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Preferential Hiring Rights of Economic Strikers

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PREFERENTIAL HIRING RIGHTS OF ECONOMIC STRIKERS

SCOPE

In *Laidlaw Corp. v. Pulp Workers, Local 681*,[1] the National Labor Relations Board held that economic strikers[2] who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements:

(1) remain employees; and
(2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment; or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

Laidlaw overrules a line of cases interpreting the permanently economic striker's right to reemployment. It gives the permanently replaced economic striker a preferential right of reemployment after the strike has ended as vacancies arise and is a far reaching step in a newly developing trend in the interpretation of an employee's right to strike. This Comment will review and analyze the prior case development of the issue presented in *Laidlaw* to illustrate the impact which that decision will have upon labor-management relations.

HISTORY OF PREFERENTIAL HIRING RIGHTS

The first case of significance in this field is *NLRB v. MacKay Radio and Telephone Co.*[3] After an economic strike was called by the union, the company brought employees from its offices in other cities to take the place of the strikers. Subsequently, all but five of those who had been on strike were taken back into the company's employ. The union brought suit on behalf of these five strikers. The National Labor Relations Board ordered the company to reinstate the strikers.[4] The Board based its ruling on section 2(3) of the National Labor Relations Act which defines an employee as ". . . any individual whose work has ceased as a consequence of,

1. 171 N.L.R.B. 175 (1968).
2. Economic strikers are employees who engage in a strike over wages, hours, working conditions or other conditions of employment. NLRB v. Herman Wilson Lumber Co., 355 F.2d 426, 430 (8th Cir. 1966).
3. 304 U.S. 333 (1938).
4. 1 N.L.R.B. 201 (1936).

or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtanied any other regular and substantially equivalent employment. . . ."[5]

The Court of Appeals for the Ninth Circuit denied the enforcement order of the Board because, by requiring reinstatement of an employee, the Board was forcing an employer to make a new contract which was beyond the scope of the National Labor Relations Act.[6] The Supreme Court held that an employer can replace its striking employees with permanent replacements and that the employer did not have to discharge the permanent replacements after the strike ended. Citing section 2(3) of the National Labor Relations Act the Court said that even when a strike is economic in nature, the striker retains his status as an employee. Consequently, the Court gave the employer the right to hire permanent replacements during a strike and confirmed that an economic striker has the status of an employee under the National Labor Relations Act.[7]

In *American Flint Glass Workers Union v. NLRB*,[8] the employer hired permanent replacements during an economic strike after which the strikers applied for reemployment. Those strikers not rehired brought suit against the company alleging an unfair labor practice. In reversing the trial examiner's decision, the N.L.R.B. held that there was no discriminatory motivation on the part of the employer.[9] By way of dictum the Board said that permanently replaced economic strikers merely have the right not to be penalized for their concerted activity and are not entitled to a preferential status in hiring. Again in dictum, the Board said that replaced economic strikers are in the position of applicants for new employment and must sustain the burden of proving discriminatory motivation by the employer. Section 2(3) of the Act and the *MacKay* case were not discussed in the Board's opinion. The United States Court of Appeals for the District of Columbia affirmed the Board's decision.[10]

In *Atlas Storage Division v. Chauffeurs, Teamsters*[11] an em-

5. 29 U.S.C. § 152(3) (1935).
6. 92 F.2d 761, 765 (9th Cir. 1937) (dissenting opinion). There was another decision before the above rehearing that held that the National Labor Relations Act as violative of the fifth amendment. 87 F.2d 611, 632 (9th Cir. 1937) (dissenting opinion).
7. 304 U.S. 333 (1938).
8. 110 N.L.R.B. 395, *enforcing* 230 F.2d 212 (D.C. Cir. 1954).
9. 110 N.L.R.B. 395 (1954).
10. 230 F.2d 212 (D.C. Cir. 1954).
11. 112 N.L.R.B. 1175, *enforcing sub. nom.* Teamsters, Local 200 v. NLRB, 233 F.2d 233 (7th Cir. 1956).

