted), rev'd, 499 U.S. 65 (1991). As one commentator has noted, "[t]he Board might [likewise] consider blanket removal of replacements at the end of the strike inherently destructive of the replacements' section 7 rights." Janes, supra note 6, at 134.

124. See Vaca v. Sipes, 386 U.S. 171, 182 (1967); NLRB v. U.S. Sonics Corp., 312 F.2d 610, 615 (1st Cir. 1963); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1081-82 (1955). See generally Thomas v. LTV Corp., 39 F.3d 611, 618 (5th Cir. 1994) ("Collective bargaining has been defined... [to include] the settlement of disputes by negotiation between an employer and the representatives of his employees.").


126. See id. at 1260-61. The Board stated: "The policy of the National Labor Relations Act is to encourage the practice and procedure of collective bargaining as a means of resolving labor disputes, including the encouragement of the negotiation of strike settlement agreements." Id. (footnotes omitted). For an academic discussion of this issue, see Matthew W. Finkin, The Truncation of Laidlaw Rights by Collective Agreement, 3 INDUS. REL. L.J. 591 (1979).

127. Gem City Ready Mix Co., 270 N.L.R.B. at 1261; see also Van Holding Corp., 293 N.L.R.B. 182, 185 (1989) (observing that "a union may waive strikers' reinstatement rights in a strike settlement agreement when the waiver is part of a quid pro quo agreement") (citing Hotel Holiday Inn de Isla Verde, 278 N.L.R.B. 1027 (1986)); Estreicher, supra note 34, at 908 (stating that "the Board has made clear... that unions can agree to limitations on the ... rights of unreinstated strikers"). But cf. Little Rock Airmotive, Inc. v. NLRB, 455 F.2d 163, 168-69 n.9 (8th Cir. 1972) ("[W]e have grave doubts that a union in collective bargaining can simply barter away the employment of some of its members"); Brooks Research & Mfg., 202 N.L.R.B. 634, 637 n.12 (1973) (noting that former Board member John Fanning "[d]id not subscribe to the view that a union has an unqualified right to waive recall rights of economic strikers").

128. See Int'l Bhd. of Elec. Workers, Local Union No. 11, 273 N.L.R.B. 183, 193 (1984) (stating that "the... reinstatement rights of economic strikers may be cut off by an agreement..."
The same analysis may apply to a strike settlement agreement like the one in *DeGraff* that favors the interests of returning strikers over those of their replacements, because in theory the union negotiating the agreement represents, at least in some respects, the interests of all employees, including replacements. In other words, a union may be entitled to waive the statutory rights of replacement workers in order to achieve a strike settlement, just as it can waive the rights of returning strikers for that purpose. Indeed, the Board has indicated that the
statutory rights of replacement workers may be entitled to less deference than those of strikers in this situation, and there are judicial decisions making the same distinction.

2. Rights Under the Common Law

For much of the NLRA’s existence, replacement workers also enjoyed little in the way of state common law protection. This point is illustrated by cases such as *Hope v. Nat’l Airlines*, *Albers v. Wilson & Co.*, and *Bixby v. Wilson & Co.*, in which courts from various jurisdictions have rejected claims that permanent replacement workers were wrongfully discharged.

a. *Hope v. Nat’l Airlines*

In the first case, *Hope v. Nat’l Airlines*, the plaintiff accepted

See generally Vaca v. Sipes, 386 U.S. 171, 182 (1967) (referring to “the congressional grant of power to a union to act as exclusive collective bargaining representative,” which “of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit”).

133. See, e.g., Detroit Newspaper Agency, 161 L.R.R.M. (BNA) at 1034 n.5:
    [C]urrently a union may bargain with respect to the return of the strikers—and... this presents a... conflict of interest. Concededly, such bargaining can have an impact on the replacements. However, such bargaining is on behalf of the strikers; the impact on the replacements is simply a consequence of the bargaining on behalf of the strikers.

134. *See Alva Allen Indus.*, 369 F.2d at 320 (stating that while a union is legally obligated to represent all members of the bargaining unit, including replacement workers, it owes “primary responsibility” to its “striking members”); cf. Midwest Motor Express, Inc. v. Int'l Bhd. of Teamsters, Local 120, 512 N.W.2d 881, 890 (Minn. 1994) (assuming that “a replacement employee... is unrepresented in... negotiations between union and employer”).

135. *See Janes, supra* note 6, at 148 (“The replacement wishing to pursue his claim on state grounds has a limited arsenal for attack.”). The lack of affirmative common law protection available to replacement workers is implicit in one state court’s observation that “[t]he common law... does not condemn ordinary strikebreaking as either a civil or criminal wrong.” Bldg. Serv. & Maint. Union, Local No. 47, v. St. Luke’s Hosp., 227 N.E.2d 265, 268 (Ohio C.P. Cuyahoga County 1967) (emphasis added).

139. *See generally Finkin, supra* note 18, at 551 (“At the time [the Supreme Court] fashioned the ‘permanent replacement’ rule (and well after), the displaced replacement had a scant claim to state.”); Note, *supra* note 33, at 674-75 (“Despite assurances of permanence, [strike replacements] historically have lacked a legal remedy if they are discharged.”).
140. 99 So. 2d 244 (Fla. Dist. Ct. App. 1957).
employment with an airline during a pilot’s strike that had seriously
limited the airline’s ability to meet its scheduling demands.\(^{141}\) The
plaintiff received verbal assurances at the time of hire that if he worked
through the strike, he would be employed “permanently” as long as the
airline was in business.\(^{142}\)

When the plaintiff was subsequently discharged, he brought suit
claiming the airline had wrongfully discharged him in violation of a
contract of permanent employment.\(^{143}\) Although there was some support
for the plaintiff’s contention under the pertinent state law,\(^{144}\) the trial
court dismissed the complaint without specifying the grounds upon
which it was deemed to be deficient.\(^{145}\) The plaintiff then appealed.\(^{146}\)

The appellate court began by noting that the plaintiff himself was
not precluded by the terms of the alleged employment contract from
terminating the employment relationship at will.\(^{147}\) The court concluded
from this that the employer’s alleged commitment to permanent
employment was unilateral,\(^{148}\) and mutuality of obligation was therefore
lacking.\(^{149}\) Accordingly, the alleged contract was enforceable against the

\(^{141}\) See id. at 245.

\(^{142}\) See id.

(considering contention that “the word ‘permanent’ as contained in [an employment] contract means
that [the employee] is entitled to remain as an employee ... so long as he is capable of rendering
the ... services for which he was employed”).

\(^{144}\) The Florida Supreme Court had previously indicated that:
the words “permanent employment” would be understood as meaning that, so long as the
defendant ... had work which the plaintiff could do and desired to do, and so long as the
plaintiff was able to do his work satisfactorily, the defendant would employ him, but that
in that sense the employment would be permanent; that is, the plaintiff would be under
no necessity of looking for work elsewhere, but could rely on the arrangement thus
1897)).

\(^{145}\) See Hope, 99 So. 2d at 245. Although the trial court in Hope did not offer an explanation
for its ruling, the Florida District Court of Appeal has stated that “[c]ontracts for ... ‘permanent’
employment are not favored in the law, and courts rarely enforce them because of their

\(^{146}\) See Hope, 99 So. 2d at 245.

\(^{147}\) See id. at 246. See generally Palmateer v. Int’l Harvester Co., 421 N.E.2d 876, 878 (Ill.
1981) (indicating that the employment at will doctrine originated in the proposition that “the
employee can end his employment at any time under any condition”).

\(^{148}\) See Hope, 99 So. 2d at 246; cf. Hesston Corp., 599 So. 2d at 151 (questioning “the
inherent fairness of an agreement that places the entire burden of the long-term commitment on the
employer since no comparable commitment exists on the part of the employee”).

\(^{149}\) See Hope, 99 So. 2d at 246; cf. Weatherly v. Int’l Paper Co., 648 F. Supp. 872, 875-76
(D.P.R. 1986) (“The employment-at-will doctrine is based on a strict interpretation of the basic,
common law contract principle of mutuality of obligation. If the employee is free to quit at any
employer only if the plaintiff had provided additional consideration beyond the mere provision of his personal services. 150

The plaintiff argued that his employment during a strike constituted the necessary additional consideration 151 because he had effectively foregone his right to join the pilot's union, 152 and incurred the disfavor of his fellow employees. 153 The court disagreed. 154 While acknowledging that a detriment suffered by a promisee may provide the consideration necessary to support a contract, 155 the court concluded that the facts
relied upon by the plaintiff were insufficient to show any consideration other than personal services, or to place him in a more favorable position than that contemplated by the employment at will rule.  


The court in *Albers v. Wilson & Co.* similarly refused to find the additional consideration necessary to support a contract for permanent employment in the fact that the plaintiff in that case had accepted employment as a replacement even though the strike at issue was violent, and any person crossing the picket line was subject to potential harm. The court noted that all persons who lived in the area were aware of the fact that anyone who accepted employment as a replacement might be subjected to violence. This potential for violence thus was a condition of, rather than consideration for, the plaintiff’s employment. Because the alleged contract for permanent employment was not supported by any consideration independent of the plaintiff’s personal services, it was terminable at will and the employer did not wrongfully discharge the plaintiff when it terminated his employment, and that of other replacement workers, to make room for returning strikers.

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156. See Hope, 99 So. 2d at 246.


158. See id. at 813; see also Janes, supra note 6, at 149 (discussing *Albers*); cf. Diamond Walnut Growers, Inc. v. NLRB, 80 F.3d 485, 488 (D. C. Cir. 1996) (describing a strike in which “replacement workers had been the targets of violence, vandalism and threats”); Brown & Sharpe Mfg. Co., 299 N.L.R.B. 586, 590 (1990) (discussing “violence directed against strike replacements, occurring not only at the picket line but at their homes and other places away from the plant”).

159. See *Albers*, 184 F. Supp. at 813; see also Rape v. Mobile & Ohio R.R. Co., 100 So. 585, 589 (Miss. 1924) (Ethridge, J., dissenting) (“[Strikes are] frequently attended with danger of physical violence, and this is so well known that no intelligent person could fail to appreciate the significance of this fact.”); Longview Furniture Co., 100 N.L.R.B. 301, 304 (1952) (“It is common knowledge that in a strike where vital economic issues are at stake, striking employees resent those who cross the picket line and will express their sentiments . . . .”), enforced as modified, 206 F.2d 274 (4th Cir. 1953).

160. See *Albers*, 184 F. Supp. at 813; cf. Gloversville Embossing Corp., 297 N.L.R.B. 182, 194 (1989) (observing that “replacement workers must be prepared to contend with some unpleasantries in a strike situation”). This phenomenon may reflect the Board’s purported reluctance to hold unions accountable for violence directed against strike replacements. See Westfall, supra note 46, at 156 & n.113 (citing authorities). But see Drivers Union Local 695, 174 N.L.R.B. 753, 758 (1969) (“If a union is unwilling, or unable, to take the necessary steps to control its pickets, it must then bear the responsibility for their misconduct.”).

A similar result was reached in *Bixby v. Wilson & Co.*, where replacements hired during the same strike that was at issue in *Albers* brought suit against the employer for breach of contract when their employment was terminated to accommodate returning strikers. Several of the plaintiffs had been required to relocate and forego other employment in order to replace the strikers, and thus had sought, and received, assurances of permanence from the employer prior to accepting their positions.

When the employer and the union subsequently settled the strike, they agreed that the respective employment rights of the striking employees and the replacement workers would be decided by arbitration. When the arbitration panel (with one member dissenting) subsequently concluded that the strikers should have seniority over the replacements, the employer discharged the replacements. The replacements then brought suit for breach of contract.

The court began its analysis by observing that the plaintiffs' right to recover was dependent upon state law, and in particular upon the contractual significance of the employer's characterization of the replacements as permanent employees. Citing various state court decisions, the court noted:

There might be several possible durations for a contract of "permanent employment." Among those could be employment for a reasonable period; employment for life; for as long as the employee was able to perform the services (for his work life); for as long as the employee's services were satisfactory; for as long as employment was available in the business with which the employment was connected.

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163. *See id.* at 901; *Janes*, *supra* note 6, at 149 & n.122 (discussing *Bixby* and *Albers*).
165. *See id.* After they began working, the replacements received yet additional assurances that their employment would not be temporary. In particular, the employer called them together on several occasions and stated: "You may have been told that you were going to be laid off when the strike is ended. We are here to tell you [that] you are going to be kept on regardless." *Id.* at 891.
166. *See id.; cf. Int'l Ass'n of Machinists, Lodge 1652 v. Int'l Aircraft Servs., Inc.*, 302 F.2d 808, 814-15 (4th Cir. 1962) (ordering parties to arbitrate the propriety of the employer's "refusal after the termination of the strike . . . to dismiss the replacement workers . . . and to reinstate strikers to their positions").
167. *See Bixby*, 196 F. Supp. at 892, 901. The dissenting panelist refused to concur in the arbitration award because its effect was to "nullify the assurances given by the [employer] to those who were employed during the strike." *Id.* at 892.
168. *See id.*
169. *See id.*
170. *See id.* at 892-93. The court noted:

There might be several possible durations for a contract of "permanent employment." Among those could be employment for a reasonable period; employment for life; for as long as the employee was able to perform the services (for his work life); for as long as the employee's services were satisfactory; for as long as employment was available in the business with which the employment was connected.

*Id.* At 902; *cf. Stromire*, *supra* note 36, at 1228 ("The duration of a contract for permanent employment depends entirely on the meaning that the state court ascribes to the term.").
decisions,\textsuperscript{171} the Bixby court concluded that under the applicable state law, a contract for permanent employment means only that the contract is to continue indefinitely until one of the parties elects to terminate the relationship,\textsuperscript{172} and thus is deemed to be terminable at will by either party.\textsuperscript{173} Like the courts in \textit{Hope}\textsuperscript{174} and \textit{Albers},\textsuperscript{175} the Bixby court acknowledged that an employer’s assurance of permanent employment may nevertheless be enforceable if, in exchange for that assurance, the employee has given consideration in addition to the mere rendering of services.\textsuperscript{176} However, relinquishing other employment and incurring expense in relocating to the new place of employment generally do not constitute such additional consideration.\textsuperscript{177} The Bixby court explained:

\begin{itemize}
\item \textsuperscript{171} \textit{E.g.}, Lewis v. Minn. Mut. Life Ins. Co., 37 N.W.2d 316 (Iowa 1949); Faulkner v. Des Moines Drug Co., 90 N.W. 585 (Iowa 1902).
\item \textsuperscript{172} See \textit{id.} at 893 (discussing \textit{Faulkner}); see also Janes, \textit{supra} note 6, at 149 (indicating that the Bixby court “denied recovery on the basis that the ‘permanent’ term was indefinite”). See generally Midwest Motor Express, Inc. v. Int’l Bhd. of Teamsters, Local 120, 494 N.W.2d 895, 900 (Minn. Ct. App. 1993) (stating that “there will be cases in which an employer’s offer of employment to a replacement worker will clearly meet only the definition of ‘permanent’ as defined under federal labor law”), rev’d, 512 N.W.2d 881 (Minn. 1994).
\item \textsuperscript{173} See \textit{Bixby}, 196 F. Supp. at 893-94 (discussing \textit{Lewis}). The court indicated that this analysis was not altered by the fact that employers have a federally protected right to hire permanent replacements for their striking workers under NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). The Bixby court explained that the fact that the employer could have continued to employ the replacements under \textit{Mackay Radio} was not determinative of whether it was legally obligated to do so. See \textit{Bixby}, 196 F. Supp. at 903.
\item \textsuperscript{174} See \textit{Hope} v. Nat’l Airlines, 99 So. 2d 244, 246 (Fla. Dist. Ct. App. 1957) (suggesting that a contract of permanent employment would be enforceable where the employee has given “additional consideration over and beyond his personal services”).
\item \textsuperscript{175} See \textit{Albers} v. Wilson & Co., 184 F. Supp. 812, 813 (D. Minn. 1960) (indicating that “a contract of permanent employment contemplates more than a contract terminable at will” if the employee “has provided an additional valuable consideration to the [employer] outside of that normally considered a condition of employment”).
\item \textsuperscript{176} See \textit{Bixby}, 196 F. Supp. at 902; see also Romack v. Pub. Serv. Co., 499 N.E.2d 768, 772 (Ind. Ct. App. 1986):

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The employment relation is at will unless there is a promise of employment for a fixed duration or the employee has given independent consideration beyond his services in exchange for the employment. An employment at will relationship may be converted to one requiring good cause before termination if the employee, in exchange for permanent employment, provides independent consideration that results in a detriment to him and a corresponding benefit to the employer.
\end{flushleft}
\item \textsuperscript{177} \textit{Id.} (citations omitted).
\item \textsuperscript{177} See \textit{Bixby}, 196 F. Supp. at 900-01; \textit{cf.} Page v. New Orleans Pub. Serv. Inc., 167 So. 99, 100 (La. 1936) (finding no additional consideration in the fact that the plaintiff “surrendered a lucrative position [with another employer] to accept employment with the defendant during a strike”). But \textit{cf.} Beyda v. USAir, Inc., 697 F. Supp. 1394, 1396 (W.D. Pa. 1988) (“[R]elinquishing or foregoing other employment opportunities... may in appropriate circumstances constitute sufficient additional consideration to rebut the at-will presumption. Likewise the expense and
It would seem the courts which hold that the rejection of offers of other employment, the giving up of other employment, and the moving to the place of employment do not constitute good additional consideration regard those matters as normally incident to contracts of employment in general and not as being "permeative" of the duration of the contract.178

III. BELKNAP, INC. V. HALE

Despite the holdings in the foregoing and other similar cases,179 some measure of state common law protection for permanent replacements now exists as the result of the Supreme Court's decision in Belknap, Inc. v. Hale.180 The specific issue addressed in Belknap was whether the NLRA preempted state law breach of contract and misrepresentation claims asserted by strike replacement workers who were displaced by reinstated strikers despite having been hired on a permanent basis,181 with assurances that they would not be terminated to accommodate the strikers.182

When contract negotiations between the employer and the union resulted in an impasse, many of the employer's employees went on
strike. In order to continue operating, the employer granted a wage increase to the employees who remained on the job. It also placed an advertisement in the local newspaper seeking applicants to “permanently replace” its striking employees. Upon being hired, these applicants signed a statement acknowledging that they were being hired as regular full-time permanent replacements.

The union filed an unfair labor practice charge challenging the employer’s unilateral wage increase to employees who remained on the job. The employer then distributed the following notice to “all permanent replacement employees”:

We recognize that many of you continue to be concerned about your status as an employee. The Company’s position on this matter has not changed nor do we expect it to change. You will continue to be permanent replacement employees so long as you conduct yourselves in accordance with the policies and practices that are in effect here at Belknap.