ployee struck with the permission of the union over the employer's refusal to bargain with the union. Subsequently, the employee applied for reinstatement; the employer refused to take him on the ground that it had sufficient personnel to handle its operations. Three days after the striker's reinstatement application was made his job became vacant. The employer did not notify the striker of the opening and hired a new applicant. The N.L.R.B. disagreed with the trial examiner[12] and found that the striker was an economic striker. He was not entitled to reinstatement because his job was either abolished or absorbed by other employees for economic reasons.[13] In affirming the Board's decision the Court of Appeals for the Seventh Circuit held that the employer's duty toward a replaced economic striker did not include seeking him out when a vacancy occurred; the employer was only to refrain from discriminating against him in the event that he made a request to fill a vacancy.[14] Section 2(3) of the National Labor Relations Act was not referred to by the Board or seventh circuit as authority for their decisions. In effect, the N.L.R.B. now considered absorbtion or abolition of a job equivalent to replacement and that either ended the economic striker's employee status.

The next step in defining the replaced striker's rights was *NLRB v. Brown and Root, Inc.*[15] The union alleged that vacancies occurred after applications were made by economic strikers. It contended that these vacancies should have been assigned to strikers as they arose. Finding that there were no vacancies on the date applications were made, the trial examiner rejected the union's assumption that the employer had a duty to seek out economic strikers as positions became available. The Board affirmed this holding and found that it was the normal practice of the company to hire the first available person.[16] The Court of Appeals for the Eighth Circuit enforced the Board's decision.[17] The Board cited *Atlas Storage Division* as authority for its decision. Section 2(3) of the Act and *MacKay* were not referred to in the Board or circuit court decision.

At this time, the law as interpreted by the National Labor Relations Board and the various circuit courts was that an employer could permanently replace economic strikers during a strike and that an economic striker's right to full reinstatement was to be determined on the day he reapplied for his job. If a permanent replacement occupied his position, or if his job was absorbed or abolished on the day he reapplied, the economic striker

12. The trial examiner found that he was an unfair labor practice striker and as such could not be permanently replaced.
13. 112 N.L.R.B. 1175 (1955).
14. 233 F.2d 233 (7th Cir. 1956).
15. 132 N.L.R.B. 486 (1961), *enforcing* 311 F.2d 447 (8th Cir. 1963).
16. 132 N.L.R.B. 486 (1961).
17. 311 F.2d 477 (8th Cir. 1963).

lost his status as an employee and his rights to full reinstatement. The employer's only duty towards the economic striker was to refrain from discriminatory action against him on his reapplication; and the burden of proof on the issue of discrimination was on the economic striker.

This mass of law favoring the employer began crumbling with the decision of *NLRB v. Erie Resistor Corp.*[18] During an economic strike the employer hired permanent replacements and advised the union that it would accord the replacements some form of super-seniority. A plan calling for 20 years additional seniority for employees (including strikers) who work during the strike was devised.[19] A short time later the union decided it had to settle the strike and submitted the super-seniority issue to the N.L.R.B. The Board disagreed with the trial examiner[20] and found the employer guilty of an unfair labor practice.[21] The Board reasoned that *MacKay* permitted an employer to hire permanent replacements during an economic strike; but it also permitted economic strikers who were not replaced to return to their jobs with full reinstatement. It held that this super-seniority plan punished the strikers.[22] The Court of Appeals for the Third Circuit denied enforcement of the Board's order.[23] The court recognized that a preferential seniority policy may be discriminatory but it held that the discriminatory conduct of an employer is not unlawful in the absence of an illegal motive.[24] Contrary to the N.L.R.B.'s interpretation of *MacKay*, the court reasoned that the "*MacKay* permanent replacement rule" was obviously discriminatory and may tend to discourage union membership and that the Supreme Court in permitting the permanent replacement rule was applying the true purpose or real motive test

18. 373 U.S. 221 (1961).

19. By June 14, 81 replacements had accepted employment, plus 23 returning strikers. On June 15, Erie Resistor Corporation posted on the company bulletin board its 20 year super-seniority plan. In the weeks following June 15, 21 more replacements accepted employment, plus 64 additional strikers.

20. The trial examiner dismissed the complaint, finding that the Board's past decisions on superseniority had considered motivation as the controlling factor and that in this case the evidence was inadequate to support a finding that the corporation had adopted its superseniority plan to discriminate against the union.

21. 132 N.L.R.B. 486 (1961).

22. The Board cited section 2(3) of the Act and *MacKay* as authority for its decision.

23. 303 F.2d 359 (1962).

24. The court cited several Supreme Court decisions—Teamsters, Local 357 v. NLRB, 365 U.S. 667 (1961); Radio Officers v. NLRB, 347 U.S. 17 (1954) holding that motivation was the important factor in this type of case.

to an employer's actions. Although the court did not mention section 2(3) of the Act in its opinion, it did say that it found nothing in the Act to change its decision. In reversing the circuit court, the Supreme Court found that although it was important to show the employer's intent or motive, specific evidence of such subjective intent was not an indispensable element in proving the violation.[25] The Court said, "some conduct may by its very nature contain the implication of the required intent from the natural foreseeable consequences of that conduct."[26] The Court then held that this super-seniority plan was that type of conduct and that the burden of proving that this conduct was not discriminatory fell on the employer. In this case the employer offered no proof that its actions were not discriminatory; therefore, the super-seniority plan was held to be an unfair labor practice. In distinguishing *MacKay*, the Court recognized that the "permanent replacement rule" which allowed an employer to operate his plant during a strike by hiring permanent replacements could discourage union membership. But the Court pointed out that the *MacKay* decision was based upon a policy consideration that the employer's interest in continuing his business outweighs the damage to concerted activities caused by permanently replacing strikers. Here, however, the employer's interest in keeping his business running efficiently by use of a super-seniority plan did not outweigh the greater encroachment upon the right to strike resulting from super-seniority plus permanent replacement.

In *Erie Reisistor*, then, the Supreme Court changed the burden of proof on the issue of discriminatory actions from employee to employer and refused to extend the *MacKay* rule. Although not discussing preferential rights of economic strikers, the Court did definitely explain what the *MacKay* rule entailed.

The Supreme Court further defined its position on the burden of proof of discriminatory conduct in *NLRB v. Great Dane Trailers, Inc.*[27] The dispute between company and union was centered on a collective bargaining agreement which contained a provision for employee vacation benefits to be paid on the Friday nearest July 1 of each year. Most of the employees struck on May 16, 1963, and many were permanently replaced. A demand for vacation pay by the strikers on July 12, 1963, was rejected by the company. Thereafter, the company announced that it would grant vacation pay according to terms of the old agreement to all employees (including strikers) who had reported for work on July 1, 1963. The union brought suit claiming that this was an unfair labor practice. The N.L.R.B. held that the employer was guilty of an unfair labor practice because of its action in regard to vacation benefits, and ordered

25. 373 U.S. 221 (1963).
26. *Id.* at 227 (1963).
27. 388 U.S. 26, 34 (1967) (dissenting opinion).

payment of such benefits to the strikers.[28] In reversing the court of appeals[29] and affirming the N.L.R.B.'s decision, the Supreme Court propounded several principles which would control cases involving the issue of employer motivation and burden of proof.

> First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved by the employee to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justification for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by the legitimate objectives since proof of motivation is most accessible to him.[30]

The Court then applied these principles to the facts of the case and found that the employer's conduct affected employees' rights. Since the employer did not produce any evidence of legitimate motives for its conduct, the employer's action was an unfair labor practice.[31]

The decision of the Supreme Court in *NLRB v. Fleetwood Trailer Co.*[32] was the next attack on the employer's citadel. After an economic strike in August, 1964, during which the em-

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28. 150 N.L.R.B. 438 (1965).