We continue to meet and negotiate in good faith with the Union. It is our hope and desire that a mutually acceptable agreement can be reached in the near future. However, we have made it clear to the Union that we have no intention of getting rid of the permanent replacement employees just in order to provide jobs for the replaced strikers if and when the Union calls off the strike.

The Board’s regional director subsequently issued a complaint.
asserting that the employer’s unilateral wage increase violated the Act.\textsuperscript{190} At that point, the employer again addressed the strike replacements, stating:

We want to make it perfectly clear, once again, that there will be no change in your employment status as a result of the charge by the National Labor Relations Board, which has been reported in this week’s newspapers.

We do not believe there is any substance to the charge and we feel confident we can prove in the courts satisfaction [sic] that our intent and actions are completely within the law.\textsuperscript{191}

The regional director subsequently convened a settlement conference in which he indicated that if a strike settlement could be reached, he would agree to the withdrawal of the unfair labor practice charge.\textsuperscript{192} As a result, the parties ultimately reached a settlement that provided for the return of the striking workers.\textsuperscript{193} In order to make room for these employees, the employer laid off its replacement workers.\textsuperscript{194}

Some of the replacement workers then sued the employer in state court for breach of contract and misrepresentation.\textsuperscript{195} After

\textsuperscript{190} See Belknap, Inc., 463 U.S. at 495; cf. Soule Glass & Glazing Co., 246 N.L.R.B. 792, 797 (1979) (holding that employer violated the Act “by granting [a] unilateral wage increase for nonstriking employees, greater than what was offered to employees in the bargaining unit”), enforced in part and enforcement denied in part, 652 F.2d 1055 (1st Cir. 1981). Unilateral wage increases have been described as “one of the most pernicious unfair labor practices.” NLRB v. Koenig Iron Works, Inc., 856 F.2d 1, 4 (2d Cir. 1988) (Oakes, J., dissenting); see also NLRB v. Minute Maid Corp., 283 F.2d 705, 710-11 (5th Cir. 1960) (“We have no doubt but that an employer may be guilty of an unfair labor practice by a unilateral wage increase ... during the time when the employees are represented by a union as their bargaining agent.”). However, not all unilateral wage increases are prohibited. See, e.g., Morse Electro Prods. Corp., 210 N.L.R.B. 1075, 1077 (1974) (upholding increase implemented “at a time when the contract between the parties had expired by its terms” and the employer had “serious doubt of a continuing majority status of the Union”).

\textsuperscript{191} Belknap, Inc., 463 U.S. at 495-96 (internal quotations omitted).

\textsuperscript{192} See id. at 496. The Board’s rules permit the withdrawal of a charge at the pre-hearing stage “only with the consent of the regional director,” and in that event also authorize the regional director to dismiss “any complaint based thereon.” 29 C.F.R. § 102.9 (1998); see also Robinson Freight Lines, 117 N.L.R.B. 1483, 1485 (1957) (“T[he Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned.”).

\textsuperscript{193} See Belknap, Inc., 463 U.S. at 496.

\textsuperscript{194} See id.

\textsuperscript{195} See id. Although the Supreme Court was not presented with the question, the replacements’ breach of contract claim, in particular, appears to have been somewhat tenuous as a matter of state law. See, e.g., United Parcel Serv. Co. v. Rickert, 996 S.W.2d 464, 472 (Ky. 1999) (Stephens, J., dissenting) (observing that “indefinite ‘permanent’ employment constitutes employment at-will in Kentucky”) (citing Shah v. Am. Synthetic Rubber Corp., 655 S.W.2d 489
unsuccessfully seeking to remove the case to federal court, the employer moved for summary judgment on the ground that the plaintiffs' claims were preempted by the NLRA. The trial court agreed, and granted the employer's motion.

The Kentucky Court of Appeals reversed, concluding that the action was not preempted because the claims at issue were of only peripheral concern to the Board and were deeply rooted in local law. The United States Supreme Court granted the employer's petition for certiorari and ultimately affirmed the state appellate court's decision.

The Supreme Court began its analysis with an overview of the NLRA preemption doctrines articulated in San Diego Bldg. Trades Council v. Garmon and Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n. Addressing first the employer's

(1983)

See Belknap, Inc., 463 U.S. at 497. The employer contended that the case was removable because the state law claims were governed by the NLRA. See Hale v. Belknap, Inc., 110 L.R.R.M. (BNA) 2397, 2397 (Ky. Ct. App.), aff'd, 463 U.S. 491 (1983). However, the Supreme Court has stated: "The fact that a defendant might ultimately prove that a plaintiff's claims are preempted under the NLRA does not establish that they are removable to federal court." Caterpillar, Inc. v. Williams, 482 U.S. 386, 398 (1987); see also Ethridge v. Harbor House Rest., 861 F.2d 1389, 1400 (9th Cir. 1988) (holding that "state law actions claimed to be preempted by sections 7 and 8 of the NLRA are not removable to federal court"); Baldwin v. Pirelli Armstrong Tire Corp., 927 F. Supp. 1046, 1052 (M.D. Tenn. 1996) (concluding that "NLRA preemption is not enough to remove state law claims to federal court").

See Belknap, Inc., 463 U.S. at 497.

See id. The trial court effectively concluded that the plaintiffs' claims involved conduct that would constitute an unfair labor practice, and thus fell within the exclusive jurisdiction of the Board under section 8 of the NLRA. See Hale, 110 L.R.R.M. (BNA) at 2398 (discussing 29 U.S.C. § 158 (1994)). See generally In re Careau Group, 923 F.2d 710, 711 n.1 (9th Cir. 1991) (indicating that "courts generally lack jurisdiction to hear unfair labor practice charges and must defer to the NLRB") (discussing S.D. Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)).

See Hale, 110 L.R.R.M. (BNA) at 2398.

See Hale, 457 L.R.R.M. (BNA) at 2398. The court reached this conclusion despite acknowledging a "strong bias in favor of federal preemption." Id.

See Belknap, Inc. v. Hale, 457 U.S. 1131 (1982). The Kentucky Supreme Court had originally granted a petition for discretionary view, see Belknap, Inc. v. Hale, 622 S.W.2d 918 (Ky. 1981), but subsequently vacated its order as having been improvidently entered. See Belknap, Inc., 463 U.S. at 497.

See Belknap, Inc., 463 U.S. at 497, 512.


427 U.S. 132 (1976). For a recent academic discussion of this branch of NLRA preemption, see Robert Rachal, Machinists Preemption Under the NLRA: A Powerful Tool to
contention that the plaintiffs' claims were preempted under \textit{Machinists}, the \textit{Belknap} Court concluded that allowing the plaintiffs to proceed would not undermine the employer's right to invoke self-help economic weapons in its dispute with the union, or otherwise interfere with the policies underlying the NLRA.\footnote{6}

In particular, the Court noted that holding employers to the assurances of permanent employment they make to induce "innocent third parties" to work as strike replacements\footnote{2} would not impermissibly burden their right to hire permanent replacements.\footnote{205} The Court stated:

\begin{quote}
[F]ederal law permits, but does not require, the employer to hire... replacements that it need not discharge in order to reinstate strikers if it hires the replacements on a "permanent" basis within the meaning of the federal labor law. But when an employer attempts to exercise this very privilege by promising the replacements that they will not be discharged to make room for returning strikers, it surely does not follow that the employer's otherwise valid promises of permanent employment are nullified by federal law and its otherwise actionable misrepresentations may not be pursued. We find unacceptable the notion that the federal law on the one hand insists on promises of permanent employment if the employer anticipates keeping the replacements in preference to returning strikers, but on the other hand forecloses damages suits for the employer's breach of these very promises.\footnote{209}
\end{quote}

\footnote{205. State law claims are preempted under \textit{Machinists} where Congress intended for the conduct at issue to be unregulated because it is among the self-help remedies left to the combatants in a labor dispute. \textit{See Belknap, Inc.}, 463 U.S. at 499.

206. \textit{See id. at 501-02}; \textit{see also Janes, supra note 6, at 147 ("[S]tate regulation of the particular replacement's contractual rights vis-à-vis his employer will probably not obstruct the policies of the federal act").

207. \textit{See Belknap, Inc.}, 463 U.S. at 500-01. One court has observed that "[t]he key factor in \textit{Belknap} was that the causes of action were brought by third parties to the labor dispute i.e., the permanent replacements." \textit{Young v. Caterpillar, Inc.}, 629 N.E.2d 830, 834 (Ill. Ct. App. 1994).

208. \textit{See Belknap, Inc.}, 463 U.S. at 499-500. Indeed, one federal court has asserted that it is precisely because "[a] promise made in the context of a strike exposes the employer to a breach of contract suit if later repudiated to accommodate returning strikers" that the hiring of permanent replacements constitutes an adequate business justification for retaining replacements and declining to reinstate strikers. \textit{Indep. Fed'n of Flight Attendants v. Trans World Airlines, Inc.}, 132 L.R.R.M. (BNA) 2422, 2423 (W.D. Mo. 1989).

209. \textit{Belknap, Inc.}, 463 U.S. at 500 (authorities omitted); \textit{cf. White v. Nat'l Steel Corp.}, 938 F.2d 474, 485 (4th Cir. 1991) ("Indeed, it seems wrongful in an elemental sense for an employer to secure an employee's performance of a contractual bargain and then to escape via preemption any liability for breach of that same contract.").}
Turning next to the question of *Garmon* preemption,\footnote{210} the *Belknap* Court noted that the states can regulate conduct that is of only peripheral concern to the Board, or that is so deeply rooted in local law that courts should not assume Congress intended to preclude the application of state law.\footnote{211} Citing previous cases in which it had found that state law causes of action were not preempted,\footnote{212} the Court indicated that the critical issue was whether the controversy was one over which the Board had exclusive jurisdiction.\footnote{213}

The Court concluded that the facts and issues to be addressed in the state court action were not within the Board’s jurisdiction:

> [W]hether the strike was an unfair labor practice strike and whether the offer to replacements was the kind of offer forbidden during such a dispute were matters for the Board. The focus of these determinations, however, would be on whether the rights of strikers were being infringed. Neither controversy would have anything in common with the question whether [the employer] made misrepresentations to replacements that were actionable under state law. The Board would be concerned with the impact on strikers not with whether the employer deceived replacements.\footnote{214}

Although the Court did not address the merits of the replacement workers’ state law claims,\footnote{215} *Belknap* has significantly bolstered the state law rights of permanent replacement workers.\footnote{216} Indeed, the Court’s holding that the NLRA does not prohibit terminated permanent replacements from pursuing state law breach of contract claims against


211. See *Belknap, Inc.*, 463 U.S. at 509.


213. See *Belknap, Inc.*, 463 U.S. at 509-10. See generally Midwest Motor Express, Inc. v. Int’l Bhd. of Teamsters, Local 120, 512 N.W.2d 881, 887 (Minn. 1994) (“A case that involves an unfair labor practice falls under the exclusive jurisdiction of the NLRB.”).


215. See *Corbett, supra* note 40, at 851 n.203; cf. *Finkin, supra* note 18, at 553 (“The Court merely held the state law of individual employment to be nonpreempted.”).

216. See *Finkin, supra* note 18, at 549. As one federal court applying *Belknap* has stated, it is now clear that “not all [state] laws regulating the replacement of picketing workers are preempted.” Bardane Mfg. Co. v. Jarbola, 724 F. Supp. 336, 342 (M.D. Pa. 1989).}
their former employers has prompted one commentator to observe (with some hyperbole) that individuals asserting such claims should now be "virtually certain of success."

IV. AN EMPLOYER'S POTENTIAL CIVIL LIABILITY TO TERMINATED REPLACEMENTS AFTER BELKNAP

A. Jacobs v. Georgia-Pacific Corp.

Despite the potential significance of Belknap, the case's actual impact on state law breach of contract claims has been somewhat mixed. In Jacobs v. Georgia-Pacific Corp., for example, the employer responded to a strike at one of its plants by "initiat[ing] a campaign to hire replacements for [its] striking workers." The campaign included the use of local radio and newspaper advertisements stating that "the hired applicants would be 'permanent replacements' for the striking [workers]."

The plaintiff was hired after responding to one of these advertisements. The strike was resolved less than a month later.

218. See infra Section VI.
219. Finkin, supra note 18, at 552; cf. James M. Rabbitt, Comment, Reconversion of Unfair-Labor-Practice Strikes to Economic Strikes, 64 GEO. L.J. 1143, 1146 n.20 (1976) ("Presumably, any replacement who had been promised a permanent position and then was discharged to accommodate a returning . . . striker would have a contract remedy against the employer.").
220. See Finkin, supra note 18, at 552 ("Belknap, Inc. v. Hale takes on importance because of a fundamental shift in the state law of individual employment. An assurance of permanence in the sense of not being dismissed except for good cause would increasingly be actionable in contract . . . .")
221. Commenting on the decision's anticipated impact shortly after it was issued, one commentator predicted that "inconsistent state interpretations . . . are likely to result from Belknap." Stromine, supra note 36, at 1230; cf. Belknap, Inc. v. Hale, 463 U.S. 491, 518 (1983) (Blackmun, J., concurring) ("One would not expect that Congress would have left anything so basic as the respective rights and duties of strike replacements and employers to the nonuniform regulation of the States.").
223. Id. at 238.
224. Id.
225. See id.
226. See id.
When the plaintiff and other replacements were discharged to permit the striking workers to return to work, the plaintiff brought suit for breach of contract and fraud. He alleged that the employer had breached its agreement that the replacements would be permanent employees, and fraudulently represented their status.

The trial court granted the employer’s motion for summary judgment and the plaintiff appealed. The Georgia Court of Appeals held that the trial court had properly concluded that the plaintiff was an at-will employee subject to discharge for any reason, notwithstanding the employer’s representation that he would be a permanent replacement. The court noted that, under Georgia law, at least in the absence of a written contract, assurances of permanent employment merely establish employment for an indefinite period, terminable at the will of either party, and can give rise to no cause of action for wrongful termination. That fact required dismissal of the plaintiff’s fraud claim as well as his contract claim.

In contrast to the analysis in Jacobs, several lower courts have applied Belknap to uphold terminated replacement workers’ state law breach of contract claims. As one court has stated, employees who
have entered into valid individual contracts that conflict with subsequent collective bargaining agreements can still bring damage claims against their employers for breach of contract.\textsuperscript{238} Implicit in these cases is the assumption that a promise that replacement workers will not be discharged to make room for returning strikers is “more than a vague promise of ‘permanent’ employment which creates no more than an employment at will.”\textsuperscript{239}

B. Bubbel v. Wien Air Alaska, Inc.

In \textit{Bubbel v. Wien Air Alaska, Inc.}\textsuperscript{240} for example, an airline pilot hired as a permanent strike replacement during a strike brought a breach of contract claim against the airline after being laid off to make room for returning economic strikers.\textsuperscript{241} He based his claim on the airline’s repeated representations that he and the other replacements were permanent employees, and would not lose their jobs if the strike was settled.\textsuperscript{242}

The trial court granted the employer’s motion for summary judgment, holding that any contractual rights that might have arisen as the result of the airline’s representations were superseded by the collective bargaining agreement executed as part of the strike settlement.\textsuperscript{243} Relying primarily on \textit{Belknap},\textsuperscript{244} the Alaska Supreme Court
reversed that ruling and reinstated the plaintiff's claim. The court explained that while an individual employment contract generally must give way to a valid collective bargaining agreement, an action for breach of the individual contract can still be maintained.

On remand, the trial court granted the plaintiff's motion for summary judgment, and the Alaska Supreme Court subsequently affirmed that ruling. The court stated that while employers have the right to hire permanent replacements during an economic strike, they must bear the consequences if they subsequently "change their minds" and terminate those replacements to achieve a strike settlement.

C. Baldwin v. Pirelli Armstrong Tire Corp.

Essentially the same result was reached in Baldwin v. Pirelli Armstrong Tire Corp. The plaintiffs in Baldwin were also replacement workers hired with an understanding that they would not be terminated to make room for returning strikers. They were nevertheless terminated when the employer began reinstating the strikers after the strike was settled.

The plaintiffs subsequently brought suit against the employer for breach of contract, and against the union for intentional interference with contract. The trial court dismissed both claims, holding that the

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245. See id. at 380.
246. See generally J. I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944):
     The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.
249. See id.
251. See Baldwin, 3 S.W.3d at 3, 4-5.
252. See id. at 2, 3.
253. See id. at 2. Tennessee holds that "a contract for permanent employment means nothing more than that the employment is to continue indefinitely subject to the continuing satisfaction of both parties and may be terminated at the will of either party." Savage v. Spur Distrib. Co., 228 S.W.2d 122, 124 (Tenn. Ct. App. 1949). In Baldwin, however, the employer's assurances that the replacements "would not be terminated solely to make room for the returning strikers" went beyond a mere promise of "permanence." Baldwin, 3 S.W.3d at 3, 5.
254. See Baldwin, 3 S.W.3d at 2.
plaintiffs' "individual contracts had been subsumed into the collective bargaining agreement" executed by the employer and the union when the strike was settled.\textsuperscript{255}

The Tennessee Court of Appeals reversed.\textsuperscript{256} It equated the trial court's ruling with a finding that the plaintiffs' breach of contract claim was preempted by the NLRA.\textsuperscript{257} It then noted that a similar argument had been rejected in\textit{Belknap}\textsuperscript{258} on facts remarkably similar to those in\textit{Baldwin}.\textsuperscript{259} Because the plaintiffs' claim was not dependent upon the terms of the collective bargaining agreement,\textsuperscript{260} but instead was based on a contract purportedly entered into at a time when neither the plaintiffs nor the employer were subject to a collective bargaining agreement,\textsuperscript{261} the court held that the plaintiffs had alleged a viable cause of action.\textsuperscript{261}

\textbf{D. Branson v. Greyhound Lines, Inc.}

A comparable result was reached in\textit{Branson v. Greyhound Lines, Inc.},\textsuperscript{262} a case arising out of the widely publicized Greyhound Bus strike.\textsuperscript{263} The plaintiff in\textit{Branson} was a former Greyhound employee who returned to work as a strike replacement.\textsuperscript{264} At the time he returned,
the most recent collective bargaining agreement had expired, and negotiations between the company and the union concerning a new agreement were ongoing.\footnote{265}

In order to encourage experienced bus drivers to cross the picket line and work during the strike,\footnote{266} the company offered replacement workers and returning strikers superseniority\footnote{267} in the form of seniority credit for any past commercial driving experience not only at Greyhound, but also for any other employer.\footnote{268} The union vehemently objected to this decision,\footnote{269} and filed an unfair labor practice charge with the Board challenging the company’s unilateral implementation of this benefit.\footnote{270}

\footnote{265. See Branson, 126 F.3d at 749, 755; see also May, supra note 262, at 865.}

\footnote{266. Finding sufficiently skilled and experienced individuals willing to cross a picket line is one of the difficulties faced by an employer hiring strike replacements. See, e.g., Choctaw Maid Farms, 308 N.L.R.B. 521, 528 (1992) (noting that “more replacements might be necessary to perform the same volume as the number of employees who went on strike”); F. Strauss & Son, Inc., 216 N.L.R.B. 95, 97 (1973) (analyzing a strike in which “[t]he replacements were not as experienced as the strikers,” and thus “additional employees were required to carry on...die operation”); Chemtech Indus., Inc. v. Labor & Indus. Relations Comm’n, 617 S.W.2d 121, 124 (Mo. Ct. App. 1981) (discussing contention that employer “experienced difficulties with the inexperience of replacement workers”). But cf. Carpenters Dist. Council, 221 N.L.R.B. 876, 878 (1975) (Murphy, Chairman, concurring in part and dissenting in part) (describing a strike in which the employer “was able to hire highly skilled and competent replacements”).}

\footnote{267. The term “superseniority” refers to “the practice of granting nonstrikers or strike replacements an artificial seniority.” Frank H. Stewart, Conversion of Strikes: Economic to Unfair Labor Practice: II, 49 VA. L. REV. 1297, 1301 (1963). In essence, an employee granted superseniority “is given credit for longer service with the employer than he actually has.” Id.}

\footnote{268. See Branson, 126 F.3d at 749-50, 754; Greyhound Lines, Inc., 319 N.L.R.B. 554, 568 (1995); see also Zanglein, supra note 262, at 658 (noting that the employees in Branson “would receive credit not only for years of service with Greyhound, but also for driving experience gained while working for other commercial employers”). See generally Erie Resistor Corp., 132 N.L.R.B. 621, 626 (1961) (“It is obvious that, in some instances, an employer may more readily secure replacements if he can offer them superseniority.”), enforcement denied, 303 F.2d 359 (3d Cir. 1962), rev’d, 373 U.S. 221 (1963), enforced on remand sub nom. Int’l Union of Elec. Workers, Local 613 v. NLRB, 328 F.2d 723 (3d Cir. 1964).