29. 363 F.2d 130 (5th Cir. 1966). The court said that although discrimination between striking and non-striking employees was proved, the Board's unfair labor practice conclusion was not well-founded because there was no affirmative showing of an unlawful motivation to discourage membership. The court went even further by speculating upon several motives, the possibility of which it felt was sufficient to overcome the inference of improper motivation.

30. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

31. The Court did not decide if the employer's discriminatory conduct was "inherently destructive" or if it was only "comparatively slight" because it said it was not necessary to its decision since the employer offered no evidence. But the fact that the Court reversed because the employer did not produce any evidence of legitimate motives for its conduct makes it appear that the Court was considering the failure to rehire strikers as conduct which was a "comparatively slight" invasion of employee rights. The opinion as a whole suggests that the court viewed this conduct as "inherently destructive."

32. 389 U.S. 375 (1967).

ployer cut back its production schedule, six strikers applied for reinstatement on August 20 and a number of other occasions. The employer rejected their applications because no jobs were available at the time. But between October 8 and 16 the company hired six new employees for jobs which the strikers were qualified to fill. The union claimed that this action by the employer was an unfair labor practice and brought suit. The trial examiner found that the employer had committed an unfair labor practice by treating its former employees as applicants for new employment without any employee status. The N.L.R.B. simply adopted the decision of the trial examiner without giving any further reasoning on the subject.[33] The trial examiner did not cite section 2(3) of the Act as authority for his analysis of the striker's employee status, but it is a fair assumption that this was his authority. The United States Supreme Court reversed the ninth circuit[34] citing section 2(3) of the Act. If the employer refuses to reinstate striking employees after the conclusion of a strike, the effect is to discourage employees from exercising their rights to organize and strike.[35] Unless the employer can show that his actions were due to legitimate and substantial business requirements, the employer will be guity of an unfair labor practice.[36] At first, this seems to be the actual holding of the case. But as Justices Harlan and Stewart point out in their concurring opinion,[37] in this case replacement or abolition of the economic strikers' jobs did not occur. Therefore, the employer erroneously treated the strikers as new applicants rather than as employees under section 2(3) of the Act. Consequently, the majority's decision involving the rights of all economic strikers must be regarded as dictum and the holding of the case must be limited to economic strikers *who were not permanently replaced.*

After *Fleetwood*, the employer still had the right to employ

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33. 153 N.L.R.B. 425 (1966).

34. 366 F.2d 126, 131 (1966) (dissenting opinion). The court denied the petition because of the Board's decision in Brown & Root, Inc., in which the Board held that the question of whether or not a striker has been replaced was to be determined on the date on which he made his offer to return to work.

35. 389 U.S. 375 (1967).

36. The Court does not indicate whether it considered the employer's conduct as "inherently destructive" of striker's rights or "comparatively slight." The fact that the Court gave the employer the opportunity to prove business justification leads to the belief that the Court viewed denial of preference in rehiring as a "comparatively slight" invasion of employee rights. But as in *Great Dane*, see note 30 *supra*, the opinion viewed as a whole would suggest otherwise. The resolution of this issue is very important because under *Great Dane*, if the employer's conduct is "inherently destructive," the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations, but if the employer's conduct is "comparatively slight" the employer can show business justifications and the Board cannot find an unfair labor practice unless the employer's motivation is specifically proved by the employee.

37. 389 U.S. 375, 382 (1967).

permanent replacements in strikers jobs during an economic strike. But after the strike ended, the economic striker had a right to a job if he thereafter applied, if on that day his job was not filled by a permanent replacement or had not been abolished. Also, the employer now had the burden of proof or at least the burden of going forward with the evidence to show that his actions were not discriminatorily motivated. The only remnant of the employer's citadel which remained was the employer's right to end the employee status of an economic striker on the day he applied for reinstatement by finding his job either permanently filled or absorbed.

But this right was soon attacked in *Laidlaw Corp. v. Pulp Workers, Local 681.*[38] Following unsuccessful negotiations in late December, 1965 and early January, 1966, the union voted to reject the employer's wage offer and notified the management of its intention to strike. On the day before the strike, the plant manager read a speech to the employees emphasizing that if they went out on strike and were replaced, they would permanently lose their right to employment by the corporation. Two days after the strike commenced one of the strikers made an unconditional request for reemployment. He was informed that his job was filled. He was told that if he desired reemployment he would have to accept the status of a new employee. Four days later the employer called the striker and asked him to return to fill a vacancy. The striker refused because of his loss of seniority and vacation rights. Thirty days after the strike began the strikers voted to return to work. Forty strikers went to the plant and made unconditional request on behalf of all the strikers to return. After consulting with his attorney, the plant manager read a prepared statement to the effect that many of the strikers had been permanently replaced and were not entitled to reinstatement. Those that were not permanently replaced would be notified. At this time, all but five of the economic strikers' jobs were filled by permanent replacements. The five strikers who were not replaced were thereafter offered jobs. A short time later, Laidlaw Corporation sent termination notices to the replaced economic strikers. These notices said that the strikers had been replaced as of the date of their written reinstatement application and that no jobs were available. The corporation, however, continued to advertise for permanent help and a number of new employees were hired due to turnover. These also included the departure of some permanent replacements. The

38. 171 N.L.R.B. 175 (1968).

union brought a charge of an unfair labor practice against the employer. The trial examiner[39] held that the Laidlaw Corporation committed an unfair labor practice by terminating the employment status of strikers and discharging them, contrary to section 2(3) of the Act. The N.L.R.B.[40] affirmed the decision and held that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements;

(1) remain employees; and
(2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment or if the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.[41]

Board's Reasoning

In reaching their conclusion the Board cited the principles of *Fleetwood* and *Great Dane* and then applied those principles to the facts of *Laidlaw*. It must be noted that the Board, in relying on *Fleetwood*, was actually relying on dictum.[42] As to the individual striker who applied for reinstatement immediately, the Board found that he was an economic striker. As such he retained his status as an employee. If his position became vacant and he was available he was entitled to full reinstatement unless there were legitimate and substantial business justifications for a failure to offer complete reinstatement. The strikers whose employment was terminated by the corporation were held to be employees and were entitled to full reinstatement as vacancies arose in their old positions unless the employer could show legitimate and substantial business justification for doing otherwise.

It is significant that the Board did not decide the *Laidlaw* case on the anti-union motivation issue since the pre-strike statement by the company and its hiring practices during and after the strike would seem to indicate the possession of such motivation. In fact, the Board said, "We find in accord with the trial examiner that the company was in fact discriminatorily motivated in its actions."[43] The Board could have easily decided this case on the ground of anti-union motivation—an unfair labor practice. It appears that the Board in deciding as it did wanted to give the Supreme Court a clear statement as to the Board's position[44] on the issue of prefer-

39. The trial examiner gave his decision before the Supreme Court's decision in *Fleetwood*.
40. The N.L.R.B. decided the case after the Supreme Court's decision in *Fleetwood*.
41. 5 CCH Lab. L. Rep. 29, 828 (1968).
42. See p. 328 *supra*.
43. 5 CCH Lab. L. Rep. 29, 825 (1968).
44. The Board's brief in *Fleetwood* was ambivalant as to the issue of preferential hiring rights. The Board concluded that the position of the

ential hiring rights of replaced economic strikers.

Legitimate and Substantial Business Justification

In its decision in *Laidlaw*, the Board states that an employer can refuse to reinstate economic strikers when there are openings if the employer has "legitimate and substantial business justifications." The Board's decision does not give any examples or guidelines as to what they will consider necessary to fulfill these exceptions. In *Fleetwood*, the Supreme Court states that a legitimate and substantial business justification is when the jobs which the strikers claim are occupied by workers hired as permanent replacements during the strike in order to continue operations. This is the rule of *MacKay*. A basis suggested by the Board[45] is when the striker's job has been eliminated for substantial and bona fide reasons other than considerations relating to labor relations, for example, the need to adapt to change in business conditions or to improve efficiency.[46] These arguments would seem to be those used by employers to establish skill or ability criteria in contract negotiations.[47]