\footnote{269. See Branson, 126 F.3d at 750. The leading superseniority case is NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), where “the Supreme Court held that the employer had violated section 8(a) (1) and (3) [of the Act] by offering, during the course of a strike,... additional seniority to those hired as replacements for striking employees.” Great Lakes Carbon Corp. v. NLRB, 360 F.2d 19, 21 (4th Cir. 1965) (characterizing Erie Resistor); see also Greyhound Lines, Inc., 319 N.L.R.B.}
Although the company and the union ultimately reached agreement on a new collective bargaining agreement, they were unable to agree on the superseniority issue, and thus included a provision in the agreement leaving resolution of that issue to the Board.\(^2\) When the Board ultimately concluded that the company's implementation of the superseniority policy was an unfair labor practice,\(^2\) the company established a "buy out" program whereby employees who had been awarded superseniority credit would receive cash payments in exchange for waiving their superseniority rights.\(^3\)

The plaintiff refused to sign a waiver,\(^2\) insisting upon receiving his additional seniority credit rather than the cash buy out.\(^2\) When the employer apparently refused to comply,\(^2\) the plaintiff brought suit for breach of contract based upon its alleged promise of superseniority.\(^7\) The trial court dismissed the plaintiff's claim, holding that it was

\(^{271}\) See Branson, 126 F.3d at 750, 754 n.3; Greyhound Lines, Inc., 319 N.L.R.B. at 558, 561-63, 565; May, supra note 262, at 866; Benedict, supra note 262, at 1102.

\(^{272}\) See Greyhound Lines, Inc., 319 N.L.R.B. at 575 (finding that the policy was "inherently destructive of employee rights," and thus was "violative of Section 8(a) (5), (3), and (1) of the Act"). In fact, the Board apparently "has never found the grant of superseniority to returning strikers or strike replacements lawful." Erie Resistor Corp., 132 N.L.R.B. at 624. However, a few courts prior to Erie Resistor, concluded that "it would be lawful and proper to grant superseniority to replacements" for economic strikers. NLRB v. Lewin-Mathes Co., 285 F.2d 329, 333 (7th Cir. 1960). But cf. Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720, 726 (6th Cir. 1964) ("To grant superseniority to replacements and returning strikers is discrimination in violation of § 8(a) (3) of the Act"). (citations omitted).

\(^{273}\) See Branson, 126 F.3d at 750; Benedict, supra note 262, at 1102; May, supra note 262, at 866.

\(^{274}\) See Branson, 126 F.3d at 750; Benedict, supra note 262, at 1102. See generally O'Connor v. Reader's Digest Ass'n, No. 92 Civ. 7414 (CLB), 1993 U.S. Dist. LEXIS 13156, at *6-*7 (S.D.N.Y. Mar. 10, 1993) (questioning "why... anyone [would] contract voluntarily to relinquish seniority").

\(^{275}\) See Branson, 126 F.3d at 750. Although the amount of the proposed buy out is not set forth in the court's opinion, employees are unlikely to relinquish significant seniority rights absent "substantial consideration." Ireland v. Charlesworth, 98 N.W.2d 224, 232-33 (N.D. 1959). See generally Kennedy v. Chem. Waste Mgmt. Inc., 79 F.3d 49, 50 (7th Cir. 1996) ("Seniority is an important employee benefit because... it provides job protection."); Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 225 n.16 (5th Cir. 1977) ("Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation.").

\(^{276}\) There presumably would have been no basis for a contractual claim if the employer had simply given the plaintiff the option of relinquishing seniority credit in exchange for the buy out payment. Cf. Bockmon v. Mountain States Tel. & Tel., 739 P.2d 887, 888 (Colo. Ct. App. 1987) (describing employee who was given "the option to elect to... relinquish her seniority status... and in exchange receive payments from the employer").

\(^{277}\) See Branson 126 F.3d at 750, 751; Benedict, supra note 262, at 1102-03.
preempted by the NLRA.  The plaintiff then appealed.  

The Fifth Circuit reversed.  Relying primarily on Belknap, the court held that the plaintiff’s breach of contract claim was not preempted under Garmon because it was not based on activity that was either protected or prohibited by the NLRA. The court noted that, as in Belknap, the Board’s focus in enforcing the NLRA was on the impact of the employer’s conduct on the strikers, while “the expectations of replacement employees, who trust that an employer will keep its promises, stem from the different and more traditional source of state contract law.” And also as in Belknap, the court’s inability to compel specific performance of the contract in view of the Board’s abrogation of

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278. See Branson, 126 F.3d at 749, 750; Benedict, supra note 262, at 1103; May, supra note 262, at 866.
279. See Branson, 126 F.3d at 750; May, supra note 262, at 866.
280. See Branson, 126 F.3d at 749, 750 n.1, 758.
281. See id. at 750-54; May, supra note 262, at 866.
283. The court stated: The first prong of Garmon preemption requires us to decide whether [the plaintiff] bases his claim on activity protected by section 7 of the NLRA. Section 7 protects the rights of employees to organize; strike; and collectively bargain. [The plaintiff’s] claim, however, relies on his employer’s alleged breach of contract. Because the employer’s alleged breach of contract does not constitute activity protected by section 7, the first prong of Garmon preemption does not apply.

Branson, 126 F.3d at 751 (internal quotation marks and citations omitted); see also May, supra note 262, at 866 (“Branson’s claim was based on the breach of a contract entered into by the employer, an action not protected under section 7.”).

284. See Branson, 126 F.3d at 753. The court explained that the employer’s alleged breach of its contract with the replacements could not be prohibited by the NLRA if, as the Board had concluded, the contract itself (or, more specifically, the superseniority program on which the contract was based) was prohibited by the NLRA, because “[i]t cannot both be an unfair labor practice to refuse to honor an implemented term and then also be an unfair labor practice to continue to honor that same term.” Id. at 752.

285. See id. at 751; see also Rosner v. Whittlesea Blue Cab Co., 766 P.2d 888, 889 (Nev. 1988) (“In Belknap,… the unfair labor practice issues before the National Labor Relations Board related to rights of the strikers, which had little in common with… the employer’s liability in damages to [the replacements] for breach of contract.”).

286. Branson, 126 F.3d at 752. The court added: “To assert that such replacement workers must bring their claims to the NLRB rather than to an appropriate court, seems to vest this federal administrative body with power over disputes purely private and independent of an unfair labor practice or collective bargaining agreement.” Id.; cf. Jones, supra note 6, at 147 (“If the replacement’s claim against the employer… is engulfed in… preemption, he is relegated to Board proceedings as his only remedy. This circumstance is not an overly attractive result for the replacement.”).
the superseniority program did not preclude an award of damages for the employer’s alleged breach of that contract. Thus, the plaintiff’s breach of contract claim was not preempted by the NLRA, and because there were genuine fact issues concerning the type of seniority credit the plaintiff had been offered and whether the employer had breached that offer, the Court of Appeals remanded the case to the trial court for further proceedings.

The breach of contract claim at issue in Branson was premised upon the employer’s offer of superseniority, rather than on an offer of permanent employment. However, the employer had advertised for permanent replacements, and it unquestionably continued to operate during the strike by hiring such replacements. In addition, the plaintiff in Branson described himself as a “strikebreaker”—a potentially derogatory term often used to describe such replacements. The employer, on the other hand, objected to that characterization of its replacements precisely because a pertinent municipal ordinance defined the term to include only replacements hired for the duration of the strike, and its replacements were hired as permanent employees.

287. See Branson, 126 F.3d at 753. This conclusion had been foreshadowed in Belknap: “[I]t might be easy[y] for an employer to obtain replacements by misstating the . . . fringe benefits that it would provide. But if the employer did so, surely the employees affected could seek protection in the state courts.” Belknap, Inc. v. Hale, 463 U.S. 491, 502 n.7 (1983).

288. See Branson, 126 F.3d at 758 & n.8. However, the court left open the possibility that, on remand, the employer could “use the NLRB order as a defense to the state [breach of] contract claim.” Id. at 754.

289. See id. at 750, 751.

290. In fact, the court specifically distinguished its consideration of “a breach of contract claim based on . . . seniority” with the Belknap Court’s focus on “breach of contract claims against a company which promised . . . permanent employment.” Id. at 751 (parentheses omitted).


293. Branson, 126 F.3d at 756 n.6.


These facts suggest that, if the plaintiff in *Branson* had lost his job as the result of the employer's failure to honor its promise of superseniority, he also could have based his breach of contract claim on the employer's assurances of permanence. In any event, the analysis in *Branson* is clearly instructive here due to the similarity between offers of superseniority and offers of permanent employment. Indeed, the *Branson* court itself suggested that the issue it was addressing was substantively indistinguishable from the one presented in *Belknap*.

**E. Cummings v. Nat’l R.R. Passenger Corp.**

Finally, in *Cummings v. Nat’l R.R. Passenger Corp.*, the Pennsylvania Supreme Court applied *Belknap* in a case arising under the RLA. The plaintiffs in *Cummings*, like those in *Belknap*, accepted

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296. *See Amalgamated Transit Union, Local 1202, 561 N.Y.S.2d at 120; cf. Laredo Coca Cola Bottling Co., 241 N.L.R.B. 167, 177 (1979)* (quoting employer’s assertion that its replacements were “not strikebreakers” but “permanent replacements”).

297. The effect of the superseniority policy was to “provide[] some replacements with greater overall seniority than some strikers,” and the company had agreed with the union that in the event the policy was found to be unlawful, it would recall certain strikers who, in the absence of the policy, would have more seniority than their replacements. *Greyhound Lines Inc.*, 319 N.L.R.B. at 563, 571. This undoubtedly might have required the termination of some of the replacements. *See Branson*, 126 F.3d at 752 (indicating that it was foreseeable that “if... the strikers will return to work... the strike replacements will be out of a job”) (quoting Leveld Wholesale, Inc., 218 N.L.R.B. 1344, 1350 (1975)).

298. *See, e.g., Ware v. Woodward Iron Co.*, 124 So. 2d 84, 87 (Ala. 1960) (discussing an employee who “brought [an] action... for breach of contract based on [his] discharge in violation of his seniority rights”); Finkin, *supra note 18, at 559* (observing that an “agreement with the union... to adhere strictly to seniority, to reinstate the strikers, and to displace [permanent replacements]... should subject the employer to... liability... under *Belknap*”); *cf. Rose v. Great N. Ry. Co.*, 268 F.2d 674, 676 (8th Cir. 1959) (“By the allegation that he had been wrongfully discharged plaintiff... [meant] that the company’s denial of his claim to have seniority... constituted an actionable ‘discharge’ of him...”).

299. *See, e.g., NLRB v. Potlatch Forests, Inc.*, 189 F.2d 82, 86 (9th Cir. 1951) (comparing employer’s superseniority policy with “an explicit promise of permanent tenure” because the purpose of the policy was to “make the places of the replacements as nearly permanent as may be”). *But see Greyhound Lines, Inc.*, 319 N.L.R.B. at 571 (concluding that “superseniority [is] qualitatively different from the right to use permanent replacements”).


positions in reliance on the employer's assurances of permanence. When they were subsequently removed from those positions in accordance with the terms of a collective bargaining agreement, they brought suit against the employer for breach of contract. Noting the factual similarity of the two cases and the comparable purposes of the RLA and the NLRA, the court found no reason to reach a result different from that in Belknap. It therefore reversed the judgment that had been entered in favor of the employer, and reinstated the initial judgment rendered in favor of the plaintiffs.

These cases create an obvious dilemma for employers. Because of the difficulty in hiring strike replacements, an employer may need to convey the impression that their employment will not terminate when the strike ends. Thus, the Board itself has indicated that the employer's
right to replace economic strikers encompasses the right to assure the replacements that their positions will be permanent.\(^3\)

However, any promise of permanent employment may be illusory if, for example, an economic strike is converted into an unfair labor practice strike.\(^3\)\(^1\) In that situation, the Board can disregard private employment agreements between strike replacements and the employer to the extent necessary to obtain reinstatement of the strikers.\(^3\)\(^3\) When that occurs, the employer now faces potential state common law liability to discharged replacements for breach of contract.\(^3\)\(^1\)\(^6\) As one court has stated:

[T]he Belknap decision serves as fair warning that an employer that hires employees to permanently replace striking employees—without qualification and without conditioning the offer of permanency on the terms upon which the employer and the union representing the striking employees ultimately settle the strike and also conditioning permanency on the absence of an NLRB order to reinstate the

outside, to take jobs in [a] strike-bound plant which would necessitate violating the picket line, in the absence of some assurance of job security vis-à-vis striking employees at the time of the discontinuance of the strike.”); Westfall, supra note 46, at 150 (“[I]n order to induce him to take the job, it may be important for a replacement to know that his employment at least has the potential for permanency and will not automatically cease when the strike ends.”).


314. See Proxy Communications, Inc., 290 N.L.R.B. 540, 541-42 (1988) (observing that “the interest of replacements for unfair labor practice strikers... is illusory or ephemeral at best,” because “they must give way to strikers who choose to return”); Westfall, supra note 46, at 144 (“Replacement employees... receive at best only an illusory permanency of employment.”); Estreicher, supra note 34, at 899 (observing that “the promise of ‘permanency’ made to replacements may be illusory where... they may... be ousted by returning strikers if the strike turns out to be an unfair labor practice strike or... ‘bumping’ [the replacements] is the price of reaching a strike settlement with the union”); For an extended academic discussion of this issue, see Janes, supra note 6.

315. See Harvey Mfg., Inc., 309 N.L.R.B. 465, 470 (1992). This authority encompasses the right to require the termination of replacements. See id; Stephenson-Yost Steel, 294 N.L.R.B. 395, 406 (1989), enforced, 904 F.2d 1180 (7th Cir. 1990); Westfall, supra note 46, at 156.

316. This obviously is in contrast to the situation in which individuals who were not assured of permanence—that is, temporary replacements—are discharged to make room for strikers. See Teledyne Indus., Inc., 298 N.L.R.B. 982, 985 (1990) (noting that temporary replacements “have no expectation of continuing employment, so displacement in favor of a striker would not disturb settled expectations”); cf. NLRB v. Remington Rand, Inc., 94 F.2d 862, 871 (2d Cir. 1938) (observing that “most [individuals] taking jobs... made vacant [by a strike] realize from the outset how tenuous is their hold”).
V. **Belknap's Own Suggested Response to the Problem**

In an attempt to minimize the dilemma its holding had created for employers, the Belknap Court indicated that an employer can "condition" its offers to permanent replacements, and thus avoid conflicting obligations to strikers and replacements in the event of a settlement or Board ruling providing for reinstatement. With respect to that issue, the Court stated:

An employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike.

Conditioning offers in such a manner, the Court noted, would minimize the replacements' incentive to assert breach of contract claims. In other words, the employers in Bubbel v. Wien Air Alaska, Baldwin v. Pirelli Armstrong Tire Co., and Branson v. Greyhound Lines, Inc., all of which applied Belknap to uphold such claims, might have avoided potential state law liability if their offers had included the conditional language discussed in Belknap.

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317. Midwest Motor Express, Inc. v. Int'l Bhd. of Teamsters, Local 120, 512 N.W.2d 881, 890 (Minn. 1994).
318. See generally NLRB v. Bingham-Williamette Co., 857 F.2d 661, 664 (9th Cir. 1988) (referring to the employer's "need to hire permanent replacements while, at the same time, protecting itself from liability under Belknap").
319. See Belknap, Inc., 463 U.S. at 503, 505 n.9; see also Midwest Motors Express, Inc., 512 N.W.2d at 890 (noting that "the Supreme Court has declared that a 'permanent' replacement contract may be... conditioned"). One commentator has characterized this observation as a "remarkable feature" of the Court's opinion. Finkin, supra note 18, at 552; see also Stromire, supra note 36, at 1222 ("[T]he [Belknap] Court altered the traditional perception of permanent replacement workers by stating that replacements who employers hire under conditional contracts would satisfy the... permanency requirement.").
321. See id. at 505 n.9.
323. 3 S.W.3d 1 (Tenn. Ct. App. 1999).
325. See supra notes 240-300 and accompanying text.
326. See, e.g., Braun, supra note 43, at 403 ("The Belknap Court suggests that an employer
Not surprisingly, employers have begun conditioning their offers to permanent replacements as suggested in Belknap. Some employers have gone even further, advising “permanent” replacements they can be terminated not only for the reasons specified in Belknap, but at the “will” of the employer—that is, “for any reason consistent with applicable state or federal law.”

This latter development gives rise to two related but distinct legal problems for an employer facing an economic strike: (1) whether characterizing strike replacements as “permanent” abrogates their status as at-will employees, thus giving rise to potential state law claims if they are terminated to make room for returning strikers, and (2) whether characterizing replacements as at-will employees precludes a finding that they are permanent, thus obligating the employer to condition permanent offers of employment to the replacements, and asserts that this would insulate the employer from liability to the replacements . . . .”); Corbett, supra note 40, at 852 n.209 (suggesting that the result in Bubbel would have been different if the employer had used “the ‘conditionally permanent’ language recommended in Belknap”).

327. See Iowa Mold Tooling Co. v. Teamsters Local Union No. 828, 847 F. Supp. 125, 127 n.1 (S.D. Iowa 1993) (observing that “employers hiring ‘permanent’ replacement workers sometimes send letters to the replacements alerting them they may nevertheless be displaced if the NLRB, a court or arbitrator orders the company to reinstate strikers”), aff’d, 16 F.3d 311 (8th Cir. 1994); Westfall, supra note 46, at 150 (observing that “the well-advised employer [will] follow[] the formulation suggested . . . in Belknap v. Hale and make[] the offer of permanency expressly subject to the terms of a strike settlement as well as a Board determination that strikers have an unqualified right to reinstatement as unfair labor practice strikers”) (footnotes omitted).

328. See generally Midwest Motor Express, Inc. v. Int’l Bhd. of Teamsters, Local 120, 494 N.W.2d 895, 899 (Minn. Ct. App. 1993) (noting that “actual offers made by employers to replacement workers in labor dispute situations will be of many different kinds”), rev’d, 512 N.W.2d 881 (Minn. 1994).

329. Target Rock Corp. 324 N.L.R.B. 373, 374 (1997) (emphasis added), enforced, 172 F.3d 921 (D.C. Cir. 1998); see also More Co., Nos. 4-CA-24574-1, 4-CA-24574-2 & 4-CA-2923, 1997 NLRB LEXIS 570, at *41 (July 16, 1997) (discussing employer who required each of its replacements to “sign a confirmation that he was an ‘at will’ employee who could be terminated ‘at any time with or without cause and without prior notice’”).

330. See, e.g., Hindley v. Settel, Inc., 672 F. Supp. 1093, 1095 (N.D. Ill. 1987) (discussing the ability of employees to “overcome the presumption of an employment-at-will by alleging a promise of permanent employment and valid consideration”); cf. Bussard v. Coll. of St. Thomas, Inc., 200 N.W.2d 155, 161 (Minn. 1972) (describing “the somewhat arbitrary rule of most jurisdictions that a contract for ‘permanent employment’ will be construed to be terminable at the will of either party except in compelling circumstances” as “arguably too mechanical an answer to the more basic issue of ascertaining the real intent of the parties”).

331. See, e.g., Verway v. Blinco Packing Co., 698 P.2d 377, 379 (Idaho Ct. App. 1985) (finding “sufficient [evidence] to justify sending the case to the jury” where the employer “advertised for permanent employees” and the replacements testified that they were “seeking permanent employment and would not have accepted work with [the employer] absent such assurances”); Finkin, supra note 18, at 552 (observing that “[a]n assurance of permanence . . . would increasingly be actionable in contract”).

332. See, e.g., Target Rock Corp., 324 N.L.R.B. at 374 n.9 (stating that “offers of permanent
reinstate the strikers at the conclusion of the strike.\textsuperscript{333}

VI. LOWER COURT REACTIONS TO \textit{BELKNAP}

A. Tobin v. Ravenswood Aluminum Corp.

The \textit{Belknap} Court’s analysis of the impact of conditioning offers to replacements has generally proven to be correct insofar as the replacements’ common law rights are concerned.\textsuperscript{334} In \textit{Tobin v. Ravenswood Aluminum Corp.},\textsuperscript{335} for example, the court implicitly concluded that by using “\textit{Belknap Agreements}”\textsuperscript{336} and other appropriate disclaimer language,\textsuperscript{337} an employer can hire permanent strike replacements on an at-will basis.\textsuperscript{338}

Each of the replacement workers in \textit{Tobin} had signed a \textit{Belknap} Agreement,\textsuperscript{339} as well as a separate employment application that stated:

\begin{quote}
employment [do not include offers advising that they could be fired at . . . will"
\end{quote}

(\textit{internal quotation marks omitted); cf. Giddings & Lewis, Inc. v. NLRB, 675 F.2d 926, 930 (7th Cir. 1982) (observing that replacement workers who were “guarantee[d] . . . employment only until a layoff occurred” could “hardly be called ‘permanent’”). \textit{See generally} Sepanske v. Bendix Corp., 384 N.W.2d 54, 59 (Mich. Ct. App. 1985) (stating that an individual with a contractual right to an “at-will position” has “no actionable expectation that [the position] would be permanent”).

333. Where replacements are merely temporary, “economic strikers’ reinstatement rights are identical to those of unfair labor practice strikers.” \textit{Harvey Mfg., Inc.}, 309 N.L.R.B. 465, 469 (1992). Thus, “even economic strikers are entitled to reclaim their jobs . . . if their jobs . . . are occupied only by temporary replacements.” \textit{Teledyne Indus., Inc.}, 298 N.L.R.B. 982, 985 (1990), \textit{enforced}, 938 F.2d 627 (6th Cir. 1991); \textit{see also} Daniel Finley Allen & Co., 303 N.L.R.B. 846, 869 (1991) (“\textit{The hiring of temporary replacements does not excuse the employer’s refusal to reinstate economic strikers who make an unconditional offer to return to work.”.

334. \textit{See Iowa Mold Tooling Co. v. Teamsters Local Union No. 828}, 847 F. Supp. 125, 127 n.1 (S.D. Iowa 1993) (indicating that conditional offers of permanent employment to replacements may “protect the company from breach of contract or misrepresentation claims that may be filed in the event the ‘permanent’ replacements are laid off”), \textit{aff’d}, 16 F.3d 311 (8th Cir. 1994); \textit{Note, supra note 33}, at 675 (observing that “courts have been willing to enforce so-called ‘\textit{Belknap} waivers’”


336. The term derives from the \textit{Belknap} Court’s reference to conditional offers of permanence. \textit{See id. at 266 n.2; see also} \textit{Corbett, supra note 40}, at 854 n.217 (stating that the agreements used by the employer in \textit{Tobin} were “unmistakably based on the language suggested by the Supreme Court in \textit{Belknap}”).

337. \textit{See Tobin, 838 F. Supp. at 266; see also} \textit{Corbett, supra note 40}, at 857 n.232 (observing that “employers sometimes use variations” of the disclaimer language suggested in \textit{Belknap}).

338. \textit{See Tobin, 838 F. Supp. at 270-71. Interestingly, the labor dispute at issue in \textit{Tobin} has been described as “perhaps the quintessential \textit{Belknap} strike-and-replacement scenario.” \textit{Corbett, supra note 40}, at 854.

339. The agreements executed in \textit{Tobin} stated:

\begin{quote}
I hereby acknowledge that Ravenswood Aluminum Corporation made me a permanent employee effective immediately . . . . I understand that my permanent employee status is
\end{quote}
"I affirm that no oral representation has been made to me regarding the length of employment with Ravenswood Aluminum Corporation and that I understand that employment is not for a definite period of time and may be terminated with or without cause at any time." Although the court was not directly faced with the issue, it indicated that, absent any contrary representations by the employer, these agreements would have rendered the replacements at-will employees.\textsuperscript{431} 

The employer in \textit{Tobin} had made other representations to the replacement workers\textsuperscript{342} that may have altered the presumption of at-will employment.\textsuperscript{343} Nevertheless, the court’s analysis suggests that employers should be more concerned with their potential liability to strikers under the NLRA than with their potential state law contractual liability to terminated replacements under \textit{Belknap}.

\textbf{B. Walker v. Teledyne Cont’l Motors} 

A similar result was reached in \textit{Walker v. Teledyne Cont’l Motors}.\textsuperscript{345} The employer in that case hired replacements during a

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\textsuperscript{342} See \textit{Corbett}, supra note 40, at 855-56 (indicating that "[t]he lesson from the ... Ravenswood dispute regarding \textit{Belknap} ... is that employers probably are more concerned with potential back pay liability under an NLRB order than they are with potential civil liability to discharged permanent replacements") (footnote omitted); cf. \textit{William D. Turner, Restoring Balance to Collective Bargaining: Prohibiting Discrimination Against Economic Strikers}, 96 W. Va. L. REV. 685, 699 n.54 (1994) ("Competent management attorneys easily can advise employers how to avoid potential liability to replacement workers under \textit{Belknap} ... ").

Each of the replacements was required to sign an agreement stating, in pertinent part, as follows:

I understand that [the employer], in exercising its right to continue operations during the strike in progress, has offered me a job as a permanent strike replacement within the meaning of federal labor law. I understand that my employment is at will and that I may quit or may be terminated at any time for any reason... I understand that no manager, supervisor, employee or other company representative has any authority to promise or has promised employment for a particular length of time, or has authority to make any other promises or representations about future employment with the company.347

The employer assumed the strike was an economic one, and thus initially took the position that the striking employees would not be returning and the replacement workers would become part of its permanent workforce.348 However, the Board’s General Counsel subsequently concluded that the strike was an unfair labor practice strike,349 and the Board notified the employer that if a strike settlement was not reached, a complaint would be issued.350

The employer and the union ultimately did reach an agreement, at which point the replacement workers were discharged.351 Some of the replacements then brought suit against the employer, alleging that their discharges breached a unilateral contract of permanent employment between them and the employer.352

The employer moved for summary judgment,353 claiming that it had

346. See id. at *2-*3.
347. Id. at *3.
348. See id. at *3-*4; cf. C.F. Indus., Inc., Nos. 18-CA-13017, 18-CA-13070 & 18-CA-13113, 1995 NLRB LEXIS 573, at *67 (June 1, 1995) (considering employer’s position that its replacements “would be considered temporary replacements if it was determined the strikers were engaging in an unfair labor practice strike, though it was [the employer’s] position the strikers were engaged in an economic strike and, if... that position was correct, their replacements would be considered permanent replacements”).
350. See id. at *5 n.2. In any ensuing proceedings, the General Counsel would have had the burden of proving that the strike was an unfair labor practice strike. See N. Am. Coal Corp., 289 N.L.R.B. 788, 792 n.16 (1988).
352. See id. at *6. In Alabama, where Walker arose, “an offer expressly stating that the employment is ‘permanent’... will support a contract for the same.” Chastain v. Kelly-Springfield Tire Co., 733 F.2d 1479, 1481 (11th Cir. 1984); see also Bates v. Jim Walter Res., Inc., 418 So. 2d 903, 906 (Ala. 1982) (observing that “if there is a promise of permanent employment... the relinquishment of prior employment may constitute sufficient consideration to bind the promisor”).
been “blind-sided” by the General Counsel’s ruling, and had no choice but to terminate the replacements to make room for the returning strikers. The specific issue addressed by the court was whether the agreement signed by the replacements was sufficient to shield the employer from liability. The court concluded that it was.

Citing Belknap, the Walker court cautioned that an employer cannot give assurances of permanent employment to replacement workers and expect to avoid a conflict between its duties to those employees and its legal obligations to its striking workers. However, the court also noted that the employer had specifically drafted the agreement to satisfy Belknap, where the Court had indicated that an employer can condition its employment of replacements in order to avoid such a conflict.

In particular, the agreement in Walker made it clear that the replacements’ employment was at-will, and that they could thus be discharged for any reason. Even absent this language, however, the agreement’s reference to permanent employment “within the meaning of federal labor law” established an effective limitation on what the replacements otherwise might have viewed as an offer of permanent employment.

354. Id. at *6. The plaintiffs, by contrast, argued that the employer “should have been aware of such a possibility and taken steps to clearly apprise the replacement employees of it upon entering on duty.” Id.

355. See id. at *7; see also id. at *3 (referring to the agreement’s language as the “crux” of the case).

356. See id. at *7.

357. See id. The Belknap Court had found unacceptable “the notion that the federal law on the one hand insists on promises of permanent employment if the employer anticipates keeping the replacements in preference to returning strikers, but on the other hand forecloses damage suits for the employer’s breach of these very promises.” Belknap, Inc. v. Hale, 463 U.S. 491, 500 (1983).


359. See Walker, 1991 U.S. Dist. LEXIS 18089, at *7; see also NLRB v. Bingham-Willamette Co., 857 F.2d 661, 665 (9th Cir. 1988) (indicating that employers can avoid liability to replacements under Belknap “by making the permanent offers [conditional]”).

360. Walker, 1991 U.S. Dist. LEXIS 18089, at *7-8. The Alabama Supreme Court has held that where an employee has acknowledged “that employment was ‘at will,’” no contract of permanent employment is created. Abney v. Baptist Med. Ctrs., 597 So. 2d 682, 683 (Ala. 1992). Indeed, the employer’s intent to commit to such a “weighty obligation” must have been expressed in “clear and unequivocal terms” before a court will find that a contract for permanent employment exists under Alabama law. Chastain v. Kelly-Springfield Tire Co., 733 F.2d 1479, 1484 (11th Cir. 1984).

In this regard, the court noted that many contingencies can arise that would require the reinstatement of striking workers and the termination of their replacements. Because an employer cannot reasonably be expected to anticipate every such contingency, the employer’s characterization of the replacements’ tenure was a practical way of addressing the problem. In short, the employer had included unambiguous language preserving the at-will status of its replacement workers, and thus was entitled to judgment on the terminated replacements’ breach of contract claim.

VII. NLRB REACTIONS TO BELKNAP

A. Some Pre-Belknap Historical Perspective: Cyr Bottle Gas Co.

The Board apparently does not dispute the judiciary’s conclusion that Belknap permits employers to avoid state law contractual liability to terminated replacements by conditioning their offers of permanent employment. Nor would permitting employers to hire permanent

N.L.R.B. 1286, 1291 (1993) (rejecting the contention that “under Belknap v. Hale, an employer needs merely to hire replacements on an other than temporary basis within the meaning of the National Labor Relations Act”), aff’d in part and rev’d in part, 53 F.3d 385 (D.C. Cir. 1995).

362. See Walker, 1991 U.S. Dist. LEXIS 18089, at *8; see also Belknap, Inc., 463 U.S. at 515 n.2 (Blackmun, J., concurring) (referring to “all the contingencies that might affect [the] tenure” of replacements) (quoting Board’s amicus brief); Estreicher, supra note 34, at 906 (observing that the “continued employment [of replacements] depends upon a host of contingent factors”).

363. See Walker, 1991 U.S. Dist. LEXIS 18089, at *8; cf. Midwest Motor Express, Inc., 494 N.W.2d at 899 (“[T]he creation of a contract in an actual striker replacement situation is very much dependent upon the facts and circumstances which give rise to that contract.”).

364. See Bingham-Willamette, 857 F.2d at 665 (stating that “the way to avoid liability under Belknap is to be frank with the replacements”); cf. Bardane Mfg. Co. v. Jarbola, 724 F. Supp. 336, 342 (M.D. Pa. 1989) (advocating “honesty and frankness from a potential employer” in order to assure that a potential strike replacement has “full knowledge of the situation into which he can potentially place himself”).

365. See Walker, 1991 U.S. Dist. LEXIS 18089, at *9-*10. But cf. Estreicher, supra note 34, at 907 (“It is not sufficient to say . . . that all that is required is that an employer fairly and accurately represent the tenuous nature of a replacement’s job.”).

366. See Hansen Bros. Enters., 279 N.L.R.B. 741, 741 n.6 (1986) (“Belknap . . . holds that to avoid civil liability to the replacements they be replaced pursuant to a Board order or a settlement agreement providing for reinstatement of the strikers, the employer may promise the replacements permanent employment subject to such conditions subsequent.”), enforced, 812 F.2d 1443 (D.C. Cir. 1987); Bingham Willamette, 282 N.L.R.B. 1192, 1197 (1987), enforced, 857 F.2d 661 (9th Cir. 1988):

In Belknap v. Hale, the Supreme Court held that an employer may be sued for breach of contract in state court by striker replacements if, having offered them permanent employment, they are later displaced by reinstated strikers pursuant to a settlement with
replacements on an at-will basis seem to run afoul of federal law, because at-will employment is not prohibited by the NLRA. 367 Indeed, the Board itself has described as "so thoroughly established as to have become a truism" the proposition that employers can discharge their employees for any reason or even for no reason, as long as the discharge is not premised upon the employee's union activities. 368

Nevertheless, the Board often disagrees with the courts' interpretation of the NLRA, 369 presumably because the Board, rather than the union or a Board unfair labor practice order. The Court held that an employer could protect itself from such suits by promising permanent employment subject to these contingencies . . . .

367. See, e.g., NLRB v. Union Pac. Stages, Inc., 99 F.2d 153, 177 (9th Cir. 1938) (stating that the NLRA "did not deprive the employer of the right to . . . dismiss his employees for any cause except where the employee was actually discriminated against because of his union activities or affiliation"); Coastal Elec. Coop., Inc., 311 N.L.R.B. 1126, 1127 (1993) (holding that employer's "maintenance of an employment-at-will policy" was not "inherently unlawful"); San-Tul Hotel Co., 198 N.L.R.B. 462, 465 (1972) ("[T]he Act does not prohibit discharge without just cause . . . ."); Fruitland Mut. Water Co., No. 19-CA-22291, 1992 NLRB GCM LEXIS 55, at *2 (Oct. 30, 1992) (concluding that "an employer does not violate the Act . . . by attempting to [preserve] its right to terminate employees at will"). But cf. Massillon Hosp. Ass'n, 282 N.L.R.B. 675, 676 (1987) (holding that a "terminable-at-will contract" was "inconsistent with the basic policy of the Act," because "the primary objective of collective bargaining . . . is to stabilize labor relations for periods of reasonable duration").

368. San-Tul Hotel Co., 198 N.L.R.B. at 465; see also NLRB v. M & B Headwear Co., 349 F.2d 170, 173 (4th Cir. 1965) ("An employer may dismiss an employee for any reason [it] chooses except the employee's union activity."); NLRB v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956) ("Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which [the Act] forbids."); Tara Corp., Inc., 273 N.L.R.B. 221, 222 n.8 (1984) (quoting McGahey with approval).