Inherently Destructive or Comparatively Slight

The vagueness and the need for clarification of these terms can best be illustrated by the Board's decision in *Laidlaw*. The Board found specifically that the Laidlaw Corporation "had not shown any legitimate and substantial business justification for not offering full reinstatement to these strikers and, that, accordingly, the failure to make such an offer constitutes an unfair labor practice. . . ."[48] This statement clearly shows that the Board regarded the employer's conduct as "comparatively slight" in affecting employees rights under *Great Dane* because the Board relies on the fact that the employer had brought forward no evidence. But later in its opinion[49] the Board states that Laidlaw Corporation's offer to the individual striker of less than full reinstatement and the termination notices sent the other strikers, were wholly unrelated to any of its eco-

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complaints had not been abolished. Brief for N.L.R.B. at 14, NLRB v. Fleetwood Trailers Inc., 389 U.S. 375 (1967).

45. Brief for N.L.R.B. at 15, NLRB v. Fleetwood Trailers Inc., 389 U.S. 375 (1967).

46. 389 U.S. 375, 379 (1967).

47. NLRB v. MacKay Radio and Telephone Co., 304 U.S. 333 at 347 (1938).

48. Laidlaw Corp. v. Pulp Workers, Local 681, 5 CCH Lab. L. Rep. at 29, 824 (1968).

49. 5 CCH Lab. L. Rep. at 29, 826 (1968).

nomic needs. Its effect was to penalize economic strikers for engaging in concerted activity. Thus it was "inherently destructive" of employee rights. Under this categorization of the employer's conduct, it would not matter what kind of evidence the employer produced to establish business justification; the Board could still find that the employer had committed an unfair labor practice.[50] Although the actual holding of *Laidlaw* puts the employer's conduct in the "comparatively slight" category, the decision as a whole points out the need for the Board to clarify these two important terms.

Retroactivity

The Board cites *Erie Resistor* as authority[51] for its holding which retroactively applies the standard of section 2(3) of the Act to replaced economic strikers, but analysis of *Erie Resistor* does not support the Board's conclusion. In *Erie Resistor* the employer awarded additional seniority credit for 20 years to replacements for strikers and also to strikers who returned to work during the strike. Nothing was offered to strikers who did not return during the strike. This was a clear case of discrimination and punishment against the economic striker. But in *Laidlaw*, the corporation, by considering the economic strikers' application for reemployment only on the date they applied for reemployment, was only following the decisions of the N.L.R.B. until that time. Thus, the Board retroactively applied a newly-amended rule. This type of ruling has been extensively criticized[52] and runs against an established trend in the law. In *Great Northern Railway Co. v. Sunburst Oil and Refining*[53] the Court upheld the constitutionality of a state court decision which changed the judicial construction of a state statute, but refused to apply the new construction where plaintiff relied on the old judicial construction of the statute. Since then the Supreme Court appears to have done substantially the same thing with respect to the imposition of criminal liability.[54]

Section 2(3) of the Act

In its opinion the Board states that the holding of *Laidlaw* was foreshadowed by and is consistent with the Supreme Court's de-

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50. NLRB v. Great Dane Trailers Inc., 388 U.S. 26, 34 (1967) (dissenting opinion).

51. 5 CCH Lab. L. Rep. at 29, 826 (1968).

52. Berger, *Retroactive Administrative Decisions*, 115 U. Pa. L .Rev. 371 (1967); *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907 (1962); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1 (1960).

53. 287 U.S. 358 (1932).

54. James v. United States, 366 U.S. 213 (1961). *See* NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952); Recent Case Notes, 66 Harv. L. Rev. 348 (1952), 101 U. Pa. L. Rev. 140 (1952).

cision in *NLRB v MacKay Radio and Telegraph Co.*[55] What the Board is referring to is the Supreme Court's reference in MacKay to section 2(3) of the National Labor Relations Act. The Court said, "The term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute and who has not obtained any other regular and substantially equivalent employment. . . ."[56]

Thus, the Board points out by the above reference that in *MacKay* the Supreme Court used section 2(3) of the National Labor Relations Act to determine the economic strikers' status. This standard will now control the rights of replaced economic strikers. This is indeed ironic. In the three cases overruled by *Laidlaw*, the N.L.R.B. and the various federal courts involved decided the issue of the replaced economic striker's status without reference to this section of the Act.