369. See Ithaca Coll. v. NLRB, 623 F.2d 224, 228 (2d Cir. 1980) (discussing the Board's "consistent practice of refusing to follow the law of the circuit unless it coincides with the Board's views"); Fla. Steel Corp., 220 N.L.R.B. 260, 266 n.5 (1975) (noting that "the Board has frequently emphasized" that it is "not bound by [a] circuit's decision"). Moreover, the Board takes the position that its administrative law judges (formerly known as trial examiners, see Avco Corp., 199 N.L.R.B. 505, 505 n.1 (1972)) are "required to follow Board cases where they are inconsistent with those of various circuit courts." Aqua-Chem, Inc., 288 N.L.R.B. 1108, 1120 n.2 (1988). The Board has explained its view in the following terms:

It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals . . . . But it is not for a Trial Examiner to speculate as to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the Trial Examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent will a uniform and orderly administration of . . . the National Labor Relations Act be achieved.

the courts, is generally deemed to be the “expert” in this field. Thus, it is not clear that the Board would find that replacements offered conditional employment are permanent employees so as to relieve the employer of its obligation to reinstate strikers at the conclusion of an economic strike. That is true despite the clear indication in Belknap that conditional employment offers do not preclude a finding of permanence.

Indeed, the Board has stated that in order for replacement workers to be considered permanent, the hiring offer must indicate that their positions would be permanent “and not merely a temporary expedient subject to cancellation if the employer so chooses.” In Cyr Bottle Gas Co., for example, employees commenced an economic strike after indicating they would return to work when the employer set a date for negotiations with their collective bargaining representative. When the employer subsequently set a date for negotiations, the striking

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370. Oshman's Sporting Goods, Inc. v. NLRB, 586 F.2d 699, 702 (9th Cir. 1978); see also McNealy v. Caterpillar, Inc., 139 F.3d 1113, 1123 (7th Cir. 1998) (observing that “the Board has special expertise in the interpretation and application of the NLRA”); Macy's Mo.-Kan. Div. v. NLRB, 389 F.2d 835, 846 (8th Cir. 1968) (referring to the Board's “expertise and experience in handling labor-management relations”). But see Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979) (observing that “the Board is not... equal to [a] court in matters of statutory interpretation”).

371. The Board’s authority to disregard judicial precedent is debatable. See Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 894 (D.C. Cir. 1978) (“While the Board may change its mind it cannot change the statutory and decisional law as fixed by court decisions following the express mandate of Congress. The Board’s failure... to follow, not its own vacillating decisions, but the decisions of the federal courts cannot be condoned.”); Labor Servs., Inc., 274 N.L.R.B. 479, 484 (1985) (“Circuit courts have repeatedly admonished the Board for continuing to issue decisions contrary to the court’s decision rendered previously on the same point.”). For commentary on the issue, see Scott Kafker, Nonacquiescence by the NLRB: Combat Versus Collaboration, 3 LAB. LAW. 137 (1987); and Rebecca Hamer White, Time for a New Approach: Why the Judiciary Should Disregard the “Law of the Circuit” When Confronting Nonacquiescence by the National Labor Relations Board, 69 N.C. L. REV. 639 (1991).

372. See Target Rock Corp., 324 N.L.R.B. 373, 382 (1997) (asserting that Belknap “was a state misrepresentation and breach of contract action” involving “only civil liability”), enforced, 172 F.3d 921 (D.C. Cir. 1998); Braun, supra note 43, at 400 (“It is... uncertain whether the Board will be willing to find that replacements offered employment conditionally are ‘permanent’ replacements, so as to abrogate an employer’s duty to reinstate economic strikers should they offer to return to work.”).


375. 204 N.L.R.B. 527 (1973), enforced, 497 F.2d 900 (6th Cir. 1974).

376. See id. at 527.
employees gave notice of their desire to be reinstated. The employer responded by informing them that they had been permanently replaced.

The employees' union then filed an unfair labor practice charge against the employer. The union contended that the striking employees had not been permanently replaced, and that the employer therefore had violated section 8(a) (1) and (3) of the Act by refusing to reinstate striking workers who had made an unconditional offer to return to work. The Board's regional director subsequently issued a complaint, and the matter was assigned to an administrative law judge who characterized the relevant issue as whether the employer had hired permanent replacements prior to receiving the strikers' unconditional offer to return to work.

The General Counsel argued that at least some of the replacements were not hired on a permanent basis because the employer had indicated they would be subject to discharge if the Board found that the employer should take the strikers back. The administrative law judge concluded that, given the employer's prior strike history, it was only being fair to the replacements by informing them that their tenure depended on whether it was ordered to replace them. Qualifying the permanence of their jobs in this manner, the judge concluded, did not prevent the replacements from being characterized as permanent within the meaning of the Act.

The General Counsel filed exceptions to the administrative law

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377. See id.
378. See id.
379. See id. at 530.
381. See Cyr Bottle Gas Co., 204 N.L.R.B. at 530.
382. Unfair labor practice hearings under the NLRA are held before administrative law judges, whose decisions are subject to review by the Board. 29 C.F.R. §§ 102.15, 102.16, 102.34, 102.45(a) & 102.48(b) (1998). The Board's decisions are, in turn, subject to limited federal judicial review. 29 U.S.C. § 160(f) (1994).
383. See Cyr Bottle Gas Co., 204 N.L.R.B. at 530. Once strikers offer to return to work, their replacements' status as either temporary or permanent effectively becomes fixed. See J.M. Sahlein Music Co., 299 N.L.R.B. 842, 842 n.2 (1990) ("[I]t is the status of... the striker replacements at the time the Union made its unconditional offer to return to work that is determinative of the issue of whether the striking employees had a right to immediate reinstatement.").
384. See Cyr Bottle Gas Co., 204 N.L.R.B. at 533.
385. A prior strike had resulted in a Board decision and subsequent settlement that provided for the return of striking employees. See id. at 530.
386. See id. at 533 ("With the background of the prior strike, charges, decision, and settlement, it seems that [the employer] was being fair to the replacements by informing them of that possibility and qualifying the permanence of their jobs in that manner.").
judge’s decision, again arguing that the replacement workers had been hired on a temporary basis. The Board disagreed with the judge’s analysis of the employer’s statement that the replacements could be discharged if the Board ordered the strikers to be reinstated. It concluded that this statement, while perhaps indeed reflecting a genuine attempt to deal fairly with the replacements, was hardly an assurance that their jobs would be permanent. On the contrary, the warning established that the employer was not offering permanent employment to the replacements. The Board therefore concluded that the employer had violated the Act by failing to reinstate the striking employees upon receipt of their unconditional request for reinstatement.

B. The NLRB’s Initial Post-Belknap Decisions


In Hansen Bros. Enters., the first significant post-Belknap Board decision discussing the issue, Chairman Donald Dotson asserted that the Belknap Court had rejected the argument that making the employment of replacement workers subject to a strike settlement or Board order requiring that they be displaced by returning strikers would make them temporary rather than permanent replacements. Although this appears to be an accurate reading of Belknap, the majority in Hansen disagreed with the chairman’s interpretation:

Contrary to our dissenting colleague, we do not read the Supreme Court’s decision in Belknap... as converting such vague statements... into an offer of permanent employment for the purposes

388. The Board’s rules permit any party to an unfair labor practice hearing to file exceptions to the administrative law judge’s decision. 29 C.F.R. § 102.46(a) (1999).
389. See Cyr Bottle Gas Co., 204 N.L.R.B. at 527.
390. See id.
391. See id.
392. See id.
393. See id. at 528.
395. See id. at 743 (Chairman Dotson, dissenting).
396. See Belknap, Inc. v. Hale, 463 U.S. 491, 503 (1983) (“[P]romising permanent employment, subject only to settlement with [the] union and to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee...”). But see Braun, supra note 43, at 400 n.138 (“The Supreme Court in Belknap only suggested the offering of conditionally permanent employment to replacements...”).
of determining strikers’ reinstatement rights. Belknap does not hold that an employer need no longer promise replacements permanent employment to render them permanent; it holds that to avoid civil liability to the replacements should they be replaced pursuant to a Board order or a settlement agreement providing for reinstatement of the strikers, the employer may promise the replacements permanent employment subject to such conditions subsequent.397

2. Concrete Pipe & Prods. Corp.

In Concrete Pipe & Prods. Corp.,398 the Board appeared to retreat from the view expressed in Hansen Bros. Enters.399 In Concrete Pipe, the Board rejected the argument that replacement workers had not been offered permanent positions because they had been told their employment would be permanent unless the strikers were reinstated as part of a strike settlement.400 The Board concluded that the existence of this contingency did not make the workers temporary rather than permanent, and distinguished Hansen Bros. on the ground that the employer in that case had never informed its replacements they were permanent.401

Despite this indication that the use of Belknap agreements does not preclude a finding of permanent employment,402 the result may be otherwise when the employer goes beyond the use of a typical “Belknap agreement” and attempts to establish at-will employment relationships

397. Hansen Bros. Enters., 279 N.L.R.B. at 741 n.6 (emphasis added). In his dissenting opinion in Belknap, Justice Brennan also suggested that disclosing to prospective replacements the possibility that the employer might be ordered to reinstate the strikers and terminate the replacements "might have the... effect of rendering the replacements temporary under federal law." Belknap, 463 U.S. at 537-38 (Brennan, J., dissenting).
401. See id.; see also Karmazin Prods. Corp., No. 7-CA-27767, 1988 NLRB GCM LEXIS 12, at *6 (Dec. 23, 1988) (noting that the employer in Hansen Bros. "never told the replacements they were permanent"). See generally Gibson Greetings, Inc., 310 N.L.R.B. 1286, 1291 (1993) (observing that “Belknap does not hold that an employer need no longer promise replacements permanent employment to render them permanent”), aff’d in part and rev’d in part, 53 F.3d 385 (D.C. Cir. 1995).
402. But see Bingham Willamette, 282 N.L.R.B. 1192, 1197 (1987) (indicating that an offer of permanent employment that advised replacements they could “later [be] displaced by reinstated strikers pursuant to a settlement with the union or a Board unfair labor practice order” makes the replacements “temporary rather than permanent”), enforced, 857 F.2d 661 (9th Cir. 1988).
with its replacement workers. Indeed, there is considerable doubt that, for purposes of the NLRA, individuals hired on an at-will basis would be considered permanent replacements. Some indication of the Board's view of this issue can be drawn from its treatment of replacements hired on a probationary basis, because probationary employment is often equated with at-will employment.

C. Cases Involving Probationary Employment

I. Kansas Milling Co.

In Kansas Milling Co., the Board found that strike replacements who were offered permanent employment, but required to complete a thirty-day probationary period, were permanent replacements even if the probationary period had not expired when the strikers offered to return to work. The Board explained:

When hired [the replacements] were assured that they would retain their jobs not for a period of limited duration but indefinitely, provided

403. See generally H. & F. Binch Co. Plant of the Native Laces and Textile Div. of Indian Head, Inc. v. NLRB, 456 F.2d 357, 362 (2d Cir. 1972) (observing that the hiring of replacement workers is "almost always oral and at will"); Janes, supra note 6, at 148 (asserting that contracts of permanent employment involving replacement workers "will more than likely arise from a mere oral understanding between the parties" that "usually remains terminable at will by either party").

404. See generally Anderson, supra note 24, at 322 ("The recruitment, employment, and possible dismissal of strike replacements are currently accompanied by a growing uncertainty as a result of a heightened awareness . . . of common law protection in certain circumstances from unjust discharge.").

405. Employers frequently subject even their "permanent" strike replacements to an initial probationary period "to determine if they [can] do the job." Dino & Sons Realty Corp., No. 2-CA-29306, 1997 NLRB LEXIS 1009, at *13 (Dec. 31, 1997). See generally G & H Prods., Inc., 261 N.L.R.B. 298, 304 (1982) ("The purpose of a probationary period is to determine the fitness and aptitude of an individual to become a permanent employee.").

406. See Koslandich v. Survival Tech., Inc., 997 F.2d 431, 432 (8th Cir. 1993) (observing that probationary employees are "clearly at-will employees"); Moe v. E. Air Lines, Inc., 246 F.2d 215, 219 (5th Cir. 1957) ("In effect, the employment relationship during [a] probationary period is an employment at will, or so long as is mutually agreeable to both of the parties."); Coleman v. Special Sch. Dist. No. 1, 959 F. Supp. 1112, 1119 (D. Minn. 1997) (stating that the "common meaning of 'probationary' . . . usually denotes an employment at-will status"); cf. Don Lee Distrib., Inc., 322 N.L.R.B. 470, 494 (1996) (considering a probationary clause that "permitted termination without cause"); Anderson, Clayton & Co., Foods Div., 120 N.L.R.B. 1208, 1214 (1958) (discussing a probation period in which the employer "was free to discharge . . . an employee without recourse on his part").


408. See id. at 225-26.
only they proved themselves qualified. True, the ultimate determination of whether they were to be retained on a temporary or permanent basis was deferred. But when the qualifying condition was met with the passage of 30 days' employment, it established their status ab initio as that of permanent replacements for the striking employees whom they displaced.499

2. Liston Brick of Corona, Inc.

There are numerous other Board decisions reaching similar results.410 For example, in one post-Belknap decision, Liston Brick of Corona, Inc.,411 the Board held that individuals hired on the condition they demonstrate their ability to perform could properly be considered permanent employees.412 Citing Kansas Milling, the Board reasoned that the imposition of such a condition is analogous to establishing an initial probationary period of employment, and affirmed that the imposition of a probationary period does not render employment temporary.413

D. The NLRB’s Recent Discussions of the Belknap Issue


In contrast to the holdings in Kansas Milling and its progeny, the Board has held that employees who do not complete their probationary periods are only temporary employees, and therefore cannot be considered permanent strike replacements.414 Because the “probationary” status of genuine at-will employees never ends,415 this analysis suggests that individuals hired on an at-will basis may only be temporary

409. See id. at 226.
412. See id. at 1197.
413. See id.
415. See News Printing Co. v. Roundy, 597 A.2d 662, 665 (Pa. Super. Ct. 1991) (indicating that an at-will employee is “on probation indefinitely from the day...he [is] hired”); Norris v. Filson Care Home Ltd., 115 Lab. Cas. (CCH) ¶ 56,244, at 79,118 (Ky. Ct. App. 1990) (observing that “there is no need to describe a ‘probationary’ period in a true employment at-will relationship as the relationship may be severed at any time in any event”).
replacements for purposes of the NLRA.\footnote{See, e.g., Gibson Greetings, Inc., Nos. 9-CA-26706, 9-CA-27660 & 9-CA-26875, 1996 NLRB LEXIS 492, at *5 (Aug. 2, 1996) (indicating that a replacement's position "was temporary . . . pending duration of [the] probationary period"); cf. Cyr Bottle Gas Co., 204 N.L.R.B. 527, 527, 533 (1973) (holding that replacements who were told their tenure depended upon "how well they performed" were "[i]n essence . . . subject to [an indefinite] probationary period," and thus had been hired "on a temporary basis"), enforced, 497 F.2d 900 (6th Cir. 1974).}

The Board's General Counsel nevertheless reached a different conclusion in Kannazin Prods. Corp.\footnote{No. 7-CA-27767, 1988 NLRB GCM LEXIS 12 (Dec. 23, 1988).} The General Counsel noted that an employer's use of at-will language when hiring strike replacements is consistent with the Belknap principle that an employer can condition its offers of permanent employment to avoid state law liability in the event it subsequently terminates the replacements and reinstates strikers.\footnote{See id. at *8.}

The language at issue was contained in the replacements' employment application, which stated:

I recognize that this application is not an offer for a contract of employment. I further recognize and agree that if I am employed by Karmazin Products Corporation, I am employed as a strike replacement and that such employment will not result in a contract for employment and that the company may terminate my employment with or without notice and [with] or without cause at any time . . . I further recognize that nothing in any documents published by the company shall in any way modify the above terms and that these terms cannot be modified in any way by any oral or written representations made by anyone employed by the company, except by a written document signed by the president of Karmazin Products Corporation.\footnote{Id. at *1-*2.}

The General Counsel concluded that this language did not preclude the existence of a mutual understanding between the employer and the replacements that the replacements' employment was to be permanent.\footnote{See id. But cf. NLRB v. Augusta Bakery Corp., 957 F.2d 1467, 1474 (7th Cir. 1992) (declining to "make the inference that replacement employees hired during an economic strike are permanent absent evidence that they were told they were merely temporary").} The General Counsel noted that the application referred to the applicants as potential strike replacements, and there was nothing in it suggesting that they would only be temporary employees.\footnote{See id. at *7.} In the General Counsel's opinion, the mere fact that the replacements were employed at will, and thus could be terminated without notice or cause, was not
inconsistent with permanent employment status\(^{422}\) because they may have understood that while they could be terminated for other reasons,\(^{423}\) the employer would not necessarily discharge them in order to reinstate the strikers.\(^{424}\)

2. *Gibson Greetings, Inc.*

Subsequent Board decisions have rejected the view expressed in *Karmazin Prods.*\(^{425}\) In *Gibson Greetings, Inc.*,\(^{426}\) for example, the Board indicated that hiring replacements on an at-will basis cannot be construed as offering them permanent employment.\(^{427}\) The replacements in that case were advised that they were being hired as "full time associates," but could be laid off if the employer and the union renegotiated an agreement that permitted the strikers to return to work.\(^{428}\)

\(^{422}\) At-will employment generally is not considered synonymous with temporary employment. See, e.g., Moe v. E. Air Lines, Inc., 246 F.2d 215, 219 (5th Cir. 1957) (rejecting the contention that hiring employees on an at-will basis "make[s] the employment ‘temporary’"); Daniels v. Barfield, 71 F. Supp. 884, 887 (E.D. Pa. 1947) (finding "untenable" the proposition that "every employment at will . . . would be ‘temporary’"). And even if the terms were synonymous for state law purposes, that fact would not be dispositive of what appears to be a "separate and distinct issue[ ] raised under the National Labor Relations Act." Keco Indus., Inc., 301 N.L.R.B. 303, 304 (1991). *But see* Midwest Motor Express, Inc. v. Int'l Bd. of Teamsters, Local 120, 494 N.W.2d 895, 899 (Minn. Ct. App. 1993) (concluding that the meaning of the term "permanent" under the NLRA is not "completely separate and distinct" from its meaning under "the common law of contracts and case law modifying the employment-at-will rule"), rev'd, 512 N.W.2d 881 (Minn. 1994).

\(^{423}\) See generally Westfall, supra note 46, at 150 (observing that permanent replacements "remain subject to discharge for a variety of reasons, despite the widely heralded inroads on the doctrine of employment at will").

\(^{424}\) *See Karmazin Prods. Corp.*, 1988 NLRB GCM LEXIS 12, at *7-*8; *cf. Gibson Greetings, Inc.*, 310 N.L.R.B. 1286, 1291 (1993) (addressing the contention that "[a]ll that matters under Belknap . . . is that the replacements understand that their employment is not temporary"); *aff'd in part and rev'd in part*, 53 F.3d 385 (D.C. Cir. 1995). *But cf.* Titan Metal Mfg. Co., 135 N.L.R.B. 196, 211 (1962) (indicating that "[a]lthough it may be a necessary element of ‘permanent replacement’ that an employer assures employees newly hired during an economic strike that they will not be terminated . . . to make room for a returning striker, proof of that fact alone is not sufficient").

\(^{425}\) The General Counsel's decision in *Karmazin* is not binding on the Board. *See George Banta Co.*, 256 N.L.R.B. 1197, 1221 (1981) ("General Counsel’s understanding [of the law] is not binding upon the Board."); *enforced*, 686 F.2d 10 (D.C. Cir. 1982); McBride's of Naylor Road, 229 N.L.R.B. 795, 797 n.2 (1977) (observing that "administrative constructions of the General Counsel . . . are not binding on the Board").


\(^{427}\) Id. at 1291 n.23.

\(^{428}\) *See id.* at 1289. Interestingly, the employer and the union had negotiated an agreement before the employer even advertised for replacements which would have averted the strike altogether. However, the union membership declined to ratify that agreement. *See Gibson Greetings, Inc. v. Int'l Bd. of Firemen*, 141 L.R.R.M. (BNA) 2974, 2976 (E.D. Ky. 1990), *aff'd,*
The employer admitted it had not specifically characterized the replacements as permanent employees due to the erosion of the employment-at-will doctrine. The Board concluded from this that the employer had deliberately phrased its offer in terms that would allow it to give the offer any construction that would serve its purpose, "such as in this case, an offer that could be construed as offering permanent employee status, but in an employment-at-will situation, something less than that." In reaching that conclusion, the Board analyzed Belknap in the following terms:

The applicability of Belknap depends in the first instance on whether there has been an offer of permanent employment to replacement workers. ... Belknap does not hold that an employer need no longer promise replacements permanent employment to render them permanent; it holds that to avoid civil liability to the replacements should they be replaced pursuant to a Board order or a settlement agreement providing for reinstatement of the strikers, the employer

947 F.2d 944 (6th Cir. 1991).

429. Gibson Greetings, Inc., 310 N.L.R.B. at 1291 n.23. Specifically, the employer argued that "in this day and age of the erosion of the employment-at-will doctrine, no prudent employer uses the word 'permanent.'" Id. at 1291; cf. Hansen Bros. Enters., 279 N.L.R.B. 741, 746 (1986) (referring to a situation in which "Belknap had alarmed [the employer] to the point that [its] deal[s] with . . . replacements deliberately skirted any commitment of permanence"), enforced, 812 F.2d 1443 (D.C. Cir. 1987). See generally Corbett, supra note 40, at 852-53 ("Out of concern for potential civil liability to replacements in the event the employers agreed, or were ordered, to reinstate the strikers, some employers made offers of employment to replacements using ambiguous language regarding permanent status.").

430. The Board acknowledged that one possible interpretation of the employer's offer was that "the replacements would be retained regardless of the outcome of the strike, and that the strikers would be reinstated only to the extent there were new openings for employees." Gibson Greetings, Inc., 310 N.L.R.B. at 1290. However, the Board maintained that this was not the only reasonable interpretation of the offer, which "could also be read to mean that . . . the [employer] intended to return the strikers to their jobs once the strike ended under any one of several scenarios, and that accordingly, [the replacements] should consider themselves to be temporary employees." Id.

431. Id. at 1291 n.23; cf. Gehrich & Gehrich, Inc., 232 N.L.R.B. 1122, 1129 n.17 (1977) (discussing employer's assertion that it "had not made an 'absolute determination' that [its] economic replacements were permanent or temporary").

432. See Gibson Greetings, Inc., at 1289-91. The administrative law judge had found the replacement's testimony to be "so vague as to be meaningless." Id. at 1313 n.21. One Board member also refused to rely on her testimony, although he did acknowledge that it was "consistent with temporary status." Id. at 1293 n.3 (Raudabaugh, concurring in part and dissenting in part).
may promise the replacements permanent employment subject to such conditions subsequent. Belknap does not convert vague [employer] statements . . . into an offer of permanent employment for purposes of determining reinstatement rights.433

However, a federal appellate court subsequently reversed this portion of the Board’s decision in Gibson Greetings.434 The court concluded that the Board’s determination that the replacement workers were temporary employees was not supported by substantial evidence.435 Although the court agreed that the statement read to employees at the time of hire was equivocal436 it relied on a memorandum issued to the replacements shortly after they were hired, which stated:

(1) The Company has refused the Union’s demands to replace all of the employees who crossed the picket line with strikers; (2) Every additional replacement hired means one less job for the strikers at the conclusion of the strike; and (3) The Company has no intention to modify its position on not discharging or requiring Union membership of those who have been through so much to do the work.437

The Board had disregarded this memorandum because it did not specifically state that the company considered the replacements to be permanent employees,438 and because it was not distributed until after the replacements had been hired.439 The court rejected this assessment,440 relying on prior Board decisions holding that post-hiring statements can establish the permanency of strike replacements.441 The court also

433. Id. at 1291; cf. Finkin, supra note 18, at 553 (observing that “the [Belknap] Court predicted the Labor Act consequences of . . . a conditional commitment, in a case in which that precise question was not in issue or passed on by the Board”).
434. See Gibson Greetings, Inc. v. NLRB, 53 F.3d 385 (D.C. Cir. 1995).
435. See id. at 387, 391.
436. See id. at 390. The court stated that “the hiring statement provides no evidence in either direction . . . in determin[ing] whether the replacements were permanent or temporary hires.” Id.
437. Id. (internal punctuation omitted).
438. The Board acknowledged that the memorandum “may imply that the [employer] considered the replacements to be permanent,” but noted that “it [did] not clearly state this.” Gibson Greetings, Inc., 310 N.L.R.B. at 1290 n.19.
439. See id.
440. See Gibson Greetings, Inc., 53 F.3d at 390. The Board had stated that the memorandum “came nearly two months into the strike and [did] not reflect what the understanding of the [employer] and the workers was at the time of their hire some weeks before.” Gibson Greetings, Inc., 310 N.L.R.B. at 1290 n.19. However, employers who hire temporary replacements can “convert [them] into permanent employees so long as they are holding jobs to which no striker has made an unconditional offer to return.” Teledyne Indus., Inc. 298 N.L.R.B. 982, 985 (1990), enforced, 938 F.2d 627 (6th Cir. 1991).
441. See Gibson Greetings, Inc., 53 F.3d at 390 (citing J.M.A. Holdings, 310 N.L.R.B. 1349
concluded that the memorandum effectively did state that the replacements were permanent:

The [Board] itself has not required an employer to have used “the magic word ‘permanent’” in order to establish that it indeed hired replacements as permanent employees. More important, the memorandum makes it abundantly clear that the replacement employees would not be replaced by returning strikers. Indeed, any replacement worker reading the memorandum could not have helped but to conclude that he or she was now a permanent employee... [T]he promises made in the... memorandum clearly establish the required “mutual understanding” that the replacement workers were hired “permanently.”442

While not specifically discussing the employer’s admission that it had not characterized the replacements as permanent due to the erosion of the employment-at-will doctrine,443 the court found that the “other evidence in the record”—which obviously included this admission—failed to undermine the assurances of permanence reflected in the post-hire memorandum.444 The court therefore reversed the Board’s determination and held that employees who received the memorandum were permanent replacements.445

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442. Id. (citations omitted); cf. Target Rock Corp., 324 N.L.R.B. 373, 373 (1997) (observing that “proof of whether an offer of employment is permanent cannot rest solely on the wording of the offer”), enforced, 172 F.3d 921 (D.C. Cir. 1998).

443. See Gibson Greetings, Inc., 310 N.L.R.B. at 1291 & n.23.

444. Gibson Greetings, Inc., 53 F.3d at 391.

445. See generally Ewing v. NLRB, 732 F.2d 1117, 1120 (2d Cir. 1984) (“Normally, a reviewing court will not reject a decision of the Board unless, after canvassing the entire record, it is not supported by substantial evidence.”) (emphasis added).

446. Gibson Greetings, Inc., 53 F.3d at 391.

447. See id. Interestingly, the Board’s administrative law judge had also concluded that these employees (and, for that matter, all others hired during the strike) were permanent replacements. See Gibson Greetings, 310 N.L.R.B. at 1286, 1313-14. On remand, the administrative law judge reached the same conclusion again, noting that because the memorandum had been posted, and bulletin board publication is “an effective method of communicating such matters,” all of the replacements had effectively received the assurances in the memorandum, and thus “all such workers were permanent employees.” Gibson Greetings, Inc., Nos. 9-CA-26706, 9-CA-27660 & 9-CA-26875, 1996 NLRB LEXIS 492, at *4-6 (Aug. 2, 1996).
3. Target Rock Corp.

The Board addressed the at-will employment of strike replacements again in Target Rock Corp. In that case, the Board concluded that the employer failed to satisfy its burden of establishing that the individuals hired to replace economic strikers were permanent employees, and held that it had therefore violated the NLRA by refusing to reinstate the strikers following their unconditional offer to return to work.

The Board considered numerous factors in reaching this result. First, the employer had placed advertisements stating that work as a replacement "could" lead to permanent employment after the strike. The Board noted that individuals hired as the result of this advertisement (which represented the majority of employees at issue) had a reasonable basis for assuming their jobs were not permanent, and that a determination as to whether they would become permanent was to be deferred until the strike's conclusion.

The replacements were also told they would be considered permanent at-will employees unless the Board decided otherwise, or a

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449. See Harvey Mfg., 309 N.L.R.B. 465, 467 (1992) ("The permanent replacement of economic strikers . . . is an affirmative defense and the employer has the burden of proof."). At one time, strike replacements were presumed to be permanent employees in representation (as opposed to unfair labor practice) cases. In O.E. Butterfield, Inc., 319 N.L.R.B. 1004 (1995), however, the Board "put an end to this inconsistency" and held that "in all cases, representation cases as well as unfair labor practice cases, the burden is on the employer to prove that the strike replacements are permanent employees." Id. at 1006.
450. Indeed, the Board stated that there had been "a substantial showing that the replacements did not understand that they were hired as permanent employees and that the [employer] did not intend for them to be so." Target Rock, Corp., 324 N.L.R.B. at 373 (emphasis added).
451. See generally Midwest Motor Express, Inc. v. Int'l Bhd. of Teamsters, Local 120, 494 N.W.2d 895, 899-900 (Minn. Ct. App. 1993) ("The character of an actual offer will, of course, depend on various factors—the language used, the parties' relationship, the context in which the offer is made, as well as other facts and circumstances taken as a whole."); rev'd, 512 N.W.2d 881 (Minn. 1994).
452. See Target Rock, Corp., 324 N.L.R.B. at 373. Specifically, the advertisement stated: "Target Rock Corporation . . . is in the midst of negotiations with striking union members. We have IMMEDIATE POSITIONS AVAILABLE . . . . All positions could lead to permanent full-time after the strike." Id.
453. The Board noted that "at least 26 of the 32 replacements still employed at the end of the strike indicated on their employment applications that they were responding to [the] advertisement." Id.
454. See id. at 374; see also id. at 377 (Higgins, concurring) ("[T]he advertisement for replacements said that 'all positions could lead to permanent full time after the strike[,]'. . . . The reasonable understanding of this statement is that the intention was for nonpermanence, albeit the positions could become permanent after the strike.").
455. See id. at 374. The Board stated: "To the extent that the [employer] reserved to the Board
settlement with the union altered their status.\textsuperscript{456} In addition, the employer’s negotiators represented to the union that the replacements were temporary, and that their employment would be terminated if the strikers made an unconditional offer to return.\textsuperscript{457}

Finally, the employment applications completed by the replacements contained at-will language allowing the employer to terminate them at any time and for any reason.\textsuperscript{458} The Board observed that the inclusion of this language did not support the employer’s assertion that the replacements were permanent.\textsuperscript{459} Implicitly rejecting the view of one Board member that preserving the at-will status of replacements does not preclude their permanency for NLRA purposes,\textsuperscript{460} the Board stated:

Although in Belknap, Inc. v. Hale, 463 U.S. 491 (1983), the Supreme Court expressed the view that the inclusion of conditions in an offer of employment would not necessarily foreclose a finding that the offer was permanent, none of the examples given or referenced by the Court included statements to the effect that the employee could be discharged at any time for any reason. Indeed, the Court... made clear that the kinds of “conditional” offers it believed could be defended as offers of permanent employment did not include offers advising replacements that they “could be fired at the will of the employer for any reason.”\textsuperscript{461}

4. Morie Co.

A similar conclusion was reached in Morie Co.\textsuperscript{462} In that case, the

\begin{itemize}
\item \textsuperscript{456} See Target Rock, Corp., 324 N.L.R.B. at 374.
\item \textsuperscript{457} See id.
\item \textsuperscript{458} See id. at 374.
\item \textsuperscript{459} See id.
\item \textsuperscript{459} See id. at 376-77 (Higgins, concurring); see also infra notes 493-99 and accompanying text.
\item \textsuperscript{460} Target Rock, Corp., 324 N.L.R.B. at 374 n.9 (quoting Belknap, Inc., 463 U.S. at 504-05 n.8).
\item \textsuperscript{461} Nos. 4-CA-24574-1, 4-CA-24574-2 & 4-CA-24923, 1997 NLRB LEXIS 570 (July 16, 1997).
\end{itemize}
employer had required its replacement workers to acknowledge that they were at-will employees and thus could be discharged "at any time with or without cause and without prior notice." The administrative law judge held that this requirement not only failed to corroborate the employer's assertion that it intended to hire permanent replacements, but was, in fact, inconsistent with any commitment to make the replacements permanent.

In reaching this result, the judge relied in part upon the fact that the collective bargaining agreement became effective once the union accepted the employer's final offer and the strikers offered to return to work. Under those circumstances, the judge observed, "any truly 'permanent' replacements... could not be purely 'at will' employee[s] but would have been subject to the various tenure provisions of the bargaining agreement, including seniority, discharge, and grievance procedures." In other words, any permanent replacements could not have been employed at will because, by definition, they would have continued to be employed after the bargaining agreement—and in particular its tenure provisions—became effective.

463. See id. at *26.
464. Id. at *41.
465. If, as apparently was the case in Morie Co., no exceptions to an administrative law judge's decision are filed, "the findings, conclusions, and recommendations of the administrative law judge... automatically become the decision and order of the Board and become its findings, conclusions and order." 29 C.F.R. § 102.48(a) (1999); see also NLRB v. Wash. Star Co., 732 F.2d 974, 975 (D.C. Cir. 1984); Croley Coal Corp., 269 N.L.R.B. 182, 182 n.1 (1984); Brownstone, supra note 26, at 235-36.
466. See Morie Co., 1997 NLRB LEXIS 570, at *41. Because there must be a mutual understanding between the employer and the replacements, "an employer's own intent to employ replacements permanently is insufficient." Chi. Tribune Co., 304 N.L.R.B. 259, 261 (1991). However, the employer's testimony with respect to its intentions may establish the requisite understanding if "none of the replacements testify[ ] about their status." Chi. Tribune Co., 318 N.L.R.B. 920, 925 (1995).
467. See Morie Co., 1997 NLRB LEXIS 570, at *41. See generally H. & F. Birch Co. Plant of the Native Laces & Textile Div. of Indian Head, Inc., 188 N.L.R.B. 720, 723 (1971) ("The question of what constitutes a real commitment will... vary with the circumstances of each situation..."), enforced as modified, 456 F.2d 357 (2d Cir. 1972).
468. See Morie Co., 1997 NLRB LEXIS 570, at *41-*42. See generally Reed Tool Co., Nos. 16-CA-16262, 16-CA-16354 & 16-CA-16411, 1995 NLRB LEXIS 924, at *28 (Aug. 31, 1995) (indicating that "replacement employees terms and conditions of employment [become] governed by the new contract" upon the union's "acceptance of [the] final offer").
469. Id. at *42; cf. Bldg. Serv. 32B-32J, Legal Serv. Trust Fund, No. 2-CA-27352, 1995 NLRB LEXIS 681, at *25 (July 18, 1995) ("If allowed to become a permanent employee, any attempt to discharge [an individual] would become subject to the grievance and arbitration provisions of the parties['] collective bargaining agreement... ").
470. Most collective bargaining agreements contain provisions requiring just cause for termination. See Sanders v. Parker Drilling Co., 911 F.2d 191, 196 (9th Cir. 1990) (Reinhardt, J.,...
This analysis is questionable. The terms and conditions of employment established for the employer's replacement workers at the time of hire may well have been superseded by the terms of the subsequently negotiated bargaining agreement. However, the employer and the union could have negotiated an agreement that contained no "just cause" termination standard or other comparable tenure provisions, which presumably would have preserved the at-will status of the replacements remaining employed after the agreement became effective. Alternatively, the union might never have accepted the
employer’s final offer,\textsuperscript{476} in which case the replacements’ at-will status also would have continued unabated.\textsuperscript{477}

In any event, it is difficult to see how the inclusion of job security provisions in a subsequently negotiated bargaining agreement could establish that the employer did not intend to make its replacements permanent at the time of hire.\textsuperscript{478} If anything, the employer’s retention of the replacements even though the union’s acceptance of its final offer effectively abrogated its right to terminate them at will would seem to strengthen the case for characterizing them as permanent.\textsuperscript{479} In short, the existence of job security provisions that became effective upon acceptance of the employer’s final offer may have abrogated the replacements’ status as at-will employees,\textsuperscript{480} but it should not have

\textsuperscript{476} See, e.g., Pub. Serv. Elec. & Gas Co., 280 N.L.R.B. 429, 433 (1986) (discussing a situation in which “no new contract was reached because the Union never accepted the Company’s final offer”); \textit{Inner City Broad. Corp.}, 281 N.L.R.B. at 1213 (describing negotiations in which the employer “stood on [a] final offer” that was “not accepted by the Union”).

\textsuperscript{477} See, e.g., Kosulandich v. Survival Tech., Inc., 997 F.2d 431, 432 (8th Cir. 1993) (observing that individuals who were “not yet covered by the protections of any collective bargaining agreement” are “clearly at-will employees”); Bates v. Jim Walter Res., Inc., 418 So. 2d 903, 906 (Ala. 1982) (rejecting the contention that “the employment at will doctrine should not be applied where, at some future date, the employment would be covered by a written collective bargaining agreement.”) (citations omitted).