The basic right raised in the issue of preferential hiring rights of replaced economic strikers is the right of an employee to strike. Under the National Labor Relations Act, the term employee in addition to its normal meaning—a person who works for another for hire—includes any worker whose employment has ceased because of a labor dispute or unfair labor practice.[57] Under section 7 of the National Labor Relations Act an employee is guaranteed the right to form or join unions, to bargain collectively, and to strike.[58] Section 8(a)(1) and (3) of the National Labor Relations Act[59] make it an unfair labor practice for an employer to violate an employee's section 7 rights or to discriminate against an employee because of union membership. Thus, when the courts are determining what rights replaced economic strikers have, they are interpreting how broad or narrow the right to strike will be.

The legislative history of the Act does give some insight into the purpose of section 2(3). In the 1935 legislative history,[60] Harvey G. Ellard, representing the Institute of American Meat Packers, pointed out at a Senate hearing that section 2(3) of the Act was something new in legislation. To that time the law had been that when a person leaves the employment of another his employment terminates. Mr. Ellard further pointed out that section 2(3) of the Act permits many implications because it allows a striker

55. 5 CCH Lab. L. Rep. 29, 826 (1968).
56. 304 U.S. 333, 345 (1938).
57. Section 2(3), 49 Stat. 450 (1935), 29 U.S.C. § 157 (1964).
58. Section 7, 49 Stat. 452 (1935), 29 U.S.C. § 157 (1964).
59. Section 8(a)(1) and (3), 49 Stat. 453 (1938), 29 U.S.C. § 158(a)(1) and (3).
60. National Labor Relations Board, 2 Legislature History of the National Labor Relations Act 1883 (1935).

to retain the status of an employee while not actually working for his employer. Although there is little else in the legislative history to help determine the purpose of section 2(3), Mr. Ellard's remarks do lend credence to a "plain meaning" interpretation of section 2(3). Congress intended the statute to give an economic striker the status of an employee until he obtains regular and substantially equivalent employment. In section 7 of the Act, Congress gave the employee the right to strike. Therefore, it had to provide a means by which the striker could regain his job after the strike. The means that Congress used was section 2(3). It is also clear that Congress intended the economic striker's status as an employee to continue until he obtained regular and substantially equivalent employment; nothing in *MacKay* affected this status.

American Flint Glass Workers, Atlas Storage Division, and *Brown and Root, Inc.*, all purported to end the economic striker's status as an employee when he applied for reinstatement and found a permanent replacement had either filled his job or that it had been abolished. But as already pointed out, these decisions did not apply section 2(3) of the Act and misinterpreted *MacKay*. They therefore must be disregarded.

In deciding *Laidlaw* the Board had section 2(3) of the Act and *MacKay* as well as the dictum of *Fleetwood* as authority on the issue of the hiring rights of replaced economic strikers. But as the brief for the Fleetwood Corporation pointed out, the Board also had to consider section 9(c)(3)[61] of the Act which was inserted in 1947 and amended in 1959, and the 1947 legislative history to guide the Board in its decision. Section 9(c)(3) uses the term "economic strikers not entitled to reinstatement." This could be interpreted as affirming the Board's decisions which held that an economic striker's status as an employee ends when he reapplies and finds a permanent replacement filling his job. Also, twice in the 1947 legislative history of the Labor Management Act it was stated that "strikers permanently replaced have no right to reinstatement."[62] The problem of consent by Congress to the Board's decisions was not discussed in *Laidlaw*. But if Congress did intend by the passage of section 9(c)(3) to affirm the Board's past decisions on the issue of preferential hiring rights of economic strikers, the holding of these cases would have become the law.[63]

However, in the legislative history of the Labor Management

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61. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the provisions and purpose of this Act in any election conducted within 12 months after the commencement of the strike.
73 Stat. 542, 29 U.S.C. § 159(c)(2) (1964).