\textsuperscript{478} The Board has held that “[t]he controlling factor is the employer’s intent at the time of hiring.” H. & F. Binch Co. Plant of the Native Laces & Textile Div. of Indian Head, Inc., 188 N.L.R.B. 720, 742 n.39 (1971), enforced as modified, 456 F.2d 357 (2d Cir. 1972); see also Target Rock Corp., 324 N.L.R.B. 375, 377 (1997) (Higgins, concurring) (indicating that the “mutual intention that the replacements be permanent” is to be determined “at the time of hire”), enforced, 172 F.3d 921 (D.C. Cir. 1998). See generally Estreicher, supra note 34, at 907 (“At the outset of [a] strike, the employer in all likelihood hopes that the replacements will continue to occupy their positions, but [it] cannot predict with any confidence what will ensue upon the strike’s end . . . .”).

\textsuperscript{479} See, e.g., Lockhart v. Cedar Rapids Cmty. Sch. Dist., 963 F. Supp. 805, 822 (N.D. Iowa 1997) (suggesting that the adoption of a provision authorizing termination only for cause would convert employees “from an at-will employment status to a more permanent status”). In other words, an employer may be willing to tolerate conduct from permanent replacements that, while undesirable, does not rise to the level of just cause for discharge, see, e.g., Ortiz v. Unemployment Ins. Appeal Bd., 305 A.2d 629, 632 (Del. Super. Ct. 1973) (referring to “act[s] of misconduct [that] did not constitute just cause for discharge [which] the employer had tolerated”), rev’d, 317 A.2d 100 (Del. 1974), while refusing to tolerate the same conduct “by a person whom [it] had decided not to retain as a permanent employee.” Zeppelin Elec. Co., 161 L.R.R.M. (BNA) 1201, 1205 (1999) (Hurtgen, dissenting).

affected their status as permanent replacements. 481

Nevertheless, the administrative law judge’s conclusion that at-will employment is inconsistent with permanent replacement is in accordance with the majority opinions in Gibson Greetings 482 and Target Rock Corp. 483 It is also at least arguably consistent with an earlier Board decision, Harvey Mfg., 484 which held that replacement workers who the employer viewed as at-will employees subject to discharge with or without cause 485 were merely temporary strike replacements, despite having received verbal assurances that their employment would be permanent. 486 In addition, the view expressed in Morie Co. is shared by some commentators. 487 As discussed below, however, it has never commanded the support of the full Board. 488

E. The “Minority” View

In Gibson Greetings, Inc., 489 Board Member John Raudabaugh

...
disagreed with the majority's conclusion that employers cannot hire permanent replacements on an at-will basis.\textsuperscript{490} He reasoned that in the lexicon of labor law, "permanent" does not mean "forever," but only that the employer intended to retain the replacements even after the strike was over.\textsuperscript{491} He went on to state:

[T]he term "permanent replacement" does not mean that there is an unconditional promise to retain the replacement. Rather, there is only the present intention to retain the replacement after the strike is over. Indeed, [under Belknap] the employer can affirmatively disclaim any unconditional promises. In that way, the employer can lawfully have permanent replacements and can nonetheless avoid breach-of.promise claims if it thereafter reinstates the strikers and lays off the replacements, e.g., pursuant to an agreement with the union, a settlement of an N.L.R.B. case, or a Board order or court decree.

... [Thus], an employer may clearly communicate words of permanent status, but then go on to say that no unconditional promises are being made. ... [T]his statement is consistent with permanent status.\textsuperscript{492}

Board Member John Higgins reached a similar conclusion in Target Rock Corp.\textsuperscript{493} He agreed with the Board's conclusion that the employer in that case failed to establish that its replacement workers were permanent employees.\textsuperscript{494} Unlike the other Board members in that case, however, he declined to base his decision on the employer's inclusion of at-will language in its employment application.\textsuperscript{495}

Member Higgins noted that Belknap permits an employer to couple an offer of permanent employment with a statement that a Board decision or a settlement with the union may result in the replacement's termination.\textsuperscript{496} In his view, the same analysis should apply to an employer's decision to couple its offer with a statement that employment is at will.\textsuperscript{497} Because, under Belknap, such conditional offers do not preclude a finding of permanent employment for purposes of the NLRA, a finding of temporary employment cannot be based on the employer's

\textsuperscript{490} See \textit{id.} at 1293 n.2 (Raudabaugh, concurring in part and dissenting in part).
\textsuperscript{491} Id. at 1293 (Raudabaugh, concurring in part and dissenting in part).
\textsuperscript{492} Id. (Raudabaugh, concurring in part and dissenting in part) (footnotes omitted).
\textsuperscript{493} 324 N.L.R.B. 373 (1997), enforced, 172 F.3d 921 (D.C. Cir. 1998).
\textsuperscript{494} See \textit{id.} at 376 (Higgins, concurring).
\textsuperscript{495} See \textit{id.} at 376-77 (Higgins, concurring).
\textsuperscript{496} See \textit{id.} at 376-77 & n.2 (Higgins, concurring).
\textsuperscript{497} See \textit{id.} at 376 (Higgins, concurring).
retention of the right to discharge replacements at will. Member Higgins stated:

[T]he employer can exercise its statutory privilege to hire permanent replacements, and can nonetheless leave open the possibility of immediate reinstatement of strikers pursuant to a settlement agreement with the union, or the settlement or adjudication of a . . . Board case. In addition, the employer can preserve its legitimate interest in protecting itself from individual-employee lawsuits grounded in state law.

VIII. POLICY CONSIDERATIONS

There are certain inconsistencies in the Board's view of the present issue. In particular, replacements can now be considered permanent even if they have been told they could be discharged if strikers are reinstated as part of a strike settlement, despite the Board's previous indication that assuring replacements they will not be terminated to make room for returning strikers is essential to a finding of permanence. On the other hand, replacements hired on an at-will basis apparently cannot be considered permanent even if they were assured

498. See id. at 376-77 & n.2 (Higgins, concurring).
499. Id. at 377 (Higgins, concurring).
502. See, e.g., Baldwin v. Firelli Armstrong Tire Corp., 3 S.W.3d 1, 3 (Tenn. Ct. App. 1999) (describing replacements who were told that they "would not be terminated solely to make room for . . . returning strikers"); Bingham Willamette, 282 N.L.R.B. 1192, 1192 (1987) (discussing replacements who "were told by [the employer] that they were being hired as regular and permanent replacements . . . and they could expect that they would not be replaced by a negotiated settlement in returning strikers"), enforced, 857 F.2d 661 (9th Cir. 1988).
503. See, e.g., Titan Metal Mfg. Co., 135 N.L.R.B. 196, 211 (1962) (characterizing such assurances as "a necessary element of permanent replacement") (internal quotation marks omitted); see also Int'l Ass'n of Machinists, Dist. No. 8 v. J. L. Clark Co., 471 F.2d 694, 698 (7th Cir. 1972) (stating that "the term 'permanent replacement' . . . describe[s] those employees, hired during the strike, who would be protected from displacement by returning strikers"); Corbett, supra note 40, at 818 n.12 ("Permanent replacement means the employer does not intend to discharge the replacement in order to reinstate a striking employee when the strike ends or when the striker otherwise requests reinstatement.").
504. See Target Rock Corp., 324 N.L.R.B. at 374 n.9; cf. Sitek v. Forest City Enters., Inc., 587 F. Supp. 1381, 1385 (E.D. Mich. 1984) (finding no "promise of permanent employment" where the employer's documentation "stated [that] . . . employment was at will").
they would not be terminated to make room for returning strikers.\textsuperscript{505}

Given these inconsistencies, as well as the generally unsettled nature of the question,\textsuperscript{506} the Board's view of the issue may continue to evolve.\textsuperscript{507} In that process, the present "minority" view—that at-will employment does not preclude a finding of permanence\textsuperscript{508}—ultimately could emerge as the prevailing view,\textsuperscript{509} although the Board's propensity to reverse itself in this manner has occasionally been criticized.\textsuperscript{510}

\begin{itemize}
\item \textsuperscript{505} See, e.g., Karmazin Prods. Corp. 1988 NLRB GCM LEXIS 12, at *7-*8 (indicating that at-will strike replacements "may have understood that, although they may be fired for other reasons, the [employer] would not necessarily fire them to reinstate the strikers").
\item \textsuperscript{506} See generally Sub-Zero Freezer Co., 271 N.L.R.B. 47, 48 (1984) (Zimmerman, dissenting) (stating that "a certain degree of instability in Board law" is "inevitable"); Westfall, supra note 46, at 48 (referring to "the recognized instability of Board doctrine").
\item \textsuperscript{507} It is not uncommon for the Board's view of an issue to change with changes in its membership. See, e.g., Bus. Servs. by Manpower, Inc. v. NLRB, 784 F.2d 442, 447 (2d Cir. 1986) (discussing an issue on which "a differently constituted Board switched positions"); Newspaper Drivers Local Union No. 372 v. NLRB, 682 F.2d 116, 117 (6th Cir. 1982) (discussing a Board reversal that "appear[ed] to be entirely related to a change in the composition of the Board"); Howard Univ., 224 N.L.R.B. 385, 385 n.2 (1976) (observing that "reconsideration after a change in Board composition is not novel"). See generally Spencer v. NLRB, 548 F. Supp. 256, 264-65 (D.D.C. 1982):
\begin{itemize}
\item One need not pejoratively characterize the Board as a politically pliable agency to recognize that existing Board precedent is inevitably, and necessarily, subject to some modification as the composition of the Board changes in response to electoral developments. A new national administration may have a decidedly different view of the appropriate balance between the statutory values of free choice and bargaining stability than its immediate predecessor, and the composition of the Board may ultimately tend to reflect that view.
\end{itemize}
\item \textsuperscript{509} Cf. NLRB v. Ensign Elec. Div. of Harvey Hubble, Inc., 767 F.2d 1100, 1102 n.1 (4th Cir. 1985) (describing a Board decision "coming on the heels of changes in composition of the Board" that was a "clear example of an administrative body reviewing its earlier decisions . . . and creating a new majority to support an earlier viewpoint expressed in dissent"); Brownstone, supra note 26, at 243 n.74 (discussing "shifting" Board decisions in which "the dissenting view in one decision became the majority's rationale in the subsequent reversal").
\item \textsuperscript{510} See, e.g., Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 894 (D.C. Cir. 1978) ("[T]he only significant development that impacted on the NLRB's current decision is the recent change in the composition of the Board that . . . construed the . . . existing precedents to the point of extinction. Such erratic decisionmaking is unacceptable . . . .") (footnote and internal quotation marks omitted); Howard Univ., 221 N.L.R.B. 727, 727 (1975) (Jenkins, dissenting) ("If precedent is to be reconsidered each time there is a change in the membership of the Board, it is likely that the lifespan of precedent on which reliance may be placed may be reduced to 18 months."); Sub-Zero Freezer Co., 271 N.L.R.B. at 48 (Zimmerman, dissenting):
\begin{itemize}
\item Certainly the Act allows for shifts in the law when the composition of the Board changes, and undoubtedly Congress intended for the Board to respond to changing times and conditions. . . . At the same time, however, such changes undermine the goals stated
\end{itemize}
\end{itemize}
As a matter of policy, the minority view may have the benefit of encouraging strike settlements that contemplate the reinstatement of strikers. Unions typically make reinstatement a condition to the settlement of economic strikes, while employers concerned about potential liability under Belknap may refuse to agree to that condition to avoid terminating replacement workers in order to comply with it. Thus, the holding in Belknap serves as a potential impediment to one of

by a long succession of Board Members of maximizing the voluntary settlement of cases and minimizing the litigation of labor disputes. Those goals call for giving due regard for both stability in the law and finality in litigation. Avoiding unnecessary instability and uncertainty is critical to the efficient administration of the Act.

Id. 511. See generally Gem City Ready Mix Co., 270 N.L.R.B. 1260, 1260-61 (1984) ("The policy of the National Labor Relations Act is to encourage the practice and procedure of collective bargaining as a means of resolving labor disputes, including the encouragement of the negotiation of strike settlement agreements.") (footnotes omitted); Energy Coop., Inc., 290 N.L.R.B. 635, 637 (1988) ("[W]e look favorably on private strike settlements that result in the amicable resolution of labor disputes and thus serve the public interest as well as that of the parties.") (footnote omitted); Colonial Press, Inc., 207 N.L.R.B. 673, 680 (1973) ("It needs no citations to show the Act encourages strike settlement agreements.").

512. Although the NLRA's only specific provision for the reinstatement of strikers applies where an unfair labor practice has occurred, 29 U.S.C. § 160(c) (1994), there is also a statutory interest "in protecting economic strikers by an entitlement to reinstatement." NLRB v. Mars Sales & Equip. Co., 626 F.2d 567, 573 (7th Cir. 1980) (emphasis added); see also Woodlawn Hosp., 233 N.L.R.B. 782, 789 n.31 (1977) (observing that "participants in both types [of strikes] have statutorily protected reinstatement rights," and that the "only relevant difference is the extent of such rights"); Brooks Research & Mfg., Inc., 202 N.L.R.B. 634, 636 (1973) ("The reinstatement rights of economic strikers . . . are statutory . . ."); Finkin, supra note 126, at 598 n. 33 (asserting that the reinstatement rights of economic strikers "are no less statutory rights than the reinstatement rights of unfair labor practice strikers"). See generally NLRB v. Am. Potash & Chem. Corp., 113 F.2d 232, 234 (9th Cir. 1940) ("The duty of an employer to reinstate arises . . . to effectuate the purposes of the Act.").


514. See Bingham Willamette, 282 N.L.R.B. 1192, 1196-97 (1987) (discussing an employer seeking to "avoid . . . a lawsuit by its striker replacements" under Belknap for "replacing them with returning strikers"); enforced, 857 F.2d 661 (9th Cir. 1988); Karmazin Prods., Corp., 1988 NLRB GCM LEXIS 12, at *6 (describing "an employer apparently attempting to protect itself from liability under Belknap").

515. See Belknap, Inc. v. Hale, 463 U.S. 491, 521 (1983) (Blackmun, J., concurring) ("Where the employer has chosen to promise permanent employment to strike replacements, its potential liability to them would make the employer reluctant to settle by giving the strikers their old jobs."); Bingham Willamette, 282 N.L.R.B. at 1197 ("Because of its concern about the possible impact of the Belknap decision [an employer] may have . . . a good reason for not entering into a strike settlement . . . calling for the reinstatement of the strikers and the discharge of the striker replacements."); Estreicher, supra note 34, at 907 ("State tort suits create an incentive on the part of employers not to accede to the one thing the union will invariably insist upon if it is to have any future in the plant: the return of its members to their jobs.").
the Act’s primary goals—fostering labor peace through the settlement of strikes.516

Addressing this very issue, the Board filed an amicus brief in Belknap in which it argued that employers should be entitled to terminate permanent replacements in the event of a strike settlement.517 The Board reasoned that subjecting employers to liability for entering into settlements that involve the reinstatement of strikers would conflict with the federal policy favoring the settlement of labor disputes.518

The Board’s argument provides a persuasive basis for interpreting Belknap’s holding that an employer can condition its offers to permanent replacements519 to include the right to employ them on an at-will basis.520 Specifically, interpreting Belknap in this manner would minimize, and perhaps eliminate, the decision’s perceived impediment to strike settlements521 by permitting employers to avoid liability for terminating such replacements to resolve a labor dispute.522

516. See, e.g., Cent. States, S.E. & S.W. Areas Pension Fund v. Midwest Motor Express, Inc., 999 F. Supp. 1153, 1164 (N.D. Ill. 1998) (suggesting that strike had been prolonged by the employer’s negotiating stance, including specifically its refusal “to displace the permanent replacement workers for the striking employees, a significant issue for the [union]”), aff’d, 181 F.3d 799 (7th Cir.), cert. denied, 120 S. Ct. 497 (1999); Estreicher, supra note 34, at 907 (observing that “federal labor policy is disserved if the prospect of state tort liability hardens the employer’s initial resolve so decisively as to foreclose a strike settlement”). See generally Belknap, Inc., 463 U.S. at 532 (Brennan, J., dissenting):

If an employer is confronted with potential liability for discharging workers he has hired to replace striking employees, he is likely to be much less willing to enter into a settlement agreement calling for... the reinstatement of strikers. Instead, he is much more likely to refuse to settle and to litigate the [unfair labor practice] charges at issue while retaining the replacements. Such developments would frustrate the strong federal interest in ending strikes and in settling labor disputes.

Id. (footnotes omitted).


518. See id. at 499; see also Braun, supra note 43, at 401 (“The Office of the General Counsel for the [Board] has asserted that if state actions for breach of contract and misrepresentation brought by discharged permanent replacements [are] allowed, the employer’s license to offer employment to replacements would be defeated. Permanent replacements, according to the General Counsel, [must] bear the risk of being laid off or discharged.”).

519. See Belknap, Inc., 463 U.S. at 505 n.9.


521. See Stromire, supra note 36, at 1230 (indicating that an employer who “can argue... that [it] merely terminated the contract at will” can “afford to be flexible in settlement negotiations” because it can “retain the replacement workers or rehire the striking employees without fear of liability”). But cf. Pinkin, supra note 18, at 555 (“In a number of jurisdictions, the wrongfully terminated, even if otherwise at-will, [replacement] employee may be able to secure a judgment for the current discounted value of the employee’s lost future wages with the employer...”).

522. In Gibson Greetings, Inc., 310 N.L.R.B. 1286 (1993), aff’d in part and rev’d in part, 53 F.3d 385 (D.C. Cir. 1995), for example, one Board member indicated that by “affirmatively
In fact, this is precisely how Justice Blackmun interpreted Belknap in his concurring opinion in that case. Justice Blackmun acknowledged that an employer’s potential contractual liability to terminated strike replacements is a perplexing problem inherent in the decision to permit employers to offer permanent employment to such replacements. However, he did not favor a solution that would permit employers to hire permanent replacements on an at-will basis, because he believed that permanently replacing economic strikers can be justified only if, in order to continue operating its business, the employer was forced to oblige itself to the replacements in a manner that precluded the strikers’ reinstatement.

To avoid breach-of-promise claims if it thereafter reinstates the strikers and lays off the replacements . . . pursuant to an agreement with the union,” Id. at 1293 (Raudabaugh, concurring in part and dissenting in part); see also Belknap, Inc., 463 U.S. at 504 n.8 (indicating that if “replacements could be fired at the will of the employer for any reason[,] the employer would violate no promise made to a replacement if it discharged some of them to make way for returning strikers”).

In Target Rock, the Board asserted that the Belknap Court, “in distinguishing Covington Furniture Mfg. Co., 212 N.L.R.B. 214 (1974), made clear that the kinds of ‘conditional’ offers it believed could be defended as offers of permanent employment did not include offers advising replacements that they ‘could be fired at the will of the employer for any reason.’” Target Rock Corp., 324 N.L.R.B. at 374 n.9 (quoting Belknap, Inc., 463 U.S. at 504-05 n.8). However, Justice Blackmun reached a different conclusion, asserting that the Belknap majority had rejected Covington Furniture’s holding that replacements cannot be considered permanent if their employment is “subject to cancellation at the employer’s option,” and instead effectively held that they may be permanent even if what they are told is that their employment will be permanent “unless the employer decides otherwise.” Belknap, Inc., 463 U.S. at 514-15 (Blackmun, J., concurring) (citing Covington Furniture Mfg. Co., 212 N.L.R.B. at 220).

See Belknap, Inc., 463 U.S. at 523 (Blackmun, J., concurring).

See id. at 521 (Blackmun, J., concurring).

See id. at 519 (Blackmun, J., concurring) (“It is difficult to explain the employer’s power to prefer permanent strike replacements over returning economic strikers unless, through the promise of permanent employment, the employer has incurred an obligation to those replacements.”); cf. Indep. Fed’n of Flight Attendants v. Trans World Airlines, Inc., 132 L.R.R.M. (BNA) 2422, 2423 (W.D. Mo. 1989) (“A promise made in the context of a strike exposes the employer to a breach of contract suit if later repudiated to accommodate returning strikers and thus . . . provides an adequate business justification for keeping new hires.”).

See Belknap, Inc., 463 U.S. at 519 (Blackmun, J., concurring) (“This power to override the economic strikers’ statutory entitlement to reinstatement must be based on the common-sense notion that, in order to continue to operate the business, the employer was required to oblige itself to third parties in a manner inconsistent with the strikers’ right to subsequent reinstatement.”); Trans World Airlines, Inc. v. Indep. Fed’n of Flight Attendants, 489 U.S. 426, 458 (1989) (Blackmun, J., dissenting) (“The employer’s legal right to resist a union demand for reinstatement flows from the necessity of the offer of permanence; absent such necessity, the employer may be required to furlough (or discharge) the replacements to make room for the strikers’ return.”); see also Indep. Fed’n of Flight Attendants, 132 L.R.R.M. (BNA) at 2423 n.1 (“Justice Blackmun would place the onus on employers to explain . . . why they could not make do during a strike with temporary replacements, thus preserving a place for strikers to return and reducing the risk of striking.”).
Although Justice Blackmun's view has also been advanced by others (including the dissenting justices in Belknap), it has not been widely embraced. Perhaps most importantly, it has been rejected by the Board, which instead holds that "it is not required that offers of permanent tenure to strike replacements must be justified by showing that the particular form of offer was necessary to keep a business in operation during a strike." The Belknap majority clearly favored the Board's view over that

528. See, e.g., NLRB v. Mars Sales & Equip. Co., 626 F.2d 567, 573 (7th Cir. 1980) (indicating that economic strikers are entitled to reinstatement unless the employer "had to offer the jobs on a permanent basis as an inducement to continuing his operations"); MCC Pac. Valves, 244 N.L.R.B. 931, 933 n.10 (1979) (asserting that an employer's right to deny reinstatement to economic strikers arises from "the employer's need to assure replacements of permanent employment in order to insure the labor force necessary to continue operations during the strike"); Thurston Motor Lines, Inc., 165 N.L.R.B. 862, 862 (1967) (observing that "the employer's right to replace is no greater than its proven need to carry on its business"); see also Indep. Fed'n of Flight Attendants, 132 L.R.R.M. (BNA) at 2423 n.1 (asserting that Justice Blackmun's approach has "considerable appeal" as a matter of policy).

529. See Belknap, Inc., 463 U.S. at 526-27, 537 (Brennan, J., dissenting); see also id. at 504 n.8 ("The dissent and the concurrence suggest that if offers of permanent employment are not necessary to secure the manpower to keep the business operating, returning strikers must be given preference over replacements who have been hired on a permanent basis.").

530. See Indep. Fed'n of Flight Attendants, 132 L.R.R.M. (BNA) at 2423 (stating that "the existence of a strike and the use by the employer of a promise of permanent tenure are the only factual matters that need be established to show business justification for turning away . . . strikers seeking to reclaim their jobs"); cf. H. & F. Binch Co. Plant of the Native Laces & Textile Div. of Indian Head, Inc. v. NLRB, 456 F.2d 357, 362 (2d Cir. 1972) (concluding that it is "not necessary [to a finding of 'permanency'] that . . . the 'replacement' would have a cause of action if a striker was allowed to return to work").

531. Waterbury Hosp., 300 N.L.R.B. 992, 1006 (1990). In other words, the Board "does not require employers to justify the choice of permanent, as opposed to temporary, replacement," because it "presumes that an employer's motive in permanently replacing its employees is to serve its legitimate business interest of continuing operations." TNS, Inc., 1999-2000 NLRB Dec. (CCH) ¶ 15,322, at 28,546 (Sept. 30, 1999) (Hurtgen, dissenting) (emphasis added). This is in direct contrast to the view of Justice Blackmun, who saw "no need to afford the [employer] the benefit of a . . . presumption of business necessity" in hiring replacements. Trans World Airlines, Inc., 489 U.S. at 463-64 n.4 (Blackmun, J., dissenting).

532. In Belknap, the Court quoted that portion of the Board's decision in Hot Shoppes, Inc. rejecting the view that "an employer may [permanently] replace economic strikers only if it is shown that he acted to preserve efficient operation of his business." Belknap, Inc., 463 U.S. at 504 n.8 (quoting Hot Shoppes, Inc., 146 N.L.R.B. 802 (1964)). The Court also noted that this aspect of Hot Shoppes has never been repudiated by the Board, that there are no Supreme Court cases to the contrary, and that, like Hot Shoppes, the Court's decision in NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), can be read as holding that "the [employer's] motive for hiring permanent replacements is irrelevant." Id. at 504-05 & n.8; see also Indep. Fed'n of Flight Attendants, 132 L.R.R.M. (BNA) at 2424 (indicating that Belknap is one of the cases "articulat[ing] support for the Hot Shoppes rule"); Waterbury Hosp., 300 N.L.R.B. at 1006 ("[F]rom the Supreme Court's discussion in Belknap . . . of the Board's decision in Hot Shoppe [sic], . . . it appears that it is not required that offers of permanent tenure to strike replacements must be justified by showing that the
of Justice Blackmun, and thus (at least in Blackmun's opinion) effectively held that hiring replacements on an at-will basis does not preclude a finding of permanency. This holding has also been suggested by other courts and, at least at one time, was the view held by the Board's General Counsel. Two former Board members have also expressed their agreement with it, and it conceivably could one day command the support of a Board majority.

However, the proper resolution of the present issue actually may rest on an even simpler foundation. Most states hold that offering permanent employment to a strike replacement gives rise to a

533. See Sinai Hosp., No. 5-CA-16952, 1985 NLRB GCM LEXIS 97, at *5 n.14 (July 17, 1985):

[T]he concurring and dissenting justices [in Belknap] took the view that returning strikers must be given preference over replacements hired on a permanent basis if promises of permanence had not been necessary to secure the replacements' services. The Belknap majority rejected this view, citing the Board's holding in Hot Shoppes... that an employer's motive for hiring replacements to continue operations is irrelevant.

Id. (internal quotation marks omitted).

534. See supra note 523.

535. See, e.g., H. & F. Binch Co. Plant of the Native Laces & Textile Div. of Indian Head, Inc., 465 F.2d at 362:

Since [the hiring of permanent replacements is] almost always oral and at will, it is not necessary that conversations should have taken a form where the replacement would have a cause of action if a striker was allowed to return... [T]hat the replacement would have reasonable grounds for indignation if he were... denied the promised job... is about as good a formulation of the appropriate standard as can be achieved.

Id. (internal quotation marks omitted).


538. See, e.g., Waterbury Hosp., 300 N.L.R.B. 992, 1006 (1990) (citing H. & F. Binch Co. with apparent approval); cf. United Auto. Workers of Am., 266 N.L.R.B. 952, 960 (1983) ("Because of the change in Board composition... the position of the present majority of the Board is open to pure speculation."). See generally Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers, 861 F.2d 1124, 1135 (9th Cir. 1988) (acknowledging "the NLRB's ability to change its interpretation [of the Act] in accord with its experience and altered objectives"); Spencer v. NLRB, 548 F. Supp. 256, 265 (D.D.C. 1982) (discussing the "salutary efforts of a reconstituted Board to modify existing rules and practices in the face of... the Board's own evolving experience with the actual effects of those rules and practices").

539. The Board occasionally declines to address the "legal-policy considerations" of issues that can be resolved on other grounds. Local 334, Laborers Int'l Union of N. Am., 205 N.L.R.B. 1191, 1191 n.4 (1973).
relationship that is terminable at the will of either party even in the absence of specific language to that effect. Thus, an employer's express reservation of its right to terminate the relationship at will merely eliminates confusion created by Belknap (on an issue the Court there did not actually address) by advising the replacement that the employer's offer of permanent employment may not give rise to a cognizable state law claim for breach of contract.

In other words, an employer that informs its replacements of their at-will status is simply being candid about the nature of the relationship into which they are entering. It is difficult to see why that candor

540. See, e.g., Bixby v. Wilson & Co., 196 F. Supp. 889, 901-02 (N.D. Iowa 1961) (holding that replacements hired "under assurances that their employment would be permanent" could not recover for breach of contract upon being discharged to make room for returning strikers, because "the parties intended only a contract terminable at the will of the parties"). See generally Janes, supra note 6, at 148 ("To qualify as a permanent employee under the Mackay doctrine the replacement must have accepted an offer of permanent employment. . . . American jurisdictions consistently hold that, barring any superseding circumstances, 'permanent' employment is employment for an indefinite term and usually remains terminable at will by either party.").

541. See generally Smith v. Kerrville Bus Co., 709 F.2d 914, 922 (5th Cir. 1983) (Clark, C.J., dissenting) (asserting that a finding of at-will employment does not depend upon the existence of "a negative proviso such as 'The employer reserves the right to discharge any employee for any reason or no reason at all.'"); Berardi v. Fundamental Brokers, Inc., 126 Lab. Cas. (CCH) ¶ 57,452, at 84,250 (S.D.N.Y. 1992):

[E]mployment contracts, because they are by law terminable at-will, need not contain . . . express [termination] provisions . . . . Indeed, it would be counter-intuitive to require or even expect such an express term in the employment context, when [the] law clearly provides that an express term is necessary to rebut the presumption that the employment is at-will.

Id. (emphasis added).

542. Because either party to an employment relationship generally has the right to terminate it "in the absence of an agreement to the contrary," Byle v. Anacomp, Inc., 854 F. Supp. 738, 745 n.3 (D. Kan. 1994), "a disclaimer that makes it clear employment is at-will" merely "preserves . . . at-will employment," as opposed to creating it. James v. Sears, Roebuck & Co., 21 F.3d 989, 998 (10th Cir. 1994) (emphasis added); see also Nickerson v. Kolbe & Kolbe Millwork Co., No. C-93-2679 DLJ, 1994 U.S. Dist. LEXIS 8709, at *11 (N.D. Cal. June 17, 1994) (indicating that an at-will disclaimer "leaves undisturbed the presumption of at will employment").

543. Belknap did not consider whether the claims asserted by the permanent replacements in that case were viable as a matter of state law, but whether they were preempted by federal law. See Air Line Pilots Ass'n Int'l v. United Air Lines, Inc., 802 F.2d 886, 910 (7th Cir. 1986); Baldwin v. Pirelli Armstrong Tire Corp., 927 F. Supp. 1046, 1051 (M.D. Tenn. 1996); Gardner, supra note 258, at 515.

544. See Corbett, supra note 40, at 852 n.207 ("Even absent [a disclaimer,] the employment-at-will doctrine . . . makes recovery by a discharged 'permanent' replacement unlikely."). See generally Leikvold v. Valley View Cnty. Hosp., 688 P.2d 170, 174 (Ariz. 1984) ("Employers are certainly free to . . . tell[ their employees . . . that their jobs are terminable at the will of the employer with or without reason. Such actions . . . instill no reasonable expectations of job security and do not give the employees any reason to rely on [other employer] representations . . . .").

545. See Alstad v. Office Depot, 10 Indiv. Empl. Rts. Cas. (BNA) 689, 692 n.2 (N.D. Cal. 1995) (observing that "an employer need not gain the consent of an employee to reaffirm the
should undermine the employee's status as a permanent replacement. Indeed, the Belknap Court appears to have rejected that very proposition when it stated: "If... implied conditions, including those dependent on the volitional act of [a strike] settlement, do not prevent the replacements from being permanent employees, neither should express conditions which do no more than inform replacements what their legal status is in any event."47

In short, subjecting an employer that informs its replacements they are being hired on an at-will basis to the enormous potential back pay liability that may result from a finding that they were merely temporary employees would discourage precisely the sort of candor the Belknap Court appears to have been advocating.54 That is presumably a result to be avoided.59

presumption that... employment is at will") (internal quotation marks and citation omitted). See generally Bardane Mfg. Co. v. Jarbola, 724 F. Supp. 336, 342 (M.D. Pa. 1989) (discussing the need for "honesty and frankness" in dealing with a potential strike replacement so that he has "full knowledge of the situation into which he can potentially place himself").

546. Cf. Cyr Bottle Gas Co., 204 N.L.R.B. 527, 533 (1973) (indicating that employer who advised its replacements that their tenure depended upon "how well they performed" was simply being "fair" to them), enforced, 497 F.2d 900 (6th Cir. 1974).

547. Belknap, Inc. v. Hale, 463 U.S. 491, 504 n.8 (1983) (emphasis added); cf. Kansas Milling Co. v. NLRB, 185 F.2d 413, 420 (10th Cir. 1950) (concluding that an employer had not lost its right to hire permanent replacements by providing employees with "a warning of what the company had a right to do, without notice") (emphasis added).

548. When an employer hires temporary replacements, "economic strikers are entitled to reclaim their jobs - not just be placed on a rehire list - if... they make... unconditional offers to return." Teledyne Indus., Inc., 298 N.L.R.B. 982, 985 (1990), enforced, 938 F.2d 627 (6th Cir. 1991). Thus, an employer who refuses to reinstate economic strikers on the mistaken assumption that they have been permanently replaced is liable for back pay running from the date of the strikers' unconditional offer to return to work. See Harvey Mfg., Inc., 309 N.L.R.B. 465, 470-71 (1992). That sum can be enormous. See Douglas E. Ray, Some Overlooked Aspects of the Strike Replacement Issue, 41 KAN. L. REV. 363, 375 (1992) ("An employer who improperly fails to reinstate one hundred strikers after they request reinstatement can easily be exposed to millions of dollars in liability.").

549. See Belknap, Inc., 463 U.S. at 503 (rejecting the view that employers should be "free to deceive" when offering permanent employment to potential strike replacements); id. at 523 (Blackmun, J., concurring) (deploiring "lies and broken promises to strike replacements"); see also NLRB v. Bingham-Willamette Co., 857 F.2d 661, 665 (9th Cir. 1988) (indicating that Belknap requires employers to be "frank with the replacements"). But cf. Madison Kipp Co., 240 N.L.R.B. 879, 891 (1979) (observing that "the Act does not require candor in all circumstances by an employer").

550. See GibsonGreetings, Inc., 310 N.L.R.B. 1286, 1291 n.23 (1993) (noting the employer's "obligation to make clear its intent... when it is hiring employees during a strike"), aff'd in part and rev'd in part, 53 F.3d 385 (D.C. Cir. 1995); cf. Murray Prods., Inc., 228 N.L.R.B. 268, 269 (1977) (criticizing employer's "lack of candor as to permanent replacements"), enforced, 584 F.2d 934 (9th Cir. 1978); see generally Bohemia, Inc., 272 N.L.R.B. 1128, 1133 (1984) (indicating that the NLRA should be interpreted to "encourage greater candor by employers").
The foregoing discussion suggests that, as a matter of federal labor policy, the fact that strike replacements have been hired on an at-will basis should not preclude a finding that they are permanent employees within the meaning of Mackay Radio. This conclusion is consistent with, and actually may be compelled by, the Supreme Court's analysis in Belknap. Thus, as the Board itself recently stated, replacements are properly considered permanent if the evidence, taken as a whole, supports the conclusion that the employer offered them "permanent" employment (that is, employment that was not specifically limited to the duration of the strike), and the offer was so understood by the replacements themselves. Whether the replacements were also told they could be terminated at the "will" of the employer should simply be one factor to consider in this analysis.

551. Whether replacement workers are considered temporary or permanent is in large measure dependent upon their own understanding of the nature of their employment. See Harvey Mfg., Inc., 309 N.L.R.B. 465, 468 (1992). In that regard, even an at-will employee may have "every reason to expect that his employment [will] be continuous and for the indefinite future." Moe v. E. Air Lines, Inc., 246 F.2d 215, 219 (5th Cir. 1957). That expectation should be sufficient to support a finding of permanence. See A.T. Massey Coal Co., Nos. 9-CA-23298-1 to 9-CA-23298-23, 1987 NLRB GCM LEXIS 161, at *7 n.5 (Mar. 11, 1987) (stating that "permanent" means "for an indefinite period, not tied to the duration of the strike"); cf. NLRB v. Augusta Bakery Corp., 957 F.2d 1467, 1474 (7th Cir. 1992) (upholding Board's finding that a replacement who "concluded his job was for an unlimited time" was a temporary employee, but noting that this was a "close call"). But cf. Rahn Sonoma Ltd., 322 N.L.R.B. 898, 900 (1997) (concluding that "employees... hired for indefinite periods of time without limits on the duration of their employment" were "not hired as permanent replacements").

552. See supra notes 519-38 and accompanying text.


554. See A.T. Massey Coal Co., 1987 NLRB GCM LEXIS 161, at *7 n.5; see also Westfall, supra note 46, at 150 (indicating that "permanent" in this context... merely employment that is not expressly limited to the duration of the strike or some shorter period"); cf. Gibson Greetings, 310 N.L.R.B. 1286, 1293 (1993) (Raudbaugh, concurring in part and dissenting in part) (indicating that the term "permanent replacement" means only that the employer has "the present intention to retain the replacement after the strike is over"), aff'd in part and rev'd in part, 53 F.3d 385 (D.C. Cir. 1995).

555. Target Rock Corp., 324 N.L.R.B. at 375; see also Midwest Motor Express, Inc v. Int'l Bhd. of Teamsters, Local 120, 494 N.W.2d 895, 899-900 (Minn. Ct. App. 1993) (indicating that the nature of an offer to a strike replacement depends on the "facts and circumstances taken as a whole"), rev'd, 512 N.W.2d 881 (Minn. 1994).

556. See Midwest Motor Express, Inc., 494 N.W.2d at 899-900 ("The character of an actual offer will, of course, depend on... the language used [and] the parties' relationship, as well as other facts and circumstances.").