62. National Labor Relations Board, 2 Legislative History of the Labor management Act 1101 (1947).

63. Maneja v. Waialua Agricultural Co., 349 U.S. 254 (1955).

Relations Act of 1947 there is evidence that Congress did not intend section 9(c)(3) as an affirmance of the Board's decisions.[64] The Senate was discussing a proposed amendment to section 2(3) of the Act which inserted a simple parenthetical expression into the section stating that, "a worker loses his employee status if, while engaging in a strike, he has been replaced or has refused an offer of reinstatement." Senator Morse in speaking against the amendment said, "this change in definition of the term employee not only removes all remedies available to strikers under the Act; for all practical purposes, it completely destroys the right to strike. . . . Even at common law, employees who were out on strike were still employees. This concept was incorporated in the Wagner Act."[65]

This amendment was rejected by Congress. Therefore it can be said with some certainty that Congress did not intend by section 9(c)(3) that economic strikers should lose their status as employees when they reapplied and found they had been permanently replaced.

The policy considerations which probably entered into the Board's decision on the rights of replaced economic strikers can best be illustrated by an analysis of the facts of *Laidlaw*. There the employer tried to use the "permanent replacement rule" plus the Board's past decisions to coerce its employees not to strike. Thus the employer tried to use the Board's rulings to nullify the employees' congressionally guaranteed right to strike. Also, the quick hiring of permanent replacements by the employer could be interpreted as motivated by an intent to penalize the strikers and make sure they would not reap any of the benefits the strike would gain. This quick replacement could also serve as a warning for the next contract disputes, in that, it would prove to the employees that if they went on strike, they would not gain from the strike even if it were successful. These dangers inherent in the Board's pre-*Laidlaw* decisions necessitated a change to a more balanced rule.

Conclusion

Although the decision of the N.L.R.B. in *Laidlaw* needs clarification, it is submitted that the Board correctly applied section 2(3) of the National Labor Relations Act as well as the principles of *Great Dane* to the facts of the case. It has implemented a rule which coincides with the intent of Congress in passing the Na-

64. National Labor Relations Board, 2 Legislative History of the Labor Management Act 956 (1947).
65. *Id.*

tional Labor Relations Act. The decision also balances the needs of employer and employee in that it retains the employer's right to hire permanent replacements during a strike. At the same time it gives the replaced economic strikers a preferential right to his job if a vacancy occurs before he can get substantially equivalent employment. This imposes no extra burden on the employer. If a vacancy occurs the employer will get the same employee whom he was satisfied with before the strike. But the decision does prevent the erosion of the employees' right to strike by the employer.

"Legitimate and substantial business justification" is the exception to the rule of preferential hiring rights and as such must be clarified in order that the employer may know when he does not have to give the replaced economic striker a preferential right to a job.

Placing the employer's conduct into the categories of "inherently destructive" or "comparatively slight" by failing to give replaced economic strikers preferential hiring rights, presents problems to the courts.[66] The best rule seems to be to place this conduct in the "comparatively slight" category and thus give the employer a chance to show legitimate and substantial business justification for his conduct. Although there is some confusion in *Laidlaw*[67] the actual holding there does apply this rule.

Further, it is disturbing that the decision in *Laidlaw* is retroactive. As such, it penalizes the Laidlaw Corporation for merely following previous decisions of the N.L.R.B. The Board should exercise the power granted to it by Congress to formulate rules in these situations, rather than proceed as it does by adjudication.[68]

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66. Notes 30 and 35 *supra.*
67. See p. 331 *supra.*
68. Although the Board has the power to make rules (§ 6, 49 Stat. 452 (1959), 29 U.S.C. § 156 (1964)) it has not chosen to exercise it. Boire v. Miami Herald Pub. Co., 343 F.2d 17 (5th Cir. 1965